

INTERIOR BOARD OF LAND APPEALS

Utah Wilderness Association

134 IBLA 395 (February 13, 1996)

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UTAH WILDERNESS ASSOCIATION

IBLA 94! 45

Decided February 13, 1996

Appeal from a Decision Record/Finding of No Significant Impact issued by the District Manager, Vernal District, Utah, Bureau of Land Management, adopting an Animal Damage Control Program for public lands in the district. UT! 080! 1990! 11.

Affirmed.

1. Animal Damage Control! ! Environmental Quality: Environmental Statements! ! National Environmental Policy Act of 1969: Environmental Statements

BLM may properly decide to proceed with a Federally administered program for controlling the depredation of livestock grazing on the public lands, by both lethal and nonlethal means, when it has taken a hard look at all of the environmental impacts of such action and appropriate alternatives thereto, including all relevant matters of environmental concern, and made a convincing case that no significant impact will result therefrom.

APPEARANCES: Gary Macfarlane, Conservation Director, Utah Wilderness Association, Salt Lake City, Utah, for the Utah Wilderness Association; James A. Winnat, State Director, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, Salt Lake City, Utah, for the intervenor; David K. Grayson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Utah Wilderness Association (UWA) has appealed from a Decision Record/Finding of No Significant Impact (DR/FONSI), issued by the District Manager, Vernal District, Utah, Bureau of Land Management (BLM), on September 29, 1993, authorizing a directed program of animal damage control (ADC) for public lands in BLM's Vernal District, which encompasses Uintah, Duchesne, and Daggett Counties, Utah, and finding, based on a September 1993 "Animal Damage Control Environmental Assessment" (EA) (UT! 080! 1990-11), that no significant impact to the human environment would result from proceeding with the program. The program, to be administered

and carried out by the ADC Division of the Animal and Plant Health Inspection Service (APHIS! ADC), U.S. Department of Agriculture, under BLM! imposed restrictions, would prevent and correct, by both lethal and nonlethal means, depredation by coyotes and other predators of domestic sheep and cattle grazing on public lands in the district. 1/

On December 17, 1992, the Secretary of the Interior, in a decision entitled In the Matter of the Appeals of Southern Utah Wilderness Alliance, Utah Wilderness Association, and Utah Chapter, Sierra Club (SEC 92! UT101) (hereinafter cited as "Secretary's Decision"), effectively set aside the District Manager's May 21, 1991, DR/FONSI, adopting an ADC program for public lands in the Vernal District, and remanded the matter to BLM for "supplementation" of a May 1991 EA on which that action had been based. 2/ The Secretary found the EA was defective because of BLM's failure properly to justify its conclusion that predator control would not affect the viability of predator species. On remand, he directed BLM to "obtain reliable information on coyote populations, or, if obtaining that information is too costly or is impossible to obtain, summarize the available information and evaluate that information" (Secretary's Decision at 21).

BLM developed the EA involved in the present appeal following the Secretary's remand and in September 1993 the District Manager issued

1/ The Secretary of Agriculture, acting through APHIS! ADC, is authorized and directed by section 1 of the Act of Mar. 2, 1931, as amended, 7 U.S.C. § 426 (1994), to conduct campaigns for destruction or control of wild animals injurious to agriculture and livestock on national forests and other areas of the public domain. See Southern Utah Wilderness Alliance v. Thompson, 811 F. Supp. 635, 638 (D. Utah 1993). APHIS-ADC filed a response to appellant's appeal on Feb. 28, 1994, requesting dismissal of the appeal, in accordance with 43 CFR 4.402, because, as an adverse party, it had not been served with a copy of the notice of appeal, as required by 43 CFR 4.413(a). Since APHIS-ADC had the right independently to maintain an appeal with respect to BLM's decision, we grant it intervenor status. See Sierra Club - Rocky Mountain Chapter, 75 IBLA 220, 221-22 n.2 (1983). However, we deny its motion to dismiss. APHIS-ADC was not named as an adverse party in the DR/FONSI, and even if it had been, it has shown no prejudice as a result of the failure to serve. See Tagala v. Gorsuch, 411 F.2d 589, 590 (9th Cir. 1969); Red Thunder, Inc., 117 IBLA 167, 172-73, 97 I.D. 263, 266 (1990).

2/ The Secretary's action followed his assumption of jurisdiction on Feb. 18, 1992, pursuant to 43 CFR 4.5, of various ADC appeals pending before this Board, including appeals from the District Manager's May 1991 DR/FONSI (IBLA 92! 37) and the Sept. 26, 1991, approval by the BLM Utah State Director of an ADC program for the Vernal District for fiscal year 1992 (IBLA 92! 223).

his DR/FONSI. UWA appealed and petitioned for a stay. By order dated December 14, 1993, the Board granted a temporary stay. We lifted that stay by order dated January 31, 1994.

[1] On appeal, appellant raises a number of issues all related to whether BLM properly addressed the environmental consequences of undertaking a proposed ADC program, and alternatives thereto, in the Vernal District, as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1988), attendant Council of Environmental Quality (CEQ) regulations, and the BLM Manual. ^{3/}

Appellant states that CEQ regulations at 40 CFR 1502.13 require a showing of "need" for a particular action, and the BLM Manual at 6830.06D (Rel. 6! 115 (Aug. 4, 1988)) allows ADC only when a "demonstrated need" has been identified (Statement of Reasons (SOR) at 1, 6). It contends that, in adopting its proposed nonlethal/lethal ADC program, BLM failed to demonstrate a "need" for the use of any lethal measures to control predator populations. It asserts that BLM improperly based its decision to adopt such measures on reported sheep losses that predate any predator control, and thus did not consider the possibility that nonlethal methods of control alone may be sufficient. It argues that BLM failed to show that nonlethal control would not be effective to limit the loss of sheep to acceptable levels.

[1] The regulation cited by appellant, 40 CFR 1502.13, provides that an environmental impact statement (EIS) "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." Similarly, 40 CFR 1508.9(b) states that an EA "[s]hall include brief discussions of the need for the proposal." Section 6830.06 of the BLM Manual (Rel. 6! 115 (Aug. 4, 1988)), which sets forth the policy guiding ADC activity on the public lands, provides that ADC may be authorized in areas when a demonstrated need has been identified for the protection of livestock. Such a need exists when losses or damage have been verified.

^{3/} Appellant refers to the provisions of the BLM Manual as "regulations." They are not regulations and do not have the force and effect of law; nevertheless, as this Board has held on numerous occasions, they are binding on BLM. Howard B. Keck, Jr., 124 IBLA 44, 55 (1992); Atlantic Richfield Co., 112 IBLA 115, 127 (1989); Beard Oil Co., 111 IBLA 191, 194 (1989); Cities Service Oil & Gas Corp., 109 IBLA 322, 325 (1989); The Joyce Foundation, 102 IBLA 342, 345 (1988); Pamela S. Crocker-Davis, 94 IBLA 328, 332 (1986); Thunderbird Oil Corp., 91 IBLA 195, 204 (1986); Okanogan County Public Utility District No. 1, Washington, 22 IBLA 342, 353 n.9 (1975). Contra Secretary's Decision at 10-11.

In his 1992 decision the Secretary concluded that BLM had demonstrated, in its May 1991 EA, a need for ADC, including lethal control, in the Vernal District, based on reported sheep loss in the period from 1983 through 1990 and evidence in a 1979 programmatic EIS, prepared by the U.S. Fish and Wildlife Service (FWS) for the ADC program, that such loss would be higher in the absence of any ADC (Secretary's Decision at 11! 12). The present EA under challenge has been supplemented, as directed by the Secretary. Appellant provides no evidence that the Secretary's conclusion on the need for ADC is in error. The Secretary's conclusion is controlling.

The adopted ADC program provides for the control of predators by both nonlethal and lethal means, recognizing that an integrated approach is the best strategy. The EA states that livestock operators are responsible for first line nonlethal preventive measures and that use of lethal methods would be invoked when necessary to prevent or reduce excessive damage (EA at 12, 34). The record contains evidence of verified sheep losses due to predation and evidence that control methods, both nonlethal and lethal, will limit such losses (EA at 2! 3, 38, 81! 82). Further, lethal control will be employed only in the case of "offending" individual predators or local predator populations (EA at 17, 61, 93, 95). As explained by BLM: "The goal of ADC is not to eradicate or significantly reduce the overall predator population, but [to] reduce predation on a localized basis and still retain an overall viable predator population" (EA at 95).

Appellant also states that there is, in fact, no need for lethal control measures because the evidence establishes that such measures will lead to a greater loss of sheep (SOR at 2, 6). It bases this conclusion on a statistical analysis (Appendix 3 to SOR), prepared by Dr. Jack T. Spence, a professor of chemistry at the Utah State University and one of appellant's members, which established a positive correlation between the confirmed number of sheep lost (given the number of sheep permitted to be grazed) and the number of predators destroyed by APHIS! ADC each year over the 8! year period from 1983 through 1990 in the Vernal District, i.e., the more predators killed the higher the sheep loss.

In response BLM points out that Spence's calculations are based on assumptions that have not been validated:

For example, the assumption made in Dr. Spence's analysis that confirmed losses are an index of total losses cannot be accepted without validation. ADC personnel do not attempt to verify all losses nor any particular fraction of them. They simply verify those shown to them by the rancher or herder, plus any others they may see in the course of their travels about the area. The more time the ADC workers spend in the area, the more are killed and, at the same time, they typically are able to find more dead sheep. If person-hours worked correlate with the other two variables, the analysis shows nothing about coyote removal\ sheep loss relationships.

(Answer at 3-4). We reject appellant's assertion that lethal control results in greater sheep loss. The record shows that control of coyote populations limits the loss of sheep.

Appellant contends that BLM is improperly proceeding with the proposed program for controlling predator populations in the Vernal District without adequate information regarding their numbers. It asserts that the EA and the DR/FONSI fail to provide the data required by NEPA, the BLM Manual, and Secretary Lujan's remand. Without such data, it argues, BLM will not be able to ensure viable populations of target species, as required by section 6830.43 of the BLM Manual (Rel. 6! 115 (Aug. 4, 1988)) (SOR at 10).

The EA, as supplemented by BLM on remand, contains adequate information and it provides an analysis of the impacts of ADC and sport harvest on the various predator populations under both the Proposed Action Alternative and the No Action Alternative. See EA at 34-36, 39-47. Furthermore, appellant provides no data or information in support of a contention that the viability of any predator population has been adversely affected by past actions in the Vernal District, or that it will be by the action approved in the DR/FONSI.

Appellant also complains that BLM improperly extrapolated coyote population data between Curlew Valley and Uintah Basin. In the absence of site! specific data, BLM estimated the number of coyotes in the Vernal District based largely on a long! term study conducted by Frederick F. Knowlton in the Curlew Valley area of northwestern Utah. See EA at 35, 44, 55. Appellant argues that BLM may not extrapolate from Knowlton's findings because that valley is 225 miles from the district and "in an entirely different physiographic province (Great Basin versus Colorado Plateau)" (SOR at 10).

In response, BLM states that it reasonably compared the two areas since, although they have different physical geographies, they are "similar ecologic sites" and their "predator prey base and habitat were similar" (Answer at 5; see also EA at 44). BLM points out that "correlation of sites across boundaries is an integral part of the ecologic site classification process" (Answer at 5). We find no error.

Next, appellant contends that BLM has failed to consider, in its EA, all of the reasonable alternatives to the proposed action, in violation of section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (1988), and its implementing regulations, because it did not analyze an alternative that provided for nonlethal predator control only, or at least required that it be employed before lethal control (SOR at 1, 8). Appellant recognizes that BLM provided, under the proposed action, that livestock operators would be encouraged to employ various kinds of nonlethal measures and to increase the level of their usage in response to increased predation "prior to use of corrective lethal measures" (EA at 12), but states that there was no

alternative that required operators to use nonlethal measures: "[I]t is merely something that could be employed at the discretion of the permittee" (SOR at 2).

Again, Secretary Lujan rejected this argument in his December 1992 decision because the nonlethal alternative had been discussed in the 1979 EIS. The Secretary stated:

Where an EIS upon which a subsequent EA is tiered adequately considered the alternative in dispute, there is no need to discuss it again in the EA. (Oregon Natural Resources Council, 115 IBLA 179, 186 (1990).) In this case, the 1979 EIS discussed an alternative of emphasizing nonlethal control.

(Secretary's Decision at 13). He concluded that the nonlethal alternative discussed in the 1979 EIS was similar to the alternatives the appellant urged and that the "absence of such an alternative from the 1991 EA was not improper and meets the CEQ requirements." Id. at 14.

Appellant contends that BLM's reliance on the Secretary's December 1992 decision, and hence on the 1979 EIS, in not including a nonlethal only alternative is flawed because circumstances have changed since 1979 because nonlethal control has been shown to be effective and lethal control ineffective (SOR at 8). In challenging the effectiveness of lethal control, appellant refers again to Spence's statistical analysis, which we have held did not establish any error in BLM's conclusions. In support of its contention regarding the effectiveness of nonlethal control, it appends several studies to its SOR. However, appellant makes no effort to demonstrate in what particular way knowledge regarding the effectiveness of nonlethal methods has negated any necessity for lethal control. Moreover, consideration of the desirability, effectiveness, and environmental impacts of nonlethal control is already incorporated in BLM's assessment of the proposed action, which has a nonlethal control component, albeit voluntary. As BLM explains, "[a] voluntary type approach was used in the proposed action since it was considered a more effective means of introducing and administering new techniques through an educational program rather than through a 'required or force' approach" (Answer at 1). BLM need not consider an alternative which is unlikely to accomplish its intended result. Howard B. Keck, Jr., 124 IBLA at 53.

We, therefore, conclude that BLM did not err in failing to consider, in its present EA, an alternative that included or required nonlethal control, or prioritized nonlethal control.

Appellant also complains that BLM's analysis of the No APHIS-ADC Program Alternative is deficient because the EA left out an important component of that alternative—the use of guard dogs by livestock operators. We find no deficiency.

First, in considering that alternative, BLM recognized that operators "could undertake their own predator control program on Public Lands" (EA at 23) and, as BLM stated, it might "cause sheep ranchers to establish animal husbandry practices which they may not have chosen to use before." Id. at 48. As described in the EA, such practices could include the "use of guard dogs." Id. at 12.

Second, the EA specifically discussed the use of guard dogs as an ADC tool. See EA at 12, 33. The fact that the term "guard dogs" does not appear in the section of the EA discussing the No APHIS-ADC Program Alternative is irrelevant.

Finally, in discussing the apparent success of its voluntary approach to nonlethal control, BLM stated in its Answer at page 1 that "over the period it took to complete the EA analysis use of guard dogs has increased from no guard dogs to use of guard dogs by 9 of the 14 active permittees." BLM notes that success in the use of a control method "is one of the best means [of] increasing [such] use." Id.

Appellant complains that the DR/FONSI is in error because adoption of the proposed action will have a significant impact on the human environment, which must be analyzed in a proper EIS. However, appellant has failed to point to any solid evidence demonstrating a significant impact. Rather, it contends that both BLM and APHIS, which is preparing a new programmatic EIS for the nationwide ADC program, consider the prior 1979 EIS prepared by FWS, to which the EA was tiered, to be inadequate (SOR at 10, 11).

The new EIS, like the 1979 EIS, will evaluate the entire nationwide ADC program. It is being prepared by APHIS under an agreement with BLM incorporated in a Memorandum of Understanding (MOU), dated September 16, 1987. There is no evidence that the 1979 EIS is inadequate, or cannot be relied upon until completion of the new EIS. ^{4/} As the Secretary stated: "[B]y mutual consent between the BLM and APHIS, the BLM has continued to tier its periodic EA's on the 1979 EIS" (Secretary's Decision at 3). ^{5/}

^{4/} When ADC functions were transferred from FWS, APHIS adopted the 1979 EIS. See 51 FR 6290 (Feb. 21, 1986).

^{5/} Appellant contends that BLM's EA was fatally flawed because it was not tiered to the APHIS EIS, in violation of the 1987 APHIS/BLM MOU, which provided that BLM's EA's would be tiered to that EIS. Clearly, there was no intent on the part of the parties to the MOU that all ADC programs would be halted to await the issuance of that EIS. We read the MOU as allowing BLM to continue approving ADC programs, so long as it properly determines, on the basis of an EA, tiered to the 1979 EIS, that there will be no significant impacts requiring preparation of an EIS, as mandated by section 102(2)(C) of NEPA.

As proof that BLM regards the 1979 EIS as inadequate, appellant points to issuance by the Director, BLM, of Instruction Memorandum (IM) No. 93! 199 on April 6, 1993 (SOR at 11). Therein, the Director informed all BLM State Directors that APHIS "should be conducting ADC on BLM lands only where current approved plans and environmental assessments (EA's) are in effect in accordance with guidance contained in BLM Manual Section 6830, and Instruction Memoranda Nos. 93! 44 and 93! 107." Noting that there were several appeals pending before the Board dealing with ADC, he further stated: "For those districts with pending appeals, or where no current ADC plans or EA's are in effect, please instruct the APHIS to cease any ADC activities until further notice."

We find nothing in IM No. 93! 199 to suggest that BLM considers the 1979 EIS inadequate. The Director instructed BLM State Directors not to permit ADC activities by APHIS on public lands in a district until a district! wide EA had been prepared and approved. Such an EA has been prepared and approved for the Vernal District.

Appellant also regards the Secretary's statement in his December 1992 decision that a "site! specific EIS" should be prepared, if warranted," as some indication that an EIS must be prepared here (SOR at 11 (quoting from Secretary's Decision at 21)). The Secretary stated at the conclusion of his decision remanding the case to BLM for supplementation of the 1991 EA: "Further, if the BLM determines, when the EA is completed, that a site! specific EIS is warranted, it shall prepare one" (Secretary's Decision at 21). Thus, the Secretary did not hold, or even suggest, that an EIS was required in this case. Instead, he left to BLM the question of whether to prepare an EIS. The record supports BLM's decision not to do so.

Further, appellant argues that an EIS must be prepared because approval of an ADC program necessarily "amounts to an amendment of [BLM's] existing RMPs [Resource Management Plans]" with respect to the two resource areas (Diamond Mountain and Book Cliffs) in the Vernal District and, since an EIS was required in connection with the RMP's, it is likewise required in the case of an amendment thereto (SOR at 11! 12).

RMP's establish general constraints and guidelines regarding all BLM-approved activity in a particular area. See 43 U.S.C. §§ 1712(a) and 1732(a) (1988); 43 CFR 1601.0! 2, 1601.0! 5(k), and 1610.5! 3(a). Preparation of an EIS is required in the case of approval of an RMP. 43 CFR 1601.0! 6. Development of an RMP, however, is distinguishable from the approval of a particular activity on the public lands, including the adoption of a program for controlling predation. See Petroleum Association of Wyoming, 133 IBLA 337, 341! 42 (1995); Wilderness Society, 90 IBLA 221, 224! 25 (1986). While an activity must conform to the RMP (43 CFR 1610.5! 3(a)), it is incorrect to conclude that approval of an activity amounts to an "amendment" of the RMP, and that such approval requires the preparation of an EIS. Amendment of an RMP is mandated under particular circumstances

(43 CFR 1610.5-5), none of which appellant has shown to exist in this case. Whether approval of an activity must be preceded by preparation of an EIS depends on whether the activity will have a significant impact on the human environment. In this case, BLM correctly found no such impact.

We, therefore, conclude that BLM has taken a hard look at the environmental consequences of proceeding with its proposed action for controlling depredation in the Vernal District or alternatives thereto, considering all relevant matters of environmental concern, and made a convincing case that there will be no significant impact requiring preparation of an EIS. Thus, it has acted in conformance with section 102(2)(C) of NEPA. See Humane Society of the United States v. Hodel, 840 F.2d 45, 62 (D.C. Cir. 1988); Howard B. Keck, Jr., 124 IBLA at 50. Appellant has failed to carry its burden to persuade us, with the submission of objective proof, to the contrary. See Oregon Natural Resources Council, 116 IBLA at 360; Coy Brown, 115 IBLA 347, 357 (1990).

Except to the extent that they have been expressly or impliedly addressed in this decision, all other errors of fact or law raised by appellant have been considered and are rejected. See G. John & Katherine M. Roush, 112 IBLA 293, 311 (1990); Glacier-Two Medicine Alliance, 88 IBLA 133, 156 (1985).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge