



CALIFORNIA WILDERNESS COALITION, ET AL.

176 IBLA 93

Decided September 26, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

CALIFORNIA WILDERNESS COALITION, ET AL.

IBLA 2008-12

Decided September 26, 2008

Appeal from a Decision Record and Finding of No Significant Impact approved by the Field Manager, Needles (California) Field Office, Bureau of Land Management, authorizing a subterranean artificial water source for desert bighorn sheep within the Sheephole Valley Wilderness. EA CA-690-EA05-25.

Affirmed.

1. California Desert Protection Act of 1994--Federal Land Policy and Management Act of 1976: Wilderness--Wilderness Act

Installation of an artificial water source for the purpose of restoring wildlife populations and their habitat is not, as a matter of law, prohibited by the California Desert Protection Act or the Wilderness Act.

2. California Desert Protection Act of 1994--Federal Land Policy and Management Act of 1976: Wilderness--Wilderness Act

Approval of an artificial water source for desert bighorn sheep within a wilderness area will be affirmed where the record establishes that installation of the project is consistent with the California Desert Protection Act and the Wilderness Act.

APPEARANCES: Laurens H. Silver, Esq., Mill Valley, California, and Lisa T. Belenky, Esq., San Francisco, California, for the appellants; Erica L.B. Niebauer, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

California Wilderness Coalition ¹ (collectively, appellants) have timely appealed a September 12, 2007, Decision Record (DR), Finding of No Significant Impact (FONSI), and accompanying environmental assessment (EA), entitled *Proposed Installation, Use And Maintenance Of The Sheep Hole Mountains S.D. Big Game Artificial Water Source, San Bernardino, California CA-690-EA05-25*, issued by the Needles (California) Field Office, Bureau of Land Management (BLM). In the DR, BLM approved the proposal of the California Department of Fish and Game (CDFG) to install, operate, and maintain an artificial water source (AWS, catchment, drinker, or guzzler), designated by BLM as the S.D. AWS, to be located in the Sheephole Valley Wilderness, approximately 25 miles east of the city of Twentynine Palms, in the NE¹/₄ sec. 34, T. 2 N., R. 12 E., San Bernardino Meridian, California. EA at 3, 28.

The Sheephole Valley Wilderness was established by section 102(61) of Pub. L. No. 103-433, 108 Stat. 4480 (1994), popularly known as the California Desert Protection Act of 1994 (CDPA), which, among other things, amended the Wilderness Act, 16 U.S.C. § 1132 (2000), to extend wilderness protection to selected lands formerly within the California Desert Conservation Area. Appellants assert that installation of the guzzler would violate the intent of the Wilderness Act and the CDPA to inhibit human interference in areas designated as wilderness. They claim that there is no need for the project—that it is unnecessary for preservation of the endemic bighorn sheep population. In addition, they argue that the proposal violates the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) and (E) (2000), and its implementing regulations, under which BLM is required to assess the environmental consequences of the proposed action. They specifically assert that BLM failed to consider a reasonable range of alternatives; failed to consider the proposal in terms of CDFG's long-term plan to increase the bighorn sheep population across several mountain ranges in the southern Mojave Desert; and failed to consider adverse impacts to the threatened desert tortoise population that could result from artificially augmenting water supplies in habitat the tortoise shares with bighorn sheep.

As discussed below, we hold that appellants have not established that the project violates the CDPA or the Wilderness Act; nor have they established that BLM committed a clear error of law or demonstrable error of fact in its environmental

¹ The other appellants are: Center for Biological Diversity, Defenders of Wildlife, Desert Protective Council, Desert Survivors, Natural Resources Defense Council, The Wilderness Society, and Wilderness Watch.

analysis of the proposal pursuant to NEPA, or failed to consider an environmental question of material significance to the proposed action. Accordingly, we affirm.

I. Background

The AWS proposal arose from an ongoing cooperative effort between BLM and CDFG to enhance bighorn sheep distribution and habitat on public land within the south Mojave Desert in general and the Sheep Hole Mountains in particular.² EA at 8-9. The need for the project is supported by data revealing the radical decline of the bighorn sheep population—a once abundant indigenous species.³ *See generally* EA at 19-22, and 76-80 (*Appendix C: The Demise of Mountain Sheep: A Brief History of California's Wild Sheep Populations and Department Efforts in the Sheep Hole Mountains*).⁴

To that end, CDFG devised a strategy to facilitate bighorn sheep restoration “in the South Mojave Metapopulation area” by providing water sources “in the central ranges,” beginning in the Sheep Hole Mountains. EA at 8. The EA states that the AWS is needed to encourage growth and increased viability of the Sheep Hole population, or “deme,” and acknowledges that the guzzler at issue here is the third to

² BLM's authority to enter into cooperative agreements with state and Federal agencies, such as the proposal by CDFG at issue here, for use and development of the public lands for purposes similar or closely related to those of the Department, is granted by sections 302(b) and 307(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1732(b) and 1737(b) (2000), respectively.

³ In the early 1900's, the California bighorn sheep population was approximately 10,000. EA at 19. Population records documented an estimated low of 12 sheep in the Sheep Hole Mountains Management Unit in 1971 and 1982. *See* BLM Answer at Attachment 4, a copy of CDFG's 1991 *Bighorn Sheep Management Plan: Sheephole Mountains Management Unit*, prepared by Pauli and Bleich, at unnumbered 7. The 2005 population estimate for bighorn sheep in the Sheep Hole Mountains was 125. EA at 64 (*Appendix A: Sheep Hole Mountains Sheep Survey Data 1997-2005*).

⁴ The EA identifies “[i]mportant features of their habitat includ[ing] topography (elevation, slope aspect, connectivity to other mountain ranges), forage (quality and quantity), and the availability of water.” EA at 19. It cites research that places responsibility for the decline of the species' population on the loss of habitat that encourages free migration between mountain ranges and the disappearance of water sources—both conditions resulting from drought—and, in no small part, on human appropriation of land and natural waters. *Id.* at 7-8.

be constructed of the five or six planned in the Sheep Hole Mountain range. *Id.* at 8, 50 (Map 4). The purpose and need for the project, it explains, is to expand use of additional bighorn habitat within the Sheep Hole Mountains, which are geographically centralized within the South Mojave and currently support the largest deme. *Id.* at 8. When combined with projected water source development, the AWS could connect bighorn sheep habitat and thereby promote migration across the Calumet, Bullion, Coxcomb, and Pinto Mountain ranges, potentially increasing the prevalence of bighorn sheep populations in five mountain ranges northeast, east, and southeast of the city of Twentynine Palms. *Id.* at 51 (Map 5), 52.

The DR authorizes construction, operation, and maintenance of a water catchment and drinker system, comprising “a small concrete dam, a metal pipeline, a buried 10,000-gallon storage tank, and a 2,500-gallon wildlife accessible subterranean drinker.” DR at 2. It describes in detail how the site will be excavated, how the storage tank and drinker will be installed, and how the dam will be constructed. *Id.* at 2-3.⁵ The DR authorizes a construction plan which will use excavating equipment to disturb “a 100 x 140 feet area” around the installation site, as well as “an existing 50 x 50 feet vehicle turnaround area currently adjacent to the work site.” *Id.* at 2. Access to the site will be via a 1/2-mile-long “preexisting dirt vehicle way to a former mine site.” *Id.*

In the EA, BLM considered two alternatives in detail: the proposed action just described, and the no action alternative. EA at 9-15, 17. BLM eliminated five alternatives from consideration as infeasible, either because they would not accomplish stated goals or would adversely affect the Sheephole Valley Wilderness more than the proposed action. *Id.* at 16-17.

The EA considered impacts of the proposed project on wilderness values. It determined that the AWS would impact the naturalness of the Sheephole Valley

⁵ The dam will be used to facilitate capture of runoff from seasonal rainfall via an “exposed corrugated galvanized steel pipe” and a buried 6-inch ABS plastic pipe, which will collect both surface and subterranean water flows and direct them into the storage tank. DR at 3. The dam will “partially block water flow in the wash and be no more than 2.5 feet at the highest point,” and will be constructed of “reinforced concrete and faced with native stone collected at the site to blend into the surrounding landscape.” *Id.* The storage tank will be buried underground. The drinker will be 16 feet long, 4 feet wide, and 8 feet deep, and will also be embedded underground, except for the entrance, which will be “the width of the drinker, fanning from 4 feet to 8 feet in width.” *Id.* The entrance will be “a ramp with steps so that animals having access to the water can escape easily.” *Id.*

Wilderness in two ways: (1) by adding “a permanent man-made structure” to an environment “primarily affected by natural processes”; and (2) by introducing the use of vehicles and motorized equipment in the wilderness to build and maintain the guzzler. EA at 37. Approximately 0.9 acres of wilderness lands, including the access route and construction site, would be disturbed. *Id.* at 38. Disturbance would be greatest during the proposed 5-day construction phase when opportunities for solitude would be impacted, but these impacts would be mitigated by advance notice to the public and suggestions for alternatives. *Id.* Although about 1/2-mile of “new vehicular tracks on the existing way” would result, they would be raked out, and neither creation of a well-defined way nor illegal off-highway vehicle use would be expected. *Id.* There would be some motorized activity associated with maintenance of the guzzler, but this would not be expected to occur but once every 5 years. *Id.* Helicopter use in connection with population surveys and other monitoring or maintenance activities could be expected 2 days per year. *Id.* A viewshed analysis determined that the proposed project site is “in the line of sight from 653 acres,” or approximately .03% of the 194,847-acre Sheephole Valley Wilderness. The EA concludes that while the completed installation would be visible from portions of the wilderness, it would not be “substantially noticeable” because the site would be “recontoured and raked to match the surrounding area.” *Id.*

The proposal also *supports* wilderness values, according to the EA: “Bighorn populations contribute to the biodiversity of the wilderness, and may play a key role in the ecosystem through their role as large herbivores.” EA at 39. The return of the bighorn, in a “viable, more consistently viewable population,” will enhance wilderness values by “return[ing] the feeling that humans are visitors and that the wilderness area is untrammelled by man.” *Id.* Moreover, the EA projects that supporting “[m]aintenance and restoration of bighorn in the Sheep Hole Mountains,” will benefit adjoining wilderness areas. *Id.* at 39-40. By contrast, the no action alternative would leave the bighorn population at risk due to drought and dwindling habitat, a consequence at odds with the Department’s “management goals for the Sheephole Valley Wilderness to create the opportunity for better utilization of the range, increase the distribution of sheep across the range, and expand the availability of permanent water,” the EA concludes. *Id.* at 40-41.

BLM determined that installation of the guzzler would cause no significant adverse impacts to wilderness values, pointing out that the presence of artificial water sources prior to designation of the Sheephole Valley as wilderness did not prevent its inclusion under the Wilderness Act, and that this particular proposal merely adds to an existing system. FONSI at unnumbered 4. The FONSI specifically addressed appellants’ concerns that the project would “interfere with natural processes to augment a big game species,” stating that the CDPA expressly authorizes

“the CDFG to ‘maintain or restore’ wildlife populations.” *Id.* at unnumbered 3-4. The FONSI states that there will be no significant impacts to desert tortoise or their habitat, explaining that the project area is largely unsuitable as desert tortoise habitat, known densities of the species in the area “are quite low,” and all terms and conditions of the 1997 “*Biological Opinion for Small Projects Affecting Desert Tortoise Habitat in . . . Riverside and San Bernardino Counties*” will be made binding stipulations upon the CDFG for installation and maintenance of the proposed guzzler. *Id.* at unnumbered 5.

Accordingly, the Field Manager for the Needles Field Office, BLM, approved the CDFG proposal to “construct, operate, and maintain” the AWS, as reviewed in the EA and set forth in the DR, with mitigation measures set forth in the Conditions of Approval (COAs) incorporated and made a part of the DR.⁶ Appellants timely appealed.

II. Arguments

Appellants first argue that BLM’s interpretation of section 4(c) of the Wilderness Act of 1964, *as amended*, 16 U.S.C. § 1133(c) (2000), and section 103 of the CDPA, Pub. L. No. 103-433, 108 Stat. 4481-82 (1994), to permit new artificial water systems in wilderness areas is erroneous. SOR at 20-37; Reply to BLM Answer at 1-15. They contend that the DR/FONSI is inconsistent with the Wilderness Act and the CDPA, which permit management actions in wilderness areas only to the minimal extent they are “necessary to fulfill the purposes of the Wilderness Act.” SOR at 21-25, 29-36. Appellants charge that BLM has not shown that the proposed guzzler is “necessary and meets minimum requirements for the administration of the area as wilderness,” *id.* at 30, and they assert that the purpose of the proposal is to “intentionally manipulate” bighorn populations in order to enhance their numbers in areas outside of wilderness, as well as in wilderness where the bighorn was not historically found. Such a purpose, they maintain, violates the intent of the Wilderness Act that “wilderness will be untrammelled by intentional human interference with natural processes.” *Id.* at 36.

Second, they assert that BLM’s environmental analysis violates NEPA on three grounds. First, the EA failed to consider a reasonable number of alternatives to the proposed action including existing mine shafts, adits, or natural tinajas (water holes);

⁶ The COAs include, among others, specific instructions pertaining to the construction and operation of the drinkers, locating ordnance, the desert tortoise, bighorn sheep, prairie falcon, invasive and nonnative species, cultural resources and Native American religious values, land use, and wilderness. DR at 7-12.

alternative sites outside of wilderness areas; and using the two existing sites more efficiently. SOR at 28-29. Second, the EA failed to consider the guzzler as part of a “larger, connected action,” in violation of 40 C.F.R. § 1508.25(a)(1). *Id.* at 37-39; Reply at 15-17. Third, the EA’s analysis of the environmental impacts is flawed, because it failed to consider the favorable impact of artificial water sources on raven populations, which prey on the desert tortoise. SOR at 39-40; Reply at 17-18.

BLM responds that neither the Wilderness Act nor the CDPA prohibits the construction of artificial water systems in wilderness areas for the maintenance and restoration of wildlife populations, nor is the DR/FONSI violative of the provisions of the Wilderness Act and the CDPA; indeed, the action as proposed in the DR/FONSI is consistent with their purposes. Answer at 2-12, 16-21. With respect to NEPA, BLM counters that: its analysis of alternatives was reasonable, *id.* at 12-16; it was not required to analyze the impacts of the AWS as part of a larger plan to install guzzlers across the California Desert Conservation Area, *id.* at 21-25; and the EA adequately analyzed the impacts of the proposed plan, *id.* at 25-27.

III. Analysis

A. The Wilderness Act and the CDPA

[1] Citing to the legislative history of the CDPA, appellants argue that section 4(c) of the Wilderness Act⁷ limits section 103(f) of the CDPA to those activities “necessary in light of the principal use of the area as wilderness” and which “involve means that are minimally intrusive to accomplish that purpose.” SOR at 21. They contend that the legislative history of the CDPA establishes that no new guzzlers are to be permitted in wilderness areas, and that motorized access is only permitted to existing guzzlers. *Id.* at 22-24.

Notwithstanding the definition of wilderness as an area “untrammeled by man,” 16 U.S.C. § 1131(c) (2000),⁸ the Wilderness Act does not prohibit active

⁷ Section 4(c) of the Wilderness Act, 16 U.S.C. § 1133(c) (2000), generally prohibits commercial enterprise, permanent or temporary roads, mechanical transports, and structures or installations in wilderness areas, except for purposes of area administration, or in emergencies involving health and safety.

⁸ Section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (2000), defines “wilderness,” in pertinent part, as follows:

A wilderness, is . . . recognized as an area where the earth and its

(continued...)

management of wilderness areas. Rather, it charges managing agencies with preserving their “wilderness character,” while at the same time administering them for “such other purposes for which [they] may have been established.” 16 U.S.C. § 1133(b) (2000). In furtherance of preserving wilderness character, it generally prohibits commercial enterprise, permanent roads, motorized equipment, mechanical transport, and structures and installations within wilderness areas, but expressly recognizes that, from time to time, otherwise prohibited uses may be “necessary to meet minimum requirements for the administration of the area for the purpose of this chapter” 16 U.S.C. § 1133(c) (2000). It also contemplates that wilderness areas may be used for multiple public purposes not *solely* devoted to wilderness character: “Except as otherwise provided in this chapter, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.” 16 U.S.C. § 1133(b) (2000).

Section 102 of the CDDPA amended the Wilderness Act of 1964 by designating certain lands formerly within the California Desert Conservation Area, including lands in the Sheephole Valley, as wilderness. 16 U.S.C. § 1132 note (2000); Pub. L. No. 103-433, 108 Stat. 4480 (1994). Section 103(a) of the CDDPA, 108 Stat. 4481, provides that “each wilderness area designated under section 102 shall be administered by the Secretary of the Interior . . . in accordance with the provisions of the Wilderness Act, except that any reference in such provisions to the effective date of the Wilderness Act shall be deemed to be a reference to the effective date of this title [October 31, 1994].” Consistent with the Wilderness Act, the CDDPA articulates multiple public purposes for creating wilderness areas in the California Desert, which, among others, are to preserve “unrivaled scenic, geologic, and wildlife values associated with these unique natural landscapes,” to “perpetuate in their natural state significant and diverse ecosystems of the California desert,” and to “protect” and “interpret” “ecological” and “historic” features of the desert, while maintaining

⁸ (...continued)

community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean . . . an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; . . . and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

wilderness values. Pub. L. No. 103-433, 108 Stat. 4472 (1994). In addition, Section 103(f) sets forth a specific instruction pertaining to wildlife that bears directly upon the situation in dispute here: “Management activities to maintain or restore fish and wildlife populations and the habitats to support such populations may be carried out within wilderness areas designated by this title and shall include the use of motorized vehicles by the appropriate State agencies.” Pub. L. No. 103-433, 108 Stat. 4482 (1994).

Since the statutory provisions of the CDPA, when read as a whole, are unambiguous, resort to legislative history to ascertain Congressional intent is unwarranted. *Alice Rock*, 168 IBLA 54, 59 (2006), quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”); see also *Davis Oil Co.*, 79 IBLA 218, 220 (1984). The intent of Congress with respect to management to maintain or restore wildlife populations within wilderness areas created by the CDPA is unambiguously set forth in section 103(f), which bears repeating: “Management activities to maintain or restore . . . wildlife populations and [their] habitats . . . may be carried out within wilderness areas designated by this title and shall include the use of motorized vehicles by the appropriate State agencies.” Installing an artificial water source for the purpose of restoring wildlife populations and their habitat is not, as a matter of law, prohibited by the CDPA or the Wilderness Act. Indeed, the language of the Wilderness Act supports such efforts in wilderness areas to the extent they do not conflict with preserving wilderness character.

[2] Appellants see just such a conflict with preserving the area’s wilderness character in the construction and operation of another water catchment in the Sheephole Valley, whereas BLM views the AWS, on balance, as benefitting the wilderness experience. BLM contends that more bighorn sheep in the valley will enhance ecological diversity and man’s sense of impermanence there.

These perspectives represent points of view at opposite ends along a subjective continuum. As noted in *Howard G. Booth*, 134 IBLA 300, 305 (1996), BLM is required to make subjective judgment decisions when assessing whether a proposed action would impair the suitability of the area for preservation as wilderness, and its “subjective judgment decisions are entitled to considerable deference, even though reasonable men might differ in making such assessments.” When an appellant challenges BLM’s subjective decisions in an appeal, we stated, “they may not be overcome by mere expressions of disagreement. There must be a showing of clear

error of law or demonstrable error of fact.” *Id.* In this case, appellants have failed to meet that burden.

The Sheephole Valley was recommended for wilderness consideration for two reasons: its relatively pristine nature and unique character, and the fact that the designation “would afford a degree of protection of the small bighorn sheep herd” as well as the desert tortoise population. 1980 Final Environmental Impact Statement for the California Desert Conservation Area, Vol. B (Appendix III) at 543. That document noted that “[a]bout one-tenth of this WSA . . . is permanent range of the Sheephole Mountains bighorn sheep herd, numbering approximately 12 individuals.” *Id.* at 541. The 1980 *California Desert Conservation Area Plan* (CDCAP) stated that, after Congressional designation, areas designated as wilderness “will be managed in accordance with the Wilderness Act, the specific legislation approving wilderness designation, and approved Wilderness Management Plans.” CDCAP at 55. It documented that individual plans would contain actions that, among other things, maintain (1) an “enduring system of high-quality wilderness,” (2) “plants and animals indigenous to the area,” (3) “stable watersheds within constraints of the . . . Wilderness Act”; and consider (4) “protection needs for populations of threatened or endangered species and their habitats” and (5) “valid nonconforming resource uses and activities in the management of wilderness so as to have the least possible adverse effect and/or whenever possible, a positive effect.” *Id.* The record before us confirms that the action approved in the DR/FONSI and analyzed in the supporting EA fulfill these goals.

BLM began its analysis with the premise that “[t]he survival and human sightings of desert bighorn sheep are important supplemental wilderness values. Desert bighorn have played an intricate role in the lives of ancient people, based upon their numerous representations in Native American rock art. Today’s wilderness experience is enhanced by viewing bighorn sheep.” EA at 56. BLM’s analysis continues:

The proposed action has been determined to meet BLM guidelines for the minimum necessary requirement to administer the wilderness because the persistence of bighorn sheep cannot be assured without the supplemental water. The CDFG assessment of the habitat requirements necessary for a viable deme in this metapopulation and the need to mitigate the effects of past human disturbances on bighorn sheep in the region necessitate the man-made structure. . . .

. . . The construction and maintenance of artificial large animal water sources would impair wilderness naturalness and solitude during

initial construction activities, during the transport of heavy materials and equipment, and while continuing to operate these structures. The actual guzzlers once in place would have a low visual profile and meet the visual standards for wilderness. The . . . design would place the majority of structures below ground. This design along with the remote location would allow the landscape to appear in a natural state and unaltered by human activity after the impacts associated with initial construction have faded. BLM would determine the minimum necessary requirement for any future water source installations separately, based on the site-specific situation.

Id.

The EA establishes that a temporary impairment of wilderness values will be mitigated to the point of insignificance and that permanent impacts to wilderness values will be minimal to non-existent. *Id.* at 37-39, summarized *supra*. While appellants fundamentally disagree with BLM's premise that the persistence of bighorn sheep cannot be assured without supplemental artificial water sources, they have not demonstrated that construction and operation of the fixture as designed in the DR and supporting documents will permanently impair the unique wilderness character of the landscape, which historically included thriving populations of bighorn sheep. They thus have not established that the catchment is inconsistent with the Wilderness Act or the CDPA.

Appellants further argue that BLM's NEPA analysis fails to support the purpose and need for the project, and that, without clear necessity, the threshold for hurdling section 4(c) of the Wilderness Act, 16 U.S.C. § 1133(c) (2000), is not met. They assert that research relied on by CDFG establishes that the Sheep Hole deme is thriving without the additional water source, rendering its purpose and need superfluous. SOR at 30-33; Reply at 8-9.

CDFG's conservation strategy, entitled *Overview and Management Objectives for the Sheep Hole - Calumet Mountains Subpopulation*, serves as the foundation for BLM's determination that the AWS will benefit the Sheep Hole deme as well as bighorn populations across the southern Mojave. See EA at 66-75 (*Appendix C*). Relying on the research of Epps, *et al.* 2003,⁹ CDFG states that "[t]he Sheep Hole Mountains subpopulation is currently the largest in the South Mojave metapopulation" but that the population is vulnerable, "as it contains less than [50] adult ewes, which is one of

⁹ That research article, entitled "Status of Bighorn Sheep in California," is found in *Desert Bighorn Council Transactions* 47:20-35. EA at 73.

several of the Department's minimum desired population indices."¹⁰ *Id.* at 70. CDFG's premise is that individual bighorn demes benefit from the ability to migrate across mountain ranges, and, in order to do that, they must have access to strategically located water sources.

Accordingly, the three main purposes for the project, the EA states, are to increase the distribution and dispersal of the sheep throughout the Sheep Hole Mountains, to enhance population stability both locally and across ranges, and to sustain "viable population demographic parameters." EA at 8-9. The EA identifies the following corresponding needs: to "encourage use of additional habitat within the Sheep Hole Mountains where the lack of available water is a limiting factor"; to achieve minimum population parameters for the deme, which are at least 50 adult females and a 40:100 ram:ewe ratio; and to ensure the "long-term viability" of the deme, which is "critical to the health of the metapopulation." *Id.* at 9.

It is clear that CDFG and BLM considered whether the AWS is necessary for the long-term viability of the bighorn sheep population in the Sheep Hole Mountains and the surrounding ranges. There is ample citation to research supporting BLM's conclusion that the AWS is necessary to ensure the viability of the Sheep Hole deme. *See EA, Appendix B.* This Board has long held when an appellant's assertions merely represent a different point of view in the controversy over what course of action is in the public interest, a BLM decision in the exercise of its discretion will ordinarily be affirmed when such judgment has been exercised by an official duly delegated with the authority to do so. *Arizona Zoological Society*, 167 IBLA 347, 356 (2006), and cases cited. Even when there is doubt whether the BLM action is necessary to achieve the cited objective, the Board will not substitute its judgment for that of the technical experts employed by BLM acting within their field of expertise, absent a showing of clear error. *Id.* In this case, appellants have not shown error in the BLM decision, but have merely presented evidence of a difference of opinion regarding the potential efficacy of providing water catchments for bighorn sheep. This is not a sufficient showing to overturn BLM's decision under either NEPA or section 4(c) of the Wilderness Act, which provides that otherwise prohibited uses may be permitted where "necessary to meet minimum requirements for the administration of the area for purposes of this chapter." 16 U.S.C. § 1133(c) (2000).

The Board will affirm BLM's approval of an AWS for desert bighorn sheep within a wilderness area designated by the CDPA where the record establishes that installation of the project is consistent with the CDPA and the Wilderness Act.

¹⁰ Population studies in 2005 observed 63 animals. EA at 64 (*Appendix A*).

B. NEPA

A BLM decision to approve an action based on an EA and FONSI will generally be affirmed if BLM has taken a “hard look” at the proposed action, identified relevant areas of environmental concern, and made a convincing case that the environmental impacts are insignificant or that any such impact will be reduced to insignificance by the adoption of appropriate mitigation measures. A party challenging BLM’s decision has the burden of demonstrating with objective proof that the decision is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider an environmental question of material significance to the proposed action. *Arizona Zoological Society*, 167 IBLA at 357. Mere differences of opinion provide no basis for reversal. *Id.*; *Rocky Mountain Trials Association*, 156 IBLA 64, 71 (2001).

1. *The Range of Alternatives.*

BLM is required by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (2000), to consider “appropriate alternatives” to a proposed action, as well as their environmental consequences. *See* 40 C.F.R. §§ 1501.2(c) and 1508.9(b); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 834 (D.C. Cir. 1972); *Santa Fe Northwest Information Council, Inc.*, 174 IBLA 93, 116 (2008), and cases cited. Appropriate alternatives are those that are reasonable alternatives to the proposed action, will accomplish its intended purpose, are technically and economically feasible, and yet have a lesser or no impact. 40 C.F.R. § 1500.2(e); 46 Fed. Reg. 18026, 18027 (Mar. 23, 1981); *Wilderness Workshop*, 175 IBLA 124, 135 (2008) and cases cited; *Biodiversity Conservation Alliance*, 174 IBLA 1, 24-25 (2008). This ensures that the BLM decisionmaker “has before him and takes into proper account all possible approaches to a particular project.” *Calvert Cliffs’ Coordinating Comm., Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). To show a failure to consider sufficient alternatives, an appellant must posit an alternative that would meet the test described above. *Biodiversity Conservation Alliance*, 174 IBLA at 25.

Appellants maintain that BLM did not fully explore options maximizing the utility of existing guzzlers, installing temporary drinkers, using seasonal water holes or old mine workings, or placing a water trough outside of wilderness boundaries. SOR at 28-29, 32. Our review reflects otherwise. BLM gave consideration to each of these ideas. To begin, the EA considered the use of existing water sources as the “no action alternative.” This was ultimately rejected because it would not serve the purpose and need for the project. EA at 40-41. Establishing a water source outside the wilderness area was excluded from consideration because “locations outside

wilderness would not be associated with steep escape terrain for the sheep,” forage would not be as nutritious, and human-related disturbances would be greater. *Id.* at 16. The installation of an above-ground storage tank and drinker was eliminated because it would require more maintenance and monitoring, would corrode more quickly thereby having a “shorter functional life span,” and would have a greater impact on wilderness characteristics than the subterranean drinker. *Id.* Installing the AWS without the use of mechanized equipment or vehicles other than helicopters was discarded as unfeasible because of the weight and mass of the components involved, “the challenges of working in bedrock and [moving] large boulders without mechanical means,” increased risks to workers, and longer project duration. *Id.* Directly transplanting sheep into adjacent mountain ranges was omitted from further consideration because: it has not, in the long run, been found to be successful; it would not expand available habitat; and adequate funding and staff are not available. *Id.* Existing mine shafts, adits, or natural water holes were rejected because they are not reliable year-round sources of water and pose hazards for construction and maintenance crews, as well as for the sheep. *Id.* at 16-17.

The record more than amply justifies BLM’s rejection of alternatives advanced by appellants. Having examined appellants’ assertions, we cannot find that they have carried their burden of demonstrating that their preferred alternatives would achieve the intended purpose of the proposed project at less cost to the environment and are technically and economically feasible in the particular circumstances of the present case. *Wilderness Workshop*, 175 IBLA at 137; *Biodiversity Conservation Alliance*, 174 IBLA at 24-25; *Missouri Coalition for the Environment*, 172 IBLA 226, 242 (2007). We are not persuaded that the range of alternatives was inadequate and, therefore, find no violation of section 102(2)(E) of NEPA.

2. Potential Impacts of Future Possible Guzzlers

Appellants, citing the Council on Environmental Quality regulations at 40 C.F.R. § 1508.25(a)(1), argue that BLM failed to consider “the impacts of the larger, interconnected action—the proposed installation of guzzlers throughout the CDCA. . . .” SOR at 38. They allege that BLM has approved the AWS “without consideration of the CDFG over-all plan to install scores of guzzlers in other Wilderness Areas as well as non-wilderness areas,” and that “[b]y piece-mealing its consideration of guzzler construction, and approving guzzler construction one at a time, BLM has segmented a project into multiple actions, ‘each of which individually has an insignificant environmental impact, but which collectively have a substantial impact,’” citing *Thomas v. Peterson*, 753 F.2d 754, at 756-59 (9th Cir. 1985). *Id.* at 38-39. BLM responds that the guzzler “is not an interconnected action” because no other guzzlers have been proposed at this point in time, and that BLM, in fact,

considered the theoretical possibility that additional guzzlers would be planned in its environmental analysis of cumulative impacts. Answer at 21-25.

Our review of BLM's responsibility, under NEPA, to consider the possible impacts of another action when added to the impacts from the proposed action focuses not on 40 C.F.R. § 1508.25(a)(1), which identifies a type of action that agencies should consider when developing the scope of an environmental impact statement (EIS), but on 40 C.F.R. § 1508.27(b)(7), which identifies one of the criteria used in evaluating the intensity of impacts to determine whether impacts of a proposed action are "significant," and triggers the need to prepare an EIS. Under that regulation, BLM must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). "Significance exists," the regulation continues, "if it is reasonable to anticipate a cumulatively significant impact on the environment." *Id.* The rule cautions that "[s]ignificance cannot be avoided by terming an action temporary or by breaking it down into small component parts." *Id.*

BLM considered the potential for additional guzzlers in the Sheep Hole and Calumet Mountains. On Map 4, the EA projects the possibility of two future CDFG catchments for the Sheep Hole Mountains, plus three others for the Calumet Mountains. EA at 50. But BLM noted that these potential catchments are dependent upon a number of presently unquantifiable variables, including reproduction rates, forage capacity, and other environmental factors. BLM estimated it would be 5-10 years before it is known whether additional water projects would be needed in the SDCEA, due to the variety of factors influencing population growth. *Id.* at 52. It concluded that "[a]side from the construction and maintenance of five additional artificial large animal water sources within the Sheephole Valley Wilderness and the one additional guzzler in the Bullion Mountains . . . [,] there are no other reasonably foreseeable future actions projected in the SDCEA." *Id.* at 54. But the EA unequivocally states:

Approval of the SD Guzzler will not foreclose BLM's options with regard to these additional guzzlers BLM will continue to retain the option of selecting the No Action alternative for any or all of [them]. . . . As these new projects are proposed in detail by CDFG, BLM [will] analyze potential ways to mitigate . . . impacts . . . on a site-specific basis in a separate EA and reanalyze cumulative impacts based on the SD guzzler as an existing facility. The results of new bighorn and wilderness monitoring would also be included in a revised

cumulative impacts analysis before any future proposed big game guzzler would be approved by the BLM.

Id. at 49.

The EA considered future CDFG guzzler projects beyond these five potential ones “too uncertain to include in the cumulative effects analysis.” EA at 52. Appellants have not shown that BLM erred in declining to consider possible impacts of speculative future actions. *Annunziata Gould*, 176 IBLA 48, 66 (2008), citing *Glacier-Two Medicine Alliance*, 88 IBLA 133, 143 n.7 (1985), and *G. Jon and Katherine M. Roush*, 112 IBLA 293, 306 (1990).

We have reviewed the EA and are satisfied that it contains a thorough discussion of the cumulative impacts from past, present and reasonably foreseeable future actions at 53-58. Appellants offer no evidence as to what significant impacts might occur or the likelihood of their occurrence. *G. Jon and Katherine M. Roush*, 112 IBLA at 306. They, therefore, have failed to identify any potential impact of a reasonably foreseeable action that is significant or would not be reduced to insignificance by required mitigation measures.

3. *Potential for Adverse Impacts to the Desert Tortoise*

The EA points out that the proposed project is not located in desert tortoise critical habitat. A survey of the project site and its proposed access route indicated no signs of tortoise, and surveys north of the site indicated that none or only a few tortoise are present in the general area. EA at 17-18. The EA considered potential effects of the guzzler on the desert tortoise, stating that “[d]ue to the rocky surface, the habitat is poor for desert tortoise (Category 3) and tortoise are not expected to occur near the project site.” *Id.* at 30. The EA concluded that “[a]dherence to tortoise mitigation measures would altogether avoid potential impacts to desert tortoise.” *Id.* at 30-31. Impacts to desert tortoises due to the creation of a permanent water source were also expected to be “nonexistent” (“[w]hile some tortoise mortalities have been associated with small game water sources . . . ,” CDFG monitoring of big-game AWSs “has revealed no tortoise mortalities . . .”). *Id.* at 31. The EA also addressed whether artificial water sources in desert habitat would increase the density of raven populations, thereby negatively impacting the desert tortoise, but found that it would not, citing research literature indicating that ravens exist in very low densities in this portion of the desert and photographs collected from 1995 to 2005 showing the presence of ravens in only 19 of 11,187 wildlife photos. *Id.* Moreover, BLM’s analysis reported that there is no “evidence that raven densities

have increased around artificial water sources *per se* nor that the construction of this water source would result in greater raven numbers.” *Id.* While appellants disagree with the analysis, they have presented no evidence to the contrary.

IV. Conclusion

We find that the record supports a conclusion that BLM has taken a “hard look” at the proposed action, identified relevant areas of environmental concern, and made a convincing case that the environmental impacts either are insignificant or will be reduced to insignificance by the adoption of appropriate mitigation measures. Appellants have not made a showing with objective proof that BLM has ignored any potentially significant impacts, or that its decision was premised on a clear error of law or demonstrable error of fact. Absent such a showing, a difference of opinion regarding the efficacy of an action proposed by BLM is not sufficient to overturn a decision supported by the reasoned conclusions of BLM technical experts acting within their field of expertise. *Arizona Zoological Society*, 167 IBLA at 357-58.

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

/s/

Christina S. Kalavritinos

Administrative Judge

I concur:

/s/

James F. Roberts

Administrative Judge