

INTERIOR BOARD OF LAND APPEALS

Independent Petroleum Association of Mountain States, et al.

136 IBLA 279 (October 1, 1996)

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INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES ET AL.

IBLA 96-359, 96-360, 96-361, 96-378

Decided October 1, 1996

Appeals from, and requests to stay a decision by the Wyoming State Director, Bureau of Land Management, granting pipeline right-of-way WYW-12880.

Stay denied, appeals dismissed.

1. Environmental Quality: Environmental Statements--Mineral Leasing Act: Generally--National Environmental Policy Act of 1969: Environmental Statements--Rights-of-way: Act of February 25, 1920

BLM properly rejected a contention that economic consequences of pipeline operation discussed in an EIS used to evaluate a right-of-way application violated NEPA requirements; stated disagreement with some facets of an economic study prepared as part of the EIS failed to show that BLM erred in finding that economic arguments raised in opposition to the pipeline did not require rejection of the right-of-way application.

2. Environmental Quality: Environmental Statements--Indians: Trust Responsibility--Mineral Leasing Act: Generally--National Environmental Policy Act of 1969: Environmental Statements--Rights-of-way: Act of February 25, 1920

Oil producing Indian tribes were properly given notice of and invited to participate as parties to a case involving environmental planning for a pipeline right-of-way for transmission of Canadian crude oil to the same Wyoming market supplied by the Tribes; while the Tribes expressed disagreement with economic information used in a study that was part of the EIS prepared during consideration of the pipeline application, no error was shown in the BLM decision to grant the pipeline right-of-way, nor did the Tribes show that BLM had acted in derogation of any treaty, statute, or agreement in so doing.

APPEARANCES: Hugh V. Schaefer, Esq., Scott L. Sells, Esq., Denver, Colorado, for Independent Petroleum Association of Mountain States and Wyoming Independent Producers Association; Kristine L. Delkus, Esq., Steven E. Hellman, Esq., Calgary, Alberta, for Express Pipeline, Inc.; Mike Chiropoulos, Esq., John Schumacher, Esq., Ft. Washakie, Wyoming, for Eastern Shoshone Tribe; Richard M. Berley, Esq., Seattle, Washington, for Northern Arapaho Tribe; Michael A. Maycock, Esq., Carol Seeger, Esq., Gillette, Wyoming, for Campbell County, Wyoming; Deborah S. Smith, Esq., Helena, Montana, for Montana River Action Network; Lyle K. Rising, Esq., Office of the Regional Solicitor, Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Independent Petroleum Association of Mountain States and Wyoming Independent Producers Association (IPAMS), Board of County Commissioners of Campbell County, Wyoming, Eastern Shoshone and Northern Arapaho Tribes (Tribes), and Montana River Action Network have appealed from an April 15, 1996, record of decision issued by the Wyoming State Director, Bureau of Land Management (BLM), that authorized a grant to Express Pipeline, Inc. (Express), of a 52-foot wide pipeline right-of-way and special use permit across public land, with provision for pump stations. The record of decision includes a draft and a final environmental impact statement (EIS) prepared to conform to requirements imposed by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 (1994). The right-of-way grant was issued effective on May 8, 1996. It crosses 97 miles of Federal land out of a total pipeline project length of 515 miles in the United States; originating in Canada, at Hardisty, Alberta, the pipeline ends at Casper, Wyoming, and is designed to handle crude oil ranging from bitumen blend to synthetic crude oil. In addition to filing statements of reasons (SOR) in support of their appeals, IPAMS, Campbell County, and the Tribes have all requested that we stay the BLM decision, so that Express may not proceed to implement the pipeline right-of-way granted by BLM.

The Montana River Action Network (IBLA 96-378) has not filed an SOR, and the time allowed within which to do so has passed; accordingly, their appeal, docketed as IBLA 96-378, is dismissed. See 43 CFR 4.402. The remaining appeals seeking stays of the decision to grant the pipeline right-of-way are governed by 43 CFR 2884.1(b), a rule specifically governing appeals of rights-of-way cases; consequently, 43 CFR 4.21(a), the regulation governing operation and effect of Departmental stays generally, does not apply herein. See Texaco Trading & Transportation Inc., 128 IBLA 239, 240 (1994). Under the operative rule, 43 CFR 2804.1(b), the Express pipeline right-of-way grant has been in effect since it was issued. The question appellants raise by their pending requests for stay is therefore whether a stay should now be imposed to prevent construction of the pipeline on the right-of-way before action can be taken on the merits of these pending appeals. Id.

An application to intervene has been filed on behalf of Larry and Rita Wagner, Wayne Mosegard and Ramona Rideout Rubis, Herman F. and Edith Dellos, Richard and Pirkko and David McKamey and McKamey Farms, Inc., Ogg Ranch, Inc., Robert C. Samuel, Jordan Farms, Inc., T&T, Inc., Harold Miller, trustee of the Harold Miller revocable trust, Grace Miller, trustee of the Grace Miller revocable trust, Paul Scheuerman, Sidney Crawford, and Hamilton Properties. All the persons seeking to intervene are private landowners whose lands in Washakie County, Wyoming, are crossed by the proposed Express pipeline. Their application states that some of them participated in the development of BLM's record of decision; nonetheless, none of them appealed therefrom. Despite this fact, they now allege that BLM's record of decision failed to adequately address impacts the Express pipeline right-of-way would have on their property. Asking to be allowed to intervene, submit affidavits, and to brief their position, they also seek an evidentiary hearing concerning, among other matters, an alleged acquisition by Express of an interest in Platte Pipeline Co.

To appeal a BLM decision to this Board, a party must file a notice of appeal in the office of the BLM officer who made the decision within 30 days after the date of service. 43 CFR 4.411(a). If he fails to do so, his appeal may not be considered. 43 CFR 4.411(b). Petitioners' attempt to circumvent this requirement by seeking to intervene, even though they failed to invoke the Board's jurisdiction as dictated by regulation, cannot be rewarded. Not having taken a timely appeal from the BLM decision they now belatedly seek to challenge, they cannot be recognized as parties; their application to intervene is therefore denied.

BLM has moved to dismiss these appeals because appellants have limited their reasons for appeal to questions of economic advantage as between oil producers that are peripheral to the BLM decision here under review and do not raise questions cognizable under NEPA. BLM also argues that appellants lack standing to bring these appeals because the issues they present are "purely economic issues of competition" which should properly be addressed to the Federal Energy Regulatory Commission (FERC), where proceedings concerning this matter are presently pending. Express has also moved to dismiss these appeals; based upon an analysis of the SOR's filed by appellants, Express contends that appellants have not identified any error in the record of decision prepared by BLM.

BLM has moved to dismiss IPAMS' appeal for lack of standing. We recently considered an appeal by IPAMS from a BLM decision approving a right-of-way for a natural gas pipeline filed by Altamont Gas Transmission Company (Altamont) from Canada to southwestern Wyoming, in Wyoming Independent Producers Association, 133 IBLA 65 (1995), in which we granted motions to dismiss. That case, however, is distinguishable from this, in that FERC, not BLM, was the lead agency in preparing the environmental review. This is an important difference, as the Board has broad authority to review BLM's decisions, and as FERC might well decline to address the

adequacy of the EIS, since it was prepared by BLM. BLM's motion to dismiss is properly denied in the interests of ensuring that appellants' right to administrative review is preserved.

IPAMS and Express have filed a number of procedural motions dealing with pleading matters and have requested leave to file numerous documents not specified in Board of Land Appeals rules governing such filings, and seek extensions of time in which to do so. All requests for leave to file replies and other documents already filed with the Board are granted; all requests for further extensions of time to file additional pleading, affidavits, or other documents are denied. IPAMS briefed the request for stay on May 14, 1996, and filed an SOR on June 13, 1996, followed by a Joint Reply filed June 21, 1996, which supplemented the SOR. An answer to the SOR was filed on July 15, 1996. This appeal is therefore ripe for decision under provision of 43 CFR 4.412 and 4.414, rules governing appeals before the Board. All documents filed by all parties up to the date of this decision have been considered in reaching this decision, wherein we deny the requests for stay and grant the motions to dismiss.

A stay may issue upon a showing that it is in the public interest, if there is a likelihood of irreparable harm, and when potential relative harms to the parties of stay issuance or denial favor stay issuance, provided a likelihood of success on the merits exists. See, generally, 43 CFR 4.21(b). The burden to show there is a reason for stay issuance rests with the party seeking a stay. Texaco Trading & Transportation Inc., supra. See, generally, 43 CFR 4.21(b)(1). The pending stay requests and motions to dismiss, on the record presented, facilitate immediate decision of these appeals. See Albert Eugene Rumpfelt, 134 IBLA 19, 20 (1995).

IPAMS (IBLA 96-359) raises three principal arguments in support of a joint request for stay: First, that the authority of the Secretary of the Interior to grant pipeline rights-of-way is limited, under the Mineral Leasing Act (MLA), 30 U.S.C. § 185(r) (1994), to pipelines that are constructed, operated, and maintained as common carriers, and that the pipeline at issue will not be so operated (Preliminary Brief at 6, 9). Second, that the BLM decision is contrary to NEPA, 42 U.S.C. § 4321 (1994), because BLM failed to adequately disclose, consider, and evaluate critical environmental and socioeconomic impacts likely to result from pipeline construction and operation on the approved right-of-way (Preliminary Brief at 12, 14, 20, 23-33, 37-47). Last, it is contended that BLM failed to consider whether Express met statutory requirements imposed by MLA section 28(j) for technical and financial capability, and failed also to consider the effect of MLA section 36, authorizing the Secretary of the Interior to sell Federal royalty oil to refineries lacking their own supply of crude (Preliminary Brief at 47). In a joint SOR filed by IPAMS, these same three arguments are reiterated (Joint SOR at 3, 5, 6); they are further explained in a Joint Reply filed on June 21, 1996, on pages 5-12, 17-19, and 20-23.

The appeal by the County (IBLA 96-360) identifies NEPA compliance as the "primary concern" on appeal (County SOR at 1). Arguing that the EIS fails to address "potential physical and economic environmental effects" of the right-of-way grant on Campbell County, it is concluded that the BLM decision is contrary to NEPA, because it failed to adequately "address the socio-economic factor" (County SOR at 2). Explaining that the scope of environmental effects is seen as "quite expansive," the County argues that economic factors are properly considered part of statements prepared in compliance with NEPA (County SOR at 4), as are social and aesthetic impacts (County SOR at 5). From this predicate, the County argues that the decision to grant the right-of-way "was made without an adequately comprehensive analysis" (County SOR at 2).

Express has filed an answer to the SOR's, and has responded to the request for stay. Addressing the arguments raised by IPAMS, Express does not deny that the pipeline crossing public lands should be operated as a common carrier, but answers that it will be so operated. Further, Express answers that BLM's NEPA analysis of the effects of the pipeline was adequate, and that socioeconomic arguments advanced by IPAMS are nothing more than an attempt to obtain favored treatment of U.S. oil producers at the expense of Canadian users of the proposed pipeline. Dismissing the argument that Express lacks financial or technical capability to construct, operate, and maintain the pipeline, Express contends it has the needed capability. As to the Federal royalty oil argument, Express states that the BLM decision adequately considered this matter on page 9 thereof.

In reply, IPAMS contends that the EIS was contaminated by undue influence exerted by Express upon the drafters of the environmental statements (Joint Reply at 5-12). It is urged that reliance by BLM upon provisions of the North American Free Trade Agreement (NAFTA), led to error in the NEPA analysis by BLM (Joint Reply at 12-17), and that criminal convictions of a Canadian corporation affiliated with Express should be considered when evaluating the financial and technical qualifications of Express to be granted the pipeline right-of-way at issue (Joint Reply at 22, 27-28).

The common carrier argument made by IPAMS is, at best, premature. It is not contended, nor is it shown, that any IPAMS group member has been denied access to the pipeline by Express, nor has there been any showing that any producer of oil from Federal lands has requested that Express transport such oil and been refused access. See 30 U.S.C. § 185(r) (1994). Express contends that it will operate and maintain the pipeline as a common carrier, in conformity to MLA section 185(r) (Express Response filed July 15, 1996, at 4). While IPAMS argues otherwise, no factual basis for their arguments has been provided; having raised this contention, it is up to them to support it with a showing of fact. They have not done so. Should a violation of the MLA arise at some future time, nothing in this proceeding will prevent appropriate action being taken to deal with it. Meantime, the question appears to be moot; because of this circumstance it cannot now provide a foundation either for issuance of a stay or maintenance of this appeal before the Department.

[1] The principal argument advanced by IPAMS and the County concerns the question whether BLM complied with NEPA in compiling the record of decision upon which issuance of the right-of-way rests; at issue is the economic effect of the pipeline grant upon domestic oil reserves. IPAMS predicts that the price their members are able to obtain for domestic crude oil from Wyoming refineries will fall when the Express pipeline makes Canadian crude oil available at Casper, and that the resulting behavior of oil producers will have adverse environmental effects on the domestic oil reserve. They explain that:

The dramatic increase in supply to the Rocky Mountain region resulting from the Pipeline will result in lower prices, and shorten the life of domestic wells. An operator will produce less of the available recoverable reserves in a well before reaching the economic limits of production. Wells that are producing under current market conditions will be rendered uneconomic by the Pipeline and abandoned prematurely. * * * Once a reservoir has been drilled and produced and then abandoned due to low prices, it will not be drilled again and therefore the resource is lost forever.

This premature abandonment results in the waste of depletable natural resources.

[Citations omitted.]

(Preliminary Brief at 15).

IPAMS states that this predicted consequence of right-of-way issue is contrary to declared Departmental policies favoring the greatest recovery of oil in the interest of conservation. Arguing that the right-of-way grant to Express is inconsistent with those longstanding policies, appellants seek to show that Canadian crude from the Express pipeline will depress prices more than BLM estimated in the EIS, and that BLM's commentary upon the effect of right-of-way issuance appearing in the final EIS is inadequate (Preliminary Brief at 16-20).

IPAMS also argues that the EIS rubber-stamped a flawed socioeconomic evaluation prepared by a hired consultant without conducting an adequate and independent review (Preliminary Brief at 20). It is suggested that BLM's conclusion there will be a \$1 decline in the price of domestic crude rests on an analysis that is factually unsupported, internally inconsistent, illogical, and that it was obtained by undue influence (Preliminary Brief at 20-26; SOR at 7; Joint Reply at 11). Examination of the final EIS does not, however, support the assertions made by IPAMS that possible effects of the pipeline upon domestic oil reserves were not considered therein, nor does the record support the assertion that the EIS prepared for the pipeline right-of-way was improperly influenced by Express. To support the stay request on the NEPA issue, IPAMS must, in addition to other requirements established by 43 CFR 4.21(b), show a likelihood that the EIS was premised on "a clear error of law, a demonstrable error of fact, or that the [NEPA] analysis failed to consider a substantial environmental question." 43 CFR 4.21(b)(ii); Glacier-Two Medicine Alliance,

88 IBLA 133, 140-41 (1985). This standard is not satisfied by such allegations, which point to no factual or legal error in the decision under review.

NEPA, 42 U.S.C. §§ 4321-4361 (1994), requires Federal agencies to take environmental considerations into account when making decisions and to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1994). BLM prepared an EIS here, leaving the principal question before us whether the EIS is so flawed as to render BLM's decision insupportable.

The Council on Environmental Quality has provided regulations that define "effects" that an agency must consider in its environmental analyses, including "[i]ndirect effects * * * caused by the action [that] are later in time or farther removed in distance, but are still reasonably foreseeable." 40 CFR 1508.8(b). In addition to considering the direct effects on the lands covered by the action being considered, BLM's EIS must consider indirect environmental effects of that action. The extent of the indirect (or off-site) effects that must be considered is limited to those "caused by" the action that are "reasonably foreseeable." See, e.g., Howard B. Keck, Jr., 124 IBLA 44, 47 (1992) and authorities cited therein. This principle has been stated in the context of the exchange of Federal lands for private lands, where it appears likely that the Federal lands will be developed after being transferred to private ownership. An agency need not consider effects that are remote and highly speculative. See Howard B. Keck, Jr., 124 IBLA at 50.

IPAMS contends that BLM failed to consider the environmental effect of connecting domestic shippers to the pipeline in response to demands for such service (Preliminary Brief at 5). No such requests have been made, however, and no likely IPAMS production near the pipeline has been identified. BLM is not required to speculate about all possible impacts, but need only consider events that are reasonably foreseeable as a result of the right-of-way. 43 CFR 1508; see Howard B. Keck, 124 IBLA at 48-50.

Regulations implementing NEPA state, concerning whether economic or social effects are within the contemplation of the statute, that they "are not intended by themselves to require preparation of an environmental impact statement." 40 CFR 1508.14. Nonetheless, if "economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment." Id. The effect of competition from Canadian crude oil on the price paid to Wyoming producers and whether there are consequential environmental impacts that are reasonably foreseeable from such an event are considered by BLM's record of decision on pages 2-3. After considering the analysis of this aspect of the right-of-way grant appearing in the EIS, the conclusion was drawn that "I am aware of the [NEPA] mandate to disclose all impacts of a Federal action, including socioeconomic impacts. I believe the record before me does that." Id. at 3. IPAMS, however, disagrees with this conclusion.

It is contended that BLM was misled by a flawed economic study that minimized the effect Canadian crude would have on prices paid for Wyoming oil. Further, it is the IPAMS position that this understatement was a direct result of improper contact between the contractor performing the economic study and Express. The record does show that an early draft of the study was revised, after comment by Express. The comment, in a letter dated November 24, 1995, is part of the record before us and concerns economic data relevant to the study. There is no indication that it was improper for Express to bring such data to the attention of the contractor making the study, or that the data presented was in error. It is, rather, to the final conclusion reached by the study and reported to BLM that IPAMS objects, disagreeing with a number of findings leading to a conclusion that:

The overall rate of decline for Wyoming crude oil production is not expected to be measurably affected by a price change of \$1.00 per barrel for sweet crude. The rate of decline is much more likely to be affected by world prices.

(Final EIS at N-10). What IPAMS does not do, however, is show that this conclusion, or the study upon which it is based, is legally or factually wrong. The NEPA arguments raised by IPAMS rest entirely on the assumption that oil prices will decline more than BLM found possible as a result of Express pipeline operations. That predicate is not supported by recorded fact, however.

The question raised by IPAMS in these economic arguments is whether operation of the Express pipeline can be directly related to a decline in domestic oil production. Express argues that any decline, should one occur, is a function of decisions made by domestic producers, and is based upon existing economic conditions beyond the operation of the pipeline (Express Response at 23). This argument accords generally with the findings of the economic study published in the final EIS on pages N-6 through N-10; citing the existence of "a wide range of factors" the study analyzes economic probabilities as they may be affected by pipeline operations. While IPAMS assumes that a decline of more than \$1 per barrel in prices will occur when the pipeline begins to operate, no evidence to support this prediction has been offered. Nor has IPAMS shown that the predicted economic impacts are the sort contemplated by NEPA regulations. Nonetheless, the socioeconomic aspect of pipeline operation was considered and analyzed by BLM.

Moreover, BLM found, after considering the economic data, that "I do not feel that I may base my decision whether or not to grant a [right-of-way] on economic factors" (Record of Decision at 3). The record supports this finding, which is a finding that the BLM decision could not be based upon the type of economic impact predicted by IPAMS. While IPAMS disagrees with aspects of the study and the manner in which it was applied, such disagreement does not, of itself, show the existence of an error of law, fact, or omission, so as to warrant revision or supplementation of the EIS prepared by BLM in this case. See Glacier-Two Medicine Alliance, supra.

IPAMS points to the possibility that predicted price reduction will force marginal oil and gas wells to be shut-in, thereby attempting to relate socioeconomic consequences with the physical environment. It is true that BLM found the expected price reduction would impact producers of southwestern Wyoming sweet and Wyoming sweet crude, and that it could potentially reduce the amount of oil exploration in southwestern Wyoming and also cause some additional shut-in or cause redevelopment programs in some fields to be discontinued, and that it could affect the level of drilling activity as well (Final EIS at N-10). However, BLM's concession that there might be impacts on Wyoming producers was based on the accuracy of assumptions that BLM noted could "turn out to be incorrect." BLM notes that Canadian crude would supplement Rocky Mountain crude production, which is in decline, without displacing it, and that Rocky Mountain production is likely to remain in demand, as area refiners prefer local crude because of the way their facilities are designed. BLM also noted that the prices of Wyoming crude would be more likely to be affected by factors totally unrelated to the Express project.

Nonetheless, BLM need not analyze every possible consequence of a decision to allow the pipeline right-of-way. Nor was it necessary for BLM to address the specific impacts that might have occurred if all the contingencies cited by appellants occurred. BLM was plainly aware of the possibility of impacts on producers when it made its decision. In view of the speculative nature of the possible harm to the producers caused by Express, BLM was not required to go into greater detail. BLM is required only to consider foreseeable impacts caused by the action. There is, therefore, no likelihood that IPAMS can prevail on the merits of this argument.

Finding that the public interest favored granting the pipeline right- of-way, the record of decision refers to laws other than NEPA in a manner that to IPAMS suggests the decisionmaker was confused about the legal foundation for his decision. IPAMS argues that the decision was based upon matters of international policy in which BLM plays no role. The record of decision does indeed make a general reference to laws not administered by the Secretary of the Interior, stating that:

I have taken into account two recent and unequivocal Congressional definitions of the public interest: the ratification of the General Agreement on Tariffs and Trade (GATT) and the North American Free Trade Agreement (NAFTA). I have determined that it would be inappropriate to use the BLM's ROW process, on only 19 percent of the proposed route, to frustrate the clear mandate of these international treaties, to discriminate against the import of Canadian oil, or to provide economic protection to a segment of the domestic oil industry. Nor do I consider it appropriate to use the process to favor one competing business venture over another (since most of Express's competitors require no permit from BLM), or to attempt to micromanage the supply and demand dynamic of the pipelining and refining market.

Id. at 3.

This statement rejects economic arguments proposed by IPAMS; it expresses reluctance to attempt to manage market activity across international boundaries. The general references to GATT and NAFTA do not purport to apply specific provisions of the referenced laws, and no specific reference to any provision of either is stated. The decision to issue the right-of-way to Express appears in the first paragraph of the BLM decision, which states:

I have determined that the draft EIS and the final EIS together, adequately disclose the impacts to the human environment of the Proposed Action and the Alternatives Discussed in Detail, and provide a sound basis for my decision. I have further determined that all practicable means to avoid or minimize environmental harm have been adopted. I also find that construction, operation, and maintenance of the pipeline would not result in unnecessary or undue degradation of the public lands.

Id. at 2. This is a correct statement of standards to be applied in dealing with pipeline right-of-way applications. See Amell Oil Co., 95 IBLA 311, 319 (1987). What follows this correct initial statement of purpose and authority is a discussion of events encountered during the planning process, including comments about trade matters received from interested parties. The authority under which the right-of-way issues, MLA section 28, 30 U.S.C. § 185 (1994), is correctly cited in the right-of-way grant itself. Right-of-way regulations published at 43 CFR Part 2800 are cited and applied by the right-of-way grant and the record of decision on page 1. The need to comply with NEPA requirements for EIS preparation is acknowledged and was satisfied. The environmental impact statements prepared considered, among other matters, whether the economic and social arguments presented to BLM were of the sort recognized by NEPA. There is no merit to the assertion that BLM attempted to act outside the sphere of authority granted to the agency by Congress, and no likelihood IPAMS can prevail on this issue.

A decision approving a right-of-way for an oil and gas pipeline on public lands will be affirmed where BLM has considered the cumulative impact of the right-of-way and the foreseeable oil and gas development to be served thereby and the record provides a reasonable basis for the conclusion that there will be no significant impacts other than those addressed in the EIS. Southern Utah Wilderness Alliance, 127 IBLA 282 (1993). Pursuant to section 28 of the MLA, as amended, 30 U.S.C. § 185 (1994), BLM has discretion to grant a right-of-way through any Federal lands for pipeline purposes for transportation of oil. That section provides broad discretion to the Secretary, through his delegated representative BLM, to grant an oil or natural gas pipeline right-of-way. See Marathon Oil Co., 83 IBLA 137, 142 (1984). When BLM identifies adverse environmental effects, but reasonably judges them to be outweighed by other benefits not provided by the no-action alternative, its decision

will be affirmed. See James Shaw, 130 IBLA 105, 115 (1994). Citing a suspension of the pipeline project by Express in 1994, IPAMS contends that the record of decision should have made a special finding, pursuant to MLA section 28(j), 30 U.S.C. § 185(j) (1994), that Express had the technical and financial capability to construct, operate, maintain, and terminate the project. A related argument that criminal conduct involving construction of the Iroquois Gas Pipeline in New York by an affiliated corporation should have been considered by BLM in evaluating the Express application is also advanced. Both arguments question the general qualification of Express to receive the pipeline grant without offering any proof that Express lacks technical or financial qualifications needed to accomplish the planned project, or that events occurring at the New York project are relevant to this right-of-way application. While section 28(j) does require that the Secretary be satisfied with the qualifications of those to whom grants are given, it does not require a special finding concerning that conclusion to be made part of the grant. See No Oilport! v. Carter, 520 F. Supp. 334, 363 (W.D. Wash. 1981). Absent a showing of a lack of required qualifications, these arguments are without merit.

So too, an objection that BLM neglected to consider MLA section 36, 30 U.S.C. § 192 (1994), authorizing the Secretary to sell the Federal royalty share of oil to those refineries lacking adequate supplies of crude, is without foundation in the record. The record of decision considered this matter on page 8, where it was found that royalty in kind "cannot generate any new oil; it can alleviate a shortage in one market only by creating a shortage somewhere else." These arguments must also, therefore, be rejected as grounds for issuance of a stay.

Having found that the three principal grounds upon which IPAMS rests its appeal lack merit and provide no substantial basis for issuance of stay under 43 CFR 4.21(b), the request by IPAMS for stay of the right-of-way grant is denied. Further, for the reasons stated above, the motions to dismiss this appeal are granted, IPAMS having failed to show any material omission or error of fact or law in BLM's record of decision here under review that justifies a continuation of this proceeding.

[2] The Eastern Shoshone and Northern Arapaho Tribes (IBLA 96-361), like IPAMS, allege that BLM violated NEPA by failing to adequately analyze the social and economic effects of the proposed pipeline. The Tribes, like members of IPAMS, are oil producers (Tribes SOR at 6); potential economic effects of the pipeline on the Tribes are addressed by the record of decision on page 10. While the right-of-way at issue does not cross tribal lands (see Tribal SOR at 18), the Tribes argue that depressed production on their reservation would seriously affect the well-being of their members. Although the Tribes narrow their complaint against the social and economic effects of the pipeline right-of-way to alleged impacts it would have on their reservation, they nonetheless tie the economic and social arguments raised in their SOR to that filed by IPAMS and adopt much of the IPAMS

argument as their own (see Tribes Supplemental SOR at 1-4). Those general arguments based upon social and economic grounds have been considered and rejected above and will not again be discussed.

In addition to those arguments already considered in the case presented by IPAMS, the Tribes argue that BLM breached a trust responsibility owed to the Tribes by failing to initiate meaningful consultation with the Tribes at an early stage of planning (Tribes SOR at 15). Nonetheless, the record shows that the Tribes were consulted at the beginning of the pipeline project when they were provided with a copy of the draft EIS. On April 15, 1996, they submitted comments supporting the no-action alternative, arguing that the proposal is adverse to their interests as oil producers (Letter to BLM dated Apr. 12, 1996). That they chose to delay their participation until late in the planning process is not grounds for complaint. Cf. Timbisha Shoshone Tribe of Death Valley, 136 IBLA 35, 40 (1996) (finding, among other matters, that the General Procedural Guidance for Native American Consultation, BLM Handbook H 8160-1 at III-15 (Nov. 3, 1994) was satisfied by giving an Indian tribe notice in writing during preparation of an EIS of a proposed mining project). The Tribes were provided with an opportunity to participate in planning the project, and did so. Nothing more was required. There is no likelihood the Tribes can prevail on the merits of this issue.

Citing Montana v. Blackfeet Tribe, 471 U.S. 759, 767 n.5 (1985), the Tribes also contend that the Secretary breached his trust duty to the Tribes to insure that Indians receive "the greatest return from their property" (SOR at 16). They further contend that BLM should have negotiated mitigation payments from Express in exchange for the right-of-way grant to Express. Arguing that BLM cannot simultaneously administer right-of-way applications for pipelines like that made by Express and handle Tribal leasing programs, the Tribes also contend there is an inherent conflict of interest in this case that requires supplementation of the EIS with a consideration of trust duties owed to safeguard tribal oil reserves.

The argument that tribal concerns about the pipeline were overlooked in the EIS ignores the discussion of possible effects of pipeline operations upon Tribal interests appearing in the record of decision, which states:

Oil and gas royalties are a major source of revenue for the Shoshone and Arapaho Tribes of the Wind River Indian Reservation. Yearly production of sweet crude on the reservation is approximately 130,000 barrels, 2.9 percent of total production. Assuming an average royalty rate of 18 percent, a reduction in the sweet price of \$1.00 per barrel could potentially reduce tribal royalty revenue by \$23,400 per year. Tribal severance tax lost would be approximately \$11,000, producing a total estimated annual revenue loss of \$34,400. No quantifiable secondary

impacts to production or exploration are anticipated, because most of the sweet crude is produced as condensate from natural gas wells.

Id. at 10. The Tribes have not shown that this statement is incorrect; it is sufficient for the purpose which BLM's NEPA action is designed to serve, which is to require the decisionmaker to consider environmental matters before taking action. See, e.g., The Shoshone-Bannock Tribes, 108 IBLA 198, 201 (1989).

We must also reject the argument that there is a conflict of interest between BLM's trust responsibility to the Tribes and BLM's decision to grant a right-of-way to Express. The Secretary's trust responsibility is defined by specific provisions appearing in a treaty, agreement, executive order, or statute. See The Havasupai Tribe v. United States, 752 F. Supp. 1471, 1486-1487 (D. Ariz. 1990), aff'd 943 F.2d 32 (9th Cir. 1991), and cases cited therein. Although they have cited authority for the proposition that the Secretary bears a general responsibility to Indian tribes, the Tribes have cited no specific authority in support of their argument that their interests must be preferred over those of a right-of-way applicant. Without such authority, their argument that they are entitled to preferential treatment must fail.

The Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1994), cited by the Tribes in support of their trust responsibility argument, limits the Secretary's "trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Minerals Agreement by any other party to such agreement." 25 U.S.C. § 2102(e) (1994). No such agreement has been shown to be at issue here. Similarly, while the Tribes cite the Indian Mineral Leasing Act of 1938 in support of their trust responsibility argument, no particular provision of that Act is cited as authority for their claim that some duty owed to them by the Secretary was breached when the Express right-of-way was issued. Nor is any provision of any treaty, executive order, or agreement cited in support of the suggestion that BLM should have extracted some payment from Express in exchange for the right-of-way grant. There being no authority for any such action, none was required or possible. See The Havasupai Tribe v. United States, supra. The trust obligation arguments advanced by the Tribes must therefore be rejected, as they are made without legal foundation.

The Tribes assert that, because issuance of rights-of-way is a discretionary act, BLM was compelled to make a finding and there was a "compelling need" that the grant was in the public interest before the right-of-way could issue (Tribes SOR at 21). A pipeline right-of-way grant, however, issues under provision of 30 U.S.C. § 185 (1994), and implementing regulations, which require no such finding; rights-of-way applications made in conformity to the Act are subject to denial only if they are inconsistent

with Federally planned uses or are "not in the public interest." 43 CFR 2882.3(e). The words "public interest" derive their meaning from the implementing regulations. See Belco Petroleum Corp., 96 IBLA 126, 132 (1987). In this case, the regulations at 43 CFR 2882.3 provide the regulatory frame of reference for processing applications such as that made by Express. No "compelling need" standard appears therein.

The Tribes also suggest that "BLM based its ultimate decision" to grant the Express right-of-way "on GATT and NAFTA." This assertion does not correctly state the action taken by BLM in this case, which was authorized under MLA section 28 and implementing regulations. As previously stated, BLM exercises no authority to implement the trade laws cited by the Tribes.

Because none of the appellants in these cases has shown error in the BLM decision here at issue, their stay requests must be denied since they have failed to show a likelihood of success on the merits. See 43 CFR 4.21(b)(1)(ii). The record of decision rests on a sound NEPA analysis appearing in an EIS and follows Departmental right-of-way regulations promulgated under authority provided by MLA section 28. Because our review of the merits of each appeal has revealed that appellants have failed to show error in the decision here under review, the motions to dismiss these appeals are granted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the requests for stay are denied and these appeals are dismissed.

Franklin D. Amess
Administrative Judge

I concur.

David L. Hughes
Administrative Judge