

October 21, 2024

Objection Reviewing Officer
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Ian Reid, Acting Forest Supervisor
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Via electronic mail to: sm.fs.modoc_info@usda.gov

Via form submission on project webpage: <https://www.fs.usda.gov/project/?project=62741>

RE: Formal Objections to Devil's Garden Wild Horse Territory Management Plan and Accompanying Environmental Analysis¹

Reviewing Officer,

Pursuant to 36 C.F.R. § 218.8, we hereby submit formal objections to the Territory Management Plan for the Devil's Garden Plateau Wild Horse Territory, including the U.S. Forest Service's ("Service") environmental analysis of the Plan's effects under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347. These objections are submitted on behalf of the following commentors.² Pursuant to 36 C.F.R. § 218.8(d)(3), American Wild Horse Campaign ("AWHC") is the lead objector.

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¹ The "Territory Management Plan to Devil's Garden Plateau Wild Horse Territory" is the "name of the proposed project." 36 C.F.R. § 218.8(d)(4). The "name and title of the responsible official" is Ian Reid, Acting Forest Supervisor, Modoc National Forest and "the name(s) of the national forest(s) and/or ranger district(s) on which the proposed project will be implemented" are the Modoc National Forest, Devil's Garden Ranger District.

² Each of these objectors submitted timely and detailed comments on the Draft Supplemental EA. Per 36 C.F.R. § 218.8(b)(4), those comments are incorporated here by reference in their entirety and attached to these Objections. *See* Attach. A.

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.

Environmental Protection Information Center ("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.

DISCUSSION

In revising its Territory Management Plan ("TMP" or "Plan") for the Devil's Garden Plateau Wild Horse Territory ("DGPWHT") to once again include the Middle Section, the Service formally returned to a single, contiguous protected territory in keeping with decades of past management. At the same time, the agency opted to carry forward the same Appropriate Management Levels ("AMLs") that were based on the *exclusion* of the Middle Section to these newly expanded boundaries despite the additional forage and resources that are now available. The Service's alternatives analysis then 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. The Service failed to make any meaningful change to its flawed approach in response to AWHC and EPIC's comments, and, therefore, both the AML limits and the alternatives analysis remain flawed in the agency's final disposition.

I. The Service's AML Determination is Arbitrary and Capricious

The Service published a Draft Environmental Assessment in March 2024 ("Draft EA") evaluating, among other changes, whether to expand the territory boundaries to include the Middle Section and, if so, whether to modify the current AML limits. Of the four evaluated alternatives, only Alternative 2 maintained the 2013 boundaries excluding the Middle Section, while the Proposed Action, Alternative 1, along with Alternative 3, proposed incorporating a 26,559-acre Middle Section to formally expand the current territory boundary "to allow for a corridor between the East and West Sections." Draft EA at 8.

The Service stated there would be no change in the AML limits for Alternatives 1, 2, and 3, i.e. the official levels would remain at 206 to 402 (mid-AML of 304) adult wild horses, but "with incidental use attributed to the Middle Section." Draft EA at 10-11, 52; *see also* 2024 AML Evaluation at 57, Table 24 (noting that up to an additional 40 adult wild horses may use the Middle Section on an incidental, seasonal basis, but making no change to the underlying AML). Only Alternative 4, which included a larger Middle Section of 43,192 acres, proposed to

increase the AML range to 500 to 1000 adult wild horses. *Id.* at 16. To support its determination, the Service incorporated a 2024 AML Evaluation report. 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”)).

In their comments, AWHC and EPIC explained that “[a]lthough 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.” *See* AWHC and EPIC Comments on the Draft EA (May 10, 2024) at 5 (hereinafter “Comments”) (quoting Draft EA at 52). They further explained that 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.” *Id.* at 6.

AWHC and EPIC also noted that the Service failed to address whether or to what extent the existing challenges in achieving a “thriving natural ecological balance” result 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. *See* Comments at 6. For example, the estimated population in April 2023 was 1,339 total wild horses, including 1,294 adult horses—over *three times* the upper limit from the 2013 TMP. *See id.* (citing 2024 AML Evaluation at 10). And 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. *See id.* (citing 2024 AML Evaluation at 10). In other words, it is both illogical and arbitrary to draw any conclusion about the propriety of the 2013 AMLs and the need to either modify or maintain them based solely on observations of current land conditions, as the Service has done here. *See* Comments at 6.

AWHC and EPIC then detailed the lack of evidentiary support for the Service’s decision to maintain the 2013 AML limit for each of the individual allotments in its 2024 AML Evaluation (accordingly, the sum of these individual allotment AMLs necessarily equaled the same territory-wide AML of 206-402 adult wild horses). *See* Comments at 6-8. Again, in each case, the Service failed to address the impact years of overuse had on the agency’s ability to determine what AML would achieve a thriving natural ecological balance and, further underscoring the arbitrary nature of the Service’s approach—regardless of whether this balance was or was not currently being met on any particular allotment—the Service’s determination was always the same: to keep the existing 2013 AML unchanged. *Id.* at 7-8.

In September 2024, the Service published the Final Environmental Assessment for the TMP (“Final EA”) along with a draft Decision Notice and Finding of No Significant Impact (“FONSI”). The Service declined to make any changes in response to AWHC and EPIC’s comments. The Final EA carries forward the same outdated 2013 AML limits to the new TMP, notwithstanding the larger size and enhanced resources included within the new territory boundaries. *See* Final EA at 64-65.

The Service also prepared a summary of its responses to public comments concerning the TMP. *See Devil’s Garden Plateau Wild Horse Territory Draft Environmental Assessment Opportunity to Comment Disposition* (August 6, 2024) (hereinafter “USFS Comment Disposition”). Although the Service acknowledged AWHC and EPIC’s comments, it failed to meaningfully respond to or address any of the substantive concerns raised.

First, the Service fails to offer any reasonable response to AWHC and EPIC’s comments that the agency arbitrarily relies on *current* land conditions (after years of supporting a very high wild horse population, well above the operative AML during that time period) to predict what level of use these allotments can support under much lower *hypothetical* future population limit. The only “response” to this concern was, in fact, non-responsive: “Thank you for your comments. The current territory resource conditions, WH population levels, and actual livestock management adjustments, necessary to achieve compliance with Forest Plan grazing standards, are reflected in Alternative 4.” USFS Comment Disposition at 33. Of course that clearly does nothing to explain how the agency reached the 206-402 AMLs for Alternatives 1, 2 and 3. Nor is it responsive to the comment presented by AWHC and EPIC that not only did the Service purport to base its AML determination on *current* land conditions, despite severe levels of overuse, but the Service also reached inconsistent conclusions—in some cases noting that a thriving natural ecological balance was being met and in other cases determining that it was not—and in every instance suggesting that the solution to achieving (or maintaining) that balance was to keep the 2013 AMLs. *See Comments* at 7-8.

Second, as a general matter, the Service fails to articulate any justification for keeping the 2024 AMLs at the same limits assigned to the smaller 2013 territory boundaries. The only justification that the agency manages to provide for keeping the AMLs the same—is to claim that they have in some way made allowance for additional horses in the Middle Section by mentioning that there may be up to 40 adult wild horses using the newly added Middle Section (in Alternatives 1 and 3) on a seasonal, incidental basis. *See USFS Comment Disposition* at 32, 59. Instead, the Service repeatedly justified its refusal to adjust the AMLs for the newly added Middle Section solely on the basis that it had accounted for “seasonal, incidental use of 0-40 WH for approximately seven months with restricted access to riparian pastures during the 5-month livestock grazing season.” *See USFS Comment Disposition* at 32, 59.

The Service asserted that:

The Alternatives, using 2024 AML Evaluation for the Middle Section, are not the same. A distinction will be made in the Final EA, Table 4 Comparison of Alternatives. As described in the AML Evaluation (Table 24) and DEA (pg. 54) Under Alternatives 1 and 3 the Middle Section would have seasonal, incidental use of 0-40 WH for approximately seven months with restricted access to riparian pastures during the 5-month livestock grazing season.

USFS Comment Disposition at 32-33;³ *see also id.* at 59 (offering same justification).

³ While the agency cites to page 54 of the Draft EA, it appears the language cited actually appears on page 52.

In fact, a closer look at Table 4 in the Final EA shows that the AML levels for Alternatives 1, 2, and 3 *remain the exact same*: 206-402 adult wild horses for the DGPWHT. *See* Final EA at 24, Table 4. The sole “distinction” that the Service purports to incorporate is an assertion that Alternatives 1 and 3 will have “Middle Section Horse Levels” of 0 – 40 adult wild horses during “seasonal, incidental use.” However, this “Middle Section Horse Level” figure has no legal significance and in no way changes the AML—which remains at the same 2013 levels that were assigned *without* the Middle Section or accounting for the newly available resources located there. In other words, the Service is not actually adjusting the AML upward to allow for 40 additional horses in parallel with the addition of the newly added 33,013 acres; rather, the high end of the AML remains at 402 horses and any horse above that threshold may be deemed “excess” by the Service and slated for permanent removal (if the statutory prerequisites for removal are satisfied).

Moreover, these 40 adult wild horses identified for seasonal, incidental use are attributed solely to the Triangle and Big Sage Allotments (20 for each allotment), *see* 2024 AML Evaluation at 57, and therefore do not represent the entire Middle Section. As such, there remain additional newly added acres of the Middle Section that are not subject to seasonal grazing restrictions—and that represent additional space, forage, and water resources that were not present under the 2013 TMP. Even if the allowance for incidental use by up to 40 horses had any legally operative effect on the AML—which it does not—that *still* would not explain why there has not been an upward adjustment to the territory AMLs to reflect the additional resources present on those areas of the newly added Middle Section that are not subject to seasonal grazing restrictions.

Given that AWHC and EPIC’s concerns have not been adequately addressed or coherently explained, the Objectors are raising them again herein pursuant to 36 C.F.R. §218.8(d). The Service should adopt an *actual* increase in the AML—not a legally meaningless “Middle Section Horse Level” that allows “incidental” wild horse use of no legal or practical significance—that takes into consideration the resources in the Middle Section that will now be available to sustain wild horses. Such an increased AML must consider and account for 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 reaching these AML determinations based on resource availability in the Middle Section.

Common sense dictates that at least some meaningful, upward adjustment in the actual AML is warranted and there is no reason to wait. Indeed, the agency’s own 2024 AML Evaluation report acknowledges that adjustment is likely needed: “[t]his AML recommendation for the proposed Middle Section acknowledges the likely need to further adjust AML levels for all pastures or units across the entire territory at a future date.” 2024 AML Evaluation at 58. If, on the other hand, the Service wants to assert that the DGPWHT cannot sustain even 1 more horse despite adding 33,013 acres (at least some of which are accessible year-round), then it must actually offer a non-arbitrary explanation for that counterintuitive and seemingly illogical determination. It has failed to do so.

II. The Service’s Alternatives Analysis Compounds the Flawed AML Determination

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. *See* Draft EA at 42, 52. Even if the AML of 206-402 is a justifiable limit—which the Service has failed up to this point to adequately demonstrate—it would *still* be the case that Alternatives 1 and 3 should *not* have the same AML as Alternative 2.

In their comments, AWHC and EPIC point out that 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. *See* Comments at 8. 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. *Id.* In other words, the agency clearly recognizes that the larger space and resources under Alternative 4 warrant a measurable increase in AMLs. *Id.* 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. *Id.*

Yet the Final EA uncritically adopts the same AMLs uniformly across Alternatives 1, 2, and 3. *See* Final EA at 24, Table 4. In response to AWHC and EPIC’s comments, the Service rehashed the same confusing and fundamentally arbitrary explanation as it offered in an attempt to explain why it kept the 2013 AMLs: the Service asserts that the number of wild horses accommodated across Alternatives 1, 2, and 3—despite having the exact same AMLs—are not in fact the same because they have made a passing reference to up to 40 adult wild horses that may use the Middle Section on a seasonal, incidental basis under Alternatives 1 and 3:

The Alternatives, using 2024 AML Evaluation for the Middle Section, are not the same. A distinction will be made in the Final EA, Table 4 Comparison of Alternatives. As described in the AML Evaluation (Table 24) and DEA (pg. 54) Under Alternatives 1 and 3 the Middle Section would have seasonal, incidental use of 0-40 WH. Under Alternative 2, the Middle Section would be outside the originally designated territory @ 0 WH. Specific WH numbers were not identified by Unit or Allotment under Alternative 4. However, under Alternative 4 use by WH in the Middle Section would remain seasonal and incidental with restricted access to riparian pastures during the livestock grazing season.

USFS Comment Disposition at 49; *see also id.* at 60 (offering same inadequate explanation).

Again, a closer look at Table 4 in the Final EA shows that the AML levels for Alternatives 1, 2, and 3 *remain the exact same*: 206-402 adult wild horses for the DGPWHT. *See* Final EA at 24, Table 4. The sole “distinction” that the Service purports to incorporate is a declaration that Alternatives 1 and 3 will have “Middle Section Horse Levels” of 0 – 40 adult wild horses during “seasonal, incidental use.” However, this “Middle Section Horse Level”

figure has no legal significance and in no way changes the AML—which remain at the same across Alternatives 1, 2, and 3 despite Alternatives 1 and 3 having 33,013 additional acres of forage and water resources to support a higher AML. Because the AML plays an important role in Forest Service decisions to permanently remove “excess” horses from the territory, adopting a pseudo-AML based on incidental use—which finds no support in statute, regulation, or guidance—is simply not the same as formally adjusting the AML upward based on the availability of new resources due to the addition of the Middle Section.

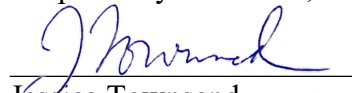
Along the same lines, the Service’s only response to AWHC and EPIC’s comment that it must “design a non-arbitrary alternatives process that reflects the meaningful difference in resources among those alternatives with access to the new Middle Section and those without”—was to claim that no changes were needed because the agency “did describe the benefits and limitations of each alternative,” and simply referring back to the basic comparison of alternatives in the Draft EA (which contained the very same problematic uniform AML limits across Alternatives 1, 2, and 3 that AWHC and EPIC raised concerns over). *See* USFS Comment Disposition at 18. Of course, this too is non-responsive.

This arbitrary and poorly designed alternatives process must still 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

The Service must develop and explain 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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Enclosures:

Attachment A Objectors' Comments on the Draft EA