

LANDS OF SIERRA, INC.

IBLA 90-94

Decided December 17, 1992

Appeal from a decision of the District Manager, Elko District, Nevada, Bureau of Land Management, to implement the North Eccles Pronghorn Antelope Habitat Management Plan. NV-015.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Land-Use Planning--
Public Lands: Administration

A BLM decision to implement a resource management plan by reintroducing pronghorn antelope onto public lands pursuant to a cooperative agreement with the State will be affirmed on appeal if the decision is based on a consideration of all relevant factors, including the threat of damage to adjacent private land resources, and is supported by the record, absent a showing of clear reasons for modification or reversal.

APPEARANCES: James M. Copenhaver, Esq., Elko, Nevada, for appellant; Rodney Harris, District Manager, Elko District, Nevada, Bureau of Land Management, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Lands of Sierra, Inc. (LSI), has appealed from an October 13, 1989, decision of the District Manager, Elko District, Nevada, Bureau of Land Management (BLM), to implement the North Eccles Pronghorn Antelope Habitat Management Plan (HMP).

Following preparation of an Environmental Impact Statement, the State Director, Nevada, BLM, on July 16, 1985, approved a Record of Decision adopting the Wells Resource Management Plan (RMP). Among the measures approved by the decision was "improve[ment of] habitat in areas identified as potential reintroduction sites for native species of wildlife" (Record of Decision at 10). On May 9, 1987, the Nevada Board of Wildlife Commissioners adopted a "Big Game Reestablishment and Transplant Plan [Plan]" prepared by the Nevada Department of Wildlife (NDOW). The Plan identified two locations in "Management Area [MA] 8" as potential reintroduction sites for pronghorn antelope, *i.e.*, the North Gollaher Mountain and North Eccles Ranch release areas. The objective of the Plan was to establish a summer resident population of 573 antelope in these

two release areas, which together cover 1,040 square miles, by the year 2000. The State Director accepted the Plan on May 7, 1987, subject to development of an HMP and consultation and coordination with affected interests.

BLM thereafter prepared an HMP addressing the reintroduction of antelope into the North Eccles Ranch release area, a 505-square mile (323,200-acre) tract of public (83 percent) and private (17 percent) land largely encompassing the Thousand Spring Valley in Nevada. Antelope are regarded as native to the valley and conditions are considered to be favorable for their reintroduction. Up to 50 antelope are to be released in the Rock Springs Creek drainage about 3 to 4 miles north of the Eccles Ranch, with the ultimate goal (consistent with NDOW's Plan) of improving or maintaining in good condition seasonal habitat capable of supporting 278 antelope by the year 2000. Such habitat will be maintained or improved through the modification of existing fences so as to facilitate antelope movement within the release area, improvement of perennial water sources, and development of management plans with respect to the 6 livestock grazing allotments situated in part within the release area. Initially, BLM proposes modification of 12 miles of existing fences and 2 spring improvement/development projects. Responsibility for releases, as well as overall management of the antelope herd, rests with NDOW. BLM is to be responsible for management of the habitat on public lands, including monitoring and evaluating habitat conditions. Once the antelope population has become established and use areas are defined, but in any case 3 years after the initial release, the HMP is to be revised "to include more specifics on objectives, planned actions (habitat improvement projects), and evaluation/monitoring" (HMP at 2).

In conjunction with development of the HMP, BLM prepared an Environmental Assessment (EA) to assess the environmental consequences of proceeding with the proposed implementation of the HMP or the alternative of no action. BLM studied the potential impact of an increased population of 278 antelope in the North Eccles Ranch release area on both livestock and recreational use of public lands and private land resources.

On March 7, 1989, the Area Manager, Wells Resource Area, Nevada, BLM, approved the HMP, with the concurrence of the District Manager, on behalf of the State Director, and the Regional Supervisor, Region II, NDOW. Also on that date, the Area Manager issued a Record of Decision/Finding of No Significant Impact accepting the proposed action of implementing the HMP and finding that no significant environmental impact would result therefrom. In his October 1989 decision, the District Manager decided to implement the HMP. LSI, which owns the Eccles Ranch on private land within the release area and has grazing privileges on public land in that area, appealed from that decision.

LSI contends that the HMP failed to adequately address the threat posed to agricultural operations owned by LSI on fenced private land in the release area from antelope reintroduced onto adjacent public land where the antelope will inevitably invade the private land and consume alfalfa crops.

LSI also argues that the HMP failed to adequately address the threat to its public reputation because it will be forced to permit "depredation hunts" in order to "slaughter" trespassing antelope while they graze in the fenced private lands (Statement of Reasons (SOR) at 3).

[1] LSI argues that "[p]ast actual experience" has proven that antelope will invade fenced private land and consume alfalfa crops. *Id.* at 2. BLM acknowledges that such invasion, with resulting damage to agricultural resources, might occur (EA at 3). Further, BLM has analyzed the threat to fenced private lands posed by the reintroduction of antelope in the release area. *Id.* at 3-5. BLM's conclusion is that injury to agricultural resources is unlikely to occur given the adequacy of forage in the release area as a whole and the fact that barbed-wire fences surrounding private lands are expected to pose a significant barrier to antelope. LSI has failed to point out how this analysis is inadequate.

It appears that adequate provision has been made for dealing with any invasion of fenced private lands. As BLM explains in an answer to the SOR, by signing the HMP the State has "acknowledge[d] [its] responsibilities for population management and any potential impacts to adjacent private land resources" (Letter to Board from District Manager, dated Dec. 22, 1989 (BLM Answer), at 5). The HMP provides at page 8 that the State may regulate the antelope population by transplanting antelope to other areas or permitting hunting. So far as depredation hunts are concerned, any damage to the reputation of LSI which might result should it be forced to permit such hunts is not an environmental impact that BLM was required to analyze in the EA. Nor can we say that it is a relevant factor which otherwise requires BLM's consideration. There is no evidence that the State will not, by the means described in the HMP, fulfill its responsibility to prevent antelope in the future either from entering private lands or from causing significant damage. Moreover, LSI may seek satisfaction from the State, which has the primary responsibility for the management of wildlife on public lands. *See* 43 U.S.C. § 1732(b) (1988); 43 CFR 24.4(c); *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1249-50 (D.C. Cir. 1980).

LSI argues that BLM has failed to explain in the HMP the basis for increasing the goal of establishing a resident population of antelope from 0.55 to 0.72 antelope per square mile of suitable habitat. The first figure, reported in the HMP at page 2, is the original 1983 goal with respect to the entire management area ("MA 8"). BLM modified this objective when it came to establish a specific goal with respect to the two release areas. *See* HMP at 7. The District Manager explains in the December 22, 1989, answer to LSI at page 4 that this was due to NDOW's more recent 1986 evaluation of the actual estimated carrying capacity of the release areas. *See also* HMP at 7; Appendix B to HMP at 4. LSI has failed to establish any error in NDOW's estimate of the carrying capacity of the North Eccles Ranch release area or to show error in the adoption of the higher population goal with respect to that area.

It is also asserted that the HMP is deficient because it failed to consider ownership of perennial waters and underlying lands when considering

development of those waters for antelope use. The HMP does state at page 9 that perennial waters will be developed in conjunction with the reintroduction of antelope onto public lands. The statement that such waters are amenable to development by BLM necessarily implies that the waters are on public land and subject to Federal control. In any case, the HMP indicates that such development is not yet considered necessary to the reintroduction program. Indeed, the HMP states at page 3 that the perennial streams in the release area are already adequate to support the water needs of summering antelope. In addition, the HMP states at page 4 that additional water for antelope is to be found not only in perennial springs and seeps, but also existing livestock water developments. Further, with the exception of 2 spring improvement/development projects, the HMP envisions that any further development will await additional evaluation "[a]fter use patterns of released animals have been established." Id. at 9.

The contention is made by LSI that the HMP failed to consider potential impact of mining activity under mining claims located since March 1988 and only nominally considered the impact of such activity under claims located prior to that time on the establishment of an antelope herd in the release area. There is no evidence that there were, at the time the HMP was prepared, any mining claims at all in the area. The HMP states, at page 5, that mineral exploration (and location of claims) might expand into that area sometime in the future. Nonetheless LSI asserts that the HMP fails to consider post-March 1988 claims since that is the month when most of BLM's resource specialists reviewed the HMP. The HMP was finally approved by the Area Manager in March 1989. There is nothing to indicate that it did not contain current information regarding the presence of mining claims in the release area. Nor was BLM required to analyze the impact of possible future mining activity on antelope herd establishment, since that is entirely speculative.

LSI argues that the HMP failed to take "fenced private land" into account in computing actual livestock grazing use on public lands in the release area (SOR at 2). In the HMP, BLM calculated actual livestock grazing use on public lands in the release area in order to gauge the impact from the reintroduction of antelope onto such lands on such usage. The figures necessary for computing actual livestock grazing use on unfenced private lands (which would likely be similarly impacted) are found in the HMP at page 6. Fenced private land is not taken into account because, as BLM explains on appeal, such land "[is] not included in the adjudication of allowable [grazing] use of the public lands" (BLM Answer at 4). LSI has offered no reason to require considering fenced private land in terms of the impact from reintroduction to authorized livestock grazing use.

LSI also contends that the HMP does not provide for "effective or sufficient coordination with affected interests," presumably during implementation of the HMP (SOR at 2). The record establishes that BLM solicited comments from affected interests during development of the HMP. We know of no requirement that BLM coordinate with affected interests during implementation of an HMP. Thus, we conclude that BLM has fulfilled its responsibility with respect to affected interests. In any case, it

must be remembered that the HMP provides initially only for the reintroduction of 50 antelope into the release area. The eventual goal of the HMP is to improve or maintain in good condition the habitat in the area so that it is capable of supporting 278 antelope by the year 2000 (EA at 2). In the meantime there will be annual assessments of the impact of increased numbers of antelope on forage and other monitoring which may effect a change in the population objective. Id. at 7. Before increasing the antelope population any further, BLM has committed itself to consult with affected interests (HMP at 8). Finally, the HMP is due to be revised 3 years from the date of the initial release, presumably with the same solicitation of input from affected interests as the original HMP.

LSI asserts that the District Manager failed to cite, in his October 1989 decision, authority for his decision to implement the HMP. While it is true that the decision lacks any citation to authority, there is, nevertheless, ample statutory authority for the decision to permit the reintroduction of antelope onto public lands. BLM is authorized by sections 102(a)(7) and 302(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701(a)(7) and 1732(a) (1988), to manage the public lands for multiple use, which encompasses a "combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable * * * resources, including * * * wildlife." 43 U.S.C. § 1702(c) (1988). In particular, BLM is authorized to "provide food and habitat for * * * wildlife." 43 U.S.C. § 1701(a)(8) (1988). BLM is also authorized to develop and implement land-use plans for that purpose. See 43 U.S.C. § 1712(a) and (e) (1988). The HMP, together with the much broader RMP on which it is based, is such a land-use plan. Further, BLM is authorized by sections 201 and 202 of the Sikes Act, as amended, 16 U.S.C. §§ 670g and 670h (1988), to formulate, in consultation with the appropriate State agency, a comprehensive plan (consistent with the overall land-use plan) of programs for conserving and rehabilitating wildlife on public lands, and to implement such programs through a cooperative agreement with the State agency. The HMP is such an agreement. See George W. Anthony, 119 IBLA 332, 334-35 (1991). The District Manager's decision to take action under the HMP to reintroduce antelope on public lands thus finds authority in both statutes. See also 43 CFR 24.4(i)(2). Members of the public, including appellant, are deemed to have knowledge of all applicable statutes. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947). We therefore find no error in the lack of any citation to authority in the October 1989 BLM decision.

Finally, LSI claims that, in deciding to proceed with the reintroduction of antelope in the release area, BLM failed to consider whether such action is a taking under the Fifth Amendment to the U.S. Constitution, and thus failed to comply with Executive Order No. 12630 (3 CFR 554 (1988)). In relevant part, that Order requires a Federal agency to consider whether administrative action will result in an unanticipated and unnecessary taking of private property under the Fifth Amendment and to prevent such a taking. See 3 CFR 555 (1988). We fail to see how reintroducing antelope onto public land will result in any taking of LSI property under the Fifth Amendment, where BLM has provided in the HMP for management of the antelope

by the State, in part so as to prevent them from going onto adjacent private land or from doing any significant damage thereto. Therefore, we are not persuaded that BLM has any further obligation under Executive Order No. 12630, the risk to LSI having been minimized by agency action.

A BLM decision implementing a resource management plan will be affirmed if the decision is based on a consideration of all relevant factors and is supported by the record, absent a showing of clear reasons for modification or reversal. See Animal Protection Institute of America, 117 IBLA 208, 216 (1990), and cases cited therein. The record reveals that BLM adequately considered all of the relevant factors in deciding to implement the RMP by reintroducing antelope into the North Eccles Ranch release area pursuant to the HMP. Further, the record supports that decision. LSI has failed to demonstrate any error to justify modification or reversal of that decision. That LSI exhibits a difference of opinion regarding the potential impact of the reintroduction program or would simply prefer that no reintroduction take place does not establish error. See William R. Franklin, 121 IBLA 37, 40 (1991).

Finally, LSI requests the Board to order a hearing before an Administrative Law Judge. While the Board has the authority to order such a hearing under 43 CFR 4.415, we will decline to do so where there is no material question of fact that, if proven, would affect the outcome of the case. See Woods Petroleum Co., 86 IBLA 46, 55 (1985). That is the situation here. Therefore, appellant's request for a hearing is denied.

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

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge