October 19, 2024

Submitted via online portal only

Ian Reid, Acting Forest Supervisor
Modoc National Forest
225 West 8th Street
Alturas, California 96101

Re: Objection to Devil's Garden Plateau Wild Horse Territory Management Plan, Final Environmental Assessment, Draft Decision Notice

Dear Acting Supervisor Reid:

The Devils Garden Preservation Group ("DGPG") hereby objects to certain aspects of the U.S. Forest Service's ("Forest Service or Service") recently issued *Devil's Garden Plateau Wild Horse Territory Management Plan and Final Environmental Assessment* ("TMP/EA") and corresponding *Draft Decision Notice* ("DDN"). DGPG previously submitted comments on the Draft TMP/EA on May 10, 2024, which are incorporated herein by reference. Pursuant to the requirements of 36 C.F.R. § 218.8(d), the lead objector on behalf of DGPG for purposes of this objection is Mike Byrne, whose name and address details are provided below.

Specifically, DGPG objects to the following in the TMP/EA, DDN, and related decision documents:

- Inclusion of the Middle Section in the wild horse territory boundary;
- The lack of adequate explanation of the basis and methodology for its census data and population estimates, resulting in projections that are likely to underestimate population expansion and gather needs moving forward;
- Managing to Appropriate Management Level at the pasture level is unreasonable given the free flow of wild horses between pastures, across the WHT, and beyond; and
- Fertility control measures should not be unnecessarily limited to those discussed in the TMP/EA, but should be inclusive of any appropriate immunocontraceptives or other measures identified in the future to provide maximum flexibility.

The basis for these objections is described in more detail below. Additionally, please note DGPG hereby requests a meeting with Forest Service officials to discuss these issues further.

INTRODUCTION

Please accept the following Objections on behalf of DGPG. Objectors have participated in the environmental review process for the Assessment, including by submitting scoping comments and comments on the Draft EA. Additionally, pursuant to 36 C.F.R. § 219.54(c)(7), each objection is accompanied by a citation to "prior substantive formal comments attributed" to Objectors demonstrating the "link" between those comments and the "content of the objection."

STATEMENT OF REASONS AND SUGGESTED REMEDIES

I. The Decision to Include the Middle Section As Part of the WHT Boundary is Arbitrary and Capricious; DGPG Recommends That the Forest Service Restore the 1975 WHT Boundary

The Draft Decision Notice ("DDN") identifies four purposes of the TMP/EA, one of which was "to determine whether the Middle Section should be added to the DGPWHT to account for movement of the existing wild horses between the East and West Sections." DDN at 9. The Forest Service was required to make such a determination by the U.S. Court of Appeals for the D.C. Circuit, which found that:

> [T]he Service failed: (i) to acknowledge and adequately explain its change in course regarding the size of the Devil's Garden Wild Horse Territory and its management of wild horses within the Middle Section, and (ii) to consider or to adequately analyze the environmental consequences of those changes. Accordingly, we reverse the district court's grant of summary judgment in part, vacate the Service's exclusion of the Middle Section territory and the related Finding of No Significant Impact, and direct the district court to remand to the Service for further consideration consistent with this decision.

Am. Wild Horse Preservation Campaign v. Perdue, 873 F.3d 914, 932 (D.C. Cir. 2017).

However, the Court did not dictate a particular result. And the Forest Service fails to reasonably articulate why inclusion of the Middle Section as part of the WHT is necessary or even helpful for movement of horses between the East and West Sections, which is already occurring. *See* DGPG Draft TMP/EA Comments, at 2 (raising same issue). The DDN identifies several additional purposes of the amended TMP, including incorporating terms and conditions from the 2021 Settlement Agreement where additional management actions are taken to bring the wild horse population within AML; consideration of applying additional fertility control techniques such as GonaCon EQ; and bringing the TMP into conformance with recent federal law regarding treatment, removal, adoption, and/or sale of federally protected wild horses. DDN at 9. However, the Middle Section need not be included in the WHT in order to facilitate gathers, trapping, and other management actions in this area. Expansion of the WHT here is inconsistent with the authority given to the U.S. Forest Service under the Wild Horses and Burros Act ("WHBA") and is not needed, given the WHBA already provides sufficient authority and mechanisms for the Service to manage horses on non-WHT lands across the forest and on other federal, state, and private ground.

There are a number of reasons the Middle Section was not initially a part of either the original wild horse management plan adopted in 1975 or the 2013 WHT management plan. Those reasons continue to hold true. First, the Avanzino and Triangle Ranch Lands were specifically excluded from the initial designation because these lands were privately owned and had little to no use by wild horses, given the large number of fences present and ongoing livestock operations. Second, the proposed addition of portions of the Big Sage, Carr, Timbered Mountain, and Triangle Allotments to the WHT as the "Middle Section" makes little practical

sense and the Forest Service should revert to the boundary established by the original wild horse management plan adopted in 1975. For example, the Carr and Timbered Mountain Allotments have pastures with overlapping acres into the proposed Middle Section which are not fenced out and would make little practical sense being included. These reasons continue to hold true today.

Suggested Remedy: The Forest Service must take a hard look at Alternative 2 or another hybrid alternative that retains the original 1975 WHT boundaries, but also allows the Service to implement much-needed management actions discussed in the area between the East and West Home Ranges. Whether or not the Middle Section is added to the WHT, the WHBA is clear that the Service must gather excess horses to facilitate a thriving natural ecological balance and remove horses from outside the Devils Garden WHT, whether they are on public or private lands.

II. The Decision Fails to Adequately Explain the Methodology and Basis for Its Analysis of the Wild Horse Population and Growth Estimates, and Likely Significantly Underestimates the Wild Horse Population.

A. Census Irregularities Undermine the Accuracy of the Forest Service's Population Estimates.

In its comments on the Draft TMP/EA, the DGPG raised potential issues regarding the reliability of the Forest Service's census data and population growth assessment. *See* DGPG Comments at 3-4. The DGPG reiterates that census irregularities from 2016-2023 need to be analyzed and not just 2019, 2021, and 2022. Ignoring these irregularities results in a count that is likely biased towards a lower population estimate.

The Forest Service acknowledges that aerial survey data from 2022 was suspected of being inaccurate, stating it "appeared to be biased low and an underestimate of true horse abundance."[1] This was determined by comparing three survey years (2019, 2021, 2022) and the parameters in the population estimation. According to the Final TMP/EA, this inaccuracy was attributed to "individual horses . . . hiding or fleeing from the approaching helicopter (noise)"[2] and that "smaller groups were missed in 2022 and larger groups were spotted."[3] However, the only reason for why the surveys conducted in 2021 and 2023 were considered reliable was because the observers were "experienced with past surveys on DGPWHT."[4] This justification appears insufficient, as reliance on observer experience alone does not adequately address the possible irregularities in aerial wildlife counting, especially taking into account the Service's own observation of horses fleeing from the approaching helicopters.

Furthermore, by only comparing results of three survey years to determine irregularities, the Service is limiting the analysis to a narrow time frame that overlooks potential long-term patterns or irregularities that could provide a clearer picture of wild horse population trends. This

[1] U.S. Forest Serv., *Final Environmental Assessment Devil's Garden Plateau Wild Horse Territory Management Plan*, at 20 (Sept. 2024).
[2] *Id.*
[3] *Id.*
[4] *Id.*

failure to examine the methodologies used in all surveys and failure to expand the compared survey years leads to census irregularities and potentially flawed understanding of horse populations.

Suggested Remedy: Additional explanation regarding the population census methodology, and data analysis performed to arrive at a population estimate is needed, in particular to account for the strong likelihood that irregular census data from 2022 (and likely other years) is resulting in a significant underestimation of the wild horse population.

B. The Forest Service's Conclusion That Wild Horse Population Growth Rate is Decreasing Is Arbitrary and Not Adequately Supported.

Census irregularities also need to be considered when estimating the wild horse population growth rate. As was noted in the Draft EA comments by the DGPG, "it is likely that the 2023 aerial survey data along with other recent surveys undercounted the wild horse population and that the Forest Service is underestimating yearly recruitment. The Service should continue to use a growth rate of 20% (as agreed to in the settlement) until significantly substantiated "better science" shows another figure is appropriate.[5]

The Forest Service currently estimates the population growth rate between 2016 and 2023 "to be between 14 percent and 15 percent,"[6] basing this calculation on aerial survey data from from 2016, 2019, 2021, and 2023 (2022 survey results were omitted for reasons previously stated).[7]

As discussed earlier, even though the Service suspects that 2022 aerial data is inaccurate, the Service has not provided any clear reasons for why the subsequent surveys are considered reliable, nor has it explained why these years are exempt from the same potential flaws that affected the 2022 data. The only reasoning was that in 2021 and 2023 the "observers were "experienced with past surveys on DGPWHT."[8] As discussed above, this reasoning seems inadequate. Without a comprehensive review or more robust methods to verify the accuracy of these surveys—like the introduction of radio-collared mares in 2023 for more estimation accuracy in the future—the validity of the population growth rates for the rest of the years remains questionable.

The EA states: "Furthermore, the known number of gathered horses was subtracted from that to find the year-end expected population size for each year. Population growth rates were adjusted to closely match survey-based estimated population sizes.[9]"

In the EA, the Forest Service outlines their reliance on the BLM's PopEquus (Folt et al. 2023), a predictive population modeling tool used to predict the potential outcomes of various

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[5] Devil's Garden Preservation Group Comments, at 4 (May 10, 2024).
[6] U.S. Forest Serv., *Final Environmental Assessment Devil's Garden Plateau Wild Horse Territory Management Plan*, at 48 (Sept. 2024).
[7] *Id.* at pg. 33.
[8] *Id. at* pg. 30.
[9] *Id.* at pg. 34.

management alternatives of wild horse. This model provides population projections and associated cost analyses under various management scenarios.

The Service used the following equation in the model in order to evaluate the alternatives:

[2023 aerial survey estimate + horses gathered from 2021 to present] - [2021 aerial survey estimate] / [2021 aerial survey estimate] X 100 = Population Growth Rate.[10]

The Forest Service has not provided any reason for why the equation chosen is the most appropriate or accurate method for estimating the wild horses population growth. Dependance on a single formula to estimate the growth rate will not fully capture the complexities of the wild horse population data. The EA does not include an explanation of whether alternative equations, which could account for a wider range of factors and a wider range of data from more surveyed years, were considered. As mentioned above, expanding the time frame of analysis to include more survey years beyond just 2021 and 2023, and including more survey years in the population growth equations would provide a more comprehensive view of population trends.

An accurate estimation of how the wild horse population is growing is imperative. The equation above was utilized as a tool used to predict the potential outcomes of various management alternatives. If the population estimates and/or population growth rate is not accurate, the Forest Service will continuously be unable to meet its management targets. Indeed, in the EA the Forest Service states that; "Assuming a population growth rate of 15 percent, the number of animals removed has been at or near the annual population recruitment." [11] Relying on an assumed growth rate that is inaccurate will undermine the Forest Service's objective of achieving the AML. Without precise data, the agency may fall far further behind on its goal to gathering enough wild horses to achieve AML by 2027.

Suggested Remedy: In light of these concerns, the Forest Service should exercise caution and maintain the previously agreed-upon 20% growth rate until new, rigorously validated data can justify a different figure. Any adjustments to population management should be based on the strongest available scientific data, and until this data is clearly substantiated, the Service should remain committed to the existing model for estimating population growth. A more data-driven and accurate calculation is essential to ensure that the number of horses gathered aligns with both the population growth and the AML goals.

III. The Decision Arbitrarily Elects to Manage Wild Horses to AML by Pasture.

For example, the Final TMP/EA notes that "Gates on existing fences within the WHT will remain open during the period of each year when livestock are absent from the area to facilitate free-roaming behavior and seasonal migrations. Where monitoring indicates concentrations of animals along fence-lines, fences will be marked with materials such as snow fence, and gates will be widened to further facilitate free-roaming behavior." Final TMP/EA at 2. The DGPG agrees that leaving gates open to facilitate wild free-roaming behavior is compatible with the goals of the WHBA. However, the DDN also provides direction that management

[10] *Id.* at pg. 41
[11] *Id.* at pg. 50

changes (e.g., use of particular fertility management protocols) will be keyed to achievements of AML in a specific unit (i.e., grazing allotment or pasture). *See* DDN at 8. Management toward AML by pasture makes little sense in this context, given the permeability of pasture and allotment boundaries with open fencing. Wild horses move freely within and across allotments frequently, not to mention that population estimates are already prone to error given the difficulty of conducting censuses in rocky and tree-lined areas, among other difficulties. Thus, accounting for AML by pasture is an ephemeral number and should not be used as a trigger for modifying management prescriptions.

Suggested Remedy: Allow for use of all fertility management protocols at all stages of management that do not require catch-treat-release before AML is reached on the entire territory, not just pasture AML. The DGPG does not support any return of horses to the territory before AML is reached as horses move freely between pastures and return of horses degrades the success of gathering by helicopter and bait trapping.

IV. The Decision Arbitrarily Limits Flexibility in Pursuing Fertility Control Measures by Limiting Fertility Control Options to Those Listed in the Final TMP/EA.

DGPG previously commented that it opposes unnecessarily limiting the types of immunocontraceptive that are available to be used. DGPG Comments at 3. For example, the Final TMP/EA "eliminated from detailed study" alternatives that would have allowed for use of immunocontraceptive devices ("IUDs") or the release of spayed females, for example. *See* Final TMP/EA at 22. Rejecting these options out of hand without any in-depth analysis is unwarranted; keeping all options open would provide additional flexibility as program needs and IUD technology may change going forward.

Additionally, the Final TMP/EA must account for the impacts of fertility control measures on the success of future gathers. For instance, if a gathered wild horse receives fertility control while in captivity, there is a concern that the specific horse and other horses in its band once released may augment their behavior

Suggested Remedy: The Forest Service should commit to using all viable and available fertility control measures, to the extent possible and consistent with best practices.

Thank you for the opportunity to comment.

Sincerely,

/s/ Mike Byrne
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