

Nellis

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10/31/91  
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# ANIMAL PROTECTION INSTITUTE OF AMERICA

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October 31, 1991

Interior Board of Land Appeals  
Office of Hearings and Appeals  
1015 Wilson Blvd  
Arlington, VA 22203

A P P E A L  
NELLIS AIR FORCE HMA  
EIS/RP & 1991 Removal Plan  
EA NV-055-02-01

Dear Sirs:

The Animal Protection Institute speaks for its members as an interested and affected party to BLM's management of wild, free-roaming horses and burros. We appeal two decisions related to the management of wild horses and burros in the Nellis herd use area of Nevada.

First, we appeal the BLM Director's decision on the final EIS/Proposed Resource Plan to reduce the wild horse area to one-tenth the size of the identified home range and use area.

Second, we appeal the justification for the pending population reduction in the October 1991 Removal Plan to reduce the population to the number calculated to be that which perennial waters--located in the ten percent area of the home range--will sustain.

There is a third area of contention that has to do with the validity of the two alternatives analyzed in the EIS. This, too, is in need of a ruling.

Because the Nellis Wild Horse area has several extenuating factors that make it complicated and confusing, we ask that you bear with us through this unusually long document. There are some 3 million acres withdrawn by the Department of Defense. These are divided into three Planning Units. The area covered by the draft 1989 EIS/proposed Resource Plan and the 1990 Final EIS, with which we are concerned, is the 2.2 million acre Unit of which the wild horse home range and use area is approximately 1.7 million acres.

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We do not disagree with BLM that a reduction of the population of horses may be needed.

#### BACKGROUND

The condition of riparian areas in the Planning Unit were described in 1981 and again in the 1989 draft EIS as severely degraded. The area of degradation continues to increase. Page 3 of the October 1991 Removal Plan quotes the use pattern for 1985, 1986, 1987 and 1991. Page 4 of that Removal Plan says the last major capture was in 1987. In fact, 600 horses were removed in December 1989 and 1,800 more horses were removed in the Spring of 1991. ATTACHMENT A contains the documents relevant to the 1990 and 1991 situation.

We argue that the condition of the range and the water supply does not justify eliminating 90 percent of the home range area.

Nellis was grazed by three livestock operators until 1979 when a 1959 decision (Page 3-8) to end grazing was implemented. However it took a fence, built in 1985 on the northern boundary, to actually end continued grazing of the area by livestock operators as unenforced and unrestricted trespass (See P. D-7, draft EIS). The land was seriously overstocked and overgrazed for many years. BLM records disclose that developed springs fell into serious disrepair and the most seriously needed repair work was delayed from 1984 until 1987. Field staff recommendations for storage tanks was disregarded (see ATTACHMENT B). No range improvement was done to restore, improve, or increase the productivity of the range; such as, fencing the source and piping waters or creating new, and enlarging old, catchment basins and potholes in the dry lake beds to create water barriers on dry washes to prolong the duration of ephemeral water use and control loss by flash flooding. The following water sources are not considered in the calculations of perennial waters on which the AML is set: Horse, Welch, Stonewall, Clapper, Cactus 1 and 2, Big Boy, Antelope (West), Small, Civet Cat, Roman, Cliff, Blondie, Antelope (East), Grass Springs and the three wells in Gold Flat.

API does not disagree that a reduction of horses was needed in this area in Spring 1991. We don't know if a further reduction is still needed. We did not appeal the Spring removal of 1,800 horses for this reason. We protested the Director's delay in responding to the EIS as the reason a proper removal plan was not possible. It appeared to us that the Administration was purposely allowing the situation to ripen, confusion to increase, and

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the situation to grow worse. When the Administration used Nellis in their testimony to Congress, June 1991, as a prototype, which was accompanied by a media campaign on Nellis, we feared Nellis was being used for reasons other than sound and proper wild horse management. We suspected they were laying the groundwork to repeal PRIA constraints and directives from the 1971 Act. It appeared to us that a general pattern was emerging, here and elsewhere, to take the law out of the wild horse program and the program out of the management framework of FLPMA and NEPA. (ATTACHMENT C contains the media campaign information).

However, what we appeal herein with regard to the removal plan of October 1991 is the justification stated on Page 6, Paragraph 2 of that plan. But first we offer arguments against the elimination of 1.4 million acres of identified home range which is the Director's decision on the FINAL EIS.

#### NO JUSTIFICATION FOR ELIMINATING 90% OF HOME RANGE

In the following, we cite the many references to the home range and habitat area (as approximately 1.7 million acres) that appeared in the draft EIS/Proposed Range Plan.

Page 1-14 (Chapter 1, Page 14) shows the map depicting the wild horse range (Spring/Summer and Fall/Winter). This is the area which we cite as being approximately 1.7 million acres of the 2.2 million acres in the Planning Unit covered by the 5-Party Agreement.

Chapter Two describes the management guidance common to all alternatives. On Page 2-3, it states the common guidance for wild horses as complying with the 5-Party Agreement of 1977 (e.g., 2.2 million acres). It directs the reader to Appendix B which is a copy of the 5-Party Agreement. Here, the area is identified as encompassing "the Nellis AFR, the Nevada Test Site, and the Tonopah Test Range." This is the total 2.2 million acres of the Planning Unit. These areas are identified by name in the map on Page 1-14. But on Page 2-5 through 2-9, the list of issues describe horses as being limited to the old Nevada range area in both alternatives (e.g., 394,000 acres). This is contrary to both the summary description of the two alternatives and the management directives that are said to be common to all alternatives.

The Issues are contradicted again on Page 2-10. Under the description of alternatives that were not analyzed, the draft EIS says "...either of the proposed alternatives, if fully implemented, would reduce conflicts to a manageable

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level without entirely removing wild horses from the Nellis Range." It also says PL 99-606 "permits the continued existence and management of wild horses in the planning area." The planning area is the 2.2 million acres.

The size of the home range area is referred to again in Chapter 3 under the description of the riparian areas. Here it refers to 814,300 acres of wild horse habitat as seriously degraded while the remaining 969,550 acres are at mid-seral stage. This is a total of 1,783,850 acres, which is the size of the home range and use area identified in the maps and other documents.

Chapter 3, which describes the affected environment, says the major use areas are Kawich Valley (east side), Cactus Flats and Gold Flats (central) and Goldfield Hills and Stonewall Mountain (west side) [Page 3-7]. This describes the 1.7 million acres of home range.

On Page 3-10, there is a reference to a 1981 EIS that was done on the military withdrawal permit application. The existence of this EIS is very surprising to us. API, an interested and affected party in 1981, was not told of this EIS or the actual status of these lands at that time.

This 1981 withdrawal EIS is referred to again in Chapter 4 on Environmental Consequences. On P. 4-7, under the heading of "Cumulative Impacts," it describes the affect of military usage as involving only 12,000 acres of land. Under the new 15-year permit this is to be reduced to 7,600 acres [in the Planning Unit]. The total military usage is stated as 58,174 acres (2.6 %) directly impacted and another 3,668 acres (0.17%) indirectly impacted by military activity [in the total 3 million acre withdrawn area].

There is no military activity on well over 2.1 million acres of the Planning Unit.

The FINAL EIS/Proposed Resource Plan says, on Page 2-5, that horses will be managed in accordance with the 5-Party Agreement [the 2.2 million acres minus actual military use]. However, this is contradicted under the objectives listed on Page 2-2. Here, it says horses will only be managed in the old Nevada range area [394,000 acres]. This we protested in January 1990 to the Director. Sixteen months later in June 1991, the Director responded. (His response is ATTACHMENT D.)

In his response to our protest the Director misquotes the Military Land Withdrawal Act. He indicates to us that

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§3(a)(2) includes a reference to wild horses and burros saying "...the management of wild horses and burros, are subject to conditions and restrictions necessary to permit continued military use." [The previous information showed they only use 60,000 acres.] The 1986 Act does not mention wild horses and burros.

The 1986 Military Land Withdrawal Act does say that to the extent consistent with applicable law and Executive orders the lands may be managed to permit continued grazing pursuant to applicable law, protection of wildlife and habitat, control of predators and other animals, recreation, and suppression of fire. It also says he shall develop a management plan and the plan "shall be consistent with applicable law." To us, "applicable law" includes the Wild Free-Roaming Horse and Burro Protection Act (amended) along with the T & E Species Act, Bald Eagle Protection Act, and the Migratory Bird Act. The Withdrawal Act also says closure to the public is to be limited to the minimum areas and periods that the military determines are required to carry out the purpose of the subsection.

The Director says since the lands were withdrawn prior to 1971 BLM considers them "non-public." We were never given the impression that BLM sees these lands as "non-public." The Engles Act of 1959 (43 USC 155-158) and the section of FLPMA regarding these withdrawn lands make it very clear that these areas of public lands are temporarily withdrawn for special use. What we did not know was that they were NOT under a withdrawal permit between 1976 and 1986. ATTACHMENT E contains BLM documents related to BLM's references to their understanding of the withdrawn status of Nellis and where they are to manage wild horses.

The Director goes on to say the 1974 Cooperative Agreement between the Las Vegas District and the Air Force established the HMA as the same area as the old "NWWR." It is very unusual that the Las Vegas District would have already established a Herd Management Area in 1974. In 1974, the rest of the State was in the MFP-I and II steps of the inventorying stages of the URAs (Unit Resource Analysis). The directives on developing management plans were in FLPMA. The draft EIS/Proposed Resource Plan does not include a 1974 Agreement with the local BLM in Las Vegas or make any reference to it. We find no record or reference to it in the administrative files. The draft EIS/proposed RP does refer to a 1973 Agreement between the Nevada State Office and the Air Force which requires BLM to enter cooperative agreements with other agencies when wild horses use lands under their jurisdiction during all or part of the year. It acknowledges that the horses in the

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old Nevada Range area are under BLM's jurisdiction. The Director disregards the 1977 Five-Party Agreement which would have been written relevant to the expiration of the withdrawal permit and the directives in FLPMA regarding withdrawn lands. He disregards the descriptions of the four major use areas that extend from the Goldfield Hills and Stonewall Mountain on the west to beyond Kawitch Valley on the east. Horses and burros in the two western areas would not use the old NWHR. He disregards the reference to PL 99-606 on Page 2-10 confirming the 2.2 million acre area of the Planning Unit as where BLM may manage wild horses and burros.

In his June 11 response to our protest, the Director goes on to say that in view of the lack of "specific legislative authority allowing BLM to manage wild horses in this area, the authority for the proposed "RP" only on NWHR is derived from the two Cooperative Agreements between BLM and USAF." We contend that the words "applicable law" do direct him as specific legislative authority.

We believe this statement by the Director contradicts the choice of management defined in the EIS as either implement present law and the 5-Party Agreement or invent a new management framework. We feel he is attempting to lead us, the public, to believe the 1986 Withdrawal Act specified conditions related to management of wild horses that requires BLM go back to an area created before the 1971 Act and that these are not public lands.

We believe that NEPA, FLPMA, and PRIA (which dovetails the Wild Horse Act into the others), create a wise and rational management framework for sound range and wild horse management. We see these laws as requiring decisions be based on technical information derived from inventorying range condition and monitoring use and impact, with well established procedures for public input and when fully implemented allow little or no leeway for political manipulation of the outcome. Therefore, we are alarmed to think they could be easily subverted by a clever manipulation of established procedures and practices.

#### INVALID ALTERNATIVES ANALYZED IN DRAFT EIS

Page S-1 of the draft EIS/Proposed RP describes the two alternatives as (1) continue current management within the framework of present laws and regulations including the existing 5-Party Agreement or (2) the Preferred Alternative would direct management attention toward improving rangeland vegetative conditions and wildlife habitat by achieving and maintaining the appropriate management level for the wild horse population on the planning area.

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On Page 4-5 of the draft EIS the impact of wild horses on vegetation is analyzed under the two alternatives. But alternative #1 (the implement present law option) is also the "No Action" alternative. In Chapter 4, it has become a worse case scenario of a no law alternative. When implemented the law requires BLM reduce overpopulation by determining excess. It says "heavy to severe grazing would occur within a quarter-mile radius of water and moderate to heavy would extend out to a 4.5 mile radius." Yet the typical grazing pattern of horses is to move into waters, drink, and move out again grazing up to 10-12 miles away. The draft EIS statement is not based on such essential facts. No attempt is made to document them.

The impact of "properly managed livestock" on wildlife habitat is analyzed. It says minor impacts to wildlife habitat occur except in the vicinity of water and suggests that appropriate stocking levels of livestock and adequate distribution of waters for livestock will minimize these impacts. There is no similar suggestion that adequate distribution of waters would disperse wild horses. Alarming to us, is the statement that says "implementation of livestock grazing decisions in this plan will result in both positive and negative impacts to vegetation." There are no livestock grazing decisions in this plan.

Page 3-8 and 3-10 describe the status of livestock grazing in Nellis as terminated in 1959 at the time of the Engles Act.

Our contention is that the very choice of alternatives is false to begin with. BLM doesn't have a choice of whether they implement the law or invent a new management framework for wild horses and burros and these public lands.

We believe the choice of alternatives must be as a clear statement of what is actually the choice that is possible. We think it would be (1) go back to the old NWHR area for horses or (2) reduce to the 1.7 million acres identified as home range and (3) No Action would be the 2.2 million acres identified in the Five Party Agreement. All three should include full implementation of the laws. This includes the events that implemented the Engles Act of 1959 such as paying the livestock operators for the loss of their preference privileges and certain water rights (not including those still held by rancher Fallini).

Objectives in all three should the development of resources to full capacity in keeping with the directives in PRIA.

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We don't know how this "long-term proposed "Resource Plan" meets the directive in the Military Land Withdrawal Act to develop a Management Plan for the duration of the 15-year permit. We don't know why it is a "proposed" plan rather than a final plan. We don't know if it goes to Congress. We don't know what is in the report on the review of withdrawn lands that FLPMA says is due in Congress by November 1991. We've never found anyone inside BLM who knows anything about that review and report. We don't know what is the status of the withdrawal permit for the Department of Energy's mission in Nellis. The whole thing changes in the Errata section of the Final. We contend the EIS violates NEPA [§1501.7 and 1502.4].

There is no Record of Decision. The only decision document is the Director's June 1991 letter to us.

THERE IS NO JUSTIFICATION FOR "AML" IN REMOVAL PLAN

In October we received an unsigned, undated Removal Plan which is the first action to implement the Director's decision. The EA for the removal is tiered back to the above EIS. The justification for the AML is to limit the population in the "planning area" to the yearlong amount of the perennial water located only in the old Nevada range area.

We are appealing the reduction to the old Nevada range and asking that the identified yearlong, home range habitat area be managed. The following argues against the decision to base population numbers on perennial waters only.

The natural adaptation of these horses and their seasonal movements as described by BLM is very clearly dependent on ephemeral waters for half the year. This includes the snowmelt in the mountains that fills the reservoirs. No other wild species is regulated and controlled by limiting it to perennial flows or developed springs. [We cite both the Supreme Court decision and the 10th Circuit Court (9/8/86 No. 82-1485) ruling to establish the status of wild horses as wildlife.]

Although we admit developed waters have affected water usage of all wild animals, we argue that denying wild species their ephemeral water-use denies their normal adaptation, their seasonal movement patterns, and natural grazing habits. The movement of horses in Nellis is described by BLM's field staff. BLM's field reports specific to seasonal movement are in ATTACHMENT B.

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The precipitation in Nellis is in the form of snow in winter, thunder showers that move up from the Gulf of California in summer. In between, there are many localized showers on the range in Spring and Fall. Horses move to moisture. Our position is that their ability to "smell" water is more than a myth. These wild horses are sensitive and attuned to moisture in the air or on the wind and they respond. It is an adaptation to their environment. It is a survival mechanism.

This being the case, we believe BLM will ALWAYS have "problem" horses outside the NWHR area if they ignore the home range and the behaviors of these wild horses. Wild, free-roaming horses will disperse with the snow in winter. They will move off and on perennial waters in summer because it is their nature to do so when it rains. To protect and manage them as "wild, free-roaming" requires that BLM management fit the horse not fit the horses to the administrative convenience of the managers. We contend that calculating the perennial water supply without taking into account ephemeral water-dependency is not proper management of a wild species. It over-manages. This, we believe, violates the least feasible management directive in the 1971 law. We believe that attempting to calculate the population as that which the perennial water only will sustain, miscalculates what is the survival and adaptation mechanism that drives wild horse birth rates. BLM will constantly have a problem with high birth rates and low recruitment rates if they refuse to read the information and gather the data, as mandated by Congress, in order to assure they make sound, rational management decisions. Population decisions must fit the natural traits and characteristics of wild, free-roaming horses and burros and their interrelationship with and impact on resources.

With all due respect, API contends that the Director's decision is not merely arbitrary and capricious, it is groundless and inaccurate. It is not simply untimely in the sense of unfitting, it was delayed for 16 months with callous indifference to the consequences on the resources.

Therefore, we appeal to IBLA to:

- (1) deny the decision to reduce the herd use area to the restricted area identified before the 1971 as the Nevada Wild Horse Range;
- (2) deny setting an AML on perennial waters only;
- (3) remand the removal plan back to the Resource Area for the needed adjustment in the number to be removed based on their assessment of the range and lack of forage; and

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(4) reject the EIS as a violation of NEPA as well as the 1986 Act's directive that a management plan be written within three years of that act.

FOR THE ANIMAL PROTECTION INSTITUTE OF AMERICA

Sincerely,

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