

INTERIOR BOARD OF LAND APPEALS

Predator Project

144 IBLA 310 (June 17, 1998)

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PREDATOR PROJECT

IBLA 94-450

Decided June 17, 1998

Appeal from a Decision Record/Finding of No Significant Impact by the District Manager, Casper District, Wyoming, Bureau of Land Management, adopting an Animal Damage Control Plan for public lands in the district. EA No. WY-062-4-027.

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: Jerry Grubbs, Predator Project, Bozeman, Montana, for the Predator Project; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Predator Project (hereinafter, Appellant) has appealed from an April 1, 1994, Decision Record/Finding of No Significant Impact (DR/FONSI) by the District Manager, Casper District, Wyoming, Bureau of Land Management (BLM), adopting an Animal Damage Control Plan (ADC Plan) for the Casper District in eastern Wyoming, and finding, based on an April 1994

"Environmental Assessment" (EA) (No. WY-062-4-027), that no significant impact to the human environment would result from proceeding with the plan. 1/

The ADC Plan, which would 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 regarding timing, location, and methods, would prevent and correct, by employing a wide range of lethal and nonlethal means, depredation, primarily by coyotes (but also by red foxes and other predators), of domestic sheep and cattle grazing on public lands in the district. 2/ In describing the basis for his Decision, the District Manager stated:

Control actions will be directed as much as possible at individual offending animals or groups of offending animals. At certain times of the year, such as lambing season, actions may be taken to suppress local populations of coyotes in areas known to have suffered predation problems. These actions will be short-term and are not aimed at the eradication of any local population of any target species.

(DR/FONSI at 1; see EA at 9.)

In its Statement of Reasons (SOR), Appellant contends that the District Manager improperly issued the DR/FONSI, adopting the ADC Plan, because the EA was "inadequate" under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994). Appellant requests the Board to set aside the DR/FONSI and to remand the case to BLM for preparation of an adequate EA and issuance of a revised DR/FONSI. (SOR at 1.) It asserts that the EA is deficient in

1/ BLM's Casper District encompasses all or part of 10 counties, viz., Sheridan, Campbell, Crook, Johnson, Weston, Natrona, Converse, Niobrara, Platte, and Goshen. The DR/FONSI was placed in full force and effect pursuant to an Apr. 1, 1994, Order by the Board which was issued at the direction of the Secretary of the Interior. On June 28, 1994, the Board issued an Order denying Appellant's petition to stay the effect of the DR/FONSI to the extent that it would permit the lethal control of predators.

2/ 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 the 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 (SUWA) v. Thompson, 811 F. Supp. 635, 638 (D. Utah 1993). ADC functions on public lands were transferred to APHIS-ADC from the U.S. Fish and Wildlife Service (FWS), U.S. Department of the Interior, on Dec. 19, 1985. See 51 Fed. Reg. 6290 (Feb. 21, 1986).

four important respects: "The BLM * * * has failed to demonstrate a need for the program, consider a reasonable range of alternatives, adequately discuss impacts to target and non[-]target wildlife populations, or provide for adequate monitoring of the program." (SOR at 2.)

It is Appellant's contention that BLM failed, in its EA, to show that lethal control is necessary to minimize livestock losses or that nonlethal control will not equally achieve that aim. It further asserts that BLM has not established that the losses to coyotes are so significant that lethal control is even warranted, noting that the reported losses of sheep and cattle are a small percentage of the overall populations in the district. It also asserts that BLM has not justified use of any lethal control directed to red foxes since there are no documented losses of livestock to red fox in the district.

[1] Reported losses of sheep from predation by coyotes and other predators have increased throughout the State of Wyoming in recent years. (EA at 4, 24, 25, 36, 38.) Cattle are also affected, but to a much lesser extent. (EA at 38.) In addition, within the Casper District, which encompasses 33.8 percent of the land area of the State, reported losses of sheep and cattle to only coyotes are relatively stable or increasing slightly. (EA at 39.) Further, while it is true that these losses are a small percentage of the overall sheep and cattle populations in the district, the numbers are relatively high and represent an economic loss of some magnitude to the livestock operators. See EA at 35, 38, 39. There are no specific figures regarding the losses caused by red foxes in the district, but, like coyotes, they are found in relatively high numbers within the district, are generally increasing in number throughout the State, and account for some of the State-wide losses. (EA at 22, 29, 30, 38.) Thus, it is not inconceivable to conclude that they will continue to cause losses, possibly in increasing numbers, in the district. Appellant has provided no evidence to the contrary. Moreover, Appellant has provided no evidence that the losses, particularly to sheep, throughout the State from all predators are not increasing or that the increase is confined to areas of the State outside the Casper District.

BLM further noted that, absent lethal control, livestock lost to predation by coyotes and red foxes would increase somewhat. There is evidence that lethal control will reduce losses to 2 to 6 percent, but that, without such control, they may increase up to 18 to 30 percent. (EA at 4.) Appellant questions BLM's assertion that losses may reach 30 percent in the absence of lethal control on the basis that the EA does not indicate whether these losses will occur to the same extent in the absence also of nonlethal control. Appellant suggests herding and using guard animals. While it is unclear whether such an increase in losses is expected in the absence of nonlethal control, there is evidence that nonlethal control would also limit losses. However, the extent to which nonlethal control will reduce losses is plainly not yet quantified, and there is no evidence

that nonlethal control alone will be sufficient to keep losses down to acceptable levels. Appellant provides no evidence regarding the extent to which nonlethal control will reduce losses or that lethal control is not necessary.

Existing evidence establishes that lethal control is necessary to diminish losses since nonlethal control alone will not suitably reduce losses. While Appellant presents evidence that, in particular instances, nonlethal methods have proven to be effective in controlling predation, Appellant has not demonstrated that effective control will result in all circumstances. See Friends of the Bow, 139 IBLA 141, 149 (1997).

In Friends of the Bow, 139 IBLA at 149, we noted a cautionary reminder that BLM is not authorizing here the exclusive and unrestricted use of lethal control by APHIS-ADC on public lands. If it turns out that nonlethal control is or is likely to be successful in minimizing livestock losses in whole or in part, lethal control will not be employed to that extent. See EA at 6. However, to the extent that nonlethal control is not or is not likely to be successful, lethal control may be employed. We are persuaded that the EA generally supported BLM's decision to afford APHIS-ADC the option to employ lethal control where necessary.

Next, Appellant contends that BLM failed, in its EA, to consider a reasonable range of alternatives, as required by section 102(2)(C) of NEPA and its implementing regulations.

Appellant complains that BLM did not consider its suggested "non-lethal control alternative," which would require the use of a full range of nonlethal control methods before employment of lethal control, so long as a "threshold level" of unacceptable livestock losses was not reached. ^{3/} (SOR at 4.) Appellant states that, under this alternative, ranchers would be required, not simply encouraged, to exhaust nonlethal control methods before using lethal control. It notes that three named studies have indicated the effectiveness of such methods, particularly the use of guard animals. ^{4/}

^{3/} Appellant identifies only one other alternative which, it argues, BLM should have considered, i.e., eliminating livestock grazing on "allotments with a history of high predation losses." (SOR at 5.) Such an alternative is clearly not designed to minimize the number of livestock grazing on the public lands that are lost to predation, and thus is not reasonably related to the aim sought to be achieved by the proposed action. For this reason, BLM did not err in failing to consider it. Howard B. Keck, Jr., 124 IBLA 44, 53 (1992).

^{4/} Appellant also notes that the experience in two other BLM districts, the Shoshone District in Idaho and the Rawlins District in Wyoming, disproves BLM's "assumption * * * that only lethal control can effectively prevent livestock losses." (SOR at 4, emphasis added.) It points to the fact that losses in the Shoshone District went down when lethal control was eliminated and that losses increased in the Rawlins District even with

BLM's preferred alternative (Alternative 2), ultimately selected by the District Manager, involved APHIS-ADC promoting the use of nonlethal control methods by private livestock operators and resorting to lethal control only when nonlethal control "has failed to prevent losses or when the potential risk of loss is high." (EA at 6; ADC Plan at 2.) Thus, in assessing the alternative, BLM considered the environmental impacts that would occur were nonlethal control to be used before APHIS-ADC undertook any form of lethal control. Utah Wilderness Association, 134 IBLA 395, 400 (1996). We find no error that neither the preferred alternative nor any other alternative provided that operators would be required to use nonlethal methods before APHIS-ADC would undertake lethal methods of control.

We start with the fact that, in his December 17, 1992, Decision in In the Matter of the Appeals of SUWA (SEC 92-UT101) (hereinafter cited as "Secretary's Decision"), the Secretary held, in the face of a similar challenge, that an EA which was tiered to the FWS 1979 Environmental Impact Statement (EIS), which discussed an alternative emphasizing nonlethal control, satisfied NEPA. (Secretary's Decision at 13-14; see Friends of the Bow, 139 IBLA at 150; Utah Wilderness Association, 134 IBLA at 400.) The EA at issue here was effectively tiered to FWS' 1979 EIS, and, at the very least, incorporated it by reference. (EA at 52.) Further, BLM concluded here that authorizing lethal control by APHIS-ADC was necessary to properly control predation on the public lands and thus reduce livestock losses. (EA at 4; DR/FONSI at 2.) To focus only on nonlethal control would result in a greater loss of livestock and, in addition, if it encouraged operators and others to undertake lethal control on their own, might result in an unacceptable impact on predator populations (as well as nontarget species). (EA at 4, 48.) Appellant has provided no evidence to the contrary. Thus, it is clear that an alternative that precluded lethal control by APHIS-ADC in all instances until after nonlethal control had been used is not likely to accomplish the purpose sought to be achieved by the proposed action. It is well settled that BLM need not consider such an alternative in this circumstance, and thus we find no error. Friends of the Bow, 139 IBLA at 150; Utah Wilderness Association, 134 IBLA at 400.

Next, Appellant contends that BLM failed, in its EA, to properly consider the direct and indirect impacts of adoption of the ADC Plan on coyotes and other predators. Appellant also asserts that BLM failed to properly consider the cumulative impact on the coyote population from

fn. 4 (continued)

lethal control. We find no evidence of such an assumption. BLM simply believes that lethal control is effective in reducing livestock losses. That is not undermined by the two cited cases, which do not necessarily prove that eliminating such control will itself cause losses to diminish or that continuing such control will itself cause an increase in losses. We have also upheld BLM's adoption of a similar ADC program in each of those districts. See Friends of the Bow, 139 IBLA at 141; Susan J. Doyle, 138 IBLA 324 (1997).

lethal control together with other past, present, and reasonably foreseeable future actions, "such as logging, mining, hunting (legal and illegal), predator control on adjacent private or public property[,] and predator control by individuals on public land." (SOR at 6.)

Appellant argues that BLM could not properly assess the impact, individual or cumulative, of lethal control on the coyote population where the current population is not "known" and BLM does not have "detailed, site-specific data on * * * the potential impact of the [ADC] program on coyote numbers." (SOR at 7.)

Admittedly "[e]xact" coyote population data for the State is not available. (EA at 27.) Nonetheless, BLM estimated the number of coyotes present within the Casper District based on a predicted population density of 0.9 coyotes per square mile. (EA at 28.) It, thus, concluded that the coyote population would be 29,625, since the district contains 32,917 square miles. Id. BLM noted that this estimate is supported by another reported typical population density which ranges from 0.3 to 5.0 coyotes per square mile and thus would yield a population of from 9,875 to 164,585. Id. Appellant has presented nothing to refute BLM's estimate.

We hold that BLM's estimate is sufficient to afford it with the information necessary to assess the impact, individual or cumulative, of lethal control on the coyote population and whether it will be significant. Friends of the Bow, 139 IBLA at 146; Susan J. Doyle, 138 IBLA at 328.

BLM also provides that, during the course of the ADC program, APHIS-ADC will monitor predator populations, and that, based on an assessment of monitoring data, BLM will make annual adjustments in the approved ADC Plan, with respect to target animals. (EA at 9, 12; DR/FONSI at 1, 3.) BLM envisions that APHIS-ADC will rely on "all available indicators" of the populations of target species and, particularly, the use of "scent-post surveys." (DR/FONSI at 1.) Appellant, however, states that BLM has failed to demonstrate that this complies with the monitoring directive in sections 6830.06.J and 6830.43 of the BLM Manual (Rel. 6-115 (August 4, 1988)), since the EA does not specify how the surveys will be conducted, including detailing "the size of the[] samples, how they'll be collected, or how they'll be evaluated." (SOR at 7; see id. at 8.) Those sections of the Manual do not set forth how monitoring shall be conducted or require that BLM provide the details thereof in an EA. However, surveys are a recognized technique, and while the manner in which the surveys will be conducted is not specified in the instant EA, being presumably left to the discretion of APHIS-ADC, Appellant has offered no basis for concluding that BLM failed to comply with section 102(2)(C) of NEPA. See Predator Damage in the West: A Study of Coyote Management Alternatives, FWS (Dec. 1978), at 65. Further, Appellant has failed to demonstrate that such an effort will not yield reliable population numbers.

Appellant argues that the computer model developed by G.E. Connolly and W.M. Longhurst in 1975 and used by BLM here to predict the direct impact of lethal control on the coyote population is based on a simple

assumption regarding the stability (absent lethal control) of such a population, and thus does not take into account other factors affecting population, such as climate and food supplies. It also notes that the model, in fact, generates population predictions at variance with actual field results. In these circumstances, Appellant concludes that the model "can not reasonably be expected to reflect the true effects of lethal control of coyote populations." (SOR at 6.)

The Connolly/Longhurst computer model predicts that 75 percent of the coyote population would have to be killed every year for 50 years in order for it to be eradicated. (EA at 42.) Appellant points out that the model assumes that the population is not affected by other factors in its environment. In challenging the model, Appellant argues that, in reality, the carrying capacity varies with climate, food supplies, and other factors beyond the scope of this model. See SOR at 5-6.

The model, however, is not used by BLM to establish exactly what will happen to the coyote population were the proposed ADC program to be implemented. The model is intended to show that the population will not be eradicated since the program will result in the death of considerably less than 75 percent of the population in the district. Also, even if the model underestimates, somewhat, the extent to which the coyote population can, in the instant case, withstand lethal control, it establishes that no eradication will occur since BLM estimates that well less than 75 percent will be killed each year. Indeed, BLM concludes that only 18.3 percent of the population in the entire district will be killed each year by lethal control effected by APHIS-ADC, together with private hunting and trapping. 5/ (EA at 42, 47-48.) In addition, only about 11 percent of that number would be killed as a result of the action taken by BLM here, since that represents the percentage of public lands within the district. (EA at 48.) Thus, BLM concludes that there will be no significant individual or cumulative impact on the coyote population from the instant action. (EA at 42, 48; DR/FONSI at 3.) Appellant has provided no evidence that any greater percentage of loss will result, or that the viability of the population might be affected. Appellant has thus failed to show error in BLM's conclusion. See Friends of the Bow, 139 IBLA at 147; Susan J. Doyle, 138 IBLA at 328; Utah Wilderness Association, 134 IBLA at 399.

The record does not support Appellant's argument that BLM totally ignored the direct impact of lethal control on the red fox population. The EA indicates the impact would be negligible. The general experience with the ADC program throughout the State indicates that an average of 1,056 red foxes were taken by APHIS-ADC from 1986 through 1993. Considering the total estimated population for the district runs from 9,875 to 85,584 (EA at 22, 29), it is apparent that the number of red foxes that

5/ Appellant has provided no evidence that any activity other than private hunting and trapping, either past, present, or reasonably foreseeable, will add to the cumulative impact on the coyote population.

would be killed would be a very small percentage. Appellant has failed to demonstrate any error in BLM's analysis.

Next, Appellant contends that BLM failed to define the "emergenc[y]" circumstances under which it would allow lethal control to be used in "[N]o-planned control areas," which would normally be off-limits to such control, and thus "effectively opens the entire District to all lethal methods with no discussion of the potential environmental consequences." (SOR at 8.)

BLM provides that lethal control may be practiced in otherwise restricted areas in "emergency" situations. (DR/FONSI at 1; ADC Plan at 7, 10; EA at 14.) While BLM has not defined "emergency" to cover a myriad of potential situations, it has provided two examples. (ADC Plan at 7; EA at 14.) Each situation was required to be handled using the procedures outlined in section 6830.53 of the BLM Manual (Rel. 6-115 (Aug. 4, 1988)). See ADC Plan at 7, 10; EA at 3 ("The ADC plan has been prepared using * * * the BLM's Manual 6830"), 14. That section states that such situations "must be based on a livestock operator's request for control measures or on public health or safety concerns." (Section 6830.53.F, BLM Manual (Rel. 6-115 (Aug. 4, 1988)).) In the case of an operator request, "loss data" must be submitted to APHIS-ADC, for evaluation and a determination that emergency control measures are warranted. Id. When "immediate action is warranted and the control area does not involve established safety zones," APHIS-ADC may proceed, later notifying BLM. Id. When "time is not of the essence," APHIS-ADC must first obtain BLM's approval before proceeding. Id. Given all this, Appellant has failed to demonstrate that this limited exception will "open[] the entire District" to lethal control.

Finally, Appellant contends that BLM failed, contrary to the policy directive in section 6840.04.G of the BLM Manual (Rel. 6-116 (Sept. 16, 1988)), to adequately consider the impact of lethal control on "Special Status Species" of wildlife, i.e., designated threatened and endangered species and those proposed or a candidate for such designation, State-listed species, and other sensitive species. (SOR at 9.) Appellant notes that certain candidate species, viz., wolverine, lynx, and ferruginous hawk, are found in the district, and that a 1991 U.S. Forest Service study by Deborah M. Finch, Threatened, Endangered, and Vulnerable Species of Terrestrial Vertebrates in the Rocky Mountain Region, Gen. Tech. Rep. RM-215, demonstrates that such species "have been jeopardized by * * * predator control efforts in the past." (SOR at 10.)

BLM concluded that the Special Status Species noted by Appellant are either not found in the Casper District (wolverine and lynx) or would not be affected by the ADC program of lethal control (ferruginous hawk). (Attachment A to BLM Answer at 7.) Appellant presents no evidence, other than its "belie[f]," to dispute BLM. (SOR at 10.) That will not suffice. Friends of the Bow, 139 IBLA at 150.

In general, we conclude that, considering all relevant matters of environmental concern, BLM has taken the requisite "hard look" at the environmental impacts, including the impacts to domestic livestock and predators, of undertaking the ADC Plan, employing both lethal and nonlethal control, in the Casper District, and alternatives thereto, and made a convincing case that, given certain mitigation measures, there will be no significant impact requiring preparation of an EIS. Appellant has failed to carry its burden to persuade us, with the submission of objective proof, to the contrary. See Friends of the Bow, 139 IBLA at 150. At best, it offers only a contrary opinion, which is insufficient to overcome the reasoned analysis of BLM's experts in matters within the realm of their expertise. See SUWA v. Thompson, 811 F. Supp. at 643; Friends of the Bow, 139 IBLA at 150; Susan J. Doyle, 138 IBLA at 327.

We, therefore, hold that BLM 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); Utah Wilderness Association, 134 IBLA at 403. The fact that Appellant would prefer that BLM undertake no lethal predator control in the district does not establish a violation of that statute. Friends of the Bow, 139 IBLA at 150.

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 as either immaterial or inconsistent with the facts or law. See Friends of the Bow, 139 IBLA at 151, and cases cited therein.

We therefore conclude that the District Manager properly decided, in his April 1994 DR/FONSI, to go forward with an ADC Plan on public lands in the Casper District, Wyoming.

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

Gail M. Frazier
Administrative Judge

I concur:

James P. Terry
Administrative Judge