

INTERIOR BOARD OF LAND APPEALS

**Wyoming Independent Producers Association, Independent Petroleum
Association of Mountain States, Wyoming Outdoor Council,
and National Trust for Historic Preservation**

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WYOMING INDEPENDENT PRODUCERS ASSOCIATION
INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES
WYOMING OUTDOOR COUNCIL
NATIONAL TRUST FOR HISTORIC PRESERVATION

IBLA 94-819, 94-820, 95-108

Decided July 13, 1995

Consolidated appeals from a decision of the Wyoming State Office, Bureau of Land Management, approving issuance of right-of-way for a natural gas pipeline. WYW-112046.

Appeals dismissed in part; decision affirmed.

1. Appeals: Jurisdiction–Rights-of-Way: Oil and Gas Pipelines–Rules of Practice:
Appeals: Dismissal–Rules of Practice: Appeals: Jurisdiction–Rules of Practice:
Appeals: Standing to Appeal

Departmental regulation 43 CFR 4.410 provides a right of appeal to the Board to any party adversely affected by a decision of an officer of the Bureau of Land Management. When BLM issues a decision approving a right-of-way across public lands for segments of a natural gas pipeline that would transport gas from Canada, based on an environmental impact statement prepared by the Federal Energy Regulatory Commission as the "lead agency," and the party appealing BLM's decision alleges injury arising from the failure of the EIS to consider the socioeconomic effects of importing gas from Canada, that party will be deemed to have been adversely affected by the FERC decision rather than that of BLM, and the appeal is properly dismissed.

2. Administrative Authority: Generally–Administrative Procedure: Judicial Review–
Appeals: Jurisdiction–Judicial Review–Rights-of-Way: Oil and Gas Pipelines–Rules
of Practice: Appeals: Dismissal–Rules of Practice: Appeals: Jurisdiction–Secretary
of the Interior

When the Federal Energy Regulatory Commission issues a certificate of convenience and necessity for a natural gas pipeline that crossing public land and a petition for judicial review of the certificate is filed with the appropriate United States Court of Appeals, the exclusive judicial review provision of 15 U.S.C. § 717r

(1988) does not deprive the Secretary of the Interior of his authority to review a decision of a subordinate approving a right-of-way for the pipeline. A motion to dismiss an appeal to the Board of Land Appeals (which exercises the Secretary's delegated administrative review authority) claiming the appeal to be a collateral attack on a FERC certificate authorizing the pipeline is properly denied.

3. Appeals: Jurisdiction–Board of Land Appeals–Federal Land Policy and Management Act of 1976: Land-Use Planning–Rules of Practice: Appeals: Dismissal

BLM's failure to seek designation of an area as an historical landscape does not, by itself, constitute an "identifiable decision" subject to appeal under 43 CFR 4.410. To the extent that designation of an historical landscape would require its proposal as an area of critical environmental concern, the proposal must be made through BLM's land use planning process. The Board does not have jurisdiction to consider appeals from the approval or amendment of a resource management plan and cannot gain jurisdiction until action is taken to implement the plan.

4. National Historic Preservation Act: Generally

The NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decisionmaking process. It does not provide for a veto or absolute bar to Federal undertakings which may adversely affect cultural resources. A decision approving issuance of a right-of-way for a natural gas pipeline does not violate the act when the Advisory Council on Historic Preservation has approved and entered into a programmatic agreement with the applicant and other involved agencies establishing requirements for inventory, evaluation, reporting, and review among the parties concerning potentially affected properties, together with provisions for a treatment plan to avoid or mitigate potential impacts.

5. Rights-of-Way: Oil and Gas Pipelines

A right-of-way for an oil and gas transportation pipeline is properly issued under sec. 28 of the Mineral Lands Leasing Act, 30 U.S.C. § 185 (1988). Although

sec. 28 requires utilization of rights-of-way in common to the extent "practical," a decision by BLM in its discretion to issue a right-of-way along a route which parallels existing rights-of-way to a lesser extent than another alternative will be affirmed when the record supports a finding that this was not a practical alternative.

6. Federal Land Policy and Management Act of 1976: Land- Use Planning--Federal Land Policy and Management Act: Rights-of-Way--Rights-of-Way: Federal Land Policy and Management Act of 1976--Rights-of-Way: Oil and Gas Pipelines

When a BLM resource management plan provides that major utility and transportation systems will be located to make use of existing corridors whenever possible but also provides that most of the area (excepting specified avoidance areas) will be open for location of major utility systems, a decision approving a right-of-way for a buried natural gas pipeline will not be reversed as inconsistent with the land use plan if the right-of way does not cross an avoidance area, and BLM reasonably concludes that a longer alternative route paralleling existing rights-of way would not be appropriate because of the added cost and disturbance.

7. Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements

A rule of reason applies when reviewing new information regarding a proposed action analyzed in an EIS and considering whether a supplemental EIS is required. A decision to issue a right-of-way for a natural gas pipeline project analyzed in an EIS without preparation of a supplemental EIS will be affirmed when the information generated in a "second look" at the project does not significantly vary from that considered in the EIS in nature or magnitude of the disclosed impacts.

APPEARANCES: Mary V. Laitos, Esq., and Allan R. Hale, Esq., Denver, Colorado, for the Wyoming Independent Producers Association and the Independent Petroleum Association of Mountain States; R. Daniel Fleck, Esq., Director, Lawyers and Advocates for Wyoming, Jackson, Wyoming, and Daniel F. Helig, Associate Director, Wyoming Outdoor Council, Lander, Wyoming, for the Wyoming Outdoor Council; Elizabeth S.

Merritt, Esq., Washington, D. C., Associate General Counsel, National Trust for Historic Preservation; Lyle K. Rising, Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management; John F. Shepherd, Esq., Jane L. Montgomery, Esq., Denver, Colorado, and Thomas L. Sansonetti, Esq., Cheyenne, Wyoming, for Altamont Gas Transmission Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

These are consolidated appeals 1/ from the July 29, 1994, record of decision (ROD) signed by the Acting State Director, Wyoming State Office, Bureau of Land Management. The ROD addressed an application for a natural gas pipeline right-of-way filed by Altamont Gas Transmission Company (Altamont) and adopted a route for the project. While announcing the intention to grant the right-of-way along the selected route alternative, the ROD provided that the right-of-way itself would not be issued until Altamont submitted an acceptable plan of development providing details of construction, rehabilitation, and operations. 2/

Altamont filed a right-of-way application with BLM and an application for a Certificate of Public Convenience and Necessity for the pipeline with the Federal Energy Regulatory Commission (FERC) in July 1989. FERC was designated the "lead agency" with responsibility for preparation of the environmental impact statement (EIS) required by section 102 of the National Environmental Policy Act (NEPA), 40 U.S.C. § 4332 (1988). BLM was a "cooperating" agency. FERC issued the Final EIS (FEIS) in May 1991.

The Altamont pipeline would transport natural gas a distance of 620 miles from the Canadian border near Port of Wild Horse, Montana, to Opal in southwestern Wyoming. Approximately 206 miles of the pipeline route cross public lands administered by BLM or the Bureau of Reclamation 3/ and, hence, pipeline construction requires authorization in the form of a right-of-way issued by BLM. At Opal the gas would be transferred to the Kern Pipeline which would transport the gas to markets

1/ The appeal filed by the Wyoming Independent Producers Association and the Independent Petroleum Association of Mountain States (Associations) has been docketed as IBLA 94-819. The appeal filed by the Wyoming Outdoor Council (WOC) has been docketed as IBLA 94-820, and that of the National Trust for Historic Preservation (NTHP) has been docketed as IBLA 95-108. 2/ Counsel for BLM filed a motion to dismiss the appeals asserting that the decision did not actually grant the right-of-way. Appellants responded that after having issued the ROD now on appeal, BLM has no further discretion to deny the right-of-way if the conditions specified in the ROD are met. By order dated November 17, 1994, the Board denied the motion to dismiss on this basis.

3/ FEIS at 3D-11 (Table 3D-6).

in southern California. The Altamont pipeline would be 30 inches in diameter and have a flow capacity of more than 700 million cubic feet of gas per day. The Kern Pipeline can now carry 700 Mmcf/day but would be expanded to carry 1,200. The ROD issued by BLM adopted the May 1991 FEIS prepared by FERC in connection with its approval of a Certificate of Public Convenience and Necessity for the project. Altamont Gas Transmission Co., FERC Docket Nos. CP90-1372-000 et al. (August 1, 1991). During the pendency of these appeals, FERC issued its order on rehearing and conditioned Altamont's certificate on compliance with additional environmental mitigation measures. Altamont Gas Transmission Co., Docket Nos. CP90-1372-001 et al. (Order dated Oct. 12, 1994) (hereinafter referred to as the FERC Order on Rehearing). Some of the issues raised in these appeals are addressed in FERC's order.

In their appeal, the Associations oppose BLM's issuance of any right-of-way that would enable construction of a pipeline importing gas from Canada. The Associations contend in their statement of reasons and response to Altamont's answer that the EIS prepared by FERC upon which BLM relied is inadequate because it considered the socioeconomic effects of construction of the pipeline, but not of its operation. They allege their members will be harmed by the importation of gas that will lead to shutting down marginal domestic wells, some of which are on public lands, and that otherwise recoverable reserves will be left in the ground. The Associations allege that socioeconomic effects from loss of Federal and Indian royalties were not analyzed in the FEIS. They allege impacts including premature abandonment of wells caused by lower gas prices and reduced exploration and drilling activities in Wyoming. Secondary effects asserted include the loss of state and Federal revenues from domestic gas production and social impacts on Wyoming communities from loss of petroleum industry jobs.

The appeals filed by WOC and NTHP focus on BLM's selection of a route through the historic South Pass area of southwestern Wyoming rather than an alternate route. They allege violations of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1988), the Mineral Lands Leasing Act (MLLA), 30 U.S.C. § 185a (1988), NEPA, and the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470f, 470h-2 (1988). Their specific contentions are addressed infra.

Altamont has moved to dismiss the appeal filed by the Associations, asserting that it raises issues relating solely to the economic effects of importing gas from Canada which is one of the issues considered by FERC in deciding whether to issue a certificate of public convenience and necessity. Since this issue was not addressed by BLM in deciding to issue a right-of-way along a specified route, Altamont asserts that: the Associations are not adversely affected by the BLM decision itself; their claimed injuries cannot be relieved by any decision of this Board; and, hence, they lack standing to appeal to the Board. The Associations assert

that the authority of BLM to issue rights-of-way under the Mineral Leasing Act, 30 U.S.C. § 185 (1988), obligates BLM to ensure that FERC's EIS is adequate before BLM can base its own decisions on it.

[1] In Hoosier Environmental Council, 109 IBLA 160 (1989), we considered an appeal from BLM's approval of a right-of-way of less than 20 miles across public land segments of a 140-mile pipeline for which FERC, as lead agency, prepared an environmental analysis (EA). In that appeal, the appellant's contentions related to whether the EA prepared by FERC adequately analyzed the anticipated impacts from and possible alternatives to the proposed pipeline project. In delineating the scope of our review authority, we noted that the issue properly before us was far more focussed:

BLM did not purport to approve the pipeline project; FERC approved that. BLM merely approved issuance of the right-of-way across various parcels of Federal land. Thus, the sole question before this Board is whether or not the FERC EA adequately addressed the impacts engendered by those segments of the pipeline crossing Federal lands.

Admittedly, it must be shown that, consistent with this Department's obligations under NEPA, the FERC EA provides an adequate basis both for an assessment of those impacts, as well as an informed consideration of stratagems to mitigate any adverse effects. But, to the extent that appellant seeks to challenge the EA's consideration of impacts generated by other segments of the pipeline, such a challenge is beyond the purview of this Board's jurisdiction. 7/

7/ This is, of course, not to say that the question of the adequacy of the FERC EA as it relates to the entire pipeline project is immune from scrutiny. What we are saying is simply that this Board is not the proper forum in which to raise such a challenge. [Emphasis added.]

Id. at 166. As we noted in Hoosier, although BLM has responsibility for issuing the right-of-way across Federal lands, FERC is vested with the authority to actually authorize the pipeline project. Id. at 174.

Departmental regulation 43 CFR 4.410 provides in relevant part: "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right of appeal to the Board." We find the Hoosier case controlling with respect to the appeals filed by the Associations. When we review the adverse effects of which the Associations complain, we find that it is the FERC decision that

adversely affects them rather than that of BLM. Our holding in Hoosier is applicable. Accordingly, the motions to dismiss the appeals filed by the Associations (docketed as IBLA 94-819) are granted.

BLM and Altamont have also moved to dismiss all of the appeals, asserting that review of FERC orders and the issues arising under those orders is statutorily prescribed by section 19(b) of the Natural Gas Act which provides for filing a petition for review of FERC's decision in the appropriate court of appeals. This section gives the court of appeals exclusive jurisdiction to consider the issues raised in these appeals under the following statutory language: "Upon the filing of such a petition [for review of the FERC order] such court [the United States Court of Appeals] shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." 15 U.S.C. § 717r(b) (1988). Altamont contends that FERC, the lead agency responsible for preparation of the EIS, had the responsibility for preparing an EIS which would support the action of all agencies with jurisdiction over the pipeline project and that the court of appeals has sole jurisdiction to review this aspect of the FERC order. ^{4/} Appellants assert that this appeal is a completion of this Department's administrative decisionmaking process under its separate statutory authority and not a proceeding to review a FERC order. BLM and Altamont essentially contend that the exclusive review provision preempts any action that would effectively modify or reverse a FERC order. Citing cases such as City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958), in which the Court held that a similar provision of the Federal Power Act precluded attacks on a Federal Power Commission's (FPC) order in a collateral proceeding, and Williams Natural Gas Co. v. City of Oklahoma City, 890 F.2d 255 (10th Cir. 1989) (following Tacoma in construing 15 U.S.C. § 717r (1988)), BLM and Altamont characterize the instant appeals as collateral attacks on FERC's order that are likewise precluded. BLM has also requested an oral argument to address the complexities of the jurisdictional arguments relating to judicial review.

Appellants respond that the cases upon which BLM and Altamont rely concern the exclusivity of jurisdiction for judicial review rather than the authority of an agency to complete its administrative decisionmaking process. They contend that the BLM decision is guided by substantive legal authority not directly applicable to FERC, including utilization of common rights-of-way and management of lands in accordance with BLM land use plans. Appellants also point out that FERC's order on rehearing explicitly recognizes this Department's authority to select the route when adjudicating the application for a right-of-way under the Mineral

^{4/} In this regard, Altamont takes issue with our decision in Hoosier Environmental Council, *supra*. Although Altamont concedes the jurisdiction of the Board to review non-environmental issues raised by the BLM ROD, Altamont contends appellants did not raise any such issues.

Leasing Act and appellants find nothing in the order precluding BLM from doing so. Appellants contend that BLM is not obligated to approve the right-of-way by the FERC decision. The fact that FERC issued its final decision on the pipeline before the BLM ROD adjudicating the right-of-way application became final does not preempt the authority of the Secretary of the Interior to make his decision on the right-of-way application. Further, appellants assert that reversal of the BLM decision would not nullify the FERC decision, but rather would require rerouting of the right-of-way.

An examination of the cases cited by Altamont and BLM is helpful in ruling on the motions. In the Tacoma case, the City filed an application with FPC for a license to construct a dam and related hydroelectric facilities on a navigable river. The application was opposed before FPC by the State, which owned a fish hatchery which would be destroyed by the resulting reservoir, causing a taking. FPC denied the State's objection and granted the license. On judicial review of the FPC ruling in the court of appeals, the court rejected the State's argument that the City had no authority to take or destroy State property, holding that State laws cannot preclude FPC from issuing a license or preclude the licensee from building a dam on a navigable stream under the dominion of the United States. Washington Department of Game v. Federal Power Commission, 207 F.2d 391, cert. denied, 347 U.S. 936 (1954). While the petition for review was pending in the court of appeals, State court litigation was initiated which eventually led to an injunction against construction on the ground that State law did not authorize the City to condemn the State fish hatchery. On review of the State court decision, the Supreme Court noted that "the Federal Government under the Commerce Clause of the Constitution (Art. I, § 8, cl. 3) has dominion, to the exclusion of the States, over navigable waters of the United States," and found that Congress has exercised this power under the Federal Power Act administered by FPC. 357 U.S. at 334 (citation omitted). After noting that FPC had rejected the State's objection to the license, including the asserted lack of authority to condemn the State fish hatchery, the Court found that the court of appeals had reviewed and affirmed the FPC order. In considering the propriety of the State court injunction, the Court reversed the State court's decision as a collateral attack on the FPC order. In construing the judicial review provision which embraced language similar to 15 U.S.C. § 717r(b) (1988), the Court stated:

It thereby necessarily precluded de novo litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review. Hence, upon judicial review of the Commission's order, all objections to the order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all. [Footnote omitted.]

357 U.S. at 336.

The Williams case cited in support of the motions to dismiss involved the application of the principles set forth in Tacoma on review of a FERC certificate of convenience and necessity for a natural gas pipeline. In Williams the court held that a challenger may not collaterally attack the validity of a prior FERC order in an action brought in State court or in Federal court. 890 F.2d at 262. Quoting from the opinion in the Tacoma case recognizing the exclusive jurisdiction of the court of appeals to affirm, modify, or set aside FPC's order, the court held that a challenge to FERC's jurisdiction could not be raised in a State court. 890 F.2d at 264.

The present case is distinguishable from Tacoma and Williams in certain critical respects. First, as noted previously, this appeal is brought on administrative review of the BLM decision granting the right-of-way pursuant to the pipeline right-of-way provisions of the Mineral Leasing Act, 30 U.S.C. § 185 (1988). See 43 CFR 4.1. 5/ This is not a proceeding for judicial review of the FERC decision to grant a certificate of public convenience and necessity. This Board is not a court of law empowered under the Constitution or an act of Congress to review final actions of executive officials. It is part of the executive branch of our Government. Our authority to consider this appeal was vested in the Board by Secretarial delegation (see 43 CFR 4.1(b)(3)) and has the same statutory root as BLM's authority to issue the decision being appealed: the explicit and exclusive authority of the Secretary of the Interior under 30 U.S.C. § 185 (1988) to select the location of a right-of-way across lands administered by him for pipelines approved by FERC. Because the Secretary has delegated his review authority to this Board, 43 CFR 4.1, we would lack jurisdiction to consider this matter only if the Secretary's own authority has been preempted by issuance of the FERC certificate and the filing of a suit for judicial review. An argument based on a negation of express Secretarial statutory authority should not be lightly advanced by counsel representing any agency under the Secretary's supervision. This Board does not casually renounce the Secretary's statutory authority.

This case is further distinguished by the fact that administrative review in the remaining appeals before us does not entail a challenge to either the FERC certificate of convenience and necessity for the pipeline or the authority of the applicant to construct a pipeline. Rather, they address the right-of-way route approved by BLM. Unlike FERC's authorizing legislation, the statute authorizing the issuance of a right-of-way is an expression of the authority of Congress under the Property Clause

5/ We note that the Secretary's explicit and exclusive authority to select the route for a natural gas pipeline under 30 U.S.C. § 185 (1988) has co-existed with the exclusive review provision of the Natural Gas Act for more than 50 years, yet no party has tendered a precedent holding that the Secretary's authority was preempted by orders issued by FERC or its predecessor, FPC.

of the Constitution, Art. IV, § 3, cl. 2. The Supreme Court has stated: "The power over the public land thus entrusted to Congress is without limitations. 'And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.'" Alabama v. Texas, 347 U.S. 272, 273 (1954) (citing United States v. California, 332 U.S. at 27). Congress has specifically authorized the Secretary to decide matters relating to public lands.

Moreover, courts have recognized that the Secretary's jurisdiction arises from Federal ownership and remains with the Secretary until legal title leaves the United States:

[I]t has long been recognized that the Secretary of [the] Interior has broad plenary powers over the disposition of public lands. Cameron v. United States, 252 U.S. 450, 459-64, 40 S. Ct. 410, 64 L.Ed. 659 (1920); Knight v. United States Land Association, 142 U.S. 161, 177, 12 S. Ct. 258, 35 L.Ed. 974 (1891); United States v. Williamson, 75 I.D. 338, 342 (1968). He has continuing jurisdiction with respect to these lands until a patent issues, and he is not estopped by the principles of res judicata or finality of administrative action from correcting or reversing an erroneous decision by his subordinates or predecessors in interest. United States v. United States Borax Co., 58 I.D. 426, 430 (1943).

Ideal Basic Industries v. Morton, 542 F.2d 1364, 1367-68 (9th Cir. 1976). In Ben Cohen (On Judicial Remand), 103 IBLA 316, 328-29, aff'd sub nom., Sahni v. Watt, Civ. No. S-83-96-HDM (D. Nev. Jan. 17, 1990), aff'd (Jan. 14, 1991), aff'd, No. 91-15398 (9th Cir. Apr. 27, 1992), we rejected an application on grounds other than those specified in the court order remanding the case, thereby exercising the Secretary's continuing jurisdiction, which was recognized in Ideal Basic Industries, Inc. v. Morton, supra.

[2] The FERC certificate conveys no interest in Federal land and cannot be construed as creating an entitlement to one. See Transwestern Pipeline Co. v. Kerr-McGee Corp., 492 F.2d 878, 883-84 (10th Cir. 1974), cert. dismissed, 419 U.S. 1097 (1975). Unlike the power of eminent domain over private lands that Congress has conferred upon holders of FERC certificates under 15 U.S.C. § 717f(h) (1988), a certificate confers no power over any interest in Federal lands. Id. Although a FERC order may be conclusive in determining the ability of its licensee to acquire private land for a power project by condemnation, see City of Tacoma v. Taxpayers of Tacoma, supra, it has no such effect with respect to Federal land. Transwestern Pipeline Co. v. Kerr-McGee Corp., supra. Accordingly, we conclude that the exclusive review provision of 15 U.S.C. § 717r (1988) does not deprive the Secretary of authority to review a decision of a subordinate regarding a right-of-way for the pipeline. The motions to

dismiss appeals to this Board, which exercises the Secretary's review authority, based on allegations that the appeals are a collateral attack on a FERC order barred by 15 U.S.C. § 717r (1988), are properly denied.

Turning to the substantive challenges to the BLM decision, we note that from the outset the most controversial issue, from BLM's standpoint, has been the route of the pipeline through southwestern Wyoming. This issue has generated public controversy and divided BLM field personnel. The pipeline must cross the continental divide and the Oregon-Mormon Trail. The "South Pass" route favored by Altamont and approved by FERC and BLM crosses through the South Pass area and parallels the Oregon-Mormon Trail for some distance. ^{6/} The pipeline would be buried, but opponents of this route believe that the scars resulting from construction of the pipeline could not be adequately reclaimed due to the poor soils of the area, so that the pipeline would significantly diminish the integrity of an area they consider to have great historic significance. Opponents of the South Pass route favor an alternative designated the "Jeffrey City" route, which would add 39 miles to the length of the pipeline at a cost of \$37.5 million, but would more closely parallel existing utility and transportation systems. Appellants WOC and NTHP challenge the data upon which the South Pass and Jeffrey City routes were compared in the EIS, and contend that the selection of the South Pass route violates BLM's land use plans.

The proposed South Pass route and Jeffrey City route diverge near Lost Cabin, Wyoming, at Milepost (MP) 428, rejoining at the end of the pipeline near Opal at MP 620. See FEIS at 2-49 (Fig. 2-10). The segment of the route through the South Pass area is described in the FEIS at 2-48:

Sweetwater River would be crossed near MP 527 and the Continental Divide near MP 529. The Divide would be crossed on the north side and immediately adjacent to SR 28 at the South Pass. This alignment would circumvent the South Pass National Historic Landmark (NHL), which lies on the southern side of SR 28 near its South Pass crossing. The route would continue towards the southwest, paralleling SR 28 to a point where the highway and the Oregon-Mormon Trail intersect near MP 537.7. Here the route would cross the Trail and SR 28

^{6/} South Pass crosses the continental divide between the Wind River Mountains and the Colorado Rockies where the altitude dips to less than 7,500 from the 13,000 foot high mountains. On the northwest side of the Great Divide Basin, South Pass is not a steep mountain pass, but rather a broad sagebrush plain about 20 miles wide. It served as the primary mountain gateway to the West for travellers on the Oregon and Mormon Trails in the mid-nineteenth century. Although there is evidence of human use of the area as long as 10,000 years ago, its "discovery" has been attributed to a group of six men led by Robert Stuart on Oct. 22, 1812, travelling from Astoria, Oregon, on behalf of John Jacob Astor.

simultaneously. Once on the south side of SR 28, the route would join an existing AT&T ROW which it would follow (on the south side of SR 28) to within three miles of Farson.

Between the Sweetwater River and Farson, the route would roughly parallel the historic Oregon-Mormon Trail, crossing it twice near MPs 536.5 [537.7?] and 561.

The Jeffrey City route is 231 miles in length and 98 percent of the route is parallel to existing rights-of-way. See FEIS at 3D-16. This alternative would cross the Oregon-Mormon trail north of Jeffrey City and again near the town of Granger. Important differences in the routes are set forth in a table at Table 6-3, FEIS at 6-20.

A 5,760-acre area near the South Pass summit, measuring somewhat more than 4 by 2 miles, has been set aside as the South Pass NHL. See Exh. 8, Appendix to Altamont Brief. Ten miles to the northeast lies the South Pass Historic Mining District (NHD), an area of nearly 30 square miles that includes South Pass City, Atlantic City, and Miner's Delight. These are the two areas that the BLM land use plans designate as "avoidance areas," i.e., areas to be avoided by rights-of-way unless no feasible alternative exists. See Lander RMP at 6 (Attachment A to BLM Answer). Altamont had originally planned for the pipeline to more closely parallel an existing right-of-way for a buried telephone cable. The route was subsequently modified so that it would not pass through the South Pass NHL. As now proposed, the buried pipeline would not cross either of these "avoidance" areas.

The controversy identified by WOC and NTHP in this case does not concern the entire length of the South Pass route but primarily focusses on a 36-mile segment of the proposed right-of-way (from MP 505 to MP 541) that would go through an area that appellants would like to have designated a "Rural Historic Landscape." See Lander Resource Area Draft Second Look Analysis, at 10 (Exh. I to WOC Brief).^{7/} Although this nomination has not been accepted, Altamont estimates the acreage embraced in the nominated area as about 300,000 acres, or more than 468 square miles (Altamont's Reply Brief at 15).

Subsequent to FERC's initial approval of the pipeline with the proposed South Pass route in 1991, a petition for rehearing was filed. BLM

^{7/} It was not until Dec. 8, 1993, more than 2 years after the FEIS and shortly after a "second look" analysis was ordered by BLM in response to the inquiries prompted by Tom Bell of Friends of South Pass and others that Bell submitted a justification for designation of the Landscape to the National Register Program of the Wyoming State Historic Preservation Office. It was submitted for the stated purpose of saving the South Pass Area from "further degradation, such as the proposed Altamont pipeline project."

did not issue the right-of-way, and Altamont announced a 1-year delay because of low natural gas prices in a letter to BLM, dated August 11, 1992. Opponents of the pipeline continued to press for a change in the route.

By memorandum dated September 17, 1993, BLM's new Director requested a report on the rationale for the selection of the South Pass route as the preferred alternative. The report submitted on October 21, 1993, identified a need for a re-evaluation of the route. By memorandum to the Wyoming State Director dated November 5, 1993, BLM's Assistant Director for Land and Renewable Resources identified an opportunity to obtain a "second look" at pertinent data before a ROD issued. The Assistant Director requested analysis of construction and reclamation costs for the South Pass route, as well as identification of cultural resources and costs of mitigating impacts to them. Comparable data was to be developed for the Jeffrey City route. Although the Worland District Office ^{8/} retained responsibility for overall project management, the initial draft second look analysis was prepared by the Lander Resource Area Office.

Lander's draft analysis for the "second look" concluded that the Jeffrey City route was preferable, finding that selection of the South Pass route would violate FLPMA, the Mineral Leasing Act, and seven land use plans. It further questioned the soil rating analyses used in the FEIS, and raised a number of issues, asserting that the analysis set forth in FERC's FEIS was inadequate. This draft was then reviewed by other BLM personnel involved in the project who disagreed with its conclusions. The ROD on appeal essentially rejected Lander's analysis, sustained the adequacy of the FEIS, and approved the selection of the South Pass route.

WOC contends that approval of the South Pass route in an area to be managed primarily for the protection of visual and historic resources violates FLPMA because it does not conform to land use plans for the area. The action is alleged to violate the Mineral Leasing Act by failing to utilize an existing utility and transportation corridor. Further, WOC challenges the adequacy of the FEIS, contending that the FEIS failed to contain the comments of Federal agencies having relevant expertise. WOC also asserts that the FEIS failed to adequately analyze certain factors including the impacts of soils in terms of reclamation potential and visual scars; geological hazards to the pipeline and necessary mitigation; conflicts with land use plans; impacts to stream water quality; and impacts

^{8/} The Altamont pipeline would cross two states and five BLM Districts. In 1989, the BLM Director designated the Wyoming State Office as the lead state office for the Altamont right-of-way project, stating that although the right-of-way crosses public lands in two states, only one grant should be issued. Thus, the Wyoming State Office was made responsible for NEPA compliance and cost-recovery. The Worland District Office was designated as the lead district office for project management.

on historic and cultural resources. WOC further contends that the EIS failed to consider cumulative impacts arising from creating a de facto utility corridor and impacts arising from the need for excess rock disposal areas, borrow sites, and ancillary access roads.

NTHP asserts that BLM's second look analysis contradicts the ROD and the FEIS with respect to impacts to cultural resources and the proposed South Pass Rural Historic Landscape District; the reclamation potential and mitigation of visual impacts; the costs of reclamation; and inconsistency with land use plans. NTHP contends that the information developed during the second look analysis makes preparation of a supplemental EIS necessary. Further, NTHP argues that the ROD violates the Mineral Leasing Act and FLPMA on several grounds: the approved route fails to utilize available rights-of-way in common to the extent practical, the decision is inconsistent with land use plans, and the route will result in undue environmental damage. NTHP also argues that BLM's decision violates NHPA because BLM failed to evaluate and nominate the proposed South Pass Rural Historic Landscape District to the National Register and to assume responsibility for the preservation of that district.

Many of appellants' specific arguments are based on their concern that granting the right-of-way would pioneer a new right-of-way corridor through an area warranting the same protection as existing historical landmarks. This perception tends to magnify the significance of differences between the second look analysis and the FEIS, thereby enlarging the perceived deficiencies in the FEIS. BLM and Altamont argue that this perception distorts appellants' view of the issues. We note, however, that designation of a right-of-way corridor usually embraces such highly visible uses as overhead transmission lines, and, although the issuance of any right-of-way can be said to create a de facto corridor (as distinguished from a designated corridor, see 43 CFR 2800.0-5(l) and (n)), appellants provide no support for their suggestion that authorization of a right-of-way for a buried pipeline inevitably creates a precedent for overhead transmission lines or other rights-of-way in the same area. While considering whether appellants have met their burden of establishing error in BLM's decision, one fact must be kept in mind: the right-of-way is for a buried pipeline not an overhead transmission line.

LANDSCAPE/NHPA

Because land status issues are so fundamental to forming a proper perspective from which to consider these appeals, we will first consider NTHP's argument that BLM's decision violates section 110 of NHPA, 16 U.S.C. § 470h-2 (1988 and Supp. V 1993), because BLM failed to evaluate and nominate the South Pass Rural Historic Landscape District to the National Register and to assume responsibility for the preservation of that district. Section 110 of NHPA concerns historic properties owned or controlled by Federal agencies. Subsections 110(a)(2)(A) and (B), 16 U.S.C.

§ 470h-2(a)(2)(A), (B) (Supp. V 1993), require agencies to develop programs for the identification and nomination of properties for the National Register of Historic Places and ensure that properties which may be eligible are managed and maintained in a way that considers the preservation of their historic and cultural values in compliance with section 106 of NHPA. 16 U.S.C. § 470f (1988). Subsection 110(f) requires that before approval of any action that may adversely affect a NHL, the agency undertake whatever planning and actions are necessary to minimize harm to the landmark. 16 U.S.C. § 470h-2(f) (1988). Section 110(f) does not pertain to properties until they have been designated, and that provision is relevant only to protection of areas within the NHD and NHL.

[3] The fact that BLM has not requested designation of this area as an historical landscape does not by itself constitute an "identifiable decision" subject to our review under 43 CFR 4.410. See generally The Exodus Corp., 126 IBLA 1, 2 (1993); Southern Utah Wilderness Alliance, 122 IBLA 17, 20 (1992). Further, effectuation of such a determination by BLM has been by classifying the designated area as an area of critical environmental concern (ACEC), just as the NHL and NHD are designated. Proposals for designating ACECs are to be made through BLM's land use planning process. ^{9/} See 43 CFR 1610.7-2. The Board does not have jurisdiction to consider appeals from approval or amendment of a resource management plan (RMP), and cannot gain jurisdiction until action is taken to implement the plan. 43 CFR 1610.5-2(b); Southern Utah Wilderness Alliance, 128 IBLA 52, 66 (1993); Hutchings v. Bureau of Land Management, 116 IBLA 55, 61 (1990); Idaho Natural Resources Legal Foundation, Inc., 96 IBLA 19, 23 (1987); Wilderness Society, 90 IBLA 221, 224-25 (1986). Therefore, to the extent appellants are contending that BLM's failure to amend its RMP to designate the landscape area violated section 110(a) of NHPA, we have no jurisdiction to consider their argument. However, we have jurisdiction to review appellants' contention that BLM has not properly considered the impact of approval of the pipeline on historic and cultural values, as required by section 106 of NHPA. See Owen Severance, 118 IBLA 381, 389-90 (1991); see generally Southern Utah Wilderness Alliance, 128 IBLA 52, 67 (1993) (consideration of impact of drilling permit on possible inclusion of tract in Wild and Scenic River System).

Under section 106 of NHPA, as amended, 16 U.S.C. § 470f (1988), BLM has certain obligations with respect to eligible as well as listed properties. That section provides:

^{9/} "Areas of critical environmental concern" are defined by section 103 of FLPMA, 43 U.S.C. § 1702(a) (1988), as "areas within the public lands where special management attention is required * * * to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural system or processes, or to protect life and safety from natural hazards." Designation as an ACEC

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted under-taking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the under-taking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470v of this title a reasonable opportunity to comment with regard to such undertaking.

For properties listed in the National Register of Historic Places or properties found to be eligible for inclusion in the National Register, specified procedures are set out in 36 CFR 800.4 for the review of individual undertakings to determine the possible effects on these properties. The term "eligible for inclusion in the National Register" includes not only properties formally determined as eligible under 36 CFR Part 63, but also "all other properties that meet National Register listing criteria." 36 CFR 800.2(e); Red Thunder, Inc., 124 IBLA 267, 284 (1992).

Although John Keck, Wyoming's State Historic Preservation Officer, expressed his concurrence in a letter to Tom Bell (a member of WOC) dated February 8, 1994, that the rural landscape is "deserving of nomination," he noted that there was insufficient documentation and that permission must be gained from a majority of landowners within the boundaries of the areas to be nominated before the nomination process could be initiated. This Department's National Park Service advised Keck by letter dated April 26, 1994, that current documentation "does not provide sufficient information about the history and condition of the primary resources and landscape characteristics to determine whether the area delineated on the maps contains a cohesive concentration of historic landscape characteristics and possesses the overall integrity that qualifies such an area as a rural landscape." The needed landscape characteristics are various types of historic structures, and NPS stated that further information was required before determining "whether the area as a whole is eligible as a rural historic landscape." We conclude that appellants have failed to establish that the entire area is eligible.

fn. 9 (continued)

segregates an area from areas that are managed for multiple use. High Desert Multiple-Use Coalition, Inc., 116 IBLA 47, 50 (1990). We further note that under 43 U.S.C. § 1712(e)(2), a management action that would exclude one or more principal uses for a period of 2 or more years in an area of 100,000 acres or more must be reported to Congress.

[4] In addition, the Director of the Western Office of Project Review, Advisory Council on Historic Preservation (ACHP), notified FERC by letter dated January 9, 1992, that ACHP's execution of a Programmatic Agreement between FERC, ACHP, the Montana and Wyoming State Historic Preservation Officers, the Bureau of Reclamation, BLM, and Altamont constituted "the comments of the Council required by section 106 of the NHPA" (Exh. 3, Altamont Answer Brief). Premised on a determination that the pipeline may have an effect on listed or eligible properties, the agreement establishes requirements for inventory, evaluation, reporting, and review among the parties, and procedures for resolving differences. FERC is required to ensure that Altamont develops a treatment plan for avoidance and mitigation of adverse effects on historic properties, including data recovery, mitigation of visual and audible effects, and use of rolling topography and existing landforms to conceal visibility of the pipeline from sensitive areas. The agreement also requires preparation of a monitoring plan including measures for discovery of unidentified sites, and recognizes that rerouting may become necessary.

Section 106 calls for consultation with the ACHP. In reviewing a challenge to a homesite application based on section 106 of NHPA in United States v. Jones, 106 IBLA 230, 251 (1988), we quoted the following statement in Solicitor's Opinion, 87 I.D. 27, 29 (1979): "[T]he NHPA is essentially a procedural, action-forcing statute designed to ensure that cultural resources are identified and considered in the decisionmaking process. It does not provide for a veto or absolute bar to federal undertakings which may adversely affect such resources." As ACHP itself determined, the Programmatic Agreement assures compliance with section 106 of NHPA.

FLPMA/MLLA/CORRIDOR

[5] Appellants contend that the ROD violates the requirements of FLPMA and MLLA to utilize rights-of-way in common and right-of-way corridors. When addressing this argument, it is important to recognize that right-of-way corridors and rights-of-way in common are distinct (although related) concepts. The right-of-way provision for oil and gas pipelines at section 28 of MLLA is the relevant authority for the gas pipeline in this case. See Exxon Corp., 97 IBLA 45, 53-55, 94 I.D. 139, 143-45 (1987), aff'd, Exxon Corp. v. Lujan, 730 F. Supp. 1535 (D. Wyo.), aff'd, 970 F.2d 757 (10th Cir. 1992). 10/ Section 28 of MLLA, as amended, 30 U.S.C. § 185 (1988), makes no reference to right-of-way corridors, but subsection (p) requires the utilization of rights-of-way in

10/ Appellant in Exxon argued that the right-of-way should have been issued under the right-of-way provisions at Title V of FLPMA, 43 U.S.C. §§ 1761-1771 (1988), which, unlike section 28 of MLLA, do not require that the pipeline be operated as a common carrier.

common "to the extent practical" ^{11/} to minimize adverse environmental impacts. ^{12/} No party to this case has identified another existing right-of-way available for common use within which Altamont could place its pipeline. Despite appellants' protestations to the contrary, the record supports a finding that the alternative route favored by appellants is not a "practical" alternative. The Jeffrey City alternative would require construction of an additional 39 miles of pipeline at an estimated additional cost of \$37.5 million. See Table S-4, FEIS at S-24 through S-26. The Jeffrey City route would also require installation of an additional compressor station and entail the temporary disturbance of a substantially greater acreage of lands during construction. *Id.* Hence, the FEIS concluded that "significant engineering and economic penalties" would result from selection of the Jeffrey City route (FEIS at 6-27). Under these circumstances, appellants have not shown that the BLM choice of the South Pass route was violative of the relevant right-of-way authority under section 28 of MLLA.

LAND USE PLANS

[6] Appellants argue that the BLM decision to issue the right-of-way is inconsistent with BLM land use plans. Central to this issue of consistency is the overview for the June 9, 1987, ROD for the Lander Resource

^{11/} Section 503 of FLPMA, 43 U.S.C. § 1763 (1988), the authority for other types of rights-of-way such as roads and overhead transmission lines, contains a similar provision but also refers to the designation of right-of-way corridors. Departmental regulation 43 CFR 2800.0-5(l) defines a "Designated right-of-way corridor" as

"a parcel of land either linear or areal in character that has been identified by law, by Secretarial Order, through the land use planning process or by other management decision as being a preferred location for existing and future right-of-way grants and suitable to accommodate more than 1 type of right-of-way or 1 or more rights-of-way which are similar, identical, or compatible."

Although BLM and Altamont point out that there are no existing "designated corridors" within the area, subsection (n) defines "Transportation and utility corridor" as "a parcel of land, without fixed limits or boundaries, that is being used as the location for 1 or more transportation or utility right-of-way [sic]." We note, however, subsection (g) and (h) define right-of-way as an instrument issued pursuant to FLPMA, not MLLA, as does FLPMA itself, 43 U.S.C. § 1702(f) (1988). Thus, as a technical matter, BLM's failure of to make Altamont's natural gas pipeline follow an existing corridor violates neither FLPMA nor the Mineral Leasing Act.

^{12/} Section 28 of MLLA requires that right-of-way grants reserve "the right to grant additional rights-of-way or permits for compatible uses on or adjacent to rights-of-way or permit area granted pursuant to this section." See 43 CFR 2881.1-3(c).

Management Plan (Attachment A to BLM Answer), to which all of the parties to this appeal refer:

Major utility and transportation systems will be located to make use of existing corridors whenever possible, to provide for cost-efficient routes and to provide for protection of other resource values such as scenery and wildlife. Most of the area will be open for location of major utility systems. However, areas with the most potential conflicts have already been identified as areas to avoid (see map 5). The avoidance areas will be areas where rights-of-way may be granted only when no feasible alternative route or designated rights-of-way corridor is available. These areas include * * * South Pass * * * and 1/4 mile or the visible horizon, whichever is less, on each side of the Oregon/Mormon Pioneer National Historic Trails.

(ROD, Lander Resource Management Plan, at 6). It is clear from Map 5, however, that the avoidance area does not include all of South Pass, as that term is defined by appellants, but directed to the NHL and NHD. As for the trails themselves, the avoidance area extends no further than one-quarter mile.

The draft second look analysis generated by the Lander Office and cited by appellants concluded that the South Pass pipeline route is not in conformance with the Lander RMP because "it does not follow existing corridors" (Draft Second Look Analysis, Exh. I to WOC Brief, at 2). ^{13/} Despite the fact that the language of this provision contains no absolute prohibition of rights-of-way on any category of lands, Lander's second look analysis (upon which appellants base their challenge) gives effect only to the first sentence of the foregoing paragraph, effectively making any area outside of an existing corridor an avoidance area. As BLM and Altamont point out, the remainder of the paragraph makes it clear that this interpretation is not justified. Under appellants' interpretation, a right-of-way could not be granted in areas designated as open to rights-of-way but not within an existing corridor unless use of a corridor was not "possible." Thus, the open areas not within corridors would be more restrictively managed than avoidance areas, because an avoidance area may be crossed if a "possible" alternative is not "feasible." This reading of the language of the RMP is inconsistent with the meaning of the language in context.

^{13/} Appellant WOC contends that the view of BLM field officials regarding conformity of the South Pass route with land use plans as set forth in the draft second look analysis should be given deference. Appellant cites the principle of judicial deference in the application of regulations to the view of the agency drafting the regulations. In the present case, however, we are involved in administrative review and not judicial review. The scope of the Board's review authority is not limited by the standards on judicial review. See United States Fish & Wildlife Service, 72 IBLA 218 (1983).

In this case, it is certainly possible for Altamont to use the "existing corridor" ^{14/} for the buried AT&T cable as Altamont originally proposed, but that would place the pipeline in an avoidance area for which there is a feasible alternative, i.e., the proposed South Pass route. Lander's RMP is more properly construed as allowing more liberal issuance of rights-of-way in open areas than would be allowed in avoidance areas. Thus, BLM is not required to find that the Jeffrey City route is not feasible as a precondition to authorizing a right-of-way for the South Pass route. Although Lander's RMP may provide support for a decision to require Altamont to use the Jeffrey City route as a matter of discretion, it does not preclude BLM from issuing a right-of-way for the South Pass route which does not fall within any of the avoidance areas shown on map 5. The other land use plans cited by Lander place no greater restriction on the issuance of rights-of-way. Thus, we find that appellants have not shown a basis on the ground of inconsistency with the relevant land use plan for overturning the BLM State Director's conclusion that the right-of-way is not inconsistent with the land use plan (Final BLM Wyoming Second Look, July 29, 1994, Exh. 5 to Altamont Answer, at 6).

NEPA

Finally, we turn to appellants' arguments that the EIS prepared by FERC was deficient. NEPA is primarily a procedural statute designed "to insure a fully informed and well-considered decision." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 558 (1978). It requires that an agency take a "hard look" at the environmental effects of any major Federal action. Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). In Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989), 350-51, the Court stated:

[I]t is now well settled that NEPA does not mandate particular results, but simply prescribes the necessary process. * * * If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. * * * Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed—rather than unwise—agency action.

Inasmuch as the right-of-way issued to Altamont by BLM would involve only a portion of the pipeline for which FERC was requested to issue a certificate, designation of FERC as the lead agency for preparing the EIS was appropriate. See generally 40 CFR 1501.5.

One of the advantages of designating a lead agency is that it avoids duplication of work. Many of the NEPA and other environmental objections

^{14/} See 43 CFR 2800.0-5(n).

raised by appellants in this appeal were raised and addressed in FERC's Order on Rehearing issued during the pendency of this appeal. We find ourselves in substantial agreement with the Commission's resolution of those issues and see no need to replicate that discussion here. ^{15/} We have already discussed the issues relating to BLM's own enabling legislation and land use plans when addressing the other arguments made by appellants in this case. The remaining NEPA compliance issues arise from BLM's "second look." Although FERC was provided with copies of Lander's second look analysis and reviewed them, FERC regarded the ROD as resolving those issues. Thus, the issue before us is whether BLM may properly adopt FERC's FEIS as a basis for issuing the right-of-way. In the particular context of this case, the key question is whether information developed since the FEIS was prepared in 1991 discloses the presence of impacts sufficiently different in nature or magnitude as to require a supplemental EIS.

[7] Appellants' argument that the FEIS is deficient or that a supplemental EIS is required is based on conclusions drawn in the "second look" and information developed during that review process. In Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989), the Court held that agencies must apply a rule of reason when evaluating new information and determining whether to prepare a supplemental EIS: "[I]f the new information is sufficient to show that the remaining action will 'affect[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." See Headwaters, Inc., 101 IBLA 234, 239-40 (1988). Regulations promulgated by the Council on Environmental Quality require agencies to

^{15/} Inasmuch as FERC's Order on Rehearing has been appealed to the United States Court of Appeals for the District of Columbia Circuit, we note that, in Friends of the River v. F.E.R.C., 720 F.2d 93, 106 (D.C. Cir. 1983), then-Circuit Judge Ginsberg found an EIS deficient because it did not fully discuss an alternative to the proposed action, most of the discussion appearing in FERC's order, not the EIS. The court declined to remand the matter for preparation of a new or supplemental EIS, noting that "well before the start of this review proceeding, the Commission did make such an investigation, after receiving and responding to extensive comments from interested persons outside the agency, and FERC incorporated its findings in an opinion accessible to the public—the July 1982 order." Id. The court concluded that sending the matter back to the agency would serve no purpose.

Although we do not interpret this decision as meaning that a decision issued at the conclusion of an agency's review process can be a lawful substitute for a deficient EIS, we are mindful that many of the challenges directed against FERC's EIS in this appeal were answered by FERC in an order that is now under review by the court that issued the Friends of the River decision.

"prepare supplements to either draft or final environmental impact statements if * * * [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR 1502.9(c)(1)(ii).

Appellants point out that the FEIS found that the number of known cultural resources sites within 1 mile of the right-of-way was greater with the Jeffrey City alternative (370) than with the South Pass route (296). See FEIS at S-26, 3M-13 through 3M-15. The Lander second look, however, found that the South Pass route has a total of 780 sites along its route as compared with 727 known sites along the Jeffrey City alternative (Draft Second Look Analysis at 7). In comparing "potentially significant" sites, the Lander second look found more along the South Pass route (173) than along the Jeffrey City alternative (62), but acknowledged that more sites will be found along the Jeffrey City alternative because a substantial portion of the land along that route has not yet been inventoried. *Id.* at 8. The Lander second look also addressed the loss of integrity to cultural resources values. Noting that integrity is not known to be an issue for the prehistoric sites involved because their value is generally related to information which can be obtained from those sites, Lander concluded that the cumulative impact on the integrity of significant historic sites on the South Pass route would be greater due to the significance and numbers of sites and the fact that most of the sites along the Jeffrey City alternative have suffered previous impacts from development projects (Draft Second Look Analysis at 11-12).

With respect to reclamation potential, appellants note the FEIS concluded that mitigation would reduce visual impacts to less than significant levels (FEIS at S-30, 6-25). The Lander second look report, in discussing the cost to mitigate impacts to cultural resources along the South Pass route, concluded that it "appears" that the pipeline scar cannot be reclaimed adequately to avoid an adverse impact to the rural historic landscape, due to the climate, soil conditions, and short growing season (Draft Second Look Analysis at 13). The Lander second look report was critical of the soil rating methodology used in the FEIS as deficient when defining the quality of the soil in terms of reclamation potential (Draft Second Look Analysis at 23-24). An analysis of the soils along the Fremont County portion of the respective routes, performed by the Lander Office, showed more fair to poor soils along the South Pass route. *Id.* at 24. This differed from the percentage of poor to fair soils along the respective routes disclosed in the FEIS, which was slightly greater on the Jeffrey City alternative (FEIS at 6-20).

Regarding the significance of the number of cultural resources on the two routes, Altamont has presented the affidavit of one of its consulting anthropologists (Exh. 7 to Altamont Answer Brief). Altamont explains that an intensive additional class III cultural resources inventory of the South Pass route was conducted after the FEIS was prepared. Given the class III inventory for the South Pass route and the fact that

only class I data is available for much of the Jeffrey City alternative, Altamont notes that it is not surprising that the number of known significant sites has been found to be higher on the South Pass route. The professional opinion of Altamont's consultant is that, based on the number of sites, the difference between the two routes is insignificant (Exh. 7 at 4).

Addressing soils and reclamation, Altamont provided an explanation by one of its soil science consultants in rebuttal of the Lander Office critique (Exh. 31 to Altamont Answer Brief). Altamont points out in its answer that, although a somewhat different methodology was used when preparing the FEIS, soil quality was not deemed a significant factor when selecting the route because mitigating measures would minimize impact on the route selected (FEIS at 6-4). Altamont also notes in its answer that the FEIS characterized the majority of the soils within the South Pass area as having poor to fair reclamation potential (FEIS at 3B-5). Soils on the South Pass alternative routes were similarly rated. Id.

Considered in context, the cultural resources impacts information developed in the second look does not establish a significant difference in the nature or magnitude of those impacts which would dictate preparation of a supplemental EIS. It is clear from examination of the FEIS that potential impacts to cultural resources are considered to be substantial for any route chosen. Inevitably more cultural resources sites will be found as more intensive inventories are conducted, but the magnitude of the impact has not changed significantly from that disclosed in the FEIS.

The significance of the soil quality arises from the visual impacts that might result from unsuccessful reclamation, but appellants have not shown any significantly greater impact than those identified in the FEIS. CEQ's regulations define significance in terms of "context" and "intensity." 40 CFR 1508.27; see generally Glacier-Two Medicine Alliance, 88 IBLA 133 (1985). In that case, we observed: "To those who use and enjoy a particular area of land in a specific manner, any adverse impact may appear significant. On the other hand, those who seek to introduce new activities are not likely to regard the impact of their action as significant." Id. at 139-40. BLM's decision need only be set aside if appellants have identified impacts significantly more adverse than those identified in the FEIS. See Marsh v. Oregon Natural Resources Council, *supra*.

A careful reading of the FEIS discloses no understatement of the visual effects of the buried pipeline. The FEIS acknowledges that visual impacts in areas of low revegetation potential could persist for 30 years or longer (FEIS at 4L-1). It also acknowledges that, in the South Pass area, the visual impact would be long term, but would be similar in appearance to existing unimproved and two-track roads sound throughout the area. Id. at 4L-10.

In order to identify some objective means of determining the significance of visual impairment, we turn to Table 3L-2 of the FEIS which lists visually sensitive resources along the Altamont route. The resources in the South Pass area have been designated Visual Resource Management (VRM) Class II except for the Oregon-Mormon Trail which is designated Class I. These classes are defined as follows:

CLASS I

The management objective for Class I is to preserve the existing character of the landscape. This class provides for natural ecological changes; however, it does not preclude very limited management activity. The level of change to the characteristic landscape should be very low and must not attract attention. This class is applied to specially designated areas, such as the wild sections of National Wild and Scenic Rivers and Wilderness Areas. This class may be prescribed for natural areas and Areas of Critical Environmental Concern where management activities are to be restricted.

CLASS II

The management objective for Class II is to retain the existing character of the landscape. The level of change to the characteristic of the landscape should be low. Management activities may be seen, but should not attract the attention of the casual observer. Any changes should repeat the basic elements of form, line, color, and texture found in the predominate natural features of the characteristic landscape.

(FEIS at 3L-3). In terms of "context" and "intensity," the FEIS considered all visual impacts, other than short term impacts, to be significant in Class I and II areas. See FEIS 4L-1 to 4L-3.

Although the Oregon-Mormon Trail is listed as Class I, BLM's land use plans do not extend this zone of protection to its entire horizon. This restriction is properly construed as applicable to the one-quarter-mile avoidance area not subject to multiple use management. Those features listed in Table 3L-2 fall in Class II, and other portions of the South Pass area fall in Classes II, III, and IV (FEIS at 4L-10). Class III allows for moderate change to the landscape that would attract attention, but would not dominate the view of the casual user, while class IV allows major modification of the existing character of the landscape (FEIS at 3L-4). Against this background, we do not find sufficient basis for a conclusion that the second look has generated significant new information regarding impacts of the pipeline right-of-way (as reclaimed) which would require a supplemental EIS.

We note that the parties to this case have tendered many exhaustive briefs in this proceeding and some of their arguments are far less relevant than others. To the extent that any assertion has not been specifically addressed in this opinion, it has been considered and rejected by the Board in deciding this case.

Counsel for BLM has requested that the parties to this case be allowed an opportunity to present oral argument before the Board. Appeals to the Board of Land Appeals are ordinarily decided on the basis of the administrative record and the briefs of the parties on appeal. Oral argument may be granted in the discretion of the Board where it appears that clarification of the issues on appeal would be aided by the opportunity to inquire further of counsel for the parties. See 43 CFR 4.25. Upon review of the extensive briefs filed on behalf of the parties to this appeal, we find that oral argument is not required to elucidate the issues involved in this appeal and, hence, the motion is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal of the Associations is dismissed and decision appealed by WOC and NTHP is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur.

R. W. Mullen
Administrative Judge