

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

**ANR PIPELINE COMPANY,
Plaintiff,**

v.

Case No. 24-C-0536

**2.99 ACRES, MORE OR LESS, IN WINNEBAGO
COUNTY, WISCONSIN and NANCY L. STURN,
Defendants.**

DECISION AND ORDER

ANR Pipeline Company brings this action under Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h), to obtain an easement over property owned by Nancy Sturn. Before me now is ANR's motion for partial summary judgment and its motion for immediate possession of the easement.

I. BACKGROUND

ANR is an interstate natural-gas company subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Under the Natural Gas Act, 15 U.S.C. §§ 717–717z, ANR must obtain permission from FERC to construct, extend, or abandon natural-gas transportation facilities.

On November 14, 2022, ANR filed an application under sections 7(b) and (c) of the Natural Gas Act for authorization to implement a pipeline-modernization project known as the Wisconsin Reliability Project. The project will replace existing pipeline and compression facilities in parts of Wisconsin and Illinois with new, more modern facilities. A chief component of the project is the replacement of approximately 48 miles of existing

pipeline originally installed in 1949, 1950, and 1960 with approximately 51 miles of new, larger-diameter pipeline in certain counties in eastern Wisconsin and northern Illinois.

After ANR submitted its application, FERC and its cooperating agencies completed an Environmental Assessment (“EA”) in accordance with the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321–70m-12. The EA discusses the potential environmental impact of the project. (ECF No. 27-1.) Following completion of the EA, FERC issued a written order granting ANR a certificate of public convenience and necessity to construct and operate the project. (ECF No. 19-2.) The same order granted ANR permission to abandon the aging pipeline infrastructure that was being replaced.

The approved route of the project runs through property owned by defendant Nancy Sturn in Winnebago County, Wisconsin. In 1960, ANR’s predecessor-in-interest purchased an easement from a previous owner of the Sturn property to construct the aging pipeline that ANR intends to replace. (ECF No. 23-1.) Because ANR must keep the old pipeline in service until the new pipeline is operational, ANR cannot remove and replace the existing pipeline within the same footprint. Instead, ANR must construct the new pipeline under a different part of Sturn’s property while the old pipeline remains in service. ANR proposes to abandon the old pipeline in place—that is, to leave it dormant in the ground—once the new route is finished.

ANR believes that it must obtain a new easement over the Sturn property to construct the new pipeline segment. Sturn, however, contends that the 1960 easement already grants ANR permission to construct the new pipeline, since that easement allows ANR to operate a single pipeline anywhere on the property. However, Sturn insists that

the 1960 easement would not allow ANR to abandon the old pipeline in place. Instead, she contends, ANR must remove the old pipeline once the new pipeline is operational.

Prior to the commencing this action, ANR attempted to purchase a new easement from Sturn. Although Sturn never took issue with the amount ANR offered to pay for the easement (approximately \$74,000), she refused to grant ANR a new easement without ANR's agreeing to remove the old pipeline from her property and to terminate the 1960 easement. ANR refused to agree to those terms. Instead, it commenced the present action under Section 7(h) of the Natural Gas Act, which grants a holder of a FERC certificate the power to use eminent domain to acquire property necessary for the construction, operation, or maintenance of a natural-gas pipeline. See 15 U.S.C. § 717f(h). ANR has moved for summary judgment on the issue of whether it is entitled to condemn a new easement on the Sturn property. Further, ANR has moved for an order granting it possession of the easement immediately, that is, before the amount of just compensation for the taking is determined. In this motion, ANR contends that it must have access to the Sturn property by October 1, 2024, in order to complete the Wisconsin Reliability Project within the timeframe set by FERC.

II. DISCUSSION

A. Motion for Partial Summary Judgment

Under Section 7(h) of the Natural Gas Act, a holder of a FERC certificate of public convenience and necessity has a limited right to use the eminent domain powers of the United States to acquire property necessary for the construction, operation, or maintenance of a natural-gas pipeline. 15 U.S.C. § 717f(h). Specifically, Section 7(h) provides:

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas [and related facilities], it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the state courts.

15 U.S.C. § 717f(h).¹ Courts have interpreted this provision to mean that the natural-gas company must prove three elements to establish the right to condemn: (1) it holds a valid certificate of public convenience and necessity; (2) the property to be condemned is necessary for the natural-gas pipeline authorized by the certificate; and (3) the holder cannot acquire the necessary easements by contract. *See Transcon. Gas Pipe Line Co., LLC v. 6.04 Acres, More or Less, Over Parcel(s) of Land of Approximately 1.21 Acres*, 910 F.3d 1130, 1154 (11th Cir. 2018).

In the present case, Sturn does not dispute that ANR holds a valid FERC certificate for the Wisconsin Reliability Project or that an easement over her property is necessary for the new pipeline. However, Sturn disputes that ANR cannot acquire the necessary easement by contract. According to her, ANR *already possesses* the property rights that it needs to build the new pipeline under the 1960 easement. ANR, on the other hand, disputes that the 1960 easement grants it the property rights necessary to construct the pipeline within the parameters ordered by FERC. To resolve this dispute, I must compare

¹ Section 7(h) also has a \$3,000 amount-in-controversy requirement for jurisdiction in the district court. Here, that requirement is met because Sturn claims that the value of the new easement would be at least \$74,000 plus the cost to ANR of removing the old pipeline. See ECF No. 23-2 at 3–4.

the language of the 1960 easement to the scope of the project as defined in the FERC certificate.²

The 1960 easement is entitled “Right of Way Grant.” (ECF No. 23-1.) It provides that, for the consideration of \$85.00, the property owners and their successors grant the Michigan Wisconsin Pipe Line Company (ANR’s predecessor-in-interest) the right to “survey, construct, operate, maintain, inspect, alter, replace, move and remove a pipe line and appurtenances for the transportation of gas, oil, or other substances which can be transported through a pipe line, over, through, upon, under and across the following real estate” (*Id.* at 1.) The easement then provides a legal description of the real estate. According to Sturn, that legal description describes her entire property, not just the part of the property under which the old pipeline runs. (Br. in Opp. at 2.) Indeed, the legal description describes an entire parcel of land using the Public Land Survey System rather than a metes-and-bounds description of the segment of the property where the existing pipeline is located. Such a description implies that the easement applies to the entire property rather than a limited strip of land running through the property.

In its reply brief, ANR does not specifically dispute Sturn’s claim that the 1960 easement describes her entire property. However, ANR asserts that the route that FERC approved for the Wisconsin Reliability Project is “outside” the 1960 easement. (Reply Br. at 3.) But ANR does not support this assertion with a legal argument. To be sure, ANR

² I note that although Sturn makes her argument under the third element of an eminent domain claim under Section 7(h), she could alternatively have made it under the second element—whether the property is necessary for the project. But the difference in characterization is inconsequential. The ultimate issue under either element is whether ANR already possesses the property rights it needs for the Wisconsin Reliability Project.

points to the FERC certificate to identify the approved route for the new pipeline and to show that it travels through a different part of Sturn's property than the existing pipeline. (See Resp. to Sturn Add'l Facts ¶¶ 2, 4.) But ANR does not attempt to show that the approved route is not on the property described in the 1960 easement. Because ANR has the burden of showing that it is entitled to summary judgment and to establish the elements necessary to exercise the right of eminent domain, I find that ANR has failed to establish that the approved route for the Wisconsin Reliability Project lies outside of the legal property description in the 1960 easement.

ANR also contends that the 1960 easement "pertains solely to the construction and pipeline authorized by the 1960 [easement] and not to any future projects." (Reply Br. at 5.) But ANR does not point to anything in the text of the easement that supports this argument, and I can find nothing in the text limits the easement to any specific pipeline project. The easement grants ANR the right to "alter, replace, move and remove" the original pipeline (ECF No. 23-1 at 1), and thus the easement contemplates that ANR might need to construct a new pipeline on a different part of the property to replace the original line constructed when the easement was created. ANR cites the case of *Klaphake v. Columbia Gas Transmission, LLC*, in support of its argument, but that case interpreted the text of a different easement under Pennsylvania law and has no apparent relevance to the interpretation of the 1960 easement under Wisconsin law. No. 17-1359, 2018 WL 4999874, at *2–3 (W.D. Penn. Oct. 16, 2018). Thus, I conclude that the 1960 easement already grants ANR the right to construct the new pipeline on the FERC-approved route.

Sturn takes the position that the 1960 easement allows only one operational pipeline on her property, and that therefore ANR must remove the old pipeline once the

new pipeline is placed in service. (See ECF No. 23-2 at 23.) According to ANR, the FERC certificate forbids removal of the old pipeline. If ANR is correct on this point, and if Sturn is correct that the 1960 easement requires removal of the old pipeline, then ANR would need to obtain a separate easement through the Sturn property to permanently maintain a second pipeline on the property, and then ANR might need to use eminent domain to acquire the separate easement. However, as discussed below, the FERC certificate does not forbid removal of the abandoned pipeline. Thus, even if the 1960 easement requires removal of the old pipeline once the new line is placed in service, ANR would not need to use eminent domain to obtain a separate easement. Instead, ANR could simply comply with the terms of the existing easement by removing the old pipeline once the new line is operational.

Turning to what the FERC certificate requires, I start by noting that it grants ANR “permission and approval” to abandon the old pipeline. (FERC Certificate at 65.) But the certificate draws a distinction between abandoning the pipeline “in place” and abandoning it “by removal.” (*Id.* at 73.) For most of the pipeline, FERC did not order ANR to use any specific form of abandonment. Instead, FERC granted ANR permission to abandon the old line and remained silent about how the abandonment would be effected. However, for a specific segment of the old pipeline, FERC ordered ANR to abandon the line by removal. (*Id.*) This part of the order was in response to the concerns of a specific landowner. FERC discussed those concerns in the EA for the project. (See EA at 132–33.) Here, FERC noted that abandonment by removal would cause greater construction disturbance to the landowner than abandonment in place, but that ANR should abandon the pipeline by removal unless the landowner agreed to abandonment in place. (*Id.*) This

recommendation in the EA was incorporated into the FERC certificate. (FERC Certificate at 73.) The FERC certificate does not otherwise condition ANR's permission to abandon the pipeline on its using a specific form of abandonment. Thus, nothing in the FERC certificate forbids ANR from removing the old pipeline from Sturn's property once the new pipeline is placed in service.

ANR contends that certain parts of the EA establish that ANR must abandon the old pipeline in place. An initial problem with this argument is that the EA is not part of FERC's order and therefore is not binding on ANR. The EA itself states that it "is not a decision document." (EA at 3.) Instead, "[i]t presents [FERC] staff's independent analysis of the environmental issues for [FERC] to consider when addressing the merits of all issues in this proceeding." (*Id.*) This is consistent with the requirements of the National Environmental Policy Act, under which environmental documents such as an EA merely discuss the environmental effects of a proposed action and do not mandate that the agency select any particular project alternative. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."). Further, FERC specifically incorporated into its order the parts of the EA that it wished to make binding on ANR. (FERC Certificate at 62–63, 66–73.) As discussed above, FERC incorporated the EA's recommendation that ANR abandon the old pipeline by removal on a specific landowner's property. But other than this one condition, FERC did not incorporate into its order any recommendation in the EA as to the method of abandoning the old pipeline.

In any event, the EA does not recommend that ANR abandon the pipeline in place. ANR points to a part of the EA stating that removal “would not be a feasible construction alternative” for the segment that runs through Sturn’s property (known as Segment PL-3). (EA at 132.) But this part of the EA addresses a specific removal method known as “lift and lay,” in which the abandoned pipeline is removed and the new pipeline is installed in the existing right-of-way. (*Id.*) The EA states that the lift-and-lay method is not a feasible alternative for Segment PL-3 because ANR must operate the old pipeline until the new pipeline is constructed, and therefore it cannot remove the old pipeline from the ground until after the new line is in service. (*Id.*) Here, Sturn is not asking that ANR use the lift-and-lay method on her property. As noted, she concedes that the 1960 easement permits ANR to install the new pipeline under a different part of her property. Thus, the EA’s discussion of the lift-and-lay method is irrelevant.

The EA does have a more general discussion of the environmental effects of removing the old pipeline after the new pipeline is placed in service. (See EA at 133.) In this discussion, the EA notes that ANR intends to abandon the old pipeline in place but decommission it in a way that would not have long-term environmental effects aside from preventing landowners from planting trees above the abandoned line. The EA states that removing the old pipeline would carry its own environmental effects in the form of “the additional land disturbance” that would be required to remove the underground pipe. (*Id.*) The EA then concludes that “there would not be an environmental advantage” to removing the old pipeline rather than abandoning it in place. (*Id.*) But again, the EA does not recommend *against* removing the old pipeline. At most, the EA indicates that abandonment in place and by removal are environmentally neutral alternatives.

For these reasons, I conclude that the FERC certificate does not require ANR to abandon the old pipeline in place on the Sturn property. Because ANR is free to remove the pipeline after placing the new line in service, the 1960 easement would provide ANR with all the property rights it needs to construct the Wisconsin Reliability Project even if Sturn's position that the easement requires removal of the old pipeline were correct. ANR therefore does not need to acquire new rights to construct the segment of the pipeline that runs through Sturn's property. Accordingly, ANR's motion for summary judgment on the issue of its right to use eminent domain under Section 7(h) of the Natural Gas Act will be denied.

Before concluding, I note that ANR has argued that the 1960 easement implicitly grants it the right to abandon the pipeline in place. (Reply Br. at 7–8.) However, whether that is correct is a question of Wisconsin property law that I cannot resolve in this proceeding. This case concerns ANR's attempt to obtain a new easement by eminent domain. It is not an action to declare the full extent of the parties' rights under the 1960 easement.³ For purposes of determining whether the 1960 easement already grants ANR the property rights it needs to construct the Wisconsin Reliability Project in accordance with the parameters set by FERC, I had to consider whether Sturn's interpretation of the easement, if correct, is inconsistent with FERC's order. Having concluded that it is not inconsistent, and that therefore ANR is not entitled to obtain a new easement by eminent domain, I cannot go further and issue a declaratory judgment adopting Sturn's

³ Although Sturn previously filed a counterclaim for declaratory relief regarding her rights under the 1960 easement, she voluntarily withdrew the counterclaim in response to ANR's motion to dismiss it. In the motion to dismiss, ANR argued that counterclaims are not permitted in eminent domain actions under Federal Rule of Civil Procedure 71.1.

interpretation of the easement or enforce the easement by ordering ANR to remove the old pipeline once the new pipeline is placed in service. Likewise, I cannot issue a declaratory judgment finding that the 1960 easement grants ANR the right to abandon the old pipeline in place. Thus, my deciding this aspect of the parties' dispute would result in an advisory opinion, which federal courts may not issue. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021). To obtain a binding legal determination as to whether the 1960 easement requires ANR to remove the old pipeline once the new line is placed in service, the parties must commence a separate action for declaratory or other appropriate relief. For purposes of this eminent domain proceeding, it is sufficient to find that even if the 1960 easement requires removal of the old pipeline, ANR could remove that line without violating any condition of the FERC certificate. Therefore, ANR already possesses the property rights it needs to construct and operate the new pipeline on Sturn's property.

B. Motion for Immediate Possession of Easement

ANR concedes that until it establishes a substantive right to obtain the new easement by eminent domain under Section 7(h), it cannot obtain an order allowing immediate possession. (ECF No. 21 at 1–2.) This concession is in accord with federal appellate authority, which requires the natural-gas company to establish a right to condemn the property under the Natural Gas Act before the question of immediate possession may be considered. *See E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 823–28 (4th Cir. 2004). Because, as explained above, ANR has not established a substantive right to condemn a second easement on the Sturn property, I must deny its motion for immediate possession. However, I note that the denial of this motion does not prevent

ANR from immediately beginning work on the Sturn property, since the 1960 easement already grants ANR the right to enter the property to begin construction of the new pipeline.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that ANR's motion for partial summary judgment (ECF No. 17) is **DENIED**.

IT IS FURTHER ORDERED that ANR's motion for immediate possession (ECF No. 20) is **DENIED**.

Dated at Milwaukee, Wisconsin, this 1st day of August, 2024.

/s/ Lynn Adelman

LYNN ADELMAN

United States District Judge