



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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ERICK W. ESTERHOLDT, *ET AL.*

IBLA 2014-74

Decided September 16, 2016

Appeals from a Record of Decision of the State Directors, Wyoming and Idaho State Offices, Bureau of Land Management, approving the grant of rights-of-way for an electrical transmission line project. WYW-174598 & IDI-35849.

Affirmed.

1. Environmental Quality: Environmental Statements;
Federal Land Policy and Management Act of 1976:
Rights-of-Way;
National Environmental Policy Act of 1969: Environmental
Statements;
Rights-of-Way: Applications

BLM properly grants a right-of-way for an electrical transmission line and related facilities, following preparation of an environmental impact statement, where it has taken a hard look at potential significant environmental consequences of doing so, and reasonable alternatives thereto, in accordance with the National Environmental Policy Act of 1969. BLM's decision will be affirmed on appeal where the appellant does not demonstrate, with objective proof, that BLM failed to consider a substantial environmental problem of material significance to the proposed action or otherwise failed to abide by the statute.

2. Environmental Quality: Environmental Statements;
Federal Land Policy and Management Act of 1976:
Rights-of-Way;
National Environmental Policy Act of 1969: Environmental
Statements;
Rights-of-Way: Applications

NEPA does not require BLM to prepare a supplemental EIS to address a relatively minor change in the preferred route for a

right-of-way where BLM properly concluded that the change would not affect the quality of the human environment in a significant manner or to a significant extent not already considered in the EIS.

APPEARANCES: Karen Budd-Falen, Esq., Cheyenne, Wyoming, for Erick W. and Jeanne M. Esterholdt, *et al.*; Constance E. Brooks, Esq., and Danielle Hagen, Esq., Denver, Colorado, for the Wyoming Coalition of Local Governments, *et al.*; Martin K. Banks, Esq., Lauren E.C. Hosler, Esq., and Aaron C. Courtney, Esq., Salt Lake City, Utah, for PacifiCorp, d/b/a Rocky Mountain Power, and Idaho Power Company; Philip C. Lowe, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Erick W. and Jeanne M. Esterholdt and others have appealed from a November 12, 2013, Record of Decision (ROD) of the State Directors, Wyoming and Idaho State Offices, Bureau of Land Management (BLM).¹ The ROD approved the granting of rights-of-way (ROW) to PacifiCorp, d/b/a Rocky Mountain Power, and Idaho Power Company (collectively, Proponents) for the “Gateway West Transmission Line Project” (Project).² It was based on an environmental impact statement (EIS) prepared pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2012). The Proponents’ ROWs, WYW-174598 and IDI-35849, authorize the construction, operation, maintenance, and termination

¹ Appeals were filed by: Western Watersheds Project and Prairie Falcon Audubon (collectively, WWP), IBLA 2014-55; Erick W. and Jeanne M. Esterholdt, *pro se* and as Trustees of the Erick and Jeanne Esterholdt Irrevocable Trust, and Jeanne M. Esterholdt, as Trustee of the Reed Land and Cattle Company (collectively, Esterholdt), IBLA 2014-74; and Wyoming Coalition of Local Governments (Coalition), on behalf of the Lincoln County Board of Commissioners (County) and Lincoln County Conservation District, Erick Esterholdt, Hal Cornia, Jeanne Reed Esterholdt, on behalf of Reed Land and Cattle Company, and Fred Roberts, on behalf of Roberts Ranch, IBLA 2014-75. By Order dated Feb. 4, 2014, we consolidated IBLA 2014-74 with IBLA 2014-75 because they arose out of the same operative facts, but we now find they raise and focus on different issues of law. Accordingly, IBLA 2014-74 and IBLA 2014-75 are hereby deconsolidated and will be addressed separately. IBLA 2014-55 arose out of similar facts, but since it raised different issues of law, it was not consolidated and has been decided separately. *See Western Watersheds Project*, 188 IBLA 278 (2016).

² We granted Proponents’ motion to intervene by Order dated Mar. 5, 2014, and denied WWP’s stay petition by Order dated Mar. 7, 2014.

of transmission lines in an east-west corridor stretching from the Windstar Substation near Glenrock, Wyoming, across public lands in western Wyoming and eastern Idaho, to the Hemingway Substation near Murphy, Idaho. We affirm the ROD because the Esterholdts have not carried their burden to show error in the decision on appeal, which we therefore affirm.

Background

The Proponents jointly proposed the Project to meet future demands for electricity, comply with their Integrated Resource Plans that had been approved by public utility commissions, “relieve operating limitations, increase capacity, and improve reliability in the existing electrical transmission grid,” which is “essential” to their providing safe, reliable, adequate, and efficient energy delivery to more than 2 million customers in Wyoming, Idaho, Utah, Oregon, Washington, and California.³ The Project includes ROWs for constructing, operating, maintaining, and terminating their facility, to be granted pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1761-1771 (2012), and its implementing rules.⁴

The Project corridor is nearly 1,000 miles long. It runs across State lands (73.4 miles), private lands (434.9 miles), and public lands (451.1 miles), plus other Federal lands (21 miles) managed by the Fish and Wildlife Service (FWS), U.S. Department of the Interior.⁵ The Project area is covered by multiple Federal land-use plans.⁶ Its transmission ROWs would be for renewable 30-year terms and be 125 feet wide to accommodate H-frame structures that would be 60-90 feet tall at intervals of 800 feet (single-circuit 230-kV), 150 feet wide to accommodate H-frame structures that would be 80-110 feet tall at intervals of 800 feet (345-kV), and 250 feet wide to accommodate lattice steel structures that would be 145-180 feet tall at intervals of 1,200 to 1,300 feet (single-circuit 500-kV).⁷

BLM published a Notice of Intent (NOI) to prepare an EIS, which initiated a public-scoping period for the Project.⁸ It issued a Draft EIS, a Final EIS (FEIS) with an

³ Motion to Intervene at 2; *see id.* at 3-4.

⁴ *See* 43 C.F.R. Part 2800 (Rights-of-Way Under FLPMA).

⁵ *See* EIS at 2-2 (Table 2.1-1).

⁶ *See id.* at 1-34 (Resource Management Plans (RMPs) for Morley Nelson Snake River Birds of Prey National Conservation Area, the Casper, Rawlins, Pocatello, Monument, Cassia, Owyhee, Green River, Kemmerer, and Jarbidge resource areas, plus Management Framework Plans (MFPs) for Bruneau, Bennett Hills/Timmerman Hills, Twin Falls, and Kuna).

⁷ *See id.* at 2-3, 2-4.

⁸ 73 Fed. Reg. 28425 (May 16, 2008).

additional public comment period, and then prepared a Biological Assessment, which FWS responded to by preparing a Biological Opinion (BiOp) that assessed impacts on threatened species, endangered species, and critical habitat pursuant to section 7 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1536 (2012).⁹ Due to its large size, the Project was divided into 10 segments for purposes of analysis (*e.g.*, Segments 1 through most of Segment 4 were in Wyoming, with the remaining segments located in Idaho).

The Project area includes the Greater sage-grouse (*Centrocercus urophasianus*), a species FWS determined was proper for listing as a threatened and endangered species under the ESA, but after extensively reexamining the status of the species and conservation efforts by Federal and State agencies, FWS concluded its listing was no longer warranted.¹⁰ BLM required surveys of Greater sage-grouse and other special status species and specified that any populations or occupied habitat should be avoided.¹¹ For example, it specified no surface occupancy within buffer areas around occupied leks (*i.e.*, breeding and/or strutting areas) or within even larger buffer areas during the breeding season, and that there could be no Project construction until it approved both a Greater Sage-Grouse Avoidance, Minimization, and Mitigation Plan (S-G Mitigation Plan) and a Migratory Bird Habitat Conservation Plan.¹²

BLM considered the Project proposed by Proponents, its preferred alternative (an amalgam of BLM preferences for each route segment), and the environmentally preferable, no action alternative.¹³ BLM also considered design alternatives, underground alternatives, and 36 route and substation alternatives to avoid or minimize environmental impacts.¹⁴ BLM addressed direct and indirect impacts on 22 environmental resources within a 2-mile corridor on either side of the Project's centerline and considered cumulative effects, together with other past, present, and reasonably foreseeable future actions.¹⁵

⁹ See 76 Fed. Reg. 45609 (July 29, 2011); FEIS, Appendix L (Response to Comments on Draft EIS); 78 Fed. Reg. 24771 (Apr. 26, 2013); ROD, Appendix A (Response to Comments on FEIS); ROD at 46, 50, 53, 86; ROD, Appendix H (BiOp).

¹⁰ See 80 Fed. Reg. 59858 (Oct. 2, 2015); 75 Fed. Reg. 13910 (Mar. 23, 2010).

¹¹ See EIS at 2-158 to 2-160, 2-164 to 2-166.

¹² See *id.* at 2-165 to 2-166; ROD at 10, 16-17 (plans must be coordinated with FWS, finalized, and approved by BLM before any construction could begin), 39 (BLM responsible for ensuring compliance with all adopted mitigation measures), 88 (BLM responsible for monitoring compliance).

¹³ EIS at ES-7 to ES-8 (Preferred Routes by Segment), 2-1 to 2-11, 2-12, 2-32 to 2-49, 2-52 to 2-86, 2-118 to 2-125; ROD at 23-33, 41-45.

¹⁴ See EIS at 2-32 to 2-37, 2-52 to 2-86, 2-125 to 2-138.

¹⁵ See *id.* at 2-178 to 2-204, 3.1-1 to 3.23-20, 4-1 to 4-92; ROD at 10.

After the EIS was finalized, Proponents determined its transmission lines needed to be re-routed in Lincoln County, Wyoming, where above-ground structures were prohibited by private property easements (Buck Ranch), would be located in a landslide-prone area, or near the community of Cokeville.¹⁶ In order to consider potential solutions, BLM commissioned the Lincoln County Reroute Report (LCRR), which analyzed the impacts of re-routing and concluded that any environmental issues from crossing public lands had already been “adequately addressed in the existing EIS.”¹⁷ Rather than reinitiate the environmental review process, BLM held a meeting to address re-routing issues on August 1, 2013, which the County attended and at which it submitted comments, but BLM did not provide affected private landowners or other members of the public with an opportunity to participate at that meeting or to submit comments on the LCRR. A draft of the LCRR was presented at that meeting, after which BLM finalized the LCRR on September 16 and responded to the County’s comments on September 30, 2013.¹⁸

BLM considered both its Preferred Alternative, which followed existing transmission lines immediately south of Cokeville, and a modified route that BLM had agreed to at the above-mentioned meeting on August 1, 2013, which would depart from the Preferred Alternative at Mile Post (MP) 121.9, pass north of Cokeville, and rejoin the Preferred Alternative at MP 130.7, the 10.4 mile long Cokeville Re-Route.¹⁹ Like the Preferred Alternative route, the Cokeville Re-route would primarily cross private land and require obtaining private land access and have environmental effects “of the same scope and intensity as those analyzed in the EIS.”²⁰ In the end, BLM

¹⁶ See ROD at 18-19, 26-29.

¹⁷ ROD at 18; *see id.* at 27 (“Public and private land resources affected by the reroutes are of the same nature and type, and the effects are of the same scope and intensity as those analyzed in the EIS[.]”); *id.*, Appendix I (LCRR); LCRR at 7, 10 (Table 3 (Cokeville Reroute Compared to BLM’s FEIS Preferred Alternative)), 11-12, 14, 15, 16-17, 17, 18, 19, 22-23.

¹⁸ See LCRR, Attachment A, at A-2 to A-5, A-7, A-8.

¹⁹ LCRR at 5, 6 (Figure 4), 7, A-10; ROD at 19, 27-28, 62; ROD, Appendix J, Figures J-1 and J-5 (Cokeville Re-Route close to routes evaluated in FEIS); *see* Answer at 12-13 (“[Cokeville Re-route is] a variation of the preferred alternative routing for approximately 10 miles of the more than 1,100 mile long project analyzed in the EIS.”).

²⁰ ROD at 18; *see id.* at 19, 27, 28; LCRR at 7, 10 (Table 3), 11-12, 14, 15, 16-17, 17, 18, 19, 22-23; *see also* EIS at 1-36 (“The Proponents would negotiate details regarding needed land acquisition across privately owned lands, either in fee or as an easement, for the transmission line and associated facilities (substations, etc.) with each landowner. . . . If a fee ownership or an easement cannot be negotiated with the landowner, the Proponents may acquire the rights needed under eminent domain laws prevailing in the affected states.”).

approved the use of public lands in the vicinity of Cokeville in connection with both the Preferred Alternative route and the modified route for Segment 4, but provided that the use of any public lands in connection with either alignment would be withheld until the Proponents obtained the necessary private land access and reached a final resolution with State and local governments.²¹

Subject to a final resolution of the Cokeville Re-Route, the State Directors approved the Preferred Alternative with modifications, the “Selected Alternative,” and granting of ROWs because they would achieve the Project’s purpose while also being sensitive to resource concerns in the area.²² Although their approval included all mitigation measures and environmental protection measures (EPMs) identified in the EIS, it specified that no surface-disturbing activities could occur until BLM also approved a plan of development that incorporated all mitigation measures and issued a Notice to Proceed.²³ They deferred granting approvals for Segments 8 and 9 (roughly 300 miles in Idaho) until siting differences were reconciled by and between Federal, State, and local parties.²⁴ The Project generally conformed to applicable land-use plans, but it did not entirely conform to the Green River and Kemmerer RMPs. As a result, BLM proposed RMP amendments that were the subject of protests denied by the BLM Director on September 20, 2013, after which they were approved by the State Directors as part of the ROD.²⁵

²¹ See ROD at 18 (“[F]urther actions concerning non-public lands are needed before a final alignment can be determined”), 19 (“The transmission line’s final location will primarily be determined by the Proponents’ ability to acquire private land access”), 28, 88.

²² See ROD at 3-5, 22 (“The Selected Alternative . . . provides the most public benefits, balances multiple resource conflicts, and avoids the most resource impacts”), 45-46, 88-89; EIS at ES-7 to ES-8; 78 Fed. Reg. 68467 (Nov. 14, 2013).

²³ See Answer at 6; ROD at 3, 5, 10, 16, 21-22, 39; *see also id.* at 3 (“[Proponents must obtain] all necessary local, state, and federal approvals, authorizations, and permits”).

²⁴ See ROD at 3 (“This decision is conditioned . . . on acceptance of mitigation plans and monitoring programs, including . . . a Migratory Bird Habitat Conservation Plan [and] a Sage-grouse Mitigation Plan”), 10, 16-17, 38, 46, 88-89; EIS at 2-143 to 2-177.

²⁵ See ROD at 1, 9, 22, 33-35, 91; *id.*, Appendix K (Protest Resolution Report); *see also id.* at 35-37 (Idaho and Wyoming provided with an opportunity to identify and resolve any inconsistencies between BLM’s proposed amendments and State/local plans).

The Esterholdts timely appealed from the ROD; this appeal is now ripe for decision.²⁶

Discussion

It is well established that a decision to grant an ROW under FLPMA is committed to agency discretion, a decision that will be overturned only if BLM acted in an arbitrary and capricious manner or contrary to law.²⁷ Esterholdt focuses solely on the Cokeville Re-Route,²⁸ claiming it was a significant change that should have been subject to an additional public environmental review process as would occur for a supplemental EIS (SEIS), as required by section 102(2)(C) of NEPA.²⁹

[1] NEPA requires a Federal agency to prepare an EIS addressing the potential environmental impacts of a proposed action and its alternatives for any major Federal action significantly affecting the environment. It does not mandate a particular result, only procedural obligations to ensure that the agency and the public are fully informed of the environmental consequences of the proposed action.³⁰ The adequacy of an EIS is judged by whether the agency took a “hard look” at the potentially significant environmental consequences of the proposed action, its reasonable alternatives, and all relevant matters of environmental concern.³¹ In reviewing and adjudicating an EIS, we apply a “rule of reason.”³²

²⁶ Esterholdt filed a statement of reasons (SOR); BLM and Proponent-Intervenors separately responded (Answer, Int. Answer).

²⁷ See, e.g., *Santa Fe Northwest Information Council*, 174 IBLA 93, 104 (2008).

²⁸ SOR at 2-3; see *id.* at 5 (“[BLM’s route transects] parcels owned, managed, and/or operated by [Esterholdt].”) (citing Esterholdt Declarations).

²⁹ 42 U.S.C. § 4332(2)(C) (2012); see SOR at 16; 40 C.F.R. §§ 1502.9(c)(4) and 1503.1(a)(4).

³⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

³¹ See *Northwest Environmental Advocates v. National Marine Fisheries Service*, 460 F.3d 1125, 1139 (9th Cir. 2006) (“NEPA requires not that an agency engage in the most exhaustive environmental analysis theoretically possible, but that it take a ‘hard look’ at relevant factors.”); *Backcountry Against Dumps*, 179 IBLA 148, 161 (2010) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

³² *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1375 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); see *Northwest Environmental Advocates v. National Marine Fisheries Service*, 460 F.3d at 1139; *State of California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (“[An EIS must contain] a ‘reasonably thorough discussion of the significant aspects of the probable environmental consequences.’”) (quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974)); *Northern Alaska Environmental Center*, 153 IBLA 253, 256 (2000).

An appellant challenging a BLM decision to approve construction, operation, maintenance, and termination of electrical transmission lines and related activity, following preparation of an EIS, must carry its burden with objective proof demonstrating by a preponderance of the evidence that BLM failed adequately to consider a substantial environmental question of material significance to the proposed action or otherwise failed to abide by section 102(2)(C) of NEPA; it must make an “affirmative showing that BLM failed to consider a substantial environmental question of material significance” and cannot simply “pick apart a record with alleged errors and disagreements.”³³

1. *Whether BLM was Required to Prepare a Supplemental EIS.*

[2] BLM is expressly required by 40 C.F.R. § 1502.9(c)(1) to supplement an EIS if it “makes substantial changes in the proposed action that are relevant to environmental concerns [or if t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.” However, as the Supreme Court has cogently explained:

[A]n agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. On the other hand . . . , NEPA does require that agencies take a “hard look” at the environmental effects of their planned action, even after a proposal has received initial approval. Application of the “rule of reason” thus turns on the value of the new information to the still pending decisionmaking process. In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains “major Federal actio[n]” to occur, and if the new information is sufficient to show that the remaining action will “affec[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.^[34]

³³ *Backcountry Against Dumps*, 179 IBLA at 161; *see Arizona Zoological Society*, 167 IBLA 347, 357-58 (2006).

³⁴ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989) (emphasis added); *accord Southern Utah Wilderness Alliance*, 177 IBLA 29, 36 (2009); *see State of Wisconsin v. Weinberger*, 745 F.2d 412, 418, 420 (7th Cir. 1984) (“[SEIS] required only if] new information presents a seriously different picture of the likely environmental consequences of the proposed action not adequately envisioned by the original EIS.”);

(continued...)

Esterholdt properly states that a “change of location” associated with a modification of the proposed action may, by virtue of being a substantial change in the proposed action, be relevant to environmental concerns and require preparation of an SEIS if that change results in a proposal that is “qualitatively different and well outside the spectrum of anything BLM considered in the . . . EIS.”³⁵

The FEIS identified Alternative 4A as the Preferred Alternative, but after it was issued, BLM considered three variations to that alternative near Cokeville.³⁶ BLM concluded that an SEIS was not required for analyzing these variations because it found: “Public and private land resources affected by the reroutes are of the same nature and type, and the effects are of the same scope and intensity as those analyzed in the EIS.”³⁷ Neither NEPA nor its implementing rules provide for a “supplemental information report,” but it is now well established that a Federal agency may use such a report for determining whether it is required to prepare an SEIS, which in this case was the LCRR relied on by the State Directors in their ROD. As the Ninth Circuit Court of Appeals summarized in *Idaho Sporting Congress, Inc.*:

Supplemental Information Reports [SIRs] are nowhere mentioned in NEPA or in the regulations implementing NEPA promulgated by the Council on Environmental Quality (“CEQ”). *See, e.g.*, 40 C.F.R. § 1508.10 (defining the term “environmental document” as including Environmental Assessments, Environmental Impact Statements, Findings of No Significant Impact, and Notices of Intent). Courts nonetheless have recognized a limited role within NEPA’s procedural framework for

(...continued)

Biodiversity Conservation Alliance, 183 IBLA 97, 116-17 (2013); *Save Medicine Lake Coalition*, 156 IBLA at 248.

³⁵ SOR at 8 (citing *Dubois v. U.S. Department of Agriculture*, 102 F.3d 1273, 1291-92 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997)); *see id.* at 8-9 (quoting *Center for Biological Diversity*, 181 IBLA at 344, and *State of New Mexico v. BLM*, 565 F.3d 683, 707 (10th Cir. 2009)); *but see* Answer at 12-13 (quoting *Wyoming Outdoor Council*, 176 IBLA 15, 41 (2008)), 15-16 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 373-74), 17-19.

³⁶ *See* ROD at 18-19; EIS at 2-35 (Table 2.4-1 (Summary of Proposed Route and Route Alternatives Considered)), 2-43 (“Preferred Alternative generally follows an established utility corridor on BLM-managed lands and complies with the State of Wyoming sage-grouse core area directive.”), 2-58 to 2-61.

³⁷ ROD at 27; *see id.* at 18 (“A Reroute Report was prepared . . . that demonstrates revised alignments . . . were adequately addressed in the existing EIS analyses and the BLM could approve alignments on public lands different from those shown in the Final EIS”), 27-28; *see also* LCRR at 22-23.

SIRs and similar “non-NEPA” environmental evaluation procedures. Specifically, courts have upheld agency use of SIRs and similar procedures for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS. We have permitted agencies to use SIRs for this purpose, in part, because NEPA and the CEQ regulations are silent on the issue of how agencies are to determine the significance of new information.^[38]

The Esterholdts characterize BLM’s determination that environmental impacts of its modified routes around Cokeville were already considered in the EIS as “conclusory” and not adequately supported by any analysis or evidence in the record, notwithstanding their repeated references to the LCRR.³⁹ However, they offer no convincing argument or supporting evidence that the Cokeville Re-Route is likely to cause impacts in a significant manner or to a significant extent not already addressed in the EIS or that slightly altering the location of the transmission line will present a seriously different picture than was addressed in the EIS.⁴⁰ For the most part, the

³⁸ *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 565-66 (9th Cir. 2000) (citations omitted); see *Price Road Neighborhood Association v. U. S. Department of Transportation*, 113 F.3d 1505, 1510 (9th Cir. 1997) (holding that when faced with a project change, the Federal Highway Administration may conduct an environmental “reevaluation” “to determine the significance of the new design’s environmental impacts and the continuing validity of its initial EA”); *Marsh v. Oregon Natural Resources Council*, 490 U.S. at 383-85 (upholding the Army Corps of Engineers’ use of SIR to analyze significance of new reports questioning the environmental impact of a dam project); *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1218-19 (10th Cir. 1997) (upholding use of SIR to evaluate significance of new survey of area to be logged); *Laguna Greenbelt, Inc. v. U. S. Department of Transportation*, 42 F.3d 517, 529-30 (9th Cir. 1994) (upholding use of “Memorandum of Record” to assess significance of recent wildfires in project area); *California v. Watt*, 683 F.2d 1253, 1267-68 (9th Cir. 1982), *rev’d on other grounds sub. nom., Secretary of the Interior v. California*, 464 U.S. 312 (1984) (upholding use of “Secretary Issue Document” to evaluate significance of new size estimates for off-shore oil and gas deposits).

³⁹ SOR at 9; see *id.* at 9-10 (“Cokeville Reroute, now transecting their property, will cross in close proximity to a family cabin located along the Bear River ponds [and have a ‘serious, substantial and significant’] impact on this unique ecosystem and pristine setting.”), 10-11 (citing LCRR at 10, 11, 15, 16, 17, 18, 23), 12 (“31 more acres of Greater Sage-Grouse habitat will be impacted (nearly 30% increase) [which] is not insignificant.”), 13-15 (citing LCRR at 10 (Table 3), 11, 23).

⁴⁰ See *State of Wyoming v. U.S. Department of Agriculture*, 661 F.3d 1209, 1257-58, 1260 (10th Cir. 2011), *cert. denied*, 133 S. Ct. 417 (2012); *Center for Biological Diversity*, 181 IBLA at 344-46.

Esterholdts simply refer to differences between the Preferred Alternative in the EIS and the Cokeville Re-route adopted in the ROD and described in the LCRR, but they fail to show how these differences are environmentally significant and make no effort to demonstrate that they are “outside the spectrum of anything BLM considered in the [EIS].”⁴¹

We simply are not persuaded that BLM violated section 102(2)(C) of NEPA or the directive in 40 C.F.R. § 1502.9(c)(1) by not preparing an SEIS in this case.

2. Whether BLM was Required by NEPA to Provide Public Notice and an Opportunity to Comment on the LCRR or the Cokeville Re-Route.

Citing various rules, Esterholdt claims BLM violated NEPA by failing to notify affected private landowners and other members of the public of the Cokeville Re-Route before it was adopted in the ROD.⁴² However, the rule at 40 C.F.R. § 1502.9(c)(4) applies only to an SEIS, and the rules at 40 C.F.R. § 1503.1(a)(4) and 43 C.F.R. § 46.435(a)(4) refer and apply only to a draft or final EIS. However, since we have concluded that an SEIS was not required in this case, it necessarily follows that BLM did not violate any of these regulatory requirements cited by the Esterholdts. It was therefore sufficient under NEPA for BLM to provide public notice that it had adopted the Cokeville Re-Route described in the LCRR when it issued the ROD and explained why it did not prepare an SEIS.⁴³

⁴¹ *State of New Mexico v. BLM*, 565 F.3d at 707.

⁴² SOR at 3, 16 (citing 40 C.F.R. § 1502.9(c)(4) (“Agencies [s]hall prepare, circulate, and file a supplement to [an EIS] in the same fashion (exclusive of scoping) as a draft and final statement [EIS].”), 40 C.F.R. § 1503.1(a)(4) (“After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall [r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.”), and 43 C.F.R. § 46.435(a)(4)).

⁴³ *See IMC Chemical Inc.*, 155 IBLA 173, 198 (2001) (“[BLM not required to afford public notice and opportunity for comment regarding a report where the report] does not . . . show that there are significant aspects of the project that were not disclosed in the FEIS”).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,⁴⁴ the decision appealed from is affirmed.

/s/
James K. Jackson
Administrative Judge

I concur:

/s/
Christina S. Kalavritinos
Administrative Judge

⁴⁴ 43 C.F.R. § 4.1.