

May 10, 2024

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**RE: Devil's Garden Plateau WHT – Middle Section**

Dear Forest Supervisor Christofferson,

We submit these public comments on behalf of the American Wild Horse Campaign (“AWHC”) and the Environmental Protection Information Center (“EPIC”), along with their members and supporters, in response to the United States Forest Service’s (“Forest Service” or “Service”) Draft Environmental Assessment (“Draft EA”) prepared for the Devil’s Garden Plateau Wild Horse Territory Management Plan. These comments are submitted pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4347, and the Council on Environmental Quality’s regulations that implement NEPA, 40 C.F.R. §§ 1500.1-1508.28.

AWHC is a national nonprofit organization dedicated to protecting and preserving the American wild horse in viable free-roaming herds for generations to come, as part of our national heritage, and as prescribed by law. AWHC’s efforts are supported by a coalition of over 60 historic preservation, conservation, horse advocacy, and animal welfare organizations. In addition, AWHC is a longtime interested party in the management of the Devil’s Garden/Modoc National Forest population of wild horses and participated directly in the planning of the subject proposed action.

EPIC is a non-profit public interest organization, representing over 15,000 members and supporters. EPIC advocates for the science-based protection and restoration of Northwest California’s forests, rivers, and wildlife with an integrated approach combining public education, citizen advocacy, and strategic litigation. We recognize that issues of social justice, human rights, and environmental justice are inextricably linked to our core mission to protect and restore Northwest California’s ecosystems and environment.

**BACKGROUND**

**I. Statutory and Regulatory Background**

In 1971, Congress unanimously passed the Wild Free-Roaming Horses and Burros Act (“Wild Horse Act”), 16 U.S.C. §§ 1331-1340. This law provides that “wild-free roaming horses

and burros shall be protected from capture, branding, harassment, [and] death,” and that they must be “considered in the area where presently found, as an integral part of the natural system of the public lands.” 16 U.S.C. § 1331. The Wild Horse Act directs the Forest Service to “protect and manage wild free-roaming horses and burros as components of the public lands.” *Id.* § 1333(a). On public lands that are home to wild horses, “[a]ll management activities shall be at the minimal feasible level.” *Id.* In 1980, the Forest Service adopted regulations requiring it to “[a]dminister wild free-roaming horses and burros and their progeny on the National Forest System in the areas where they now occur (wild horse and burro territory) to maintain a thriving ecological balance considering them an integral component of the multiple use resources.” 36 C.F.R. § 222.61(a)(1). The agency must “[e]stablish wild horse and burro territories in accordance with the Act and continue recognition of such territories where it is determined that horses and/or burros will be recognized as part of the natural system.” *Id.* § 222.61(a)(3).

Enacted in 1976, the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600-1687, established a formal two-step process for forest planning. First, the Service must “develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System.” 16 U.S.C. § 1604(a). Each forest plan must “provide for multiple use and sustained yield of the products and services obtained therefrom . . . and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” *Id.* § 1604(e)(1). This statutory process requires meaningful “public participation in the development, review, and revision of land management plans.” *Id.* § 1604(d). Second, once a forest plan is developed, NFMA mandates that all subsequent agency actions in that forest comply with the forest plan. Thus, “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. § 1604(i). Like other site-specific plans, “Wild Horse and Burro Territory plans are to conform with the Forest land and resource management plans.” Forest Service Manual § 2263.11 (Jan. 2003); *see also* 43 C.F.R. § 4710.1 (analogous requirement for Bureau of Land Management (“BLM”), providing that “[m]anagement activities affecting wild horses and burros . . . shall be in accordance with approved land use plans”).

Congress enacted NEPA “to promote efforts which will prevent or eliminate damage to the environment.” *Id.* § 4321. To achieve NEPA’s substantive goals, Congress mandated that agencies evaluate the environmental impacts of federal actions and consider reasonable alternatives that might avoid or minimize impacts. *Id.* § 4332(C). An agency must prepare an Environmental Impact Statement (“EIS”) for every “major Federal action [] significantly affecting the quality of the human environment.” *Id.* Only if an agency determines that an action will not result in significant environmental impacts may it avoid preparing an EIS, in which case the agency still must prepare a less rigorous Environmental Assessment (“EA”) and a Finding of No Significant Impact (“FONSI”) setting forth the specific grounds for why an EIS is not necessary. *See* 40 C.F.R. §§ 1501.4(b), (c), 1508.9, 1508.27.

## **II. Factual Background**

Wild horses have lived in the area now known as the Devil’s Garden Plateau Wild Horse Territory (“Devil’s Garden WHT” or “Territory”) since at least the late 1800s. In 1975, the Forest Service created the Devil’s Garden WHT and issued its first Wild Horse Territory Management Plan. The 1975 Management Plan identified two non-contiguous units, East and

West, for the management of 300 horses. The Forest Service estimates that the 1975 territory comprised 225,101 National Forest System acres and 7,521 acres in the adjoining BLM-administered Round Mountain Herd Management Area (“HMA”), “for a combined total Joint Management Area (JMA) of 232,622 acres.” Draft EA at 1.

In the mid-1980s, the Forest Service made two modifications to the management approach for the Devil’s Garden WHT. First, the agency incorporated approximately 23,631 acres into the Territory to create a single, contiguous territory comprising approximately 258,000 acres. The lands that were added to the Territory—referred to as the “Middle Section” because they joined the two pre-existing wild horse units and served as a key linkage between them with plentiful forage, water, and space—include portions of five livestock grazing allotments: Triangle, Avanzino, Carr, Big Sage, and Timbered Mountain. Second, the Forest Service changed from a single population target of 300 or 305 horses to utilizing a population range of 275 to 335 horses. Draft EA at 1.

On November 27, 1991, the Forest Service completed the formal planning process for the Modoc National Forest and issued the 1991 Forest Plan, which is still in effect today. This Forest Plan was the culmination of an extensive planning process involving twelve years of work, over forty public meetings and workshops, and input from many interested parties. With respect to the Devil’s Garden WHT, the 1991 Forest Plan stated that “[t]he Forest has one wild horse territory of about 258,000 acres.” From 1991 until 2013—i.e., for more than two decades—the Forest Service uniformly treated the Middle Section as part of the Devil’s Garden WHT and authorized wild horses to use that portion of the Territory (rather than removing them from the Middle Section), consistent with the 1991 Forest Plan.

### *2013 Management Plan Removing Middle Section and AWHC’s Legal Challenge*

In 2013, however, the Forest Service abruptly reversed course on two decades of established agency policy and practice of treating the Middle Section as part of the Devil’s Garden WHT. The Forest Service issued a new Wild Horse Territory Management Plan—accompanied by an EA and a FONSI—redrawing the Devil’s Garden WHT boundaries, removing the Middle Section, and reducing the Territory by 32,899 acres, from 258,000 Modoc Forest Plan acres down to 225,101 across the two distinct herd units, East and West. At the same time, the Forest Service set the Appropriate Management Level (AML) at 206 to 402 with a mid-AML of 304 wild adult horses. The Forest Service’s decision failed to reconcile the agency’s new position with the still-operative 1991 Forest Plan or the agency’s longstanding practice of treating the Middle Section as part of the Devil’s Garden WHT for survey, removal, and other purposes.

AWHC and others challenged in court the Forest Service’s decision to eliminate the Middle Section from the Devil’s Garden WHT. In 2017, the U.S. Court of Appeals for the D.C. Circuit ruled in AWHC’s favor on two major issues: (1) it held that the Forest Service “failed to acknowledge and adequately explain its change in policy regarding the management of wild horses in the Middle Section as part of a single, contiguous protected Wild Horse Territory”; and (2) the Forest Service “failed to consider adequately whether an [EIS] was required under NEPA” before the agency could eliminate the Middle Section from the Territory. *Am. Wild*

*Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017). To remedy these major legal violations, the D.C. Circuit—over the Forest Service’s objection—vacated the portions of the 2013 Territory Plan and EA that sought to eliminate the Middle Section from the Devil’s Garden WHT (or sought to analyze that action), and also vacated in full the agency’s combined Decision Record and FONSI.

### *Revised Territory Management Plan*

On September 1, 2022, the Forest Service issued a scoping notice on its proposal “to develop and implement a revised Territory Management Plan, including the Middle Section, to guide the management of wild horses and their habitat in the Devil’s Garden Plateau [WHT] over the next 15 to 20 years” and soliciting public comment. USFS, Proposed Action for Public Scoping: Devil’s Garden Plateau Wild Horse Territory Supplemental Environmental Assessment, August 2022 (hereinafter “2022 Scoping Notice”) at 1. The agency announced that the revised plan would be analyzed in a Supplemental EA. *Id.*

In addition, because the vacated 2013 territory management plan (excluding the Middle Section) set an AML range of 206 to 402 adult wild horses, the Forest Service stated that “[s]ince the Middle Section is being analyzed in this Supplemental EA, there is a need to determine if the AML needs to be adjusted.” 2022 Scoping Notice at 7. The Forest Service included a Draft Appropriate Management Level Evaluation (hereinafter “Draft AML Evaluation”), *see* 2022 Scoping Notice Appendix IV, describing the agency’s approach to evaluating whether a change in AML was warranted, but stopping short of doing so, stating that “[t]he AML Determination for the Middle Section of the territory will be made as part of the forthcoming Decision Notice to issue a revised Territory Management Plan.” Draft AML Evaluation at 52.

On November 29, 2022, AWHC submitted extensive comments in response to this notice and raised a number of important issues including, among others, concerns about the substance and methodology of the Draft AML Evaluation. *See* Attachment A. AWHC expressly incorporates by reference its earlier comments.

After considering public comment, including those submitted by AWHC, the Forest Service published its Draft EA for the Devil’s Garden Plateau Wild Horse Territory Management Plan on March 14, 2024. The document laid out a number of management directives common to all alternatives, and also set forth four discrete alternatives for the boundaries and management of the Devil’s Garden WHT. The Proposed Action, Alternative 1, would incorporate a 26,559-acre Middle Section to the current territory boundary “to allow for a corridor between the East and West Sections.” Draft EA at 8. The 2024 Devil’s Garden WHT Boundary total would be 258,114 acres. *Id.* at 9. The Forest Service also stated that there would be no change to the 2013 AML limits:

Based on proposed changes to the allocated NFS acres for the territory and evaluation of existing resource conditions and monitoring data within the Middle Section, the Proposed Action alternative is for no change to the current territory AML. The AML would remain at 206 to 402 (mid AML @ 304) wild adult horses

with incidental use attributed to the Middle Section. Permitted livestock use would remain at current permitted levels.

*Id.* at 10-11.

Alternative 2 would retain the 2013 Devil’s Garden WHT boundaries, a total area of 225,101 acres, while also maintaining the 2013 AML range of 206 to 402 adult wild horses. *Id.* at 14. Alternative 3 would mirror Alternative 1 with respect to both size (i.e., incorporating the Middle Section for a total territory area of 258,114 acres), and AML (i.e., retaining the lower 2013 limits of 206 to 402 adult wild horses), with modified methods of fertility control under certain conditions. *Id.* at 15. Only Alternative 4 involved expanding the territory beyond the size adopted in the 1991 Plan and for which the WHT was managed from 1991 to 2013 and from 2017 to present, including a larger Middle Section of 43,192 acres, for a total of 294,096 acres within the Devil’s Garden WHT. *Id.* at 16. Under Alternative 4, fertility measures would be limited and the AML lower and upper limits would be increased substantially to 500 to 1000 wild adult horses, respectively. *Id.*; *see also* Draft EA, Table 4 at 21 (detailing Territory acreage and AML levels under the four alternatives).

To support its AML determinations, the Forest Service incorporated a 2024 AML Evaluation report, which it stated, “provides an AML determination for the Middle Section of Devil’s Garden Plateau Wild Horse Territory [and] is intended to supplement the 2013 AML Evaluation until such time that a new AML evaluation is completed for the entire territory.” Draft EA at 52 (citing USFS, Appropriate Management Level Evaluation for the Middle Section of the Devil’s Garden Plateau Wild Horse Territory, Feb. 25, 2024 (“2024 AML Evaluation”)). Although the Service expressly recognized that—compared to Alternative 2—both Alternatives 1 and 3 would include an additional territory allocation of 33,013 acres and would have “more forage and water resources available to the wild horse population, as well as enhanced habitat connectivity between the East and West Sections,” it elected to make no commensurate adjustment in AML for these additional space, forage, and water resources. Draft EA at 52. Ultimately, the Forest Service elected to keep AML at the lower 2013 levels for all three of these alternatives. *Id.*

## DISCUSSION

While AWHC and EPIC applaud the Service’s proposal to formally reintegrate the Middle Section and return to a single, contiguous protected Wild Horse Territory in keeping with decades of past management, the agency’s 2024 AML determination for the Middle Section is arbitrary both on its face and as incorporated into the Draft EA’s alternatives analysis. The Service first fails to adequately develop or explain its wholesale adoption of the outdated 2013 AMLs, which were based on the *exclusion* of the Middle Section that the new boundaries now propose to incorporate. Having expanded the Territory and added substantial amounts of space, forage, and water resources to the area, it defies common sense and the agency’s own reasoning to not at the same time make a commensurate increase in AML to reflect the availability of these additional resources. In addition, the Draft EA alternatives analysis compounds this error by assigning the same AMLs across Alternatives 1, 2, and 3, despite acknowledging that they

possess substantially different access to the resources necessary to sustain and support the wild horse population in the Devil's Garden WHT.

### *Flawed 2024 AML Evaluation*

First, in its 2024 AML Evaluation, the Service decided not to make a single change to AMLs for *any* of the grazing allotments within the Devil's Garden WHT, including those overlaying the new Middle Section. Instead, they arrived at a lower AML for the Territory of precisely 206 adult wild horses and an upper limit of precisely 402 adult wild horses. *See* 2024 AML Evaluation at 57.

These are the very same AMLs first established in the 2013 Territory Management Plan, which explicitly did not take the Middle Section into account at all. Apart from the highly questionable approach in applying the AMLs from the 2013 Territory boundaries *without* the Middle Section to the proposed 2024 boundaries that *do include* the Middle Section, either way the Service fails to provide analysis either developing these exact numbers or discussing why increasing the AML to reflect the newly added Middle Section acreage would be inappropriate or otherwise hinder the goal of achieving a “thriving natural ecological balance.”

Nor does the Service address whether or to what extent the existing challenges in achieving this balance results from the fact that the wild horse population in the Devil's Garden WHT substantially exceeds the current AMLs and has done so for more than a decade. Indeed, in stark contrast to the 2013 AMLs being set at a range of 206 to 402 adult wild horses, the estimated population in April 2023 was 1,339 total wild horses, including 1,294 adult horses—over *three times* the upper limit. *See* 2024 AML Evaluation at 10. In April 2021, the total population of wild horses was estimated to be even higher: 1,937, down from a high of 2,246 horses in 2016. *Id.* at 10. In other words, whatever conclusion the Service might reach as to the current ecological condition of these allotments and whether that reflects a thriving natural ecological balance, it would be highly arbitrary for the agency to derive any conclusion about the propriety of the 2013 AMLs and the need to either modify or maintain them based solely on these observations. Until the populations begin to approach those limits (which is an action uniquely and exclusively within the Forest Service's control), it is simply not possible to attribute *current* land conditions (after years of supporting a very high wild horse population) to those much lower *hypothetical* future population limits. But that is exactly what it appears the Service has done here.

For example, with respect to the Carr Allotment, the 2013 AML lower and upper limits were set at 32 and 78, respectively in the 2013 Territory Management Plan. In 2024 AML Evaluation, the Service observed that wild horse use in the area has been greatly exceeding allocated use for several years, but then concludes, without any evidentiary support, that “[i]n-depth evaluation of the existing monitoring data indicated that 78 wild horses should remain the AML upper limit in the Carr allotment including the Timbered pasture. To allow the population to grow from the lower limit to the upper limit over a period of at least four years, the AML lower limit should remain at 32 wild horses.” *Id.* at 22. Likewise, the Service concludes that, “[a]ttainment of the current AML of 32 to 78 wild horses would likely ensure that utilization objectives in the upland habitats are met. Meeting utilization objectives would be expected to

maintain riparian areas in satisfactory ecologic condition and maintain or increase the amount of water and forage available for use by all herbivores.” *Id.*

With respect to the Timbered Mountain Allotment, the Service determined in the 2024 AML Evaluation that “[a] thriving natural ecological balance is not being achieved” due to utilization from wild horse use substantially exceeding Forest Plan standards in the Black Rock Pasture, as well as wild horse grazing and drought conditions in Deer Hill Pasture. *Id.* at 33. The Service then immediately concluded, without any evidentiary basis or support, that “[a]ttainment of the current AML of 48 to 86 wild horses would likely ensure that Forest Plan utilization standards are met.” *Id.* at 34.

The Forest Service commits a similar logical flaw with the Triangle Allotment, portions of which overlay the historical Middle Section and are now proposed to be added to the Territory. Wild horse use in this allotment, even at the current high population levels, is primarily incidental. However, the Service determined that *even though* ecological balance was being met, it was appropriate to maintain the same overall AML range for the Territory: “[i]n most years a thriving natural ecological balance has been achieved” and “[a]llowance for incidental use by wild horses and seasonal free roaming of individuals around the territory, would likely continue meeting Forest Plan utilization standards in most years and sustain upland and riparian habitat conditions.” *Id.* at 43, 44.

Likewise for the Big Sage Allotment, where only the northwest portion is proposed to be included within the new Middle Section and wild horse use is largely seasonal, likely serving as “an important corridor for individual wild horses free roaming between the West and East Sections of the territory.” 2024 AML Evaluation at 53-54. The Service observed that while “utilization levels have generally been slight to light across uplands in Northwest Corner pasture and proposed Middle Section,” there was “[h]eavy to severe use” noted around two important springs in the Allotment and “[w]ith high wild horse population levels, forest standards have not been met at [the] two key use areas in most years.” *Id.* at 53. Despite acknowledging that the heavy use is due to primarily to a wild horse population that is far greater in size than anything contemplated by the 2013 AML limits, the Service nonetheless concludes that those precise limits should be maintained:

There has been recognized incidental use in proposed Middle Section on Big Sage allotment since the territory was established. If the wild horse population were managed at the current AML, seasonal free roaming of individuals around the territory is expected to continue meeting Forest Plan utilization standards in most years and sustained upland habitat conditions.

2024 AML Evaluation at 54.

In each instance, the Service clings to the precise limits in the outdated AMLs from the 2013 TMP without evidentiary support, without accounting for the high levels of overpopulation that have contributed to current conditions, and without addressing why a commensurate increase in AML limits to reflect the added Middle Section resources, as common sense would dictate, would not be appropriate. As further evidence of the Service’s arbitrary determinations,

it is telling that regardless of whether ecological balance had been largely achieved (as in the Triangle Allotment) or was not achieved (as in the Carr and Timbered Mountain Allotments), the Service reached the identical conclusion: the AML should remain at *exactly* 206 to 402 adult wild horses.

The Service must establish an AML that takes into consideration the resources in the Middle Section that will *now* be available to sustain wild horses—resources which indisputably were *not* available and taken into account when this same AML was set in 2013—and it must provide non-arbitrary, coherent rationales for these determinations.

#### *Draft EA's Flawed Alternatives Analysis*

In addition to the flaws in the underlying AMLs described above, the Service compounds these errors by incorporating the old 2013 AMLs into its alternatives analysis in a manner that is itself deeply flawed and fundamentally arbitrary. The Service explicitly states that Alternatives 1 and 3 have more water, forage, and space than Alternative 2, but then incorporates the *very same* AML limits for all three alternatives. For example, the Service notes that “Alternatives 1 and 3 would have the same AML population as Alternative 2,” but in the very next sentence inexplicably notes that:

Alternatives 1 and 3, with inclusion of the Middle Section, would have a territory allocation which would be 33,013 acres greater in size than Alternative 2 [and] there would be more forage and water resources available to the wild horse population, as well as enhanced habitat connectivity between the East and West Sections.

Draft EA at 42. When discussing impacts to forage availability, the Service repeats this telling observation:

Alternatives 1 and 3 would account for seasonal, incidental use in the Middle Section without increasing the overall upper AML. When compared to Alternative 2, there would be more forage and water resources available to individual horses, as well as enhanced habitat connectivity between the East and West Sections.

*Id.* at 52.

The agency never explains this obvious, illogical discrepancy or why the clear difference in resources between Alternative 2, on the one hand, and Alternatives 1 and 3, with the newly added Middle Section, on the other, does not carry over to any meaningful difference in the AML limits. The only alternative that does evaluate an increase in AML is the substantially larger Alternative 4, with a Middle Section of 43,192 acres—62% larger than the Middle Section in Alternatives 1 and 3. Under Alternative 4, however, the AML limits are more than doubled to a range of 500 to 1000 adult wild horses. In other words, the agency clearly recognizes that the larger space and resources under Alternative 4 warrant a measurable increase in AMLs. But this only underscores the agency's failure to apply the same common-sense approach to the AMLs for Alternatives 1 and 3 relative to the smaller Alternative 2 that lacks any Middle Section at all.

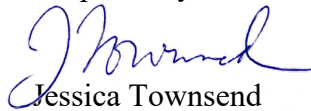


This arbitrary and poorly designed alternatives process must be corrected. The Service must develop and consider an alternative that reflects a commensurate increase in the AML limits reflective of the new Middle Section resources that are proposed to be available, for the first time as a formal matter, for wild horse use.

## **CONCLUSION**

AWHC and EPIC welcome the Forest Service's proposal to formally reintegrate the Middle Section and return to a single, contiguous protected Wild Horse Territory. The Service must now take the next essential step by developing and explaining a revised AML that objectively reflects the newly available space, forage, water resources being added to the Devil's Garden WHT to sustain the wild horse population, rather than falling back on the outdated 2013 AMLs that were based on entirely different boundaries and resource considerations. In addition, the Service must design a non-arbitrary alternatives process that reflects the meaningful difference in resources among those alternatives with access to the new Middle Section and those without. To do otherwise would violate both the APA and NEPA and would be fundamentally inconsistent with the underlying goal of creating a larger Territory with greater connectivity and access to those resources that will support the welfare and sustainability of the Devil's Garden wild horses.

Respectfully submitted,



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