



UNITED STATES DEPARTMENT of the INTERIOR
BUREAU OF LAND MANAGEMENT

Las Vegas District Office
4765 Vegas Drive
Las Vegas, Nevada 89108

NDOW
Appeal

m
NELLS
5-4-99

In Reply Refer To:
NV052-1060

May 4, 1999

Dawn Lappin
Wild Horse Organized Assistance
P.O. Box 555
Reno, Nevada 89504

Dear Ms. Lappin:

Enclosed is Environmental Assessment, Water Development Projects Nellis Air Force Range, NV-052-98-009; and the related Decision Record/FONSI.

Should you have any further questions, please contact Gary McFadden, Wild Horse & Burro Specialist, here at the Las Vegas Field Office, telephone 702: 647-5024.

Sincerely,

Marvin Dan Morgan
Assistant Field Manager
Renewable Resources



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Las Vegas Field Office
4765 Vegas Drive
Las Vegas, Nevada 89108
<http://www.nv.blm.gov>



In Reply Refer To:
(NV-052)
1792

Dear Five Party Member:

The enclosed Environmental Assessment, Water Development Projects Nellis Air Force Range, (NV-052-98-009) and Decision Record/FONSI represents the BLM's position for the temporary management of wild horses on the Nellis Air Force Range. The Bureau of Land Management has resource management responsibility for the wild horses that occur on the Nellis Range through the Free Roaming and Wild Horse and Burro Act. We all know that a permanent solution for management of wild horses on the Nellis Air Force Range is what we need to achieve and work towards. This of course will take some time and many future meetings to iron out management prescriptions which will meet the intent of the law and provide the long term solution which is needed.

This decision may be appealed to the Interior Board of Land Appeals (IBLA), Office of the Secretary, in accordance with the regulations contained in 43 CFR, Part 4 and enclosed Form 1842-1. If an appeal is taken, your notice of appeal must be filed in this office, at the above address, within 30 days from receipt of this decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition pursuant to regulation 43 CFR 4.21 (58 FR 4939, January 19, 1993) or 43 CFR 4770.3, for a stay of the effectiveness of this decision during the time that your appeal is being reviewed by IBLA, the petition for a stay must accompany your notice of appeal. A petition for a stay is required to show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for a stay must also be submitted to each party named in this decision and to IBLA and to the appropriate office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and

(4) Whether the public interest favors granting the stay.

I would like to continue meeting to work on this issue because the time is right to work out a permanent resolution to this ongoing controversy.

Sincerely,

A handwritten signature in cursive script that reads "Michael F. Dwyer". The signature is written in black ink and is positioned above the printed name.

Michael F. Dwyer
Las Vegas Field Office Manager

ENVIRONMENTAL ASSESSMENT
NV-052-98-009

Water Development Projects
Nellis Air Force Range

Prepared By: Gary McFadden

Date: April 30, 1999

BUREAU OF LAND MANAGEMENT

Las Vegas District
Las Vegas, NV

PURPOSE AND NEED

The purpose and need is to provide water for wild horses outside the exclosure fences at 3 springs on the Nellis Bombing Range (attached are project location maps). This will ensure that horses in the area will have their traditional water sources and therefore will not suffer unduly or die due to any lack of water. This action is anticipated to be temporary until the Nellis Air Force Range Resource Plan would be modified to include this use area into the Nevada Wild Horse Range if appropriate, or some other solution would be developed. The 3 spring exclosures listed below in Table 1 were constructed in 1998 by the Air Force for riparian and wildlife habitat restoration. This environmental assessment will analyze the impacts resulting from the construction of pipelines and troughs at the 3 springs. The springs are located in the Cactus Range of the Nellis Bombing Range outside the Nevada Wild Horse Range.

Table 1

Source Name	Location	PFC Rating
Cactus(Lower Source)	T2S,R46E,Sec.34 NW	NF
Stealth	T2S,R46E,Sec.20 NE	FAR
Sleeping Column	T3S,R46E,Sec.5 NW	FAR

RELATIONSHIP TO PLANNING

The proposed action is in conformance with Standard Operating Procedure (k) on page 17 of the Nellis Air Force Range Resource Plan: "Spring improvement projects will be fenced and water will be piped away from the source to a trough or pond if necessary. Water will also be left at the spring source to create riparian vegetation for wildlife." Horses have historically used these waters. It was decided by BLM management to continue providing water for horses at these locations until the Nellis Air Force Range Resource Plan would be modified. This modification would clarify horse use on the range and use of water at the 3 springs. Management Director Item #11 (page 9) of the Nellis Air Force Range Resource Plan provides for delineation of 1971 wild horse use areas. The data gathering effort underway suggests residual use of vegetation and water use in the Cactus Range. Further data collection and consultation may result in modification of currently identified Nevada Wild Horse Range. This action and process will conform to the purpose and responsibilities stated in the Charter of The Five Party Agreement signed in November, 1997, by all parties: Bureau of Land Management, Nellis Air Force Base, U.S. Fish & Wildlife Service, Department of Energy (Nevada Operations Office), and the Nevada Department of Wildlife through the State of Nevada Clearinghouse. In summary the charter states its purpose as

an agreement between the 5 parties to enhance management of land and its resources located on the Nellis Air Force Range using biodiversity conservation and ecosystem-based approaches by all five parties in a cooperative, consistent, and collaborative manner.

PROPOSED ACTION AND ALTERNATIVE

Proposed Action - Provide water for horses outside the riparian exclosures at the 3 springs. The springs were previously developed and used for livestock watering and now the developments are used for horse watering. The newly constructed riparian exclosures will protect the spring sources and allow for riparian restoration of the riparian areas to proper functioning condition (PFC). The PFC ratings are listed in Table 1. and are non-functioning (NF) and functioning at risk (FAR). The specific proposed action at each spring follow:

Cactus Spring - There is a headbox at the source, piping to a trough, and a trough that is now inside the new exclosure. There is a degraded riparian area that has developed from the overflow at the existing trough. The intent is to restore and enhance the riparian area at the existing trough location. The existing trough would be removed and used at the new watering location. Maintenance would be performed on the headbox if necessary. The existing pipe from the headbox to the trough would be excavated and cut at a location approximately half way from the headbox to the trough. At this location a tee would be installed in the pipe, see the attached detail. The side pipe leg would go a short distance and surface and supply water to the existing riparian area. The direct pipe would go to the new trough location with a bulb valve installed to regulate the flow to the trough. The valve would be used to control the water flow amount to the trough from about 25 to 50% of the total with the remaining going to the riparian area in the side pipe for maintenance and enhancement. The regulated flow would be in new 1 1/4 inch Driscoll piping to the trough approximately 2500 feet downslope to the southeast. The piping would be placed in a newly excavated trench 24 inches deep. Excavation would be performed with a trenching machine. The ditch would be backfilled.

Stealth Spring - There is an existing headbox and pipe that runs a short distance to a pool that is presently being used for horse watering. The pool overflows onto and feeds an existing degraded riparian area. The existing headbox, pipe and pool are within the new exclosure. The intent is to pipe a portion of the water to a trough outside the exclosure and leave a portion for riparian maintenance and restoration. Maintenance would be performed on the headbox if necessary. A tee would be installed at the end of the existing pipe. The side pipe would go a short distance and supply water to the existing pool and riparian area. The direct pipe

would go to the new trough location with a bulb valve installed to regulate the flow to the trough. The valve would control flow to the trough at approximately 25% of the total with the remaining going to the riparian area in the side pipe for maintenance and enhancement. The regulated flow would be in new 1 1/4 inch Driscoll piping to the trough approximately 1250 feet downslope to the southeast. The piping would be placed in a newly excavated trench 24 inches deep. Excavation would be performed with a trenching machine. The ditch would be backfilled. The metal trough would be painted green and have a 500 gallon capacity.

Sleeping Column Spring - There is pipe from a pool at the source to a nearby existing trough. There is a small enclosure fence around the source and trough that would be removed prior to new water development. The spring is supplying water to the trough and is supporting a riparian area within the small enclosure, excess water is flowing out of the enclosure area and down a ditch along an adjacent road. Along with enclosure fence construction the Air Force would divert existing surface water flow from the road ditch back onto its historical area restoring the riparian habitat. The intent of this action is to remove the existing pipe and trough and install a collection system and pipe to a new trough approximately 1250 feet downslope to the southwest. A french drain collection system utilizing Johnson Screens would be installed approximately 25 feet below the source. Water would be piped in new 1 1/4 inch Driscoll pipe from the collection system to the trough. The pipe would be placed in a newly excavated trench 24 inches deep. Excavation would be performed with a trenching machine. The ditch would be backfilled. The metal trough would be painted green and have a 500 gallon capacity. At the trough a float valve would be installed on the system allowing water to enter the trough only as it is used, creating a closed system.

The Bureau of Land Management (BLM) would be responsible for all materials and installation of the new collection system, the piping, and troughs. Also included is maintenance on the existing headboxes. The existing fencing, piping, troughs and all trash would be removed from the area by the BLM.

No Action Alternative - proposed water developments at the 3 springs would not be constructed providing water outside the enclosures. Gates on the enclosures would remain open allowing horses access to spring sources, water developments, and riparian areas within the enclosures until such time the horses were removed from the area. Riparian areas would continue to degrade from over use by horses. The investment by the Air Force for riparian and wildlife habitat restoration would be wasted.

EXISTING ENVIRONMENT

The project is located within the Cactus Range area of Nellis Bombing Range at approximately 6200 feet in elevation. The springs occur at the junction between the volcanic uplands and the fan-piedmont position on the landscape. The area soils are shallow and gravelly and have developed from volcanic alluvium. The vegetation is predominantly sagebrush. Bighorn sheep, mule deer, mountain lion and numerous non-game species inhabit the area and use the springs.

ENVIRONMENTAL CONSEQUENCES OF THE PROPOSED ACTION AND ALTERNATIVE

Proposed Action - There would be no anticipated impacts to the following resources as a result of the proposed action: ACEC's, T&E species, farm lands, flood plains, water quality, wetlands, wild and scenic rivers, hazardous or solid wastes, air quality, noxious weed management, environmental justice, and Native American concerns. Should it be determined that any of these elements be impacted during construction, stipulations would be developed to mitigate the impact.

Soil disturbance and compaction would occur on approximately 15,000 square feet or 0.34 acres along the pipeline construction corridors and trough locations. The potential for accelerated soil erosion as result of the proposed action is minimal due to the moderate slopes present and the small area disturbed along the corridors.

The uprooting and crushing of vegetation would occur along the narrow strip of land surface proposed for pipeline construction. This is expected to be a short term impact. Areas of vegetative loss should revegetate through natural processes. Vegetative loss would occur on the immediate area around the troughs due to trampling by horses when watering. Riparian-wetland vegetation associated with the springs would aggrade and benefit from protection from horse use and trampling. Water quality would improve.

Initial construction activities would cause stress and discomfort to wildlife species for a short period until construction is complete. During the long term, wildlife in the area would benefit as the riparian habitat continues to aggrade ecologically as a result of protection and moving the horse watering and use away. The enhanced riparian habitat would provide additional cover and forage for many species, including birds.

The Nellis Air Force Range archaeologist will conduct an existing data review of the proposed areas of potential effect to determine the appropriate levels of cultural resource evaluation and Native American consultation needed for the undertaking in consultation with the State Historic Preservation Office.

The horse watering relocation would cause stress and discomfort to

the horses presently using the springs for watering. However this should be a short term impact until the horses adapt to the new troughs and watering locations. The new systems and troughs should provide a more dependable source of watering.

Existing trash and debris would be removed around the spring riparian areas including the existing fencing around the source at Sleeping Column.

No Action Alternative - Horses would continue to have access to the 3 springs for watering. Heavy use would continue on the riparian-wetland areas. Riparian values and water quality would continue to be impacted. The wildlife in the area would still be required to compete for water at the sources as well as riparian forage and cover with the area horses.

PROPOSED MITIGATING MEASURES

1. If cultural resources are subsequently discovered during construction that could be adversely affected by project activities, construction will cease and the Assistant District Manager for Renewable Resources would be informed immediately.
2. All trash (i.e. construction materials, old pipe, old fencing, etc.) will be removed from the project sites once construction is complete.

CONSULTATION AND COORDINATION

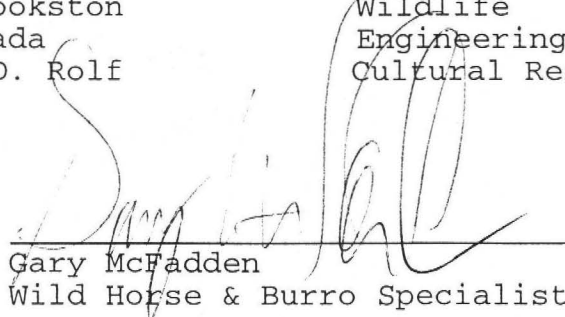
Eric Watkins	Nellis Air Force Base
Keith Myhrer	Nellis Air Force Base
Craig Stevenson	Nevada Department of Wildlife

RECORD OF INTERNAL REVIEW, LAS VEGAS FIELD OFFICE, BLM

Jeanie Cole	Wildlife
Jack Norman	Riparian, Soil/Water/Air
Gary McFadden	Wild Horse & Burro
Peter Crookston	Wildlife
Sal Estrada	Engineering
Stanton D. Rolf	Cultural Resources

SIGNATURES

Prepared by:

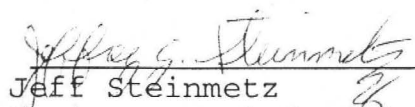


Gary McFadden
Wild Horse & Burro Specialist

4-30-99

Date

Reviewed by:



Jeff Steinmetz
Environmental Coordinator

4/30/99

Date

DECISION RECORD/FINDING OF NO SIGNIFICANT IMPACT
for the
Water Development Projects
Nellis Bombing Range
(EA No: NV-052-98-009)

Decision: I have reviewed the EA for the proposed Water Development Projects at the Nellis Air Force Range and concur with my staff's assessment. The projects are approved as proposed with the following mitigating measures:

1. If cultural resources are subsequently discovered during construction that could be adversely affected by project activities, construction will cease and the Assistant District Manager for Renewable Resources would be informed immediately.
2. All trash (i.e. construction materials, old pipe, old fencing, etc.) will be removed from the project sites once construction is complete.

Rationale: The water developments will move the horses off the spring sources and riparian habitats. This will allow for their restoration and will be positive for the wildlife in the area. The horses will have a dependable adequate source of water away from the springs. The decision is in conformance with the Nellis Air Force Resource Management Plan. It is critical the BLM follow its legal responsibility to ensure no harm occurs to the animals prior to working out a permanent solution.

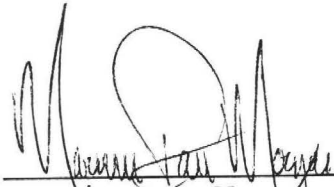
FONSI: I have determined that no significant impacts will occur to the quality of the human environment as a result of this decision; therefore, an EIS is not required.

Rationale: My finding of no significant impact is based on the following:

1. The project will have no adverse effects on such unique characteristics as cultural resources, wilderness areas, wetlands, or riparian areas.
2. The environmental effects of the project are neither controversial nor do they involve unique or unknown risks.
3. The project will have no adverse effects on species listed or proposed to be listed on the List of Endangered or Threatened Species, or on designated Critical Habitat for these species.

4. The project does not threaten to violate a Federal, State, or local law or requirements imposed for the protection of the environment.

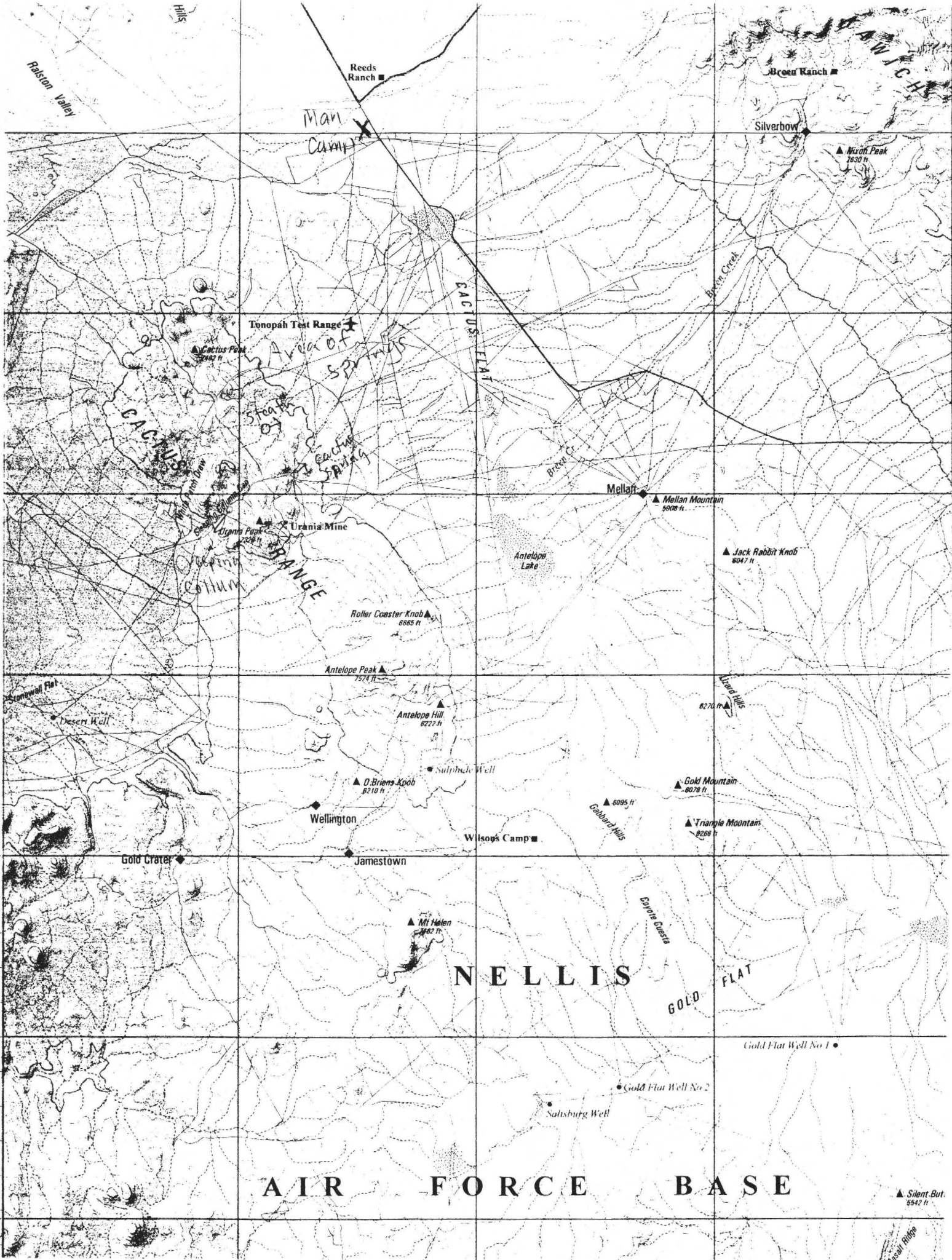
Approved:



Marvin Dan Morgan
Assistant Field Manager,
Renewable Resources
Las Vegas Field Office
Bureau of Land Management

4/30/99
Date

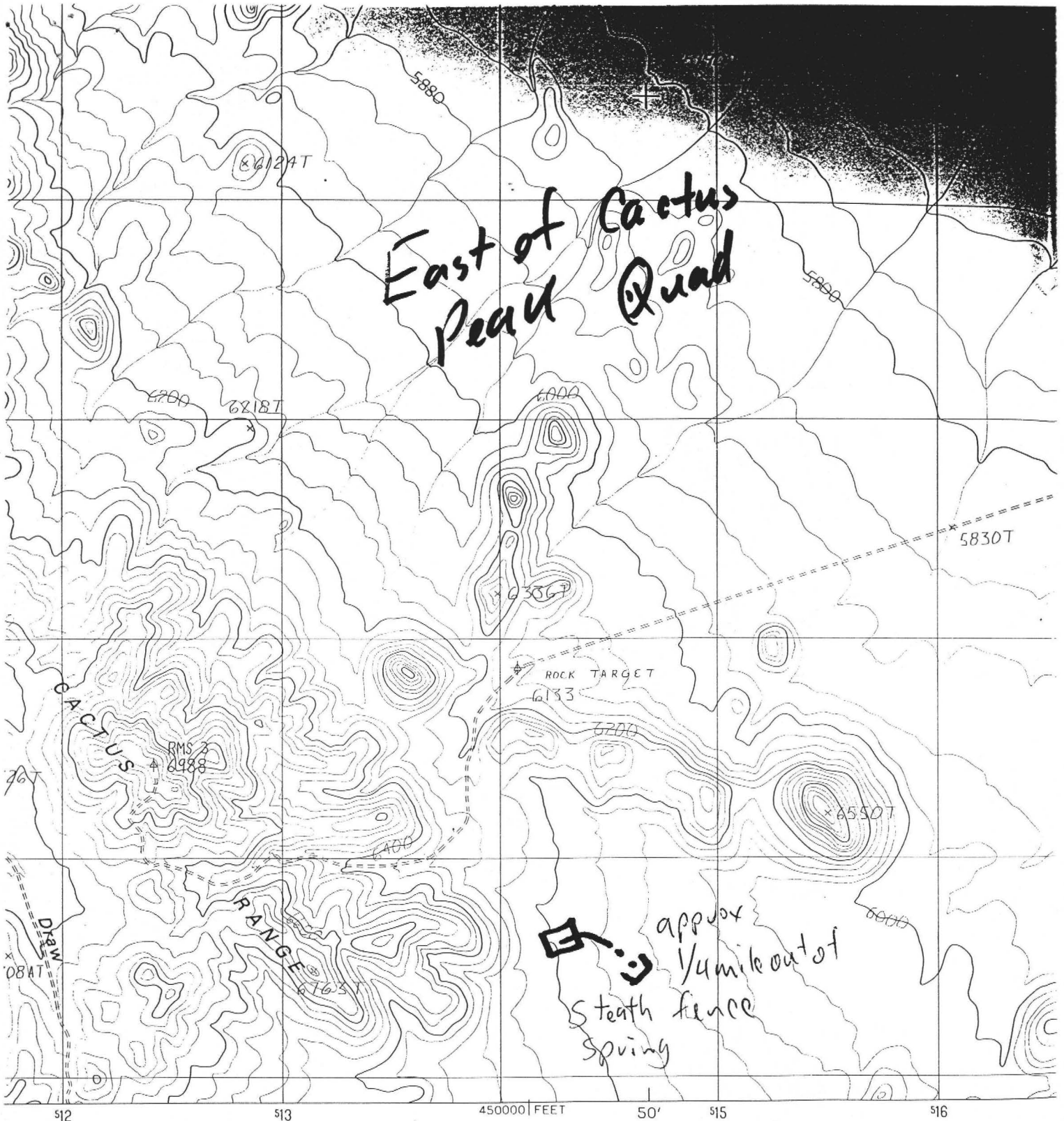
ATTACHMENT - PROJECT LOCATION MAPS



AIR FORCE BASE

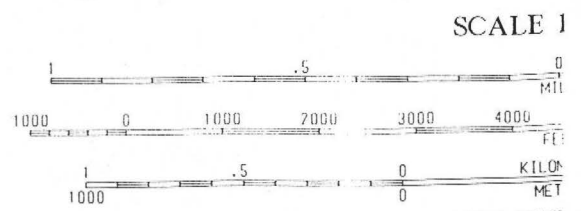
▲ Silent But
5542 ft

Basin Ridge



THE UNITED STATES GEOLOGICAL SURVEY
 USGS, NOS/NOAA AND DMA
 AERIAL PHOTOGRAPHS TAKEN 1976 AND 1982
 FIELD NOTES 1984. MAP EDITED 1987
 PROJECTION TRANSVERSE MERCATOR
 MAP DATUM TRANSVERSE MERCATOR
 ZONE ZONE 11
 GRID TICKS NEVADA, CENTRAL ZONE
 GRID INTERVAL 0'07" EAST
 MAGNETIC DECLINATION 14'30" EAST
 DATUM NATIONAL GEODETIC VERTICAL DATUM OF 1929
 DATUM 1927 NORTH AMERICAN DATUM
 (predicted North American Datum of 1983,
 on lines as shown by dashed corner ticks
 179 meters east):
 Private inholdings within the boundaries of any
 observations shown on this map
 between houses, barns, and other buildings
 are not shown because of insufficient data
 features not field checked in certain

PROVISIONAL MAP
 Produced from original
 manuscript drawings. Informa-
 tion shown as of date of
 photography. 1

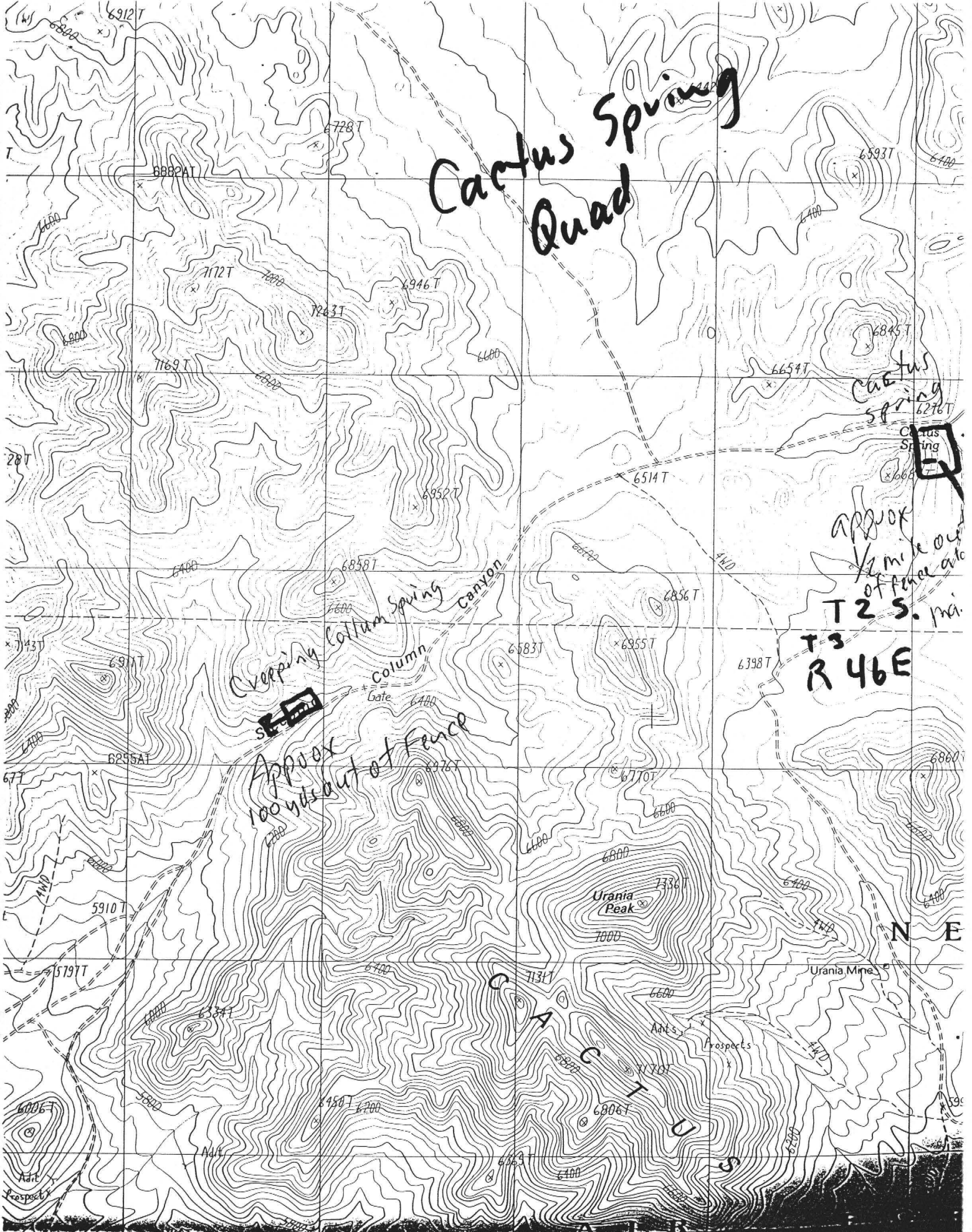


CONTOUR INTERVAL
 SUPPLEMENTARY CONTOUR

To convert feet to meters
 To convert meters to feet

THIS MAP COMPLIES WITH NATIONAL
 MAP SCALE BY THE GEOLOGICAL SURVEY

Cactus Spring Quad



approx
1/2 mile out
of fence area

T 2 S. mi.
T 3
R 46 E

Approx
100 yds out of fence

Capping Collum Spring
Column Spring Canyon
Gate

Cactus Spring
Cactus Spring

U R A N I A
C A T T U R I N G

Urania Mine

Ants
Prospects

Ant
Prospect



KENNY C. GUINN
Governor

Nellis
STATE OF NEVADA

DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES

DIVISION OF WILDLIFE

1100 Valley Road
P.O. Box 10678
Reno, Nevada 89520-0022
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PETER G. MORROS
Director
Department of Conservation
and Natural Resources

TERRY R. CRAWFORTH
Administrator

DeW
[Handwritten initials]

June 7, 1999

Mr. Michael F. Dwyer, Manager
Las Vegas Field Office
Bureau of Land Management
4765 Vegas Drive
Las Vegas, NV 89108

RE: Appeal to Interior Board of Land Appeals of 1792 (NV-052-98-009)

Dear Mr. Dwyer:

The Nevada Division of Wildlife is appealing the Decision (EA NV-052-09-009) which will provide water for feral horses in the Cactus Range of the Nellis Weapons Range. This decision is a continuation of strategies which have given priority to horse management at the expense of range conditions, riparian resources, native wildlife species and the health of the horse resources of the area.

The Division appeals this decision on the following grounds:

1. By this action, the Bureau of Land Management (BLM) disregards the direction for the establishment of boundaries for management and distribution of feral horses as set forth in direction of the Free Roaming wild Horse and Burro Act (Public Law 92-195, 1971).
2. 43 Code of Federal Regulations (CFR), Chapter II, 1610-3.2, (a), states, in part: "Guidance and resource management plans and amendments to management framework plans shall be consistent with the officially approved or adopted resource related plans...." This decision violates the Nellis Air Force Range Resource Plan and Environmental Impact Statement by perpetuating feral horse use outside the Nevada Wild Horse Range. This action also allows for horses to occupy and use lands which are adjacent to, but not a part of, the designated Nevada Wild Horse Range. These lands are currently at Appropriate Management Level (AML) or are not wild horse range and remain horse free.
3. A decision to either open exclosures to permit horse use of water or to provide water to horses outside exclosures will result in continued over-use of range resources and riparian habitats. Both alternatives are unacceptable.
4. The management decision would allow horse numbers to exceed a thriving ecological balance within the legal boundary of the Nevada Wild Horse Range, as currently described. Efforts are currently underway to determine an AML based on water, forage, living space and the genetic needs of the horses. This effort, defining AML, for the area must involve

DAVID NAWI
Regional Solicitor

BRUCE HILL
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Telephone: 801-524-5677 ext. 233
Telefax: 801-524-4506

Attorneys for the Bureau of Land Management

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS

NEVADA DIVISION OF WILDLIFE,)	IBLA 99-___
)	
Appellant)	Appeal of Assistant Field Manager's
)	Final Decision, dated April 30, 1999,
)	Approving Wild Horse Watering Facilities
)	(EA NV-052-09-009)
)	

OPPOSITION TO PETITION FOR STAY
AND ANSWER

The Bureau of Land Management (BLM), through the undersigned counsel,¹ hereby submits its opposition to the stay petition and its answer to the Appellant's statement of reasons filed in the above-captioned matter. The BLM received the appeal and associated

¹ Please be advised that, as of the date of this pleading, the BLM in the above captioned case is represented by Mr. John W. Steiger, Attorney-Advisor, Office of the Field Solicitor. As required by 43 C.F.R. §§ 4.22(b), 4.413(c)(4), and 4.473, all statements of reason, written arguments, briefs, or other documents filed in this matter must henceforth be served on Mr. Steiger at the address shown above. Failure to provide timely service to the address shown above may subject this appeal to summary dismissal as provided in 43 C.F.R. §§ 4.402 and 4.413(b).

stay petition on June 8, 1999. By pleading dated June 17, 1999, the Acting Assistant Field Manager for Renewable Resources, Las Vegas District, moved for an extension of time for seven days to respond to the stay petition. This pleading is submitted in accordance with that motion. For the following reasons, the BLM respectfully requests that the stay petition be denied and that the BLM's decision be affirmed.

I. Background

The area subject to this dispute is in the Nellis Weapons Range, administered by the United States Air Force but on lands managed by the BLM. See Pub. L. No. 99-606, § 1(b), § 3, 100 Stat. 3457, 3460. In 1986, Congress withdrew the subject lands for the weapons range for a period of 15 years. See id. § 5(a), 100 Stat. 3462. Currently, Congress is considering whether to renew or extend the withdrawal. Cf. id. § 5(b), (c), 100 Stat. 3462-63 (provisions regarding the renewal or extension of the withdrawal). The BLM anticipates that the withdrawal will be renewed or extended, and that the legislation will address future management of wild horses in the area.

In 1962, the Commander of the Nellis Air Force Base and the Nevada State Director of the BLM entered into a memorandum of understanding (MOU) governing the management of wild horses on the weapons range. The MOU, among other things, described a wild horse management area comprising 435,000 acres within the weapons range.² Another MOU was entered into in 1965 that repeated the 1962 MOU's provisions, but reduced the

² The MOU and all other documents referred to herein are being transmitted by the Las Vegas District Office to the Board as part of the administrative record.

size of the wild horse management area to 394,500 acres.

After passage of the Wild Free-Roaming Wild Horse and Burro Act (WHBA) in 1971 (see 16 U.S.C. §§ 1331-40), the BLM determined that the earlier MOUs were inadequate. Subsequently, in 1974, the Commander of the Nellis Air Force Base and the State Director entered into a cooperative agreement that expressly superseded the earlier MOUs and provided for wild horse management consistent with the WHBA. The cooperative agreement stated that it applied to essentially the same geographic area as that described in the 1965 MOU, but recognized that wild horse use extended off that area. See Cooperative Agreement (Feb. 8, 1974 (date of Commander's signature)), ¶ 2.

In 1985, the BLM adopted a wild horse management plan for the area. The document recognized that wild horses range over a much larger area than that described in the 1962 MOU. See Nevada Wild Horse Range Herd Management Area Plan, at 1-2 (1985). This area was estimated to comprise 1,935,000 acres, over four times the size of the area in the 1962 MOU. See id. at 2. Nonetheless, the plan called for the wild horses to be managed "with the objective to maintain the home range wholly within the [Nevada Wild Horse Range (NWHR)]" (id. at 13), referring to the area established in the 1962 MOU (id. at 1). The herd was to be limited to 2000 head. Id. at 13.

In 1991, the BLM analyzed the monitoring data collected to date and established an appropriate management level (AML) of 1000 head. See Memo. to Assistant Secretary -- Land and Minerals Management, from Director, BLM (Jan. 15, 1992) (1992 Memo). The AML was established through the adoption of a removal plan, which ultimately was approved by the Assistant Secretary for Lands and Minerals Management. See Plan for Nellis Air

Force Range Wild Horse Removal (undated) (1992 Removal Plan), attached to 1992 Memo. The removal plan states that the AML was established for the Nevada Wild Horse Range as reflected in the "1973" (actually 1974) cooperative agreement. 1992 Removal Plan at 2. However, the BLM actually relied on monitoring data from wild horse use on a much larger area. This is reflected on page 4 of the plan, which indicates 877,419 "useable acres," more than twice the acreage identified in the 1965 MOU and 1974 cooperative agreement.

A month after adoption of the 1992 Removal Plan, the Nevada State Director approved the Nellis Air Force Resource Plan (Feb. 1992) (Resource Plan) to govern the area's management. An objective of the Resource Plan was to manage wild horses "only on the Nevada Wild Horse Range." Id. at 9. The Resource Plan recognized, however, that the geographic extent of wild horse use as of the date of the WHBA's enactment (in 1971) was unknown, providing a "[m]anagement [d]irection" to "[d]elineate 1971 wild horse use areas." Id. The BLM has since gathered data indicating the 1971 wild horse use areas, and it intends to initiate a plan amendment process to recognize and manage wild horse use in these areas once Congress renews or extends the withdrawal of the weapons range (or allows it to lapse). Cf. Environmental Assessment, NV-052-98-009, at 2 (April 30, 1999) (EA) (indicating intent to amend plan).

In 1997, the Air Force proposed to the BLM to enclose in fences several springs used by wild horses on the weapons range but outside of the area described in the 1965 MOU and 1974 cooperative agreement. The Air Force proposed the fencing to allow for the restoration of riparian habitat associated with the springs that had been damaged by wild horse use. The BLM agreed that the Air Force could enclose the springs so long as it complied with the

National Environmental Policy Act (NEPA) (42 U.S.C. §§ 4321-4370c) and provided access to the wild horses using the springs until water could be supplied outside of the fences.

In 1998, the Air Force constructed the fences without submitting any NEPA documentation for BLM review. After the fences were constructed, the BLM requested that the Air Force keep open gates in the fences to allow wild horses continued access, to which the Air Force agreed. The BLM subsequently issued the decision at issue in this appeal.

As of this date, wild horses continue to use the springs through the gates in the fences. If the stay petition is denied, the BLM intends to implement the decision immediately. Upon completion of the watering facilities, the gates will be closed.

II. Argument

A. Response to the stay petition

As an initial matter, the BLM first notes that the Appellant requests not only a stay of the BLM's decision but an order to close the gates of the fences enclosing the springs. The Appellant's request for the order is apparently a request for affirmative injunctive relief. Even assuming that the Board has jurisdiction to order the gates closed (the Air Force administers the weapons range), there is no regulatory basis or, to the BLM's knowledge, Board precedent for granting such relief pending resolution of the merits. Perhaps most importantly, ordering the gates closed, without providing an alternative water source, may harm a number of wild horses protected by the WHBA by forcing them to move to other water sources which may be inadequate. See EA at 2 (stating that the purpose of the proposed action is to "ensure that horses in the area will have their traditional water sources

and therefore will not suffer unduly or die to any lack of water").

With respect to the request to stay the BLM's decision, the Appellant has failed to carry its burden to demonstrate that the four standards set forth in 43 C.F.R. § 4.21 have been met:

1. The Appellant has failed to show that the balance of harm favors a stay. The Appellant has not demonstrated that the balance of harm favors a stay. In any event, application of this standard favors denying the stay. On one hand, the Appellant will not be harmed by construction of the disputed facilities. No increase in wild horse use will result, so there will be no increase in adverse environmental impact caused by horses. Any impact caused by the construction will be minimal and temporary. See EA at 5-6. On the other hand, foregoing the construction of the disputed facilities will continue to perpetuate the damage to riparian habitat associated with the springs caused by wild horse use. See id. at 6. Consequently, a greater degree of harm will occur if a stay is granted.

2. The Appellant is unlikely to prevail on the merits. The Appellant raises six grounds for error. None have merit. First, the Appellant provides no support for its argument that the BLM's decision violates the WHBA. The Appellant suggests that the BLM's action is in disregard of the act's "direction for establishment of boundaries for management and distribution." The BLM's action will not result in wild horses using areas in derogation of the WHBA. The BLM's data indicates that wild horses used the area in the vicinity of the springs when the WHBA was enacted in 1971. See, e.g., EA at 2 (stating that wild horses have traditionally and historically used the springs). Moreover, no formal wild horse use area has been established as provided in section 3(a) of the WHBA. See 16

U.S.C. § 1333(a). Although the 1965 MOU and 1974 cooperative agreement established a wild horse management area, which was carried forward into the Resource Plan, this did not constitute a designation of "specific ranges on public lands as sanctuaries for [wild horse] protection and preservation." Id.

In addition, the Appellant cites to nothing in the WHBA that prevents the BLM from taking action to prevent harm to wild horses even where they roam off their historical range or range established pursuant to section 3(a) of the WHBA. The action the Appellants are challenging will simply allow for the improvement of riparian habitat surrounding the springs while continuing to provide water to wild horses.

The Appellant's second ground for error is also meritless. The citation to 43 C.F.R. § 1610.3-2(a) is misplaced. That provision relates only to the consistency between BLM resource plans and officially approved plans, policies, or programs of other governmental entities. The allegation that the decision violates the Resource Plan is also inapposite. The environmental assessment supporting the decision expressly considered the proposed action's relationship to the Resource Plan (see EA at 2), and the decision found the proposed action to be in conformance (see id. (Decision Record) at 7). Although the Resource Plan indicates an objective to limit wild horse use to the area indicated in the 1965 MOU and 1974 cooperative agreement, it does not prevent the BLM from taking action to prevent harm to wild horses outside of that area. This is especially true in light of the data indicating that wild horses used the area in the vicinity of the springs when the WHBA was enacted in 1971. Indeed, the Resource Plan contemplates a determination of the geographic extent of wild horse use in 1971, and the BLM intends to initiate a plan amendment process to

recognize and protect wild horse use in this area. See EA at 2.

The Appellant's third asserted error, that the decision to provide watering facilities will result in continued over-use of range and riparian resources, also fails because the Appellant fails to support the contention. The BLM is unaware of any data indicating that the current AML is inappropriate. If, in the future, monitoring indicates that the AML needs to be modified, the BLM will do so.³ The Appellant's fourth ground for error fails for the same reason. There is no data to show that the present horse population exceeds a thriving ecological balance.

Fifth, the Appellant fails to demonstrate that the BLM did not comply with the consultation provision of the WHBA. Section 3(a) of the WHBA provides, in relevant part, that "[a]ll management activities . . . shall be carried out in consultation with the wildlife agency of the State wherein such lands are located in order to protect the natural ecological balance of all wildlife species which inhabit such lands. . . ." 16 U.S.C. § 1333(a). The Appellant commented on the environmental assessment prepared for the proposed action prior to the final decision. See Letter from Cornelio O. Padilla, Biologist, Nevada Division of Wildlife, to Jack Norman, BLM (March 31, 1998). The BLM considered the Appellant's comments (see EA at 2), and now the Board will consider them again before the decision is implemented. The WHBA does not require more.

Sixth, and finally, the Appellant is incorrect in inferring that the BLM did not comply

³ The BLM notes that the wild horse gathers that it undertook in the area in 1996 and 1997 have resulted in a significant improvement of range resources. The 1997 gather reduced the population to 525 head, which will be allowed to increase through natural recruitment to the AML of 1000 head. Monitoring will continue throughout this recruitment period.

with the "Five Party Agreement." This agreement does not require the BLM to abdicate its management responsibility to the consensus of the other signatories to the agreement. The "[r]esponsibilities" set forth therein are largely to establish a protocol for consultation, which the BLM has followed and intends to follow in the future (see EA at 2).

3. The Appellant has failed to show irreparable harm. The Appellant does not mention much less demonstrate that it will suffer irreparable harm. If the BLM's decision is reversed, the facilities can be removed with no permanent harm to the environment or to the interests of the Appellant. Indeed, the environmental assessment expressly anticipates that the action will be "temporary until the [Resource Plan] would be modified to include this use area into the Nevada Wild Horse Range if appropriate, or some other solution would be developed." EA at 2.

4. The Appellant has failed to show that the public interest favors a stay. The Appellant similarly fails to make any showing that the public interest favors a stay. If a stay is granted, riparian habitat associated with the springs will continue to be damaged by wild horse use. If the stay is denied, the riparian habitat will improve. In either case, the current level of wild horse use should not change. However, if a stay is granted and the Air Force, for some reason, unilaterally closes the gates, wild horses may be harmed. This would not be in the public interest, as expressed in the WHBA.


B. Answer

The BLM's decision should be affirmed on the merits. The BLM believes that the discussion of the merits in the previous section should be sufficient to also serve as an answer to the Appellant's statement of reasons.

III. Conclusion

The Appellant has failed to carry its burden to demonstrate that a stay is warranted or that the BLM's decision is in error. The stay petition should be denied and the BLM's decision affirmed.

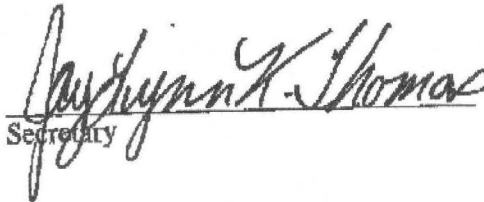
Respectfully submitted this 25th day of June, 1999.


John W. Steiger
Counsel for BLM

CERTIFICATE OF SERVICE

I certify that on the 25th day of June, 1999, the foregoing OPPOSITION TO PETITION FOR STAY was telefaxed and served by mail, return receipt requested, on the following:

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Secretary

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