



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS USAF TACTICAL FIGHTER WEAPONS CENTER (TAC)
NELLIS AIR FORCE BASE, NV 89191

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LAS VEGAS DISTRICT
BUREAU OF
LAND MANAGEMENT

OFFICE OF THE COMMANDER

Mr Kemp Conn
Las Vegas District
Bureau of Land Management
P.O. Box 26569
Las Vegas, NV 89126

Dear Mr Conn

I have approved the documents you forwarded and am returning the signature sheet as requested.

My approval is predicated on the understanding that your removal of animals from the Stonewall Mountain area has been delayed to early FY83 and you will renegotiate your requirements with range scheduling. The desired period is 20 Nov 82 to 7 Jan 83.

With approximately 6000 horses and burros on the northern ranges, the time has come for us to take decisive action. Your planned removal of 500 animals should be viewed as the beginning of a continuing effort to reduce the population to a level that the Wild Horse Range can support.

Sincerely

JACK GREGORY

JACK I. GREGORY
Major General, USAF
Commander

Atch
Signature Sheet

8-6-82

	Int	Date
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ADM		8/10/82
P & EC		
YACC		
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WILDLIFE		
CH OPER		
CH ADMIN		
AM SERA		
AM CALIENTE		

6 August 1982



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS 554TH COMBAT SUPPORT GROUP (TAC)
NELLIS AIR FORCE BASE, NV 89191

Kemp
MR. Frei
KC
6/27/84

20 June 1984

Bert Stanley, Esq.
U.S. Dept of the Interior
Regional Solicitor
Federal Building
Room E2753
2800 Cottage Way
Sacramento, CA 95825

Dear Mr. Stanley

At a meeting of the Five-Party Cooperative Group held at Nellis Air Force Base on 7 June 1984 to discuss the wild horse problem on the Nellis range, it was agreed that the Air Force and BLM attorneys should attempt to reach a common view of the legal issues surrounding wild horse removal. I have attached the pertinent portions of a legal memorandum prepared by one of our attorneys on the application of the Wild Horses and Burros Act (WHBA) to the wild horses which have over-populated the Nellis ranges. It would be greatly appreciated by all of the parties if one of your attorneys would review this memorandum and provide some feedback indicating an agreement or disagreement with our statement of the law in this area.

All members of the Five-Party Group are concerned with finding a workable solution to this problem. While the Air Force has taken somewhat of a leading posture in this matter to date, and is prepared to continue doing so, I think you will agree that under the WHBA the ultimate decision-making responsibility for wild horse removal lies with the Department of Interior. For that reason we feel it appropriate to involve you in this matter.

It was the intention of the Five-Party Group that a legal consensus be reached before its next meeting, to be scheduled for sometime in mid-July. I am therefore asking for a response from you by July 6th so that we can move toward a meeting of the minds for the July meeting.

Sincerely

//Signed//

ROGER A. JONES, Colonel, USAF
Staff Judge Advocate

1 Atch
Legal Memo re Wild Horses
on Nellis Ranges

cc: Milton Frei, Esq.
Nevada State Office
300 Booth Street
P. O. Box 12000
Reno, NV 89520

Readiness is our Profession

WILD HORSES ON NELLIS RANGES

LEGAL MEMORANDUM

CAPT GERALD D. LAVER

554CSG/JA

STATEMENT OF THE PROBLEM

The rapid growth in wild horse population poses a serious problem to state and federal agencies due to both ecological and operational concerns. The horses are legally protected by the Wild Horses and Burros Act of 1971. Under this Act, the horse population may be reduced by the Bureau of Land Management by such practices as destruction of old, sick and lame horses, adoption, and destruction of healthy horses, but only after compliance with the requirements of the Wild Horses and Burros Act (WHBA or Act) and the National Environmental Policy Act (NEPA)

FACTS

The Nevada Wild Horse Range (NWHR) was established in 1962 by a cooperative agreement with the Department of Defense and the Department of Interior. Wild horse population estimates at that time were placed at 200-400 head. These horses were mainly in the area designated as the NWHR. Since 1962 the wild horses have expanded their range and roam over a much larger area. The present population estimates are over 7,000 wild horses on the NWHR and surrounding area. The NWHR is 394,000 acres of unfenced range lying within the northeast corner of the USAF Tactical Fighters Weapons Center Range Complex in Nye County. The total area of the present home range is estimated at 1,165,000 acres, which is presently covered by a five party agreement for management with the U.S. Air Force (USAF), U.S. Fish and Wildlife Service (USFWS), Department of Energy (DOE), Bureau of Land Management (BLM) and the Nevada Department of Wildlife (NDOW).

Historically this area was grazed by livestock, horses and wildlife. Even though the area was withdrawn for military purposes in 1940, livestock grazing continued until 1979. Attempts were made during the fifties and sixties to discontinue livestock grazing to no avail. In 1979 a fence along the northern boundary was completed, thus eliminating livestock grazing from the area. Nationally the NWHR is not well known and does not generate much public interest, because of its remoteness and the inaccessibility of the area. The National Wild Horse Association, a Las Vegas based organization, has shown considerable active interest and has been involved in helping to develop and maintain water improvements. The members are also very much interested in the welfare of the wild horses. The USAF and the DOE have ongoing programs of weapons development and military aircraft training which are presently increasing. These activities lessen and/or prevent even agency access to the area, especially the area designated as the Tonopah Test Range.

→ AND POSSIBLY FENCING IN OR OUT, MIGRATING WILD HORSES FROM AREAS NORTH OF THE NWHR AND/OR WITHDRAWN AREA.

(NEED A MAP FOR CLARITY, I.E., FENCES, WITHDRAWN AREAS, NWHR)

The virtually uncontrolled use of the ranges by the wild horses has led to numerous problems. First, the horses' population

growth has had an adverse impact on the use of the ranges by the Air Force and DOE. These problems include increased risks of ground traffic accidents involving horses, decrease in visibility for optical testing devices due to increases in suspended particulates, and increased risk of aircraft bird strikes due to carrion birds. Second, the ecological balance of the area has also been adversely affected. The horses compete for water and forage resources with other species of big game such as desert bighorn sheep, antelope, and mule deer. Vegetation has been severely damaged by trampling and grazing, particularly near sources of water where the herds concentrate.

ISSUES

The five party cooperative group is seeking viable solutions to these problems caused by the over-populated horse herds. It is anticipated that any viable solution will require thinning of the herds by adoption or humane methods of destruction. Since the WHBA affords protected status to the horses, certain legal issues must be explored. First, what is the extent of the WHBA's coverage in terms of geographic area? Second, what steps may be taken to control the wild horse population consistently with the WHBA and NEPA.

I. Coverage of the Wild Horses and Burros Act

The Congress of the United States passed the WHBA in 1971 with the declared policy that as symbols of the historic and pioneer spirit of the American West, wild, free-roaming horses and burros should be protected from capture, branding, harassment, or death and be considered an "integral part of the natural system of the public lands." 16 U.S.C. §1331. "Wild free-roaming horses and burros" are defined as "all unbranded and unclaimed horses and burros on public lands of the United States." 16 U.S.C. §1332(b). "Public lands of the United States" means "any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service." 16 U.S.C. §13329(e). All such horses and burros are placed under the jurisdiction of either the Secretary of Interior or Secretary of Agriculture, as appropriate. 16 U.S.C. §1333. The Secretaries are authorized and directed to protect and manage wild free-roaming horses and burros as components of the public lands. It would appear that the application of the WHBA to Nellis range horses is defined by the geographical boundaries of lands administered by the BLM. Since all Nellis ranges are within BLM jurisdiction, used by the Air Force and Department of Energy subject to cooperative agreements with the BLM, all unbranded and unclaimed horses physically located on the ranges are protected by the WHBA.

In addition, wild horses do not necessarily lose their protection by wandering across property lines. The Act states that if wild free-roaming horses stray from public lands onto privately owned land, the owners of the land may inform the nearest Federal marshal or agent of the Secretary, who shall arrange to have the animals removed. 16 U.S.C. §1334. In no event may anyone other than agents of the appropriate Secretary destroy those animals.

Moreover, a private land-owner is permitted to maintain wild free-roaming horses on his private land, if he does so in a way that protects them from harassment, does not willfully remove or entice them from public lands, and reports the approximate number of animals maintained to the appropriate Secretary.

Thus, although the Act's coverage is expressly defined in terms of geographical limits, the Act also purports to afford protection to horses on private land which have at some point strayed from public land. Indeed, if the Act is to apply to wild horses maintained on private land, it might be argued that the Act applies to horses which have never been on public land, given the difficulty of determining which horses within a herd originated on the public or private land. In a case involving the constitutionality of the WHBA, the United States Supreme Court expressly declined to rule on whether this aspect of the Act is a constitutional exercise of Congress' powers under the Property clause of the Constitution. See Kleppe v New Mexico, 426 U.S. 529, 96 S.Ct. 2285(1976). The court found it unnecessary to decide whether the Act could "be read to provide federal jurisdiction over every wild horse or burro that at any time sets foot upon federal land." Id. at 546, 96 S.Ct at 2295.

Reason For Claiming Period?

It can be said with certainty that all wild unbranded and unclaimed horses on federal lands within the BLM's authority, including all Nellis ranges, are protected by the Act. In addition, it is possible that wild horses which stray outside those boundaries are also protected. It thus is not clear whether the numbers of wild horses adjacent, but with access to federal lands should be included as part of the population estimate for planning purposes. It is recommended that the planning be confined to the federal ranges' limits, however, since it is not considered feasible to attempt to inventory, reduce, or otherwise manage animals found outside of the federal range boundaries. In addition, the Act's application to animals on private lands appears to be limited to control over animals who stray from the range or are maintained on private lands, and not to affirmative management practices over herds found on lands not within BLM control.

II. Requirements of the WHBA

The WHBA requires the respective Secretaries to "manage wild, free-roaming horses...in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands". 16 U.S.C §1333 One federal district court has concluded that the WHBA requires by inference that the 1971 population levels be maintained. See American Horse Protection Association v Andrus, 460 F Supp. 880 (D. Nev. 1978), affirmed in part, remanded in part 608 F 2d 811 (9th Cir. 1979) In doing so, he must consider the recommendations of biological and ecological experts. Id. All management activities are to be at the "minimal feasible level" and in consultation with the wildlife agency of the State in which the federal lands are located in order to protect the natural ecological balance of all wildlife species present.

The original Act authorized the Secretary to order old, sick, or lame animals destroyed in the most humane manner possible, and after consulting with the Advisory Board, when an area was found

to be overpopulated. He could then cause additional excess animals to be captured and removed for private maintenance under humane conditions. In addition, the Secretary could order other horses and burros to be destroyed when deemed necessary to preserve and maintain the habitat in a suitable condition for continued use. This last option was available to alleviate overpopulation only when destruction was the only practical way to remove excess animals from the area.

EXCESS

A 1978 amendment to the Act further defined the Secretary's obligations in maintaining horse populations. The amendment defines "excess animals" as wild, free-roaming horses or burros ((1)) which have been removed from an area by the Secretary pursuant to applicable law or ((2)) which must be removed from an area in order to preserve and maintain a thriving natural ecological balance and multiple-use relationship in that area.

The 1978 amendment requires the Secretary to maintain a current inventory of wild horses and burros on given areas of the public lands. The purpose of this inventory is to make determinations as to whether and where overpopulations exist and whether action should be taken to remove excess animals. This information should also be used to decide whether appropriate management levels should be achieved by the removal or destruction of excess animals, or by other methods such as sterilization or natural controls on population levels.

Perhaps the most significant guidance offered by the amendment is the furnishing of a specific order of priority for disposing of excess animals. 16 U.S.C §1333 (b)(2). First, the Secretary must make a determination based upon specified sources of information that an overpopulation exists and that action is necessary to remove excess animals. In making that determination, the secretary must consider the inventory, any land use planning, court-ordered environmental impact statements and/or any information otherwise available to him.

Once that determination is made, the Secretary must immediately remove excess animals from the range in order to achieve appropriate management levels. Removal of animals will continue in a set order and priority until a "thriving natural ecological balance" has been restored and the range is protected from the "deterioration associated with overpopulation".

AS OVER THE AREA
SUB AREA BY SUB
AREA.

The Secretary must first order old, sick, or lame animals to be destroyed in the most humane manner possible. One court has required that animals destroyed pursuant to the WHBA be destroyed by injection, not shooting, and only upon certification by a licensed veterinarian that the animal is severely injured or seriously sick and should be destroyed as an act of mercy. American Horse Protection Association v Andrus, 460 F Supp. 880(D. Nev. 1978), affirmed in part 608 F. 2d 811 (9th Cir 1979).

If excess horses still remain after this step, the statute requires that remaining horses be humanely captured and removed for private adoption to the extent that demand exists. The adoption program has many specific procedural requirements imposed by statute and regulation, including a fee. In this regard, a recent change to Department of Interior regulations authorizes the Director, Bureau of Land Management, to adjust or waive the

adoption fee if he determines that the wild horses are unadoptable at the full adoption fee. 43 C.F.R §4740.43 (d)(3). All other procedural requirements apply. Id.

If excess animals still remain after the adoption demand has been met, the Secretary must then destroy the excess animals in the most humane manner possible. The American Horse Protection Association v Andrus case would again seem to require destruction by injection..:

III. NEPA Requirements

Court cases interpreting the WHBA deal extensively with the application of NEPA to the BLM's herd management practices. At least two cases have held that while NEPA definitely applies to BLM roundups of horses, Environmental Impact Statements were not required before the BLM conducted roundups to thin herds of wild horses subject to the WHBA. See American Horse Protection Association v Andrus, 460 F.Supp. 880 (D.Nev. 1978) affirmed in part, remanded in part 608 F 2d 811 (9th Cir 1979), remand dismissed on appeal for mootness 679 F 2d 150 (9th Cir 1982); American Horse Protection Association v Frizzell, 403 F. Supp. 1206 (D. Nev. 1975). In both cases, the BLM had concluded after environmental assessments that the roundups would not have a significant effect on the environment. However, the Federal Court of Appeals reviewing the Andrus case made it clear that the issue of whether an EIS is required under NEPA must be decided on a case-by-case basis depending upon the number of horses and characteristics of the area involved. 608 F 2d at 814-15. Therefore, a thorough environmental assessment of the proposed reduction of horse population should be accomplished before the Secretary of the Interior makes the ultimate decision to round up the horses. Since the action is certain to create public and environmental controversy, input from the public should be sought. See AFR 19-2, para 11.f(2). Regulations of the Air Force and the Council on Environmental Quality must be complied with. AFR 19-2, for example, requires review by higher Air Force headquarters, if the action is likely to create public controversy. See AFR 19-2, para 3.j(4).

CONCLUSIONS AND PROPOSALS

All unbranded and unclaimed wild horses on the Nellis Ranges are protected by the WHBA. Responsibility for maintaining those herds at "ecologically balanced" levels, and arguably at their 1971 levels ultimately rests with the Secretary of the Interior through the Bureau of Land Management. The following actions are proposed:

- HQ USAF/JACL must be notified "promptly" according to AFR 19-2, para 3.j(4).

- A draft environmental assessment (EA) will be prepared by the Air Force based on estimates of horse population, information contained in Five-Party Agreements, and other available information. Suspense: 1 July 1984.

- A Five-Party Meeting on the Air Force Plan/Objectives will be held to coordinate the proposed EA, plan of action, and legal opinions on WHBA applicability. Suspense: 15 July 1984.

- CRMP Meetings - Public special interest groups will be invited to send a representative to voice concerns and alternatives regarding proposed action. Suspense Beginning: 15 August 1984 Suspense Completion: 15 October 1984

- Complete EA. Suspense: 1 November 1984

- Public Review. Suspense: 15 November 1984

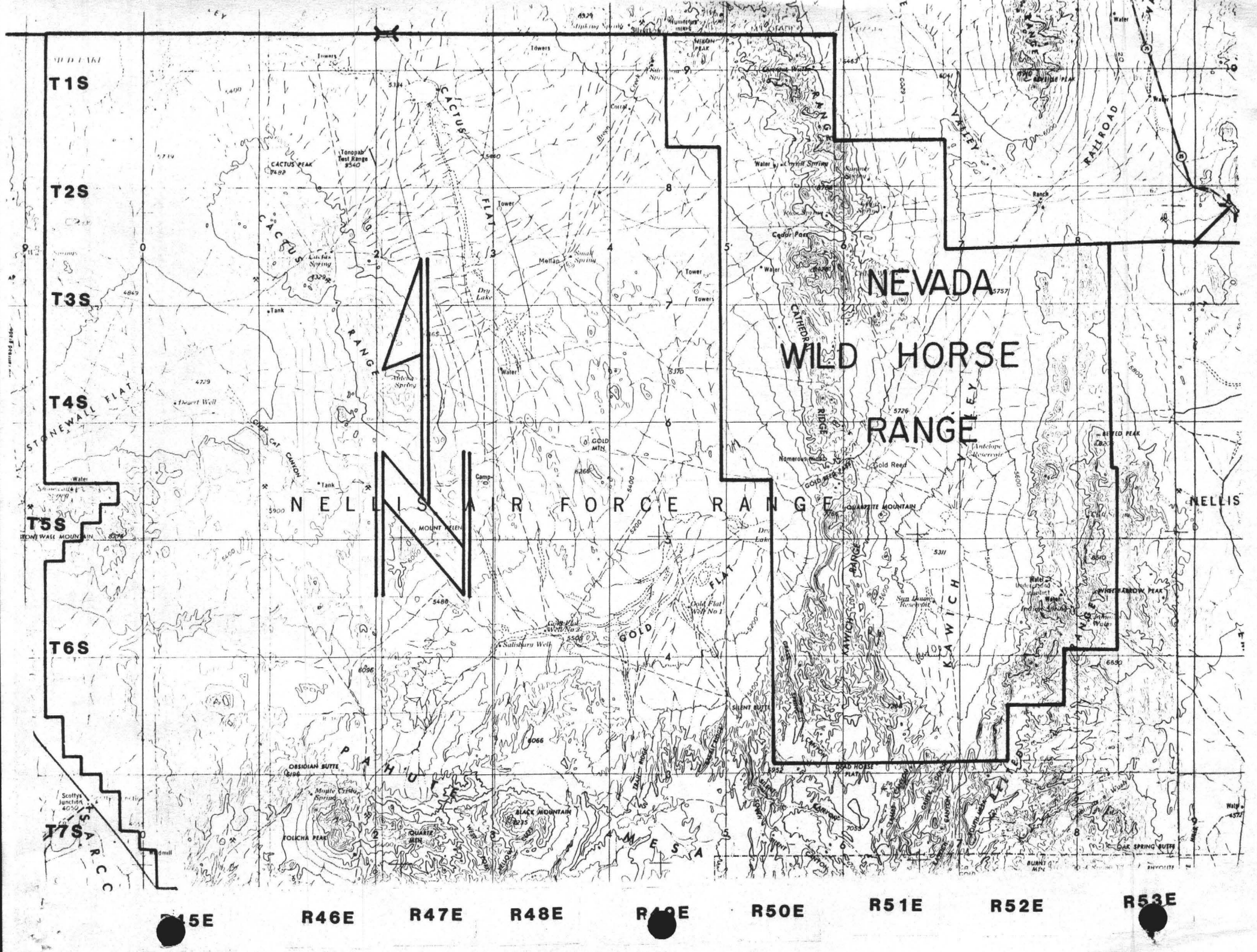
- Final Determination on need for Environmental Impact Statement (EIS). Suspense: 15 December 1984

- Action as soon as practicable thereafter.

- Adoption, waiver of fee.

- Destruction as necessary to achieve proper levels

- If at any time an Environmental Impact Statement is deemed appropriate, this timetable should be revised and superseded based upon EIS procedural requirements.



T1S

T2S

T3S

T4S

T5S

T6S

T7S

R45E

R46E

R47E

R48E

R49E

R50E

R51E

R52E

R53E

NEVADA
WILD HORSE
RANGE

NELLIS AIR FORCE RANGE

STONEWALL FLAT
CACTUS RANG
MOUNTAIN
KAWICH

MESA

RAILROAD

CANYON

CANYON

KAWICH

NELLIS