

ESCALANTE WILDERNESS PROJECT

IBLA 2002-210

Decided October 25, 2004

Appeal from a Decision Record/Finding of No Significant Impact of the Monument Manager, Grand Staircase-Escalante National Monument, Utah, Bureau of Land Management, deciding to reintroduce desert bighorn sheep and pronghorn antelope in the Grand Staircase-Escalante National Monument.
EA No. UT-030-01-027.

Affirmed as modified.

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

In deciding whether to authorize the reintroduction of big game wildlife on Federal lands, using predator control deemed necessary to the optimal success of the reintroduction effort, BLM is not required to consider the alternative of going forward with reintroduction without any such control, and did not violate section 102(2)(E) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(E) (2000), by failing to address that alternative.

APPEARANCES: James Jay Tutchton, Esq., and Robin Cooley, Esq., Environmental Law Clinic, University of Denver College of Law, Denver, Colorado, for the Escalante Wilderness Project; J. Mark Ward, Esq., and Martin B. Bushman, Esq., Office of the Attorney General, State of Utah, Salt Lake City, Utah, for the Utah Division of Wildlife Resources; Jared C. Bennett, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Escalante Wilderness Project (EWP) has appealed from a January 30, 2002, Decision Record/Finding of No Significant Impact (DR/FONSI), of the Monument Manager, Grand Staircase-Escalante National Monument, Utah, Bureau of Land

Management (BLM), deciding to reintroduce desert bighorn sheep (Ovis canadensis nelsoni) and pronghorn antelope (Antilocapra americana) into their historic ranges within the Grand Staircase-Escalante National Monument (Monument), in Kane and Garfield Counties, Utah, based on a September 2001 Environmental Assessment (EA) (No. UT-030-01-027).^{1/}

The Utah Division of Wildlife Resources (UDWR) proposed to reintroduce desert bighorn sheep and pronghorn antelope into selected parts of the Monument over a 10-year period, with annual releases of from 10 to 20 sheep and 60 to 70 antelope.^{2/} In order to promote the success of the reintroduction program, UDWR also proposed controlling predators of sheep and antelope, as follows:

[T]he State of Utah proposes to perform predator control measures for up to 2 years after each release. These measures would be carried out by the State of Utah and would be performed to allow sheep/pronghorn populations a better chance to become established. Prior to implementation of predator control measures by the State, officials from UDWR would seek input from Monument staff on what control activities, if any, would be appropriate for each site. Together, the two agencies would determine what the offending predator is and how best to address each specific situation. [^{3/}] [Emphasis added.]

^{1/} A separate appeal challenging the DR/FONSI (IBLA 2002-213) was brought by Forest Guardians on behalf of itself and Sinapu, Great Plains Restoration Council, Coalition to Abolish the Fur Trade, Rocky Mountain Animal Defense, The Fund for Animals, and Southern Utah Wilderness Alliance. That appeal was dismissed by order of the Board dated May 26, 2004.

^{2/} The current proposal is the latest of several similar projects approved by BLM, following environmental review, that resulted in the release, in the Monument, of close to 25 sheep and 100 antelope in 1999, and 20 sheep and 60 antelope in 2000. (BLM Response to Petition for Stay (Response) at 7; EA at 1-2.)

^{3/} UDWR has elsewhere explained:

“Predator control would only be implemented if it is decided necessary to help new populations [of bighorn sheep and pronghorn antelope] to successfully reproduce and grow. If any predator control is initiated, it would be limited to areas close to where sheep/antelope are living and not spread out indiscriminately across the Monument.”

(Letter to BLM, dated Oct. 19, 2001.)

(EA at 3.) UDWR expected that predator control should be reduced or eliminated “once newly transplanted populations of sheep/pronghorn have become acclimated to their surroundings and are showing signs of persistence.” Id. at 6.

BLM prepared its EA in September 2001 to provide the factual basis for a determination by BLM whether the reintroduction program was likely to result in any significant impact to the human environment and require prior preparation of an environmental impact statement (EIS), pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000).

In his DR/FONSI, the Monument Manager adopted the proposed action to authorize the reintroduction program, including State implementation of predator control. He also decided that no significant impact was likely to occur as a consequence of the program, and so an EIS was not required.

EWP timely appealed from the Monument Manager’s DR/FONSI, seeking a stay thereof. By order dated April 30, 2002, we granted a stay, and by order dated October 7, 2002, we granted UDWR’s motion to intervene.

EWP asserts that, while it generally does not oppose the reintroduction program, it does object to the predator control component of that program. See Notice of Appeal/Petition for Stay (NA/Petition) at 17. It argues that the EA is deficient and violates NEPA, because BLM failed to consider reintroduction without predator control as a reasonable alternative to the proposed reintroduction program. See id. (“We accept the role of predators in healthy ecosystems and would grieve for every predator needlessly killed due to BLM’s refusal to analyze a no predator control alternative”).

In its EA, BLM rejected consideration of a “no predator control” alternative on the basis that “[p]redator control measures fall under the authority and responsibility of the State of Utah for management of fish and wildlife,” rendering consideration of such an alternative “beyond the scope of the assessment.” (EA at 4.) BLM argued further on appeal that the State has the exclusive authority to render “final decisions on * * * implementing any post-release predator control measures,” and that BLM and this Board “cannot prevent the State of Utah from * * * implementing predator control measures regarding the reintroduced or other wildlife populations.” (Response at 4, 5.)

In our April 30, 2002, order granting EWP’s stay petition, we criticized as unsustainable BLM’s assertion that it had no authority to prevent State-sponsored

predator control on Federal lands. (Order at 9.) We now conclude that, although it erred with respect to the scope of its authority over wildlife on such lands, BLM did not violate section 102(2)(E) of NEPA, by failing to consider a no predator control alternative. Therefore, we affirm the Monument Manager's DR/FONSI, authorizing the reintroduction program assisted by predator control, as modified by our discussion below.

[1] Section 102(2)(E) of NEPA requires BLM to consider, in an EA, "appropriate alternatives" to the proposed action, as well as their environmental consequences. 42 U.S.C. § 4332(2)(E) (2000); see 40 CFR 1501.2(c) and 1508.9(b); City of Aurora v. Hunt, 749 F.2d 1457, 1466 (10th Cir. 1984); Bales Ranch, Inc., 151 IBLA 353, 363 (2000). Such alternatives should include reasonable alternatives to the proposed action that will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no impact. 40 CFR 1500.2(e); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1180-81 (9th Cir. 1990); City of Aurora v. Hunt, 749 F.2d at 1466-67; Bales Ranch, Inc., 151 IBLA at 363. Consideration of alternatives ensures that the decisionmaker "has before him and takes into proper account all possible approaches to a particular project." Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

Both BLM and the State contend that BLM lacks the statutory authority to restrict or preclude the State from undertaking predator control on Monument lands, and is barred from implementing, and need not consider, such an alternative. They argue that, under the plain language of section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (2000), as well as its legislative history, its implementing regulations, Presidential Proclamation No. 6920, dated September 18, 1996, establishing the Monument, and the Secretary's November 15, 1999, Record of Decision (ROD), for the Monument Management Plan, effective February 2000, BLM's authority to interfere with UDWR predator control decisions is, given the State's authority to manage wildlife on the Monument, strictly limited, and, in the circumstances at issue here, non-existent.^{4/} (BLM Supplemental Answer at 10; State Answer at 5, 15.)

BLM argues that such an alternative does not accomplish the intended purpose of the proposed action, since it falls outside the permissible purposes that BLM can seek to achieve through the exercise of its statutory authority, and need not be

^{4/} Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2000), provides that nothing in FLPMA "shall be construed * * * as enlarging or diminishing the responsibility and authority of the States for management of fish and wildlife."

considered. (Supplemental Answer at 4-5 (citing Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991)).) The State argues that, because BLM lacks statutory authority to modify UDWR's proposal, a no predator control alternative is not feasible, and need not be considered. (Answer at 5 (citing Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978)).)

We accept the general proposition that the State has primacy over wildlife, including predators, resident on Federal lands within the State, except when Congress has acted to assert the paramount interest of the United States in its own lands. Kleppe v. New Mexico, 426 U.S. 529, 543, 545-46 (1976); Wyoming v. United States, 279 F.3d 1214, 1226-27, 1235 (10th Cir. 2002); Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1248-50 (D.C. Cir. 1980). We find such an instance, for example, in the policy pronouncements of section 102(a) of FLPMA, 43 U.S.C. § 1701(a) (2000), that instruct BLM to manage the public lands in a manner that “will protect the quality of * * * environmental * * * values” and “will provide * * * habitat for * * * wildlife.” 43 U.S.C. § 1701(a)(8) (2000).^{5/} Given this declaration of policy, it is clear that BLM may promote big game wildlife use of the public lands, through reintroduction programs targeting favorable habitat for such reintroduced species. Moreover, in order to protect habitat for wildlife, it has been suggested that BLM has the authority to close lands under its jurisdiction to hunting and fishing for reasons related to the management of wildlife habitat. Defenders of Wildlife v. Andrus, 627 F.2d at 1249-50, n.8. Accordingly, we conclude that BLM has authority to properly restrict or preclude predator control on public lands based on wildlife habitat considerations.

Notwithstanding BLM's authority in such matters, we conclude that BLM was not required, by section 102(2)(E) of NEPA, to consider a “no predator control” alternative in conjunction with the big game wildlife reintroduction program. The reason is that such an alternative does not comport with the purposes of the proposed action. We, therefore, affirm BLM's decision to approve the project, based on this modified rationale.

^{5/} The regulations at 43 CFR Part 24, titled “Department of the Interior Fish and Wildlife Policy: State-Federal Relationships,” provide at 43 CFR 24.4(d) that, while the States have “primary authority and responsibility for management of fish and wildlife on Bureau of Land Management lands, the Secretary, through the Bureau of Land Management, has custody of the land itself and the habitat is a responsibility of the Federal Government.”

The intended purposes of a proposed action “define[] the scope of the alternatives analysis [in an EIS or EA],” since “[t]he range of alternatives is dictated by ‘the stated goal of a project,’” and only those alternatives that accomplish such purposes need be considered. Pit River Tribe v. BLM, 306 F. Supp.2d 929, 939, 940 (E.D. Cal. 2004) (quoting from Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 812 (9th Cir. 1999)).

The overall goal of the proposed action in the present case is to reintroduce big game wildlife to their historic ranges in the Monument and, when necessary to such reintroduction effort, to control predators in order to optimize the survival of such wildlife. (EA at 2.) It is evident that predator control, in the context of the reintroduction program, is not directed at eradicating predators within the Monument in order to protect livestock or wildlife. Rather, it is proposed for use in limited circumstances, employed only where and when necessary to protect specific reintroduced wildlife, to promote the success of the reintroduction program.

BLM stated that predator control was an option that might be employed “to allow sheep/pronghorn populations a better chance to become established.” (EA at 3; see UDWR Predator Management Plan, dated Feb. 8, 2001, at 1.) It further stated:

Predators by nature would prey upon sheep/pronghorn, especially their young, to provide food for themselves and their young. The Monument recognizes this as a natural process and welcomes it but insists that protective measures are sometimes needed to allow the newly transplanted animals, and their young, time to become established. [Emphasis added.]

(EA at 6; see Draft UDWR Bighorn Sheep [Herd] Unit Management Plan (Herd Unit No. 26, Kaiparowits), at 2.) As the Draft UDWR Pronghorn Herd Unit Management Plan (Herd Unit No. 26, Kaiparowits) stated at page 2: “Predation, especially by coyotes, can be a problem [for] pronghorn fawns. Initially, coyote control may be needed in fawning areas to assist in the establishment of the re-introduced animals.”

In addition, BLM provided that, prior to undertaking any predator control, UDWR would consult with BLM and determine “what control activities, if any, would be appropriate for each site,” and, further, “what the offending predator is and how best to address each specific situation.” (EA at 3, emphasis added; see Letter to BLM from UDWR, dated Oct. 19, 2001.) It is clear that the proposed action envisioned that no predator control might be warranted, and that, to the extent it was warranted, it would be targeted to specific areas of the Monument and specific

situations where reintroduced wildlife were at risk from particular predators. (EA at 6; Letter to BLM from UDWR, dated Oct. 19, 2001.)

A no predator control alternative that allows for the potential loss of reintroduced wildlife from predation, with no effort being undertaken to prevent that from occurring, would not promote the success of the reintroduction program, by optimizing the survival of reintroduced wildlife, and would not accomplish the purpose of the proposed action. That alternative is not a reasonable alternative to the proposed reintroduction of big game wildlife assisted by predator control. NEPA does not require BLM to consider such an alternative. See Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d at 813 (“NEPA does not require [a Federal agency] * * * to ‘consider * * * alternatives * * * inconsistent with its basic policy objectives,’” quoting from Seattle Audubon Society v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996)).^{6/}

We note that EWP raises other challenges to BLM’s decision to authorize the reintroduction program. First, EWP contends that BLM violated NEPA by failing to describe with specificity the release sites and/or reintroduction areas for desert bighorn sheep and pronghorn antelope, as well as their historic ranges, that would permit a level of site-specific review consistent with NEPA requirements. (NA/Petition at 13.) We agree that the record is not very specific regarding the historic ranges of the two species, where the sheep/antelope can be reintroduced consistent with the proposed program, or the specific release sites or reintroduction areas. See EA at 1, 3, 5. However, BLM determined that sufficient suitable habitat exists for further transplantation:

Current populations of sheep/pronghorn demonstrate that sufficient habitat exists within the Monument to allow for future releases. * * * Overflights and ground surveys demonstrate that sufficient area of suitable habitat still remains[.]

^{6/} EWP also argues that BLM failed to consider the “impacts” of allowing predator control on “predator populations,” and failed to disclose any information regarding the size and health of such populations. (NA/Petition at 3.) BLM, however, did consider such impacts, concluding that such control would temporarily reduce predator numbers in the area of the proposed releases, but that the numbers would return to normal, once control ceased and sheep/antelope became established. (EA at 7.) BLM clearly regarded this impact as minor, and certainly not significant. See DR/FONSI; EA at Appendix 1 (Fish & Wildlife). EWP has not shown that potential impacts on predator populations are likely to be significant.

Id. at 2. The specific release sites and timing are clearly intended to be left to determination by UDWR, with the assistance of BLM, near to the time of the actual annual releases, given outstanding forage and other conditions and the results obtained from monitoring past releases. See EA at 3-4, 7; Draft UDWR Bighorn Sheep [Herd] Unit Management Plan (Herd Unit No. 26, Kaiparowits); Draft UDWR Pronghorn Herd Unit Management Plan (Herd Unit No. 26, Kaiparowits). We find no fault with this approach. EWP fails to demonstrate that BLM did not analyze and consider the likely environmental impacts of the reintroduction program merely because release sites are not specifically identified in the EA. See NA/Petition at 12-13.

EWP contends that BLM violated NEPA by failing to consider the likely impacts of hunting (as well as other recreational pursuits) on the reintroduction program, and suggests that BLM should have addressed banning hunting in order to promote the success of the program. (NA/Petition at 2; see id. at 15.)

BLM acknowledged that hunting and other recreational use might occur in the reintroduction areas in the future.^{7/} (EA at 1, 2, Appendix 1 (“Interdisciplinary Team Review Record”) (Recreation).) Hunting attributable to the reintroduction program was to be expected, because the program was intended to achieve “management objectives” in UDWR’s bighorn sheep and pronghorn antelope “species management plans,” that included promoting recreational opportunities, including hunting. (EA at 3; see Draft UDWR Bighorn Sheep [Herd] Unit Management Plan (Herd Unit No. 26, Kaiparowits), at 2, 3; Draft UDWR Pronghorn Herd Unit Management Plan (Herd Unit No. 26, Kaiparowits), at 1.) However, we find no NEPA violation. BLM was required by section 102(2)(C) of NEPA to consider the potential environmental impacts of the proposed action, that was the reintroduction of desert bighorn sheep and pronghorn antelope on Federal lands, not the possible future increases in hunting.

Next, EWP contends that BLM violated NEPA by failing to address fully the likely impacts of livestock grazing on the reintroduction program, and to specifically consider a reasonable alternative of reducing or eliminating such grazing in order to

^{7/} In our Apr. 30, 2002, order, we pointed out that the proposed action at issue here did not itself effect any increase in hunting, and that, while it might eventually have that consequence, any increase was “certainly speculative,” being dependent on whether the prey species (reintroduced big game wildlife) reached suitable numbers, and whether the State then authorized hunting to occur. (Order at 4.) We concluded that any analysis of the effects of hunting, whether on the reintroduction program or otherwise, was “premature.” Id. We stand by that conclusion.

promote the success of the program. EWP notes that BLM did not accurately gauge the likelihood or extent of conflict between cattle and other livestock and bighorn sheep/pronghorn antelope, with respect to forage and water (especially during times of drought). It asserts that BLM erroneously concluded that it expected “very little competition” between livestock and sheep/antelope. (NA/Petition at 4 (quoting from EA at 4); see NA/Petition at 4-7, 14; Addendum to NA/Petition at 1-3.)

BLM declined to consider the alternative of reducing or eliminating livestock grazing.^{8/} (EA at 4.) It noted first that it has been documented that there are no domestic sheep within the Monument, that sufficient existing forage in the Monument has been allocated to both livestock and bighorn sheep/pronghorn antelope, and that, given their differing forage and habitat requirements, there is “very little competition” between cattle and sheep/antelope, even when they are in close proximity. (EA at 4, 7; see Declaration of Harry A. Barber, Wildlife Biologist, Monument, dated Apr. 4, 2002 (attached to BLM Response), at 2; Draft UDWR Pronghorn Herd Unit Management Plan (Herd Unit No. 26, Kaiparowits), at 2.) BLM concluded that it did not need to consider a reduced or no-grazing alternative since it would have no appreciable benefit to the reintroduced big game wildlife, compared to the proposed action. (Response at 11 (citing Southern Utah Wilderness Alliance, 141 IBLA 85, 93-94 (1997)).)

We find no NEPA violation. BLM was required by section 102(2)(C) of NEPA only to consider the potential environmental impacts of the proposed action, that was the reintroduction of desert bighorn sheep and pronghorn antelope on Federal lands, not the expected impacts of livestock grazing on the proposed action.

Next, EWP contends that BLM violated NEPA by failing to consider the cumulative impacts of the proposed action and other past, present, and reasonably foreseeable future actions on rangeland health (specifically vegetation, soil, water quality, riparian/wetland areas) and other Monument resources. The other actions cited by EWP are the authorizations for livestock grazing on the Federal lands of the Monument, especially grazing allotments that have already been “heavily utilized by livestock and which are seriously degraded compared to their ‘historic condition.’” (NA/Petition at 7.)

^{8/} The proposed action itself provided for “[n]o livestock stocking changes,” noting however: “Prior to the proposed releases, the wildlife staff and the range staff would meet to discuss livestock/wildlife interactions. Within these meetings forage condition for the specific area would be discussed so as to avoid unnecessary livestock/wildlife conflicts.” (EA at 4.)

We agree that consideration of cumulative impacts is required by section 102(2)(C) of NEPA. However, BLM did so when it evaluated all resource values (including rangeland health) for cumulative impacts, concluding that they would be negligible. (EA at 3, 6, 7-8, Appendix 1.) EWP has not established that there are likely to be any cumulative impacts stemming from the reintroduction program and livestock grazing use that BLM failed to consider, given the small numbers of additional animals, annually and cumulatively, that will be introduced, or that such impacts are likely to rise to significance, requiring preparation of an EIS.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Monument Manager's January 2002 DR/FONSI is affirmed as modified.

H. Barry Holt
Chief Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge