



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Tonopah Field Station
1553 South Main Street
P.O. Box 911
Tonopah, Nevada 89049-0911



FEB 14 2006

In Reply Refer To:
4770
(NV065.03)

**REMAND OF THE WILD HORSE SECTION OF THE
FINAL MULTIPLE USE DECISION
FISH LAKE VALLEY COMPLEX
(Silver Peak, White Wolf, Ice House, Fish Lake Valley, Red Spring Allotments)**

INTRODUCTION:

On September 27, 2005 the Final Multiple Use Decision (FMUD) was issued for the Fish Lake Valley Complex. The Wild Horse and Burro portion of this decision established a wild burro Appropriate Management Level (AML) of 33 burros for the Silver Peak Herd Management Area (HMA).

On October 26, 2005, the Nevada Department of Wildlife (NDOW), Southern Region appealed a portion of the Wild Horse and Burro decision for the Silver Peak Herd Management Area. NDOW claimed the land use plan did not recognize burros in the Silver Peak HMA; therefore no AML could be set for burros in the HMA.

On November 22, 2005, the Interior Board of Land Appeals remanded the Silver Peak portion of the Fish Lake Valley Complex FMUD Wild Horse and Burro decision back to the BLM.

After careful consideration of NDOW's appeal points, along with meeting with NDOW, the following change will be made to the Final Multiple Use Decision. The BLM will manage for zero burros in the Silver Peak HMA and the Fish Lake Valley HMA. The BLM will implement all other decisions in the FMUD that were not subject to the October 26, 2005 appeal.

Therefore, it is my decision to manage for zero (0) wild burros in the Silver Peak HMA and Fish Lake Valley HMA.

RATIONALE:

This decision is based on and is in accordance with the Tonopah Resource Management Plan (RMP). The current Tonopah RMP does not recognize or establish burros in this HMA. The chart on page 15 of the Tonopah RMP indicates an AML for horses only.

After further review, we determined that establishing an AML for wild burros in the Silver Peak HMA would not be in accordance with the Tonopah RMP. Therefore, this decision is being issued in a manner that will manage for zero burros in the Silver Peak HMA. The Silver Peak HMA was not identified as a burro herd area or HMA for wild burros in 1971. Therefore we cannot manage for wild burros in this HMA. Habitat in Fish Lake Valley HMA is suitable horse range but not suitable burro range. The majority of the area used by horses in Fish Lake Valley HMA occurs on high mountain sites on the adjacent Forest Service wild horse territory.

AUTHORITY: The authority for this decision is contained in Sec. 3 (a), Wild Horse and Burro Act (P.L. 92-195) and Title 43 of the Code of Federal Regulations including, but not limited to the following:

§4710.1 Land use planning

Management activities affecting wild horses and burros, including the establishment of herd management areas, shall be in accordance with approved land use plans prepared pursuant to part 1600 of this title.

Wild Horse Decision

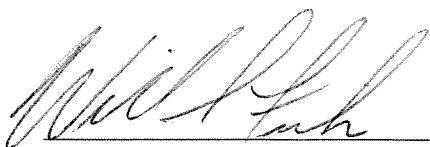
Within 30 days of receipt of this wild horse decision, you have the right to appeal to the Board of Land Appeals, Office of the Secretary, in accordance with regulations at 43 CFR 4.4. If an appeal is taken, you must follow the procedures outlined in the enclosed, "Information on Taking Appeals to the Board of Land Appeals". Please also provide this office with a copy of your Statement of Reasons. An appeal should be in writing and specify the reasons, clearly and concisely, as to why you think the decision is in error.

In addition, within 30 days of receipt of this decision you have a right to file a petition for a stay (suspension) of the decision together with your appeal in accordance with the regulations at 43 CFR 4.21. The petition must be served upon the same parties identified in items 2, 3, and 4 of the enclosed form titled "Information on Taking Appeals to the Board of Land Appeals". The appellant has the burden of proof to demonstrate that a stay should be granted.

AUTHORIZED OFFICER'S SIGNATURE:

If future monitoring indicates that Tonopah RMP Land Use Plan objectives and Mojave/Southern Great Basin RAC Standards are not being achieved, further adjustments will be made accordingly. Likewise, if future monitoring indicates that RAC Standards, and RMP objectives are being met, and that an increase in the number of AUMs are warranted, this decision will be evaluated and amended as appropriate.

These decisions are consistent with 43 CFR 4180 and the Mojave/Southern Great Basin RAC Standards and Guidelines for rangeland health.



William S. Fisher
Assistant Field Manager
Tonopah Field Station

02-13-06

Date

Enclosures:

Attachment 1, Nevada Department of Wildlife appeal

Attachment 2, IBLA remand decision

Attachment 3, List of Interested Parties

Attachment 4, Form 1842-1 – Information on Taking appeals to the Board of Land Appeals



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October 26, 2005

RECEIVED

OCT 27 2005

TONOPAH FIELD STATION

NDOW-SR# 06-056

Mr. William S. Fisher
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PO Box 911
Tonopah, NV 89049-0911

Re: Notice of Appeal for the Fish Lake Valley Complex Final Multiple Use Decision (FMUD)

Dear Mr. Fisher:

The Nevada Department of Wildlife has reviewed the *Final Multiple Use Decision for the Fish Lake Valley Complex* located in Esmeralda County, Nevada. We commend the Bureau for its efforts given the national directive to ensure appropriate management levels were set for all for wild horse and burro herds by September 2005. Notably, the Department concurs that based upon the Bureau's assessment of forage, wild horse and burro management laws and judicial guidance that wild horses should be removed from the Fish Lake Valley HMA. But we strongly disagree with the proposal to replace wild horses with wild burros in the Silver Peak HMA. Consequently the Department is appealing a portion of the Wild Horse Management Decision for the Fish Lake Valley and Silver Peak herd management areas (HMAs). The statement of reasons for our appeal is summarized below.

1. Horses and burros are scientifically recognized as separate species based upon morphology, genetics, behavior, and physiology. That horse and burros may interbreed but do not produce viable young (i.e. the mule) is perhaps the most obvious factor for separate species recognition.
2. Because of the differences between wild horses and wild burros in size, behavior and habitat use, the latter present a more formidable competitive threat to wildlife in the planning area, particularly desert bighorn sheep. For example, the Department recently rebuilt two Bureau wildlife water developments on the north end of the Silver Peak Range within the HMA so as to preclude wild horse use. If burros became the managed wild equine in the Silver Peak HMA, enclosure fences of the wildlife water developments would require altering to prevent breaching by burros. And, monitoring would have to be augmented to ensure that wild burro

use does not cause impacts to wildlife and their habitat, notably desert bighorn. We find this potential situation inconsistent with the land-use determinations affecting desert bighorn contained in the *Approved Tonopah Resource Management Plan and Record of Decision* (1997). We wish to remind the Bureau that wild horses and burros, when present, are a dominant species in the ecological systems of the United States.

- Studies by Joel Berger, (University of Nevada, Reno) and others [Sumner, (1959), Weaver, R. A. (1959), Weaver, R. A. (1972), Dunn and Douglas, (1982)] have documented inter-specific dominance and territorial aggression that can negatively impact wildlife use of the natural resources. With regard to inter-specific social interactions, Berger reports on pages 254-255 in his 1986 book *Wild Horses of the Great Basin: Social Competition and Population Size*, "In fact, in virtually all cases, native species were subordinate to exotics (table 11.1), that is, horses supplanted deer 11 times, bighorns 2 times and pronghorn 6 times."
- Ginnet and Douglas (1982) made the following conclusion based on their investigations on food habits of feral burros and desert bighorn sheep in nearby Death Valley:
Burros outnumber bighorn on the study area by at least a factor of 2. In addition, since burros are not restricted to giving birth to during one time of the year as are desert bighorn, they are likely to have a higher reproductive potential than are bighorn. Finally, because of their typical equid digestive system, burros are theoretically capable of existing on lower quality forages than could a ruminant. This could be an enormous competitive advantage in an arid environment which is characterized by frequent years of low forage production and low forage quality. For these reasons, we feel that the feral burro should be expected to outcompete desert bighorn in most situations, and should be removed as quickly as possible from habitats also occupied by (or potentially occupied) by desert bighorn sheep.
- Dunn and Douglas (1982) had more to say regarding species interaction at springs:
Use of springs by desert bighorn sheep (Ovis canadensis nelsoni) and feral burros (Equus asinus) was examined as part of a study on resource partitioning between these species. Spring use by ewe groups was almost entirely restricted to a spring not use by burros while ram group use was not affected by the presence of burros. The number of burros present affected sheep use of springs, although the impact varied with different intensities of burro use. Evidence also suggests that temporal shifts in drinking times of bighorn may occur at springs used by burros. The potential adverse impacts of limiting use of springs by ewe groups are discussed.

They also observed that feral burros have a greater need for water than bighorns because: (1) behavioral adaptations to reduce heat gain are not as well developed as in desert bighorn, (2) the amount of feces burros produce is greater than that of desert bighorn, (3) the water content of the feces is higher than bighorn, (4) urine flow is greater than bighorn and is much less concentrated (Schmidt-Nielsen, 1974).

Lastly, (b)ighorn use of springs decreased substantially when there were 3 or 4 burros present.

- The Bureau's *A Guide to Managing, Restoring, and Conserving Springs in the Western United States* (Technical Reference Manual 1737-17, 2001) lends credence to concern about horse and burro use.

Unlike domestic livestock, wild horses and burros are not usually subject to grazing systems that would afford some protection or rest for springs. As a result, their activities frequently reduce or eliminate riparian vegetation, pollute aquatic habitats and impact functioning condition." The Manual also reads, In addition, springs are areas of social interactions for wild horses and burros where the dominant males protect their bands of females. This territoriality tends to keep horses or burros using the same spring, increasing the negative impacts to these areas.

3. We also find that changing the species to be managed within an HMA was not the intent of the Free-Roaming Wild Horse and Burro Act of 1971 (Act) or subsequent amendments. Nor is there precedent or foundation for this action in judicial direction or prior practice. Wild horses and wild burros are in no way identified as interchangeable in the Act; the intent was to determine what species occurred where as of December 15, 1971 and manage for that species consistently through time within identified Herd Areas or sub-units thereof, e.g. Herd Management Areas. Supportive documents and records include:
 - In the Bureau's *Silver Peak Range Habitat Management Plan* (1970), Meyers mentions only wild horses occurring there.
 - In Table 3 on page 15 of the Bureau's existing land use plan, the *Approved Tonopah Resource Management Plan and Record of Decision* (1997), sets an Interim Herd Size or AML for wild horses for the Silver Peak HMA, but does not address burros. We wish to point out that in the 1986 Record of Decision (ROD) for Planning Area A of the Esmeralda-Southern Nye RMP, the map on page 31 indicates that the Silver Peak HMA is a wild horse only HMA and management prescriptions on the previous page are also for only horses. Burros are not at all identified for this HMA, the implication being they did not occur there at the time of the Act.
 - The Department's own bighorn sheep surveys conducted in 1972, 1975, 1976, 1978, 1982, 1984, 1994, 1996, 1998 and 2000 support Meyer's assertion that burros were not present in the HMA. In addition to bighorn, other wildlife and animals were recorded as part of the survey when identified (see table at bottom).
 - Additional to bighorn, other wildlife and animals were recorded (see table at bottom).
 - In 1979, the Department issued *The Status And Trend Of Desert Bighorn Sheep - The Silver Peak Mountain Range*. The middle paragraph on page 6 reads, *Horse populations in the area have continued to increase since 1970 because of the lack of any control measures. The 1975 BLM horse inventory for the Silver Peak Range resulted in the observation of 205 animals with a reasonable estimate of 300. BLM estimates further indicate that horse populations are increasing by approximately 25 percent annually (Ferris, pers. Comm., 1977).* And, the bottom paragraph of page 6 reads, *There are presently no wild burros occupying the Silver Peak Mountain Range although scattered observations indicate limited use to the north in the vicinity of Columbus Salt Marsh.*

Burros have also extended their range on the south to the vicinity of Goldfield during the past several years.

Clearly, the preponderance of information corroborates that burros did not occur in the Silver Peak HMA at the time of the Act.

4. The Bureau rationalizes post-Act presence of burros in its discussion of recommendations on pages 24-26 of the FMUD. The Bureau indicates that 10-15 burros presently use the *Clayton Hills* area on the southeast margin of the Silver Peak HMA. But there is no compelling information to support burro habitation of the Silver Peak HMA at the time of the Act. Only horses were present. Instead,
 - The proposed switching of AML from wild horses to burros exceeds the direction under the Act, *All management activities shall be at a minimal feasible level.....*
 - This is further supported in 43 CFR Ch II Section 4710.4, which states, "*Management of wild horses and burros shall be undertaken with the objective of limiting the animal's distribution to the herd areas. Management shall be at the minimum level necessary to attain the objectives identified in approved land use plans and herd management area plans.*" (Emphasis added).
 - Most importantly, 43 CFR Ch II 1610.5.5-3 (a) states: *All future resource management authorizations and actions, as well as budget and other action proposals to higher levels in the Bureau of Land Management and the Department, and subsequent and more detailed or specific planning, shall conform to the approved plan.*" Again, the current Land Use Plan does not identify burros as existing in the Silver Peak HMA at the time of the Act (December 15, 1971). By attempting to validate burro use of the Silver Peak HMA and failing to set an AML for burros in the Fish Lake HMA, this AML document does not comply with and the RMP Record of Decision.

The Bureau should be removing burros from the Silver Peak HMA, not encouraging their establishment and expansion.

The issue is not which equine species is better suited for survival in the Silver Peak HMA. The proposed management does not comply with current land use plans, nor does it present substantive information identifying an error in past land use documents as to the existence of burros. According to the preponderance of best information and current regulations, the Department asserts that any burros in the Silver Peak HMA are outside of properly identified HMAs for burros.

The Department regrets the need to pursue this course of action, but the Bureau's failure to resolve this issue in the FMUD forces the necessity of our appeal. We request a hearing on this matter through the appeal process. Please contact the Department at 702-486-5127 x3600, if you have any questions.

Sincerely,



D. Bradford Hardenbrook
Supervisory Biologist - Habitat

CS/TS/DBH:dbh

cc: NDOW, Files
Nevada Wild Horses Commission

References Cited:

- Berger, Joel. 1986. *Wild Horses of the Great Basin: Social Competition and Population Size*. University of Chicago. 326 pp.
- Dunn, W.C. and C.L. Douglas. 1982. Interactions between Desert Bighorn Sheep and Feral Burros at Spring Areas in Death Valley. Pages 87-96 in *Desert Bighorn Council 1982 Transactions*: Vol. 26.
- Ginnet, T.F. and C.L. Douglas. 1982. Food Habits of Feral Burros and Desert Bighorn Sheep in Death Valley National Monument. Pages 81-87 in *Desert Bighorn Council 1982 Transactions*: Vol. 26.
- McQuivey, R.P. 1979. The Status and Trend of the Desert Bighorn Sheep in Nevada, The Silver Peak Mountain Range. Nevada Department of Wildlife, Special Report 79-1, Federal Aid in Restoration, Project W-48-9, Study R-III, Job I. 25 pp.
- Meyers, L.H. 1970. *Silver Peak Range Habitat Management Plan*. Las Vegas District, USDI Bureau of Land Management.
- Schmidt-Nielsen, Knut. 1974. *Animal Physiology*. 118 pp. Prentice-Hall, Englewood, N.J.
- Sumner, L. 1959. Effects of wild burros on bighorn in Death Valley National Monument. *Desert Bighorn Council Trans.* Vol. 3:4-8.
- USDI Bureau of Land Management. 1986. *Record of Decision, Esmeralda – Southern Nye Planning Area A*. Battle Mountain District Office, Battle Mountain, Nevada. 38 pp.
- USDI Bureau of Land Management. 1997. *APPROVED Tonopah Resource Management Plan and Record of Decision*. Battle Mountain District, Tonopah Field Station. October 1997. 56 pages w/ appendices & maps.
- Weaver, R. A. 1959. Effects of burro on desert water supplies. *Desert Bighorn Council Trans.* Vol. 3:1-3.
- Weaver, R. A. 1973. Burro versus bighorn. *Desert Bighorn Council Trans.* Vol. 17:90-97.

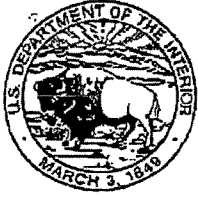
Summary Table of Nevada Department of Wildlife Desert Bighorn Survey Results, Silver Peak Mountain Range, Esmeralda County, Nevada

DATE	Observers	Other Species Observed
11/ 1/71	Lee, McQuivey, Cooper	No mention
11/16/72		Cows and horses seen
1/15/73		No mention
7/20/75	Tsukamoto, McQuivey	92 feral horses, 2 marsh hawks, 50+ chukar, 2 golden eagles
1/13/75	McQuivey, Lusk	69 feral horses, 4 golden eagles, 21 chukar, 1 sparrow hawk, 1 mule notes sheep decline as horse population increases.
9/28/76	McQuivey, Tsukamoto	21 feral horses, 2 mule deer, 1 marsh hawk, 3 golden eagles
9/19/78	Cooper, Lusk	47 horses, 4 mule deer, 2 golden eagles, Cooper's hawk, 1 bobcat, numerous chukar
9/24/80	McQuivey, Turner	Several scattered groups of chukar
10/20/82	Delaney, Mortimore	2 mule deer, 50 chukar, 1 horse
9/11/84	Delaney, Lee	28 + 150 horses, 45 chukar, 1 prairie falcon
9/16/86		Survey sheet missing
9/13-14/88	Delaney, Lusk	300 chukar
9/12/90	Delaney, Stevenson, Lusk	150 chukar, 1 golden eagle
9/ 9/92	Stevenson, Cummings	1 mtn. lion, 2 red-tailed hawks, 1 prairie falcon, 2 golden eagles, 15 chukar.
9/ 8/94	Stevenson, Cummings	2 golden eagles, 12 chukar, 9 feral horses
9/ 5/96	Stevenson, Cox	Bobcat, 22 horses, 2 golden eagles, 2 red-tailed hawk
9/14/98	Stevenson, Cummings	1 golden eagle, 10 chukar
9/15/98	Stevenson, Cummings	100 chukar, 2 bobcats, 3 feral horses, 2 horse carcasses
9/ 5/00	Donham, Cummings	6 + 3 horses, 47 chukar, 1 golden eagle, 1 red-tailed hawk

NOV. 30. 2005 12:08PM

US IBLA

NO. 0904 P. 1/2



United States Department of the Interior

DLR

OFFICE OF HEARINGS AND APPEALS
Interior Board of Land Appeals
801 N. Quincy St. Suite 300
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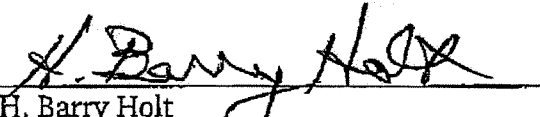
November 30, 2005

IBLA 2006-34	:	NV-06-06-02
	:	
NEVADA DEPARTMENT OF WILDLIFE	:	Wild Burro Levels
	:	
	:	
	:	Set Aside and Remanded

ORDER

The Nevada Department of Wildlife (NDOW) appealed the Appropriate Management Level (AML) for wild burros within the Silver Peak Herd Management Area (HMA) as established in the Final Multiple Use Decision of the Fish Lake Valley Complex issued on September 27, 2005, by the Assistant Field Manager, Tonapah Field Station, Nevada, Bureau of Land Management (BLM). ^{1/} On November 23, 2005, counsel for BLM filed a motion to remand the BLM burro AML decision for further review and issuance of a revised burro AML determination for the Silver Peak HMA. The motion is granted.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's burro AML decision is set aside and the case is remanded to BLM for further action.


H. Barry Holt
Chief Administrative Judge

^{1/} NDOW did not appeal any other aspect of the Final Multiple Use Decision.

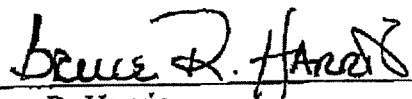
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US. IBLA

NO. 0904 P. 2/2

IBLA 2006-34

I concur:



Bruce R. Harris
Deputy Chief Administrative Judge

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UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

INFORMATION ON TAKING APPEALS TO THE BOARD OF LAND APPEALS

DO NOT APPEAL UNLESS

- 1. This decision is adverse to you,
- AND*
- 2. You believe it is incorrect

IF YOU APPEAL, THE FOLLOWING PROCEDURES MUST BE FOLLOWED

1. NOTICE OF APPEAL Within 30 days file a *Notice of Appeal* in the office which issued this decision (see 43 CFR Secs. 4.411 and 4.413). You may state your reasons for appealing, if you desire.

2. WHERE TO FILE NOTICE OF APPEAL U.S. Department of the Interior
Bureau of Land Management
Tonopah Field Station
P.O. Box 911
Tonopah, NV 89049

SOLICITOR - ALSO COPY TO U.S. Department of the Interior
Office of the Field Solicitor
6201 Federal Building
125 S. State Street
Salt Lake City, UT 84138-1180

3. STATEMENT OF REASON Within 30 days after filing the *Notice of Appeal*, file a complete statement of the reasons why you are appealing. This must be filed with the United States Department of the Interior, Office of the Secretary, Board of Land Appeals, 4015 Wilson Blvd., Arlington, Virginia 22203 (see 43 CFR 4.412 and 4.413). If you fully stated your reasons for appealing when filing the *Notice of Appeal*, no additional statement is necessary.

SOLICITOR - ALSO COPY TO U.S. Department of the Interior
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Salt Lake City, UT 84138-1180

4. ADVERSE PARTIES Within 15 days after each document is filed, each adverse party named in the decision and the Regional Solicitor or Field Solicitor having jurisdiction over the State in which the appeal arose must be served with a copy of: (a) the *Notice of Appeal*, (b) the Statement of Reasons, and (c) any other documents files (see 43 CFR Sec. 4.413). Service will be made upon the Associate Solicitor, Division of Energy and Resources, Washington, D.C. 20240, instead of the Field or Regional Solicitor when appeals are taken from decisions of the Director (WO-100).

5. PROOF OF SERVICE Within 15 days after any document is served on an adverse party, file proof of that service with the United States Department of the Interior, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy St., Suite 300, Arlington, Virginia 22203. This may consist of a certified or registered mail "Return Receipt Card" signed by the adverse party (see 43 CFR Sec. 4.401 (c) (2)).

Unless these procedures are followed your appeal will be subject to dismissal (see 43 CFR Sec. 4.402). Be certain that all communications are identified by serial number of the case being appealed.

NOTE. A document is not filed until it is actually received in the proper office (see 43 CFR Sec. 4.401 (a)).

SUBPART 1821.2--OFFICE HOURS; TIME AND PLACE FOR FILING

Sec. 1821.2-1 *Office hours of State Offices.* (a) State Offices and the Washington Office of the Bureau of Land Management are open to the public for the filing of documents and inspection of records during the hours specified in this paragraph on Monday through Friday of each week, with the exception of those days where the office may be closed because of a national holiday or Presidential or other administrative order. The hours during which the State Office and the Washington Office are open to the public for the filing of documents and inspection of records are from 10 a.m. to 4 p.m., standard time or daylight savings time, whichever is in effect at the city in which each office is located.

Sec. 1821.2(d) Any documents required or permitted to be filed under the regulations of this chapter, which is received in the State Office or the Washington Office, either in the mail or by personal delivery when the office is not open to the public shall be deemed to be filed as of the day and hour the office next opens to the public.

(e) Any document required by law, regulations, or decision to be filed within a stated period, the last day of which falls on a day the State Office or the Washington Office is officially closed, shall be deemed to be timely filed if it is received in the appropriate office on the next day the office is open to the public.

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