

INTERIOR BOARD OF LAND APPEALS

Native Ecosystems Council

139 IBLA 209 (June 25, 1997)

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NATIVE ECOSYSTEMS COUNCIL

IBLA 94-311

Decided June 25, 1997

Appeal from a Decision of the District Manager, Worland District, Wyoming, Bureau of Land Management, approving an Animal Damage Control Plan for the Worland District. EA-WY-015-EA4-047.

Affirmed.

1. Animal Damage Control--Federal Land Policy and Management Act of 1976:
Generally

The BLM's exercise of discretion in striking a balance between protection of wildlife and predation of domestic wildlife under section 1701 of FLPMA, 43 U.S.C. § 1701(a)(8), (12) (1994), will be upheld absent justification for modification or reversal shown by a preponderance of the evidence when the decision is in accord with applicable statutes and regulations and is based on a reasoned analysis of all relevant factors and made with due regard for the public interest.

2. Animal Damage Control--Environmental Quality: Environmental Statements--
National Environmental Policy Act of 1969: Finding of No Significant Impact

A BLM decision approving an ADC program based on an EA will be affirmed on an appeal when the record establishes a careful review of environmental problems has been made and relevant areas of environmental concern have been identified and the final determination that no significant impact will occur is reasonable in light of the environmental analysis.

3. Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Finding of No Significant Impact

A rule of reason applies to both the range of alternatives required to be considered as well as the adequacy of analysis in an EA. When an alternative has been analyzed in an EIS to which an EA is tiered, there is no requirement that BLM reconsider the alternative. The EA must discuss all reasonable alternatives and no obvious alternatives may be ignored. When the range of alternatives considered by BLM in an EA was sufficient to permit a reasoned choice and BLM's rejection of alternatives was premised on conclusions having scientific support in the record, BLM's decision will not be disturbed absent proof of error by a preponderance of the evidence.

4. Animal Damage Control–Environmental Quality: Environmental Statements–National Environmental Policy Act of 1969: Finding of No Significant Impact

A BLM decision approving an ADC program is properly affirmed on appeal where the contentions as to the inadequacy of an EA are refuted by the record on appeal, and the appellant has not established that BLM's decision is premised on a clear error of law or a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action.

APPEARANCES: Donald J. Duerr, Laramie, Wyoming, for Appellant; Lowell L. Madsen, Esq., Assistant Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management; Constance E. Brooks, Esq., and Diane G. Cluxton-Kremer, Esq., Denver, Colorado, for Intervenor Wyoming Wool Growers Association; Joseph B. Meyer, Esq., Attorney General, Mary B. Guthrie, Esq., Deputy Attorney General, and Kristi T. Sansonetti, Esq., Cheyenne, Wyoming, for amicus curiae State of Wyoming.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Native Ecosystems Council (NEC) has appealed the January 21, 1994, Decision Record and Finding of No Significant Impact (DR/FONSI) issued by the Worland District Manager, Wyoming, Bureau of Land Management (BLM), approving the Worland District's Animal Damage Control Program (ADC Program) for calendar year 1994.

The ADC Program reviewed in Environmental Assessment (EA) EA-WY-015-EA4-047 and approved in the Worland District Manager's DR/FONSI represents a plan proposed jointly by BLM and the U.S. Department of Agriculture,

Animal and Plant Health Inspection Service - Animal Damage Control (APHIS-ADC) to control skunk populations and to alleviate ongoing predation of domestic livestock by coyote and red fox by both lethal and nonlethal means in designated "planned control" and "restricted control" areas on public lands managed by BLM within the Worland District. ^{1/} Control measures under the program are directed as much as possible at individual offending animals or groups of animals. (DR/FONSI at 1.) The ADC Program, as modified by a set of mitigating measures designed to protect human safety and threatened, endangered, nontarget and special status species and their habitats, (EA at 21-22), represented the "proposed action" of the two agencies reviewed in the EA. The EA described the proposed action as well as two alternatives ("no action - continued emergency control" and "no lethal control") and discussed the environmental consequences associated with each.

With its Notice of Appeal, NEC sought a stay of "all lethal predator control activities" authorized by BLM's Decision. On February 25, 1994, we placed BLM's Decision in full force and effect pending action on NEC's Petition for Stay. See 43 C.F.R. § 4.21(a)(1). We denied NEC's Petition and granted Wyoming Wool Growers Association's (WWGA's) motion to intervene on April 4, 1994. On October 13, 1994, the State of Wyoming (Wyoming) moved to appear *amicus curiae* and filed a brief in support of that motion. Wyoming's motion is hereby granted.

On appeal, NEC asserts that the ADC Program violates the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1701(a)(7) and (8) (1994), in diminishing rather than protecting ecological values and in failing to prescribe harmonious management of wildlife and grazing resources as required under multiple-use principles. (Statement of Reasons (SOR) at 2-5.) Appellant argues that under the National Environmental Policy Act (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), and the implementing Council on Environmental Quality (CEQ) regulations, 40 C.F.R. Part 1500, BLM has improperly tiered its EA to a 1979 environmental impact statement (EIS) and has failed to (1) adequately describe the affected environment; (2) demonstrate the insignificance of impacts associated with the ADC Program; and (3) consider all reasonable alternatives. (SOR at 5-13.) Finally, NEC argues that BLM failed to comply with the Special Status Species Management provisions of the BLM Manual § 6840. (SOR at 13-18.)

The NEC argues that "all wildlife has ecological value," (SOR at 2), and that in approving the proposed action, which would result in the taking of 500-700 coyotes, 100-150 red fox, and some nontarget species, (EA at 48), BLM has violated 43 U.S.C. § 1701(a)(8) (1994) in which Congress declared its policy that the public lands be managed "in a manner that

^{1/} Except where need is demonstrated on an individual case-by-case basis, no control is authorized in areas designated "No Planned Control."

will protect * * * ecological * * * values." "Killing wildlife to benefit livestock operators cannot be considered an 'harmonious' way to jointly manage the wildlife and range resources," as required by the Congressional policy of managing on the basis of multiple use set forth in 43 U.S.C. § 1701(a)(7) (1994), NEC argues. (SOR at 4-5.) See 43 U.S.C. § 1702(c) (1994).

[1] We disagree. Congress also declared as policy that the public lands be managed "in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands," 43 U.S.C. § 1701(a)(12) (1994), and in a manner "that will provide food and habitat for fish and wildlife and domestic animals," 43 U.S.C. § 1701(a)(8) (1994). Thus, no mandate exists for BLM to subordinate livestock to wildlife. Nor is such a mandate found in NEPA. See Cape May Greene, Inc. v. Warren, 698 F.2d 179, 188 (3rd Cir. 1983); Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (NEPA effects a reordering of priorities so that environmental costs will assume their proper place along with other considerations).

Inherent in multiple-use concepts is the proper balancing of economic and ecological values. Friends of the Bow, 139 IBLA 141, 143-44 (1997). In approving this ADC Program, BLM struck such a balance. It also chose a program that protects ecological values. The Worland District ADC Program is tailored to address predation by coyote and red fox at certain times of the year, such as during lambing season in areas with a history of livestock loss, and to focus on problem animals or local populations of predators. (EA at 42-43.) "Eradication of any local population is not the goal of APHIS-ADC in the Worland District." (EA at 43.) The proposed action selected by BLM would likely result in killing fewer predators and nontarget animals than would occur if bounty hunting occurred in response to selecting the alternative of no lethal control. (EA at 44.)

The BLM's exercise of discretion in striking such a balance will be upheld absent justification for modification or reversal shown by a preponderance of the evidence, where the decision is in accord with applicable statutes and regulations and is based on a reasoned analysis of all relevant factors and made with due regard for the public interest. National Organization For River Sports, 137 IBLA 396, 401 (1997); Committee for Idaho's High Desert, 137 IBLA 92, 99 (1996); John M. Stout, 133 IBLA 321, 328 (1995); Edward R. Woodside, 125 IBLA 317, 325 (1993). Neither conclusory allegations of error nor differences of opinion standing alone establish error. Bill Armstrong, 131 IBLA 349, 350 (1994); Glacier-Two Medicine Alliance, 88 IBLA 133, 144 (1985).

The NEC's remaining arguments are founded on section 102(2)(C) of NEPA. The NEPA is essentially a procedural statute whose purpose is to insure that the agency makes a fully-informed and well-considered decision.

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). In Sierra Club, Toiyabe Chapter, 131 IBLA 342, 344 (1994), the Board observed:

NEPA is an action-forcing statute that requires agencies to take a hard look at the environmental consequences of a proposed action and provides for broad dissemination of relevant environmental information. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh environmental costs. NEPA is intended to assure informed agency action. It does not assure wise agency action. Id. at 350-51.

[2] The BLM prepares an EA to determine whether an EIS must be prepared. 40 C.F.R. § 1501.4(b) and (c). If, on the basis of its EA, an agency makes a FONSI upon the quality of the human environment, no EIS is necessary. Sierra Club, Toiyabe Chapter, 131 IBLA at 345; Union Oil Co. of California, 102 IBLA 187, 189 (1988). A decision to forgo an EIS, i.e., to issue a FONSI, will be affirmed on appeal if it is based on a consideration of all relevant factors and is supported by the record, including an EA which establishes that a careful review of environmental problems has been made, all relevant areas of environmental concern have been identified, and the final determination is reasonable in light of the environmental analysis. A party challenging a FONSI finding must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. Committee for Idaho's High Desert, 137 IBLA 92, 98 (1996); The Steamboaters, 131 IBLA 223, 228 (1994), aff'd, Civ. No. 95-6251-HO (D. Oreg. Aug. 16, 1996); Sierra Club, Toiyabe Chapter, 131 IBLA at 345; Powder River Basin Resource Council, 124 IBLA 83, 91 (1992). For the reasons detailed below, we conclude NEC has not successfully carried its burden.

The NEC's argument that "BLM cannot tier to an EIS it did not prepare or previously adopt," (SOR at 5), must be rejected. Tiering to the "Mammalian Predator Damage for Livestock Production in the Western United States" Final Environmental Impact Statement prepared in 1979 by the U.S. Department of Interior, U.S. Fish and Wildlife Service (FWS) (1979 EIS), was approved by the Secretary of the Interior in Southern Utah Wilderness Alliance, SEC 92-UT101 (1993) and Committee for Idaho's High Desert, SEC 92-ID-101 (1993). The BLM may properly tier to the 1979 EIS. Friends of the Bow, 139 IBLA at 145.

In contending that the EA failed to adequately disclose the affected environment, NEC asserts BLM failed to disclose the distribution, status, or trend of special status species (discussed below), or the nature of

the coyote and fox populations that would be the most affected by the ADC Program. (SOR at 9.) The NEC criticizes the EA because while it states that "[t]here are 19 recognized subspecies of coyote (EA at 32)," it is silent as to which of these species occurs within the Worland District and whether some of the coyote subspecies are rare and deserve special attention rather than eradication. Id.

In response, BLM notes NEC "fail[ed] to quote the qualifying sentence [in the EA]: 'However, the integrity and taxonomic utility of these subspecies designations are questionable (Bekoff, 1982).'" (Answer at 10.) Wildlife biologist Guy Connolly explains that "for a coyote subspecies to be valid taxonomically, its members must be morphologically distinguishable from the members of other subspecies." ^{2/} (Affidavit at 3.) He states that "a taxonomist of today probably would not consider all of these subspecies to be valid." Id. at 4. There is a "probable lack of morphological distinguishability" due to "the great amount of individual variation in color, size, and cranial characteristics of coyotes." Id. and Hartley H. T. Jackson, Classification of the Races of the Coyote, 1951, Attachment 2 to Connolly Affidavit at 229. Connolly observes that "[w]ithin the range of one subspecies, individual coyotes will be found that are typical of other subspecies." Id. and Attachment 2, at 230. Based on a comparison of range maps prepared by Jackson and by Hall, (Affidavit, Attachment 1), with the area of the Worland District (Park, Bighorn, Washakie, and Hot Springs counties), only two subspecies of coyotes are found in Wyoming, the Plains Coyote and Mountain Coyote, and the Worland District lies almost entirely within the range of Mountain Coyote. (Affidavit at 4.) Connolly states that the Mountain Coyote is one of the most widely distributed subspecies throughout the Great Basin region of the western United States and north into British Columbia and Alberta. According to Jackson, it is the best known in the wild of any of the races, is in many regions "by no means scarce and at times actually common," and shows "clear intergradation with all races adjoining it distributionally, and often borderline specimens are difficult to determine over a considerable range." (Attachment 2, at 282.) Connolly interprets this last comment to mean only a taxonomic expert would be able to identify the correct subspecies to which a particular coyote belonged, and even then it would be a matter of opinion. There is no indication that either subspecies of coyote occurring in Wyoming is scarce or rare, Connolly states, and because this was not an issue the EA properly did not discuss it. (Affidavit at 5.)

To NEC's claim that the EA fails to identify areas of high historical depredation loss BLM responds that Map 6, (EA at 26), shows where "Emergency Control" was employed in 1993 in response to confirmed depredation

^{2/} Guy Connolly is a Certified Wildlife Biologist, U.S. Department of Agriculture, APHIS-ADC, Denver Wildlife Center. Since 1975, his work has concerned biology and management of wildlife damage and particularly the development of methods to control coyote depredation on livestock. (WWGA Answer, Ex. 60 (Affidavit), Ex. 61 (Curriculum Vita).)

losses and Map 2, (EA at 19), identifying areas of proposed "Planned Control" confirms that areas designated "Planned Control" had a history of loss the previous year. We agree.

The NEC's contention that the EA failed to disclose existing predator-prey relationships is not supported in the record. The EA addresses the predator-prey relationship between coyote and sheep, (EA at 4-5), the coyote's prey diet, id. at 32, the relationship between cyclical rabbit and hare populations and predation of sheep, id. at 37, and the prairie dog as prey for predators, including the endangered Black-footed Ferret, id. at 37. Other environmental assessments that are incorporated by reference in the EA on page 4 also discuss predator-prey relationships, BLM observes. (Answer at 10.)

The NEC asserts the EA fails to demonstrate the insignificance of the ADC Program impact on the Worland Coyote population. The NEC quotes the statement in the EA on page 35 that the "estimated absolute coyote population in the Worland District [is] 2,500 to 39,000 animals," and argues that "BLM admits the Worland District Coyote population could, at times, be as low as 2,500 individuals." (SOR at 10.) Employing this low figure of 2,500 coyotes, NEC adds the number of coyotes cited in the EA as lost due to human-caused mortality (1,350 based on 650 from sport hunting and trapping and 700 due to APHIS-ADC activities in 1992) and as lost due to natural causes of mortality ranging from 36-45 percent, and concludes that the total annual mortality could be between 90 and 99 percent. The NEC argues that "this significant impact could occur as a result of the proposed ADC plan." Id. The NEC notes that BLM reached a different conclusion by averaging the high and low population estimates and maintains that averaging lacks the scientific integrity required by 40 C.F.R. § 1502.22(b)(4) (1994). The NEC urges averaging "ignor[es] potentially catastrophic impacts (e.g., extirpation) even if the probability of occurrence is low" and observes that the "EA does not demonstrate that there is a 'low' probability of the coyote population being only 2,500 individuals; rather the EA indicates the Coyote population cycles between 2,500 and 39,000 individuals. EA at 35." Id.

The BLM responds that 2,500 is a theoretical minimum that is very unlikely to occur. Even if it did occur, correspondingly fewer coyotes would be taken due to hunting and ADC activities. In any event, population trends will be monitored and ADC activities would be curtailed if there were a severe unexplained drop in the trend. (Answer at 12-13.)

Connolly suggests that

NEC's argument, in part, may stem from misinterpretation of BLM's statement that the estimated coyote population in the Worland District is 2,500 to 39,000 animals [EA at 35]. NEC misstates this phrase as " * * * the EA indicates that the Coyote population cycles between 2,500 and 39,000 individuals [NEC Statement

of Reasons at 10]. The BLM's presentation clearly intends the 2 numbers as maximum and minimum estimates corresponding to maximum and minimum coyote densities reported in scientific literature. In addition, BLM clearly selected the midpoint between these extremes, approximately 20,000 coyotes, as the best or most defensible population estimate [EA at 35].

Coyote numbers within any population are changing constantly. Natural coyote populations have births at only one season (spring), while deaths occur the year round. Thus, coyote numbers on the Worland BLM district would be expected to vary in an annual cycle with numbers lowest just before spring and highest after the pups have been born. Biologists typically express mortality rates as fractions of the maximum annual population. The Worland EA analyzes man-caused mortality as fractions of the estimated population of 20,000 coyotes [EA at 42]. Therefore, it can be assumed that the estimated 20,000 coyotes represents the maximum population on the Worland district. Population dynamics modeling indicates that the minimum coyote population equals roughly half of the maximum population [Connolly & Longhurst 1975, *The Effects of Control on Coyote Populations*; see Attachment 5, at 18]. Thus, the Worland coyote population would fluctuate annually between a post-birth high of 20,000 to a pre-birth low of approximately 10,000 coyotes. These numbers on an area of approximately 8,000 square miles [derived from values presented in the EA at 35] would correspond to coyote densities varying seasonally between 1.25 and 2.5 coyotes per square mile. These are very reasonable estimates compared to published density estimates for other regions of North America (USDI 1978).

(Connolly Affidavit at 5-6.)

Connolly adds that

[m]ost coyote biologists believe coyotes experience 'compensatory mortality,' that is, a population subject to unusually high mortality from one cause will have correspondingly lower losses from other natural causes. In particular, high harvest or control removals will result in reduced natural death rates, compared to the level of natural mortality expected in populations with no control (no-human caused mortality).

(Affidavit at 7.) Connolly, who helped develop the Connolly-Longhurst Model and is the principal author of the publication describing this population dynamics model referenced in the EA on page 54, states:

The Connolly-Longhurst model, for instance, estimates annual, natural mortality rates of 40% of adults and 61% of pups in an uncontrolled population. [Attachment 5, at 18]. These rates

decrease with increasing percentages of coyotes killed annually. Thus, NEC's implication that harvest mortality is simply additive to natural losses [NEC's Statement of Reasons at 10] is at variance with commonly accepted notions of coyote population dynamics.

Id.

Even assuming that total mortality is less than 75 percent of the population, NEC argues that genetic diversity will be reduced:

If an exploited population [i.e., one subject to lethal predator control] is stable, its offspring are deriving, on average, from half as many adults as the offspring from an unexploited population. Therefore, lethal predator control contributes to a reduction in genetic diversity in the Coyote population. For example, one litter of 10 Coyote pups will have less genetic diversity than 2 litters each containing 5 pups. Such reductions are irreversible and irreparable.

An EIS, NEC urges, is the proper document for disclosing these impacts, citing 42 U.S.C. § 4332(2)(C)(v) (1994). (SOR at 11.)

The BLM states that the ADC Program "contemplates the removal of up to 700 animals out of an estimated population of 20,000. NEC utterly fails to demonstrate how a breeding population of 19,300 animals would have significantly less 'genetic diversity' than one of 20,000." (Answer at 14.)

Connolly also disputes NEC's argument, stating that he is unaware of any study demonstrating a loss of genetic diversity in a coyote population, either as a result of predator control or due to human influence. (Affidavit at 7.) Connolly notes that it is

generally accepted that genetic diversity is lowest in small inbreeding populations; in the coyote world, inbreeding would be greatest in unharvested populations where mortality and population turnover are relatively low. Coyote harvest would tend to increase, not reduce, genetic diversity because many of the animals removed from a coyote population tend to be replaced by immigrants from adjacent areas.

(Affidavit at 8.) Responding to NEC's contention set forth above, Connolly states:

No citation or scientific basis is given to support these statements. Here, NEC is clearly in error. I know of no basis in personal communications with predator experts or in published scientific literature to suggest that exploitation of coyote populations reduces the number of reproducing coyotes by half.

On the contrary, modeling studies show that the number of reproducing coyotes remains remarkabl[y] constant at all levels of exploitation short of extermination. This is illustrated by the Connolly-Longhurst model [Attachment 5, at 18]. In this model, the unexploited population (0 coyotes killed) had 100 coyotes at breeding time; 23 of these coyotes were females that produced litters. The number of females with litters changed to 22 at annual harvest or exploitation rates of 10% and 20%. There were 21 females with litters at annual harvest rates of 30%, 40%, and 50%, and 20 females with litters at 60% annual harvest.

Connolly thus finds no basis on which to hypothesize a reduction in genetic diversity owing to the contemplated ADC Program. Connolly suggests that genetic diversity may actually increase as a result of the ADC Program. 3/

The NEC argues that BLM's EA does not indicate why the ADC Program would cause less impact than bounty hunting or contests. (SOR at 10-11.) The NEC is mistaken. See EA at 25, 27, 38-39, 40, 43-47, 48-51.

The NEC maintains that BLM did not adequately disclose impacts to the following special status species "that are known to occur (or are likely to occur) in the Worland District": the Ferruginous Hawk, Northern Goshawk, Allen's Thirteen-Lined Ground Squirrel, North American Lynx, North American Wolverine, River Otter, and the Swift Fox. Since these species are inherently vulnerable, the EA is deficient in not taking a hard look at how the ADC Program may affect them, NEC argues. (SOR at 11-12.) In addition, NEC contends that in Chapter 6840 of the BLM Manual, BLM "promulgated regulations to ensure that actions authorized on BLM administered lands do not contribute to the need to list any * * * Special Status Species under the provisions of the ESA [Endangered Species Act]." (SOR at 13.) See BLM

3/ Connolly suggests that the Connolly-Longhurst Model reveals

"that exploitation has several effects on population dynamics. As exploitation (killing) percentages increase, average coyote ages decrease, minimum (breeding) population size decreases slightly, maximum (breeding + pups born) population size increases slightly, and total mortality rates increase [Attachment 5, at 18]. One result of these and other changes is that the coyote population turns over at younger and younger ages as exploitation increases. Increasing turnover means that more coyotes enter and leave the population annually. Every coyote birth represents an opportunity for the population to express new genetic material. In addition, heavy exploitation is likely to confer a survival advantage on those individual coyotes that are best able to evade man's capture techniques. Therefore, exploitation could cause genetic selection for wariness, intelligence, or other traits that enhance coyotes' ability to survive in 20th century, real-world environments." (Affidavit at 9.)

Manual § 6840.02. The NEC argues that the Manual required BLM to "[d]eter- mine the distribution, abundance, reasons for current status, and habitat needs for candidate species occurring on lands administered by BLM and evaluate the significance of lands administered by BLM or actions in maintaining those species." BLM Manual § 6840.06(c).

The stated purpose of BLM Manual § 6840 "is to provide policy and guidance for the conservation of Special Status Species of plants and animals, and the habitats on which they depend." The BLM Manual is not a regulation, does not have the force and effect of law, and is not binding on this Board. Oregon Natural Resources Council v. BLM, 129 IBLA 269, 277 (1994); New Mexico Wilderness Coalition, 129 IBLA 158, 162 (1994); Pamela S. Crocker Davis, 94 IBLA 328, 332 (1986). Courts have recognized that it is up to the agencies themselves to enforce compliance with their internal procedures, and no cause of action for breach of those procedures exists. Schweiker v. Hansen, 450 U.S. 785, 789, rehearing denied, 451 U.S. 1032 (1981); U.S. v. Caceres, 440 U.S. 741, 755-56 (1979).

While none of the substantive requirements of the ESA apply to candidate or special status species, the Secretary has declared the Department's policy with respect to such species in the EA. The EA on page 30 states: "Even though candidate species are not covered under the special protection measures of the ESA, BLM policy states that the habitat for candidate species will be managed in such a way that the species does not become threatened or endangered."

This Board has upheld decisions implementing this policy. See Edward R. Woodside, supra, 125 IBLA at 324. To establish error in BLM's implementation of this policy, a party must show that the EA failed to disclose impacts on a special status species that would cause it to become threatened or endangered. A necessary predicate to such a showing is a showing that at the time BLM issued its Decision (1) the species in question was a candidate species; and (2) the species occurred within areas of "Planned Control" or "Restricted Control," i.e., areas designated for animal damage control activity within the Worland District.

The Northern Goshawk, the North American Lynx, and the Ferruginous Hawk fail to satisfy the first criteria. At the time of BLM's Decision, the Northern Goshawk and Ferruginous Hawk were not listed by FWS as candidate species. The original petition for the Northern Goshawk did not extend to Wyoming and was otherwise rejected for lack of sufficient information in 1992. See 57 Fed. Reg. 28474 (June 25, 1992). On November 15, 1994, subsequent to BLM's Decision in this case, the Northern Goshawk was listed as a category 2 candidate species. 54 Fed. Reg. 58982, 58990 (Nov. 15, 1994). On August 19, 1992, the FWS rejected the petition to list the Ferruginous Hawk as a category 2 candidate species finding, inter alia, that the species was common and widespread in Wyoming. See 57 Fed. Reg. 37507, 37512 (Aug. 19, 1994). The FWS reversed its position on the Ferruginous Hawk, after the Decision challenged in this case, on November 15, 1994. See 59 Fed. Reg. 58982, 58990 (Nov. 15, 1994). The EA

mentions the Ferruginous Hawk and the Northern Goshawk along with other raptors in the EA on page 36. Although NEC successfully established that the North American Lynx, a category 2 candidate species, occurs within areas of "Planned Control" ^{4/} Wyoming was not listed as being within the range of the North American Lynx, until November 15, 1994. See 59 Fed. Reg. 58982, 58985 (Nov. 15, 1994). Consequently, no error is established in BLM's Decision.

As to the remaining species identified by NEC, NEC has failed to satisfy the second criteria, *i.e.*, demonstrate that the species occurred within "Planned Control" or "Restricted Control" areas designated for animal damage control activity within the Worland District. The assertion that the North American Wolverine has been sighted in the northeastern part of Wyoming, absent proof that the species was sighted on lands designated for animal damage control activities within the Worland District, is insufficient. Similarly, the contention that "it is possible" that the Swift Fox "occurs on the Worland District," (SOR at 17), the contention that the River Otter occurs in "drainages running out of Yellowstone National Park and into the Worland District," and the assertion that Allen's Thirteen-Lined Ground Squirrel, which is a category 2 candidate species in Wyoming, see 56 Fed. Reg. 58809 (Nov. 21, 1991), "occurs only in the Big Horn Basin of Wyoming," do not establish that these species occur within areas of "Planned Control" or "Restricted Control" designated for animal damage control activity within the Worland District.

We conclude that BLM gave adequate consideration to the impacts of the ADC Program on special status species in the EA and did not contravene the BLM Manual provisions regarding these species.

The NEC claims that the EA failed to consider all reasonable alternatives, including the "no lethal control alternative," an alternative requiring exhaustion of all nonlethal control measures before employing lethal control and an alternative of restricting or eliminating grazing in areas of high predation.

The NEC contends that rather than giving the no-lethal-control alternative objective consideration as a possible course of action, BLM included the no-lethal-control alternative "to provide a baseline for comparison of impacts of the other alternatives." (EA at 27.) The NEC does not agree that either of the reasons cited by BLM for not giving detailed consideration to this alternative, *i.e.*, because the alternative was considered in the 1979 EIS to which the EA was tiered or because the selection of the alternative would not be consistent with the objective of allowing APHIS to carry out its duties mandated under the ADC Act of 1931, (EA at 27), is compelling. (SOR at 12.) The NEC insists that BLM must determine the best methods for controlling depredations and implement those. The NEC avers that "non lethal control methods can reduce all depredation losses." Comparing the no-lethal-control alternative to lethal control, NEC notes that even with lethal control methods, BLM expects sheep losses to range

^{4/} See maps attached to NEC's SOR and BLM's Answer at 20.

4-8 percent or higher, citing the 1979 EIS on page 87. In support of its claim that nonlethal controls can solve all predator problems, NEC points to several anecdotal articles reporting success using burros and guard dogs.

The BLM relates that the no-lethal-control alternative is essentially Alternative 1, the "No Federal Animal Control Program" addressed in the 1979 EIS. Even though tiering would have satisfied the requirements of NEPA and FLPMA, BLM urges this alternative was given full treatment in the EA. The BLM explains that this alternative was rejected because it was not impact-free and was thought to have potentially severe unpredictable consequences, none of which BLM could control. (EA at 49.) The BLM emphasizes that the likelihood that it could implement a no-lethal-control program is low, given the "demonstrated willingness of local county predatory animal boards (PAB's) to shift resources away from APHIS-ADC in response to even moderate BLM restrictions (EA at 25, 44, 49)." (Answer at 15.) The BLM surmises that it is unlikely that any county funding would be contributed to APHIS-ADC if APHIS-ADC were prohibited from conducting lethal control on public lands. The BLM urges that due to the land ownership pattern in the Worland District, lethal control on private lands alone is ineffective, a fact well known to PAB's. Since 40 percent of APHIS-ADC funding comes from PAB's, the elimination of PAB funding, BLM reasons, would be "tantamount to elimination of the program." *Id.* at 16.

Maintaining that the alternative of requiring exhaustion of all nonlethal control measures before employing lethal control was considered as a sub-alternative to Alternative 2 discussed in the EA, *see* EA at 25, the BLM states that this alternative was rejected because nonlethal controls have proven to be effective for only short periods of time and then only when integrated with lethal controls. Disputing the notion that this alternative is impact-free, BLM charges that this alternative would require individual livestock operators to suffer economic loss before lethal predator control could be implemented, is paperwork-intensive for involved state and Federal agencies, and provides no demonstrated environmental benefit. *See* EA at 16-17, 18, 48, 49-51; BLM Answer at 16.

The BLM disputes NEC's claim that moving livestock to another allotment will solve predation problems or that this alternative is feasible. The notion that coyotes are territorial in the sense that they will not leave their home range to find food when food becomes scarce is refuted by scientific evidence, BLM argues. Research shows that while coyotes often organize in family groups and occupy defined territories, they will aggressively expand their range to follow a prey base. The young will leave their group and adults will migrate up to 250 miles. *See* Dolnick, Medford, and Schied, Bibliography on the Control and Migration of Coyotes and Related Canids, with Selected References on Animal Physiology, Behavior, Control Management and Reproduction, 1976; Answer at 17-18.

The NEC's argument that BLM should simply require livestock operators to move to another allotment, BLM urges, fails to comprehend that ranchers

cannot unilaterally change pastures to avoid predator problems because grazing, stocking levels, and season of use on public lands within the district are based on land use plans to which this EA is tiered. (EA at 27.) Grazing permits issued to permittees, BLM notes, are land specific. Permits authorize the grazing of a specific number of animal unit months on certain land at certain times of the year and prohibit the grazier from trespassing on lands allocated to others. The BLM states that NEC has not advanced any reason why grazing patterns established in land use plans should be modified to accommodate NEC's belief as to how to best balance the uses of public land. (Answer at 18.)

[3] The NEPA requires that an EIS consider "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii) (1994). The CEQ regulations provide that Federal agencies shall, to the fullest extent possible, "[u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment." 40 C.F.R. § 1500.2(e). Agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a) (emphasis supplied). The required adequate consideration of alternatives is not overridden by a determination that a FONSI would issue even if the alternative had been considered. Powder River Basin Resource Council, 120 IBLA 47, 56 (1991). Agencies need not discuss alternatives that would not satisfy the purposes of the proposed action or that are remote and speculative. Headwaters, Inc. v. BLM, Medford District, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d 1457, 1467 (10th Cir. 1984); Allen D. Miller, 132 IBLA 270, 273 (1996). All reasonable alternatives must be considered and obvious alternatives may not be ignored. Western Colorado Congress, 130 IBLA 244, 247 (1994).

When an EIS upon which a subsequent EA is tiered adequately considered an alternative in dispute, there is no need to discuss it again in the EA. Oregon Natural Resources Council, 115 IBLA 179, 186 (1990). A "rule of reason" approach applies to both the range of alternatives and the extent to which each alternative must be addressed. The range of alternatives should be sufficient to permit reasoned choice. See Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972); Allen D. Miller, 132 IBLA at 273.

Considering NEC's contentions in light of the record, we find the no-lethal-control alternative was considered in the EIS and in the EA, the latter in order to compare impacts over a greater range of alternatives. The 1979 EIS discussed the exhaustion alternative, (1979 EIS at 185), as did the EA, concluding that this alternative offered little discernible benefit, given the efforts that would be required of state and Federal agencies and the fact that individual graziers would suffer a loss before action could be taken. As to eliminating grazing from allotments experiencing high predation, BLM considered this alternative, albeit briefly,

because it had concluded that the coyote would merely shift its focus to another allotment in search of prey given a scarcity of food. As required, BLM briefly discussed the reasons for eliminating various alternatives. City of Aurora v. Hunt, 749 F.2d at 1467.

The BLM's selection of the proposed action, the ADC Program, and rejection of the various alternatives discussed in the EA, was founded on BLM's conclusion that a coyote will expand its territory to follow a prey base and its conclusion, predicated in part on the 1979 EIS, that nonlethal control methods are ineffective alone in addressing the predation of livestock in the Worland District. The record contains ample scientific support for these conclusions. No error has been shown by NEC in these conclusions.

[4] A party challenging a FONSI finding must show that the determination was premised on a clear error of law, a demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the action for which the analysis was prepared. The NEC's contentions as to the inadequacy of the EA are not supported by the record on appeal. The NEC has established no error in BLM's Decision. Disagreement with BLM's Decision premised on a belief, however genuine, that nonlethal control is intrinsically better provides no basis for reversal or modification of BLM's Decision. Bill Armstrong, 131 IBLA at 350.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur.

John H. Kelly
Administrative Judge