

UTAH CATTLEMEN'S ASSOCIATION ET AL.

IBLA 95-45 through 95-49

Decided January 9, 1998

Consolidated appeals from a decision of the District Manager, Salt Lake (Utah) District, Bureau of Land Management, approving an animal damage control plan for public lands in the Salt Lake District. EA UT-020-93-48.

Set aside and remanded.

1. Animal Damage Control

In approving an animal damage control plan, BLM is required to provide sufficient evidence and analysis of predation losses to justify the level of ADC program activities selected. Specifically, BLM must explain why planned control is necessary on the areas where it is provided and relate the level of control to the level of livestock losses.

APPEARANCES: Brent Tanner, Salt Lake City, Utah, for the Utah Cattlemen's Association; Darrell Johnson, Rush Valley, Utah, pro se; Bonnie Young, Brigham City, Utah, pro se; George Nickas, Salt Lake City, Utah, for Utah Wilderness Association; Cary G. Peterson, Salt Lake City, Utah, for State of Utah.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This case involves consolidated appeals from an August 30, 1994, Decision Record (DR) issued by the Salt Lake (Utah) District Manager, Bureau of Land Management (BLM), approving an animal damage control (ADC) program for public lands in that district. ^{1/}

The DR was based on Environmental Assessment (EA) No. UT-020-93-48 which was tiered directly to the earlier programmatic environmental impact statement (EIS), U.S. Fish and Wildlife Service, Mammalian Predator Damage

^{1/} Appellants in this consolidated case are the Utah Cattlemen's Association (IBLA 95-45), Darrell Johnson (IBLA 95-46), Bonnie Young (IBLA 95-47), Utah Wilderness Association (Utah Wilderness) (IBLA 95-48), and the State of Utah (IBLA 95-49).

Management for Livestock Protection in the Western United States (1979). (EA at 2.) The DR made a finding of no significant impact (FONSI) and concluded that the proposed action analyzed in the EA would allow ADC "actions to be conducted for the protection of livestock on public lands and at the same time protect human safety and environmental concerns." (DR at 5.) The DR stated that the primary purpose was to reduce livestock losses due to predation. While BLM authorizes ADC on public lands, it is carried out by the Animal and Plant Health Inspection Service, U.S. Department of Agriculture (APHIS), ^{2/} under both a National and a state Memorandum of Understanding (MOU). ^{3/} Thus, the BLM decision allows APHIS to conduct "an integrated predator control program on public land within the Salt Lake District." (DR at 1.) The District Manager concluded in the DR that "[s]ufficient livestock losses have been documented in APHIS records for me to conclude that an integrated control program is justified on public land." (DR at 5.)

The EA on which the DR is based is intended to be a "long term document" which "will only be updated when a significant change has occurred within the Salt Lake District ADC Program." (EA at 2.) The EA did not evaluate the philosophy or merits of the program noting those matters were "national programmatic concerns and therefore beyond the scope" of the district's authority. (EA at 2.) It evaluated "how, where, and to what degree the Program" would be applied in the district. (EA at 3.) The EA noted that the BLM role is to determine if the program planned by APHIS would place predators or other animals in jeopardy and to impose any mitigation required to avoid unnecessary and undue damage to public land resources. (EA at 3.) An annual control plan meeting with APHIS would determine the nature and extent of ADC activities on the public lands and whether or not adjustments from the previous year's program would be necessary. (EA at 3.)

The EA analyzes five alternatives including the proposed action (alternative 1); continuing the previously authorized ADC program; using nonlethal control; expanding control; and precluding ADC on public lands. The EA noted that the alternative of allowing predator control districtwide with all tools available being used as needed was rejected without detailed analysis because such an alternative would ignore BLM's mandate to regulate the ADC program based upon multiple-use values. (EA at 14.)

Under the proposed action, 62 of the 159 grazing allotments in the district would be open to control. In 1989, there were 132 allotments with ADC agreements. It would be the responsibility of each livestock operator to apply applicable and prudent nonlethal predator loss controls such as

^{2/} Responsibility for implementing the ADC program was transferred by statute in 1985 from the U.S. Fish and Wildlife Service to APHIS. (EA at 2.)

^{3/} The Utah Division of Wildlife Resources (UDWR) is also a participant in the State MOU.

scare devices, physical barriers, guard animals, and husbandry practices. Livestock permittees are strongly encouraged to apply nonlethal predator loss controls before requesting authorization of ADC control. (EA at 4.) The EA recognized that guard dogs had wide potential for application and could be used effectively under some circumstances, but also stated they had some limitations. However, the EA determined that those graziers who were most successful used an integrated approach combining good husbandry practices with both lethal and nonlethal controls and were flexible enough to become informed about other effective methods as they are developed. (EA at 5.)

The EA identified the coyote as the principal target species, and, thus, control activities would be concentrated on them, although operations would not be limited to coyotes. The intent of the plan would be "to reduce animal depredation as quickly as possible and to direct control at depredating individuals or local depredating populations while avoiding control of non-depredating animals." (EA at 5.) Preventative control would be authorized within "Planned Control Areas." However, control operations could be initiated prior to the onset of predatory livestock losses or prior to the introduction of livestock upon a specific area with historical losses to predators. Id. Corrective predator damage control would be authorized where APHIS had verified and documented within the last 30 days that a damage problem existed and that the problem was significant enough to warrant control services. Id.

Lethal control methods authorized under the proposed action include traps, snares, M-44 sodium cyanide devices, shooting, and aerial hunting. The district would require case-by-case prior notification and approval to use M-44's, which would only be used when APHIS/ADC determined the use of other methods would be ineffective and would result in a hardship on the permittee suffering livestock losses. Id. at 10. The proposed action requires notification of the specific location of the devices, the date of installation and the date of expected removal. Id. Denning (killing animals in the den with gas cartridges or by shooting) would not be allowed unless it could be positively confirmed that the young were part of an offending family group.

Preventative control would be authorized only within "Planned Control Areas" and only when APHIS/ADC made an evaluation and determination that livestock losses had historically occurred and would continue to occur in the absence of control activities. Corrective predator damage control would be authorized where APHIS/ADC had verified and documented that a current damage problem existed that was significant enough to warrant control services. (EA at 5.)

"No control zones" under the proposed action are areas where control needs are not anticipated due to a lack of historic livestock losses and/or a lack of operator request. A livestock operator could request control,

but had to submit loss data to APHIS which would evaluate it and determine if emergency control measures were warranted. (EA at 6.)

The proposed action sets forth restrictions on ADC activities that apply to threatened, endangered, and special status species, as well as to wilderness and wilderness study areas, human safety zones, and bird hunting areas. (EA at 9-11.) Control of bear, bobcat, and cougar would be permitted only when a documented loss has been confirmed and only the offending individual may be taken and then only after receiving approval from the UDWR and BLM. (EA at 11.)

Under the proposed action alternative, aerial hunting would be permitted only within "Planned Control Areas" after the appropriate BLM area office is notified of the area to be hunted, dates of hunting and other pertinent information. The Area Manager would approve the information prior to the aerial hunting operation.

Alternative 2 involves continuation of the previous APHIS/ADC program from FY 1989. At the time of the District Manager's Decision, there was no current APHIS/ADC program due to a statewide restriction to "Emergency Control Only" until a new EA was completed. The earlier program was similar to the proposed action but was less restrictive. This alternative would permit unlimited denning as well as decrease the public safety zones to 1/4 mile from 1/2 mile in the proposed alternative. Moreover, under this alternative, planned control areas would include cattle allotments.

Under Alternative 3, no lethal ADC work would be conducted on public lands by APHIS except where emergency control is necessary for public safety. Nonlethal devices such as siren-strobes or propane exploders would be used by APHIS to stop persistent livestock predation. Under this alternative, APHIS would investigate, confirm, and record all reported damage situations to ensure that responsible control techniques were used.

Under Alternative 4, preventive and corrective ADC actions would be pursued as aggressively as legally possible. Both preventive and corrective aerial gunning would occur yearlong, as needs were identified. There would be aggressive use of M-44's. Although still subject to the approval of the BLM State Director, M-44's would be employed for preventive control. Among other measures to be used, would be single-dose lethal baits and restricted-use pesticides which would be applied by certified pesticide applicators.

Alternative 5 is the no action alternative under which there would be no APHIS/ADC control on BLM managed lands. However, while there would be no predator control on public lands, both private landowners and state land lessees would continue to be able to enter into agreements with APHIS/ADC to carry out ADC activities on non-BLM lands. Under this alternative, taking of state-protected predators (except the coyote and red fox) would be at the discretion of the users and sportsmen and would come under the state game laws, while nonprotected predators (coyotes and red fox) would come

under the State Department of Agriculture regulations. This alternative is described as resulting in less control over the kind of devices used and the manner in which these devices would be used.

The statements of reasons (SOR's) for appeal filed by Appellants Utah Cattlemen, Darrell Johnson, Bonnie Young, and the State of Utah raise certain common issues going to the authority of BLM in this matter. These Appellants argue that BLM has no jurisdiction to restrict aerial hunting and that approval of aircraft use in control areas should be done at the annual work-plan meeting, not on a case-by-case basis. All of these Appellants also challenge BLM's restrictions on the use of M-44's, contending that restricting their use to a last-resort nullifies their effectiveness. They assert that the areas of use and timing of placement should be worked out as part of the annual work-plan for the most effective use of the device. Further, these Appellants challenge the jurisdiction of BLM to require approval prior to any cougar or bear removal. These Appellants assert that jurisdiction to regulate removal of wildlife such as cougar and bear is vested solely in the state.

The Utah Cattlemen, Johnson, and Young also challenge the BLM DR as discriminatory against cattle ranchers. Claiming that as cattle producers they suffer losses annually to coyote predation, they note that the preferred alternative provides for preventative control only in sheep allotments. They assert that this is discriminatory against cattle ranchers. The Utah Cattlemen and Johnson raise an additional argument in regard to the human safety zone. Under the preferred alternative, there may be no control activities within 1/2 mile of rivers, streams, springs, ponds, and reservoirs unless required for human health or safety reasons and then only after receiving prior approval from the District Manager. Both the Utah Cattlemen and Johnson argue that this zone may eliminate areas of critical control as that area is often where depredation can occur and the majority of predators can be found.

The Utah Wilderness has challenged the BLM DR on the ground that the EA does not consider an adequate range of alternatives; fails to demonstrate a need for the proposed action or that it will be effective; and does not adequately respond to the comments on the draft EA. Specifically, Utah Wilderness asserts that the ADC Decision and accompanying documents do not satisfy the requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 through 4370 (1994). It notes that NEPA requires Federal agencies to "[s]tudy, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E) (1994). Utah Wilderness argues that NEPA requires that alternatives be studied and developed and that informed and meaningful consideration of alternatives is an integral part of the statutory scheme. Utah Wilderness points out that the Board has held that "[a]ll reasonable alternatives must be considered and obvious alternatives

may not be ignored." Wyoming Game & Fish Commission, 91 IBLA 364, 369 (1986) (citations omitted). ^{4/}

Utah Wilderness asserts that an EA must "include a brief discussion of the need for the proposal." 40 C.F.R. § 1508.9(b). Citing a decision of the Secretary of the Interior on appeal from an EA prepared for a FY 1992 ADC program, ^{5/} Utah Wilderness contends that the EA must present data regarding the number of livestock losses to predation and analyze that data in resolving the questions of need and effectiveness. Utah Wilderness cites statewide annual losses of 12 percent as reported in the 1993 Utah Agricultural Statistics Annual Report prepared by the Utah Department of Agriculture as contrasted with the EA which reports an annual percentage of sheep lost to coyotes of 0.6 percent. (SOR at 14, EA at 15.) Appellant challenges the lack of support in the record for an expensive lethal control program, especially when the EA itself states that "[r]elative to the economy of the livestock industry within the District [the amount of damage historically sustained] is not significant." (SOR at 15, EA at 21.)

As a threshold matter, certain arguments raised in these appeals are properly rejected as lacking either factual support in the record or a sustainable legal rationale. With respect to BLM restrictions on ADC activities conducted on public lands, we find no conflict has been shown between the authority of the state to regulate activities such as hunting and the authority of BLM in managing the public lands to regulate ADC activities to protect public land resources. Thus, for example, notwithstanding the authority of the state to regulate wildlife and hunting within its boundaries, BLM has issued special recreation permits for "fox hunt" events on public lands. See Red Rock Hounds, Inc., 123 IBLA 314 (1992). Regarding allegations of discrimination against cattle graziers, we note that the record shows reported losses of calves as a total of three for the period from FY 1988 through FY 1993. (EA at App. C.) Given the level of loss, we find no improper discrimination against cattle graziers has been shown. We also find that Appellants have failed to carry the burden of showing error in the conditions and stipulations required by BLM regarding aerial gunning, M-44's, and buffer zones.

Reviewing the record in this case, we find that at the time the EA was prepared, there were approximately 90,000 sheep and 22,000 cattle being

^{4/} In challenging the adequacy of the analysis of alternatives, Utah Wilderness cites the discussion regarding alternative 3 (nonlethal controls). Utah Wilderness points out that this discussion cites predator-loss statistics of 4.3 percent for lambs and 0.3 percent for ewes from the 1979 programmatic EIS which are inconsistent with the local loss experience in the district between 0.2 and 0.6 percent for lambs and ewes set forth elsewhere in the EA. (EA at 15.)

^{5/} In the Matter of the Appeals of Committee for Idaho's High Desert, Golden Eagle Audubon Society, and John Barringer, SEC 92-ID 101, Dec. 17, 1992 (hereinafter cited as Committee for Idaho's High Desert).

grazed on public lands within the district. (EA at 15.) Based upon an average of approximately 90,000 sheep grazed on public lands within the district, BLM determined that the reported sheep loss ^{6/} rate was 0.6 percent, and the verified loss rate was 0.2 percent. The EA acknowledges that these loss rates are well below loss percentages in any other study document reviewed, but concludes that economic impacts to individual ranchers could be substantially greater. (EA at 21.) ^{7/}

[1] The problem of the analysis required to establish a basis for selecting an ADC alternative was addressed by the Secretary of the Interior in Committee for Idaho's High Desert. In reviewing another ADC program, the Secretary found:

Although it is evident that predation occurs in the Boise District, a decision regarding the necessity for the level of control proposed in the EA must be reasonable and supported by adequate information. An EA must contain a brief discussion of the need for the proposed action. (40 C.F.R. § 1508.9(b).) An agency is required to provide enough detail in a NEPA document to establish that it has taken a good-faith, objective, hard look at the environmental consequences of the proposed actions. * * *

Simply citing data is insufficient; CEQ [Council on Environmental Quality] regulations require analysis in addition to evidence. (40 C.F.R. § 1508.9.) The BLM has submitted only one year's worth of raw data to support their determination, and they have submitted no evidence of any reasoning based on that data. The BLM offers conclusions, not analysis. For example, the BLM states that "the ADC program is needed and directed towards livestock depredation problems associated mostly with coyotes and occasionally with [other predators]." The BLM then describes the areas of planned and restricted control and the control methods to be used on the Boise District. * * * The BLM also states that in 1990 APHIS killed 980 coyotes in the Boise District. The BLM does not explain why planned control is necessary on all the areas where it is provided. They do not relate the level of control to the level of livestock losses. Because the BLM failed to provide adequate analysis relating the raw data to the level of need for the ADC activities, I conclude that the information submitted by the BLM does not reasonably support the level of control proposed in the Boise District as set forth in the EA and the Plan. (See 40 C.F.R. §§ 1500.1(b), 1508.9(b).)

Committee for Idaho's High Desert, *supra*, at 11-12.

^{6/} A reported loss is a loss reported by a resource owner or manager, but not verified by APHIS/ADC personnel. (EA at App. E.)

^{7/} As a basis for this conclusion, BLM hypothesized a potential loss of one or two lost animals per night during the grazing season. There was no analysis of the probability of such a loss to graziers in the district.

This Board has applied this requirement that BLM provide an analysis of the need for the level of ADC activities chosen in a DR, particularly in situations where the record discloses a lower-than-average rate of loss to predators. Predator Project, 127 IBLA 50, 53 (1993). Although the record before the Board presents data on predator losses for several years, 8/ the EA does not provide an analysis of the evidence of predation losses sufficient to justify control on areas where it is authorized or to relate the level of control to the level of livestock losses. Rather, the record contains conclusory assertions such as the BLM finding that a "[d]emonstrated need for this program is indicated to BLM when livestock losses are verified in the field by APHIS technicians and documented in their records." (EA at 3.) Consistent with this approach, the District Manager concluded in the DR that "[s]ufficient livestock losses have been documented in APHIS records for me to conclude that an integrated control program is justified on public land." (DR at 5.) 9/ In a context similar to this, we held that when the record disclosed no reasoned analysis by BLM relating the loss experience to the ADC alternative selected and how the levels of control relate to actual or projected livestock losses, the ADC program and the associated EA are properly set aside and remanded for further analysis. Utah Wilderness Association, 140 IBLA 147, 154-55 (1997).

As we noted in Utah Wilderness Association, *supra*, at 155, the issue before us is not the desirability of the proposed action or the integrated pest management policy it seeks to implement, but whether BLM has conformed to the standards of evidence and analysis required by the Secretary in Committee for Idaho's High Desert, *supra*, in support of its decision. The information gathered in the process of reviewing the annual work plan during the period this appeal was pending should presumably enable BLM to provide the evidence and analysis required to support the proposed action or a revised version thereof. Accordingly, we set aside BLM's 1994 DR and FONSI and remand this case for preparation of a new EA and decision.

8/ A "Summary of Previous Years APHIS/ADC Activities" is attached to the EA as appendix C. This summary shows verified and reported livestock losses for FY 1988 through FY 1993 as well as the take of coyote, cougars, and other predators. The summary shows that 3,464 coyotes were taken in the 6 years reported. A total of 1,055 sheep and lambs were verified as killed by the coyotes during that period.

9/ Indeed, the EA acknowledges that there is a problem with data quality, noting in particular that "BLM knows that a substantial number of coyotes are taken by APHIS in sheep allotments because of lamb vulnerability," but "with current data it is not clear whose allotments account for the greatest number of coyote problems, how much was preventive or corrective, and how that relates to cooperator efforts at avoiding losses." (EA at 38.) "A correlation analysis of losses and cooperator practices with better quality data should allow for [a] more informed decision process in the future." *Id.*

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 Decision appealed from is set aside, and the case is remanded.

C. Randall Grant, Jr.
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

