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File Code: 1570
Appeal No.: 14-05-00-0001-A215
Date: January 2, 2014

Ms. Janet Lynch
655 Elmwood Road
Pownal, ME 04069

CERTIFIED – RETURN RECEIPT REQUESTED

Dear Ms. Lynch:

The Forest Supervisor for the Modoc National Forest, Kimberly Anderson, signed the Decision Notice (DN) approving Alternative 2 of the Devil's Garden Wild Horse Territory Management Plan Environmental Assessment (EA) on August 27, 2013. The notice of the decision was published on August 29, 2013. On October 11, 2013, you filed a Notice of Appeal (NOA) pursuant to 36 CFR 215.

I have reviewed the entire appeal record, including your written Notice of Appeal (NOA), the DN, EA, and the supporting documentation. I have weighed the recommendation from the Appeal Reviewing Officer and incorporated it into this decision. A copy of the Appeal Reviewing Officer's recommendation is enclosed. This letter constitutes my decision on the appeal and on the specific relief requested.

FOREST ACTION BEING APPEALED

Implementation of a Territory Management Plan (TMP) whereby wild horses in the Devil's Garden Plateau Wild Horse Territory (WHT) are managed for the next 15-20 years as a self-sustaining population of healthy animals in a thriving natural ecological balance with other uses and within the productive capacity of their habitat as required by Public Law 92-195, the 1971 Wild Free-Roaming Horses and Burros Act (WFRHBA), as amended.

Designation of the Forest Service as the lead agency for all wild horse management actions within the WHT, consistent with the authority provided in Forest Service Manual 2261.1, 36 CFR 222 Subpart B, and the 1971 WFRHBA (as amended). The proposed action would identify management and monitoring objectives and actions for future management of the herd and their habitat.

Removal of excess wild horses (both within and outside the WHT), when necessary, to prevent further deterioration of the range. Disposition of older animals that are gathered will be consistent with law, regulations and policy.

This change is made to insure compliance with the 1971 WFRHBA, as amended.

Baseline genetic diversity would be established and monitored, and management actions would be taken as needed to ensure a healthy, diverse and self-sustaining wild horse population is maintained over the long-term.

Population suppression methods such as application of PZP or sex ratio adjustments would be implemented to slow the average annual growth rate.

Habitat improvement projects would be undertaken to enhance the habitat available for wild horses within the WHT over the short and long-term.

The decision also includes the following modifications to the Proposed Action (Alternative 2): Sex ratio adjustment to favor males beyond a 50:50 ratio will not be considered at this time. This change is made to address public concern regarding this practice and because it is thought possible to lower the herd growth rate to an acceptable level (< 20%) through sex ratio adjustment to 50:50 males/females and implementation of fertility control.

If necessary to maintain genetic diversity (based on monitoring), animals will only be introduced from the alternate home range in the Devil's Garden WHT.

APPEAL REVIEWING OFFICER'S FINDINGS and RECOMMENDATION

The ARO, Laurence Crabtree, found that the project is an appropriate and reasonable response to direction in the Modoc National Forest Land and Resource Management Plan and is in compliance with the plan.

The purpose and need for the project were clear. The Modoc Forest Supervisor's decision logic and rationale were clear and well documented in the Record of Decision. The Forest Supervisor was responsive to public participation, and thoroughly responded to concerns that were identified during the scoping and comment periods.

The ARO recommended affirming the Forest Supervisor's decision on all issues, including issues pertaining to the proposed amendments, except issues 2Ciii and 13 regarding the lack of analysis and disclosure of the costs associated with the proposed gathers of wild horses. In turn, the ARO recommended denying the Appellant's requested relief, except the relief in that related to the aforementioned issue.

DECISION

I agree with the ARO's analysis as presented in his recommendation letter. Some of the issues raised in your appeal letter are similar to comments made during the comment period. All appeal issues you raised in your appeal letter have been considered. I affirm the Forest's proposed amendments to their Forest Plan. I also affirm the Forest Supervisor's decision to implement Modified Alternative 2, with the exception of gathers of wild horses and associated activities. Those activities may only commence once the deficiency regarding the lack of analysis and disclosure of costs associated with gathers of wild horses has been sufficiently corrected. I deny

all requested relief, except that related to the lack of analysis and disclosure of the costs of the gathers.

The project may be implemented on, but not before, the 15th business day following the date of this letter in accordance with 36 CFR 215.9(b). My decision constitutes the final administrative determination of the Department of Agriculture as per 36 CFR 215.18(c).

Sincerely,

/s/ Barnie T. Gyant
BARNIE T. GYANT
Deputy Regional Forester
Appeal Deciding Officer

Enclosure

USDA United States Department of Agriculture | Forest Service | Eldorado National Forest | 100 Forni Road
Placerville, CA 95667
530-622-5061 (Voice)
530-642-5122 (TTY)

File Code: 1570-1

Date: December 30, 2013

Subject: Devil's Garden Wild Horse Territory Management Plan
Bowers AWHPC Appeal 14-05-00-0002-A215
Lynch Appeal 14-05-00-0001-A215
Modoc National Forest

To: Appeal Deciding Officer

I am the designated Appeal Reviewing Officer for this appeal. This is my recommendation on disposition of the appeal filed by Carla Bowers, Deniz Bolbol (American Wild Horse Preservation Campaign), and by Janet Lynch, appealing the Modoc National Forest Supervisor, Kimberly Anderson, Decision Notice (DN) for the Devil's Garden Wild Horse Plateau Wild Horse Territory Management Plan Project Final Environmental Assessment (EA). The decision was signed on August 27, 2013 and the legal notice of the decision was published on August 29, 2013.

DECISION BEING APPEALED

The Modoc National Forest proposes the implementation of a Territory Management Plan (TMP) whereby wild horses in the Devil's Garden Plateau Wild Horse Territory are managed for the next 15-20 years as a self-sustaining population of healthy animals in a thriving natural ecological balance with other uses and within the productive capacity of their habitat as required by PL 92-195, the 1971 Wild Free-Roaming Horses and Burros Act (WFRHBA, or the "Act"), as amended.

The Devil's Garden Plateau Wild Horse Territory (WHT) is located within Modoc County, California. The southern boundary of the territory is about 7 miles north of the City of Alturas. The territory includes all or portions of Townships 43- 46 North, Ranges 8-13 East.

The proposed action designates the Forest Service as the lead agency for all wild horse management actions within the WHT, consistent with the authority provided in Forest Service Manual 2261.1, 36 CFR 222 Subpart B, and the 1971 WFRHBA (as amended). The proposed action would identify management and monitoring objectives and actions for future management of the herd and their habitat. The need for the proposed action is to ensure the herd is managed as a self-sustaining population of healthy animals in a thriving natural ecological balance with other uses and the productive capacity of their habitat as required by the WFRHBA.

The current wild horse population has resulted in animals moving outside the WHT in search of water and has led to the deterioration of key portions of the range. In these areas, the desired conditions have not been attained. The proposed action provides for the removal of excess wild horses (both within and outside the WHT), when necessary, to prevent further deterioration of the range. Managing wild horse population size within the established AML would result in

achieving the desired conditions and a thriving natural ecological balance within the WHT as required by the WFRHBA.

The genetic health of the herd has not been determined. Under the proposed action, baseline genetic diversity would be established and monitored, and management actions would be taken as needed to ensure a healthy, diverse and self-sustaining wild horse population long-term.

The current annual rate of population growth for the Devil's Garden wild horse herd is above average (25 percent per year). Population suppression methods such as application of PZP or sex ratio adjustments would be implemented to slow the average annual growth rate. Because water may be a limiting habitat factor for wild horses in some areas and existing fences may be impacting free-roaming behavior, habitat improvement projects would be undertaken to enhance the habitat available for wild horses within the WHT over the short and long-term.

The Responsible Official has decided to implement the Proposed Action (Alternative 2), as fully described in the EA on pp. 27-32, with the following modification:

Sex ratio adjustment to favor males beyond a 50:50 ratio will not be considered at this time. This change is made to address public concern regarding this practice and because it is thought possible to lower the herd growth rate to an acceptable level (< 20%) through sex ratio adjustment to 50:50 males/females and implementation of fertility control.

If necessary to maintain genetic diversity (based on monitoring), animals will only be introduced from the alternate home range in the Devil's Garden WHT. For example, if monitoring indicates a concern with genetic diversity in the West Home Range, only similar animals from the East Range would be introduced. This change is made to address public concern regarding the introduction of animals from other Territories or Herd Management Areas into the Devil's Garden WHT.

Disposition of older animals that are gathered will be consistent with law, regulations and policy. This change is made to insure compliance with the 1971 WFRHBA, as amended.

The components of the chosen alternative are:

1. Approval of the Devil's Garden Plateau Wild Horse Territory Management Plan.

2. Designation of the Modoc National Forest as lead agency for management actions related to wild horses in the DGPWHT.

3. Adoption of the non-significant Forest Plan amendments as described below:

   a. Delete Standard 5 (LRMP, 4-19) which states: "Manage the wild free-roaming horse herds to achieve a Forest population between 275 and 335 (on the average, 305) animals." Replace Standard 5 (LRMP, 4-19) as follows: "5. (S) Revise the herd management plan for the Devils Garden Plateau WHT approximately every ten to twenty years. Evaluate the appropriate management level (AML) for wild horses as part of the herd management plan analysis and decision process."

b. Delete Guideline 5A (LRMP, 4-19) which states: "Every ten years revise the herd management plan for each wild horse territory, including forage allocation for horses within the carrying capacity of the territory. Cooperate with the Bureau of Land Management in capture and placement of the animals. Replace Guideline 5A (LRMP, 4-19) as follows: "A. (G) When review of resource monitoring and population inventory data indicates the appropriate management level (AML) for wild horses may no longer be appropriate, complete an in-depth analysis of resource monitoring data. If indicated, adjust the AML either up or down in order to maintain a thriving natural ecological balance and multiple-use relationship within the WHT. Express the AML as a population range with a lower and upper limit within which wild horses can be managed for the long-term. Establish the AML upper limit as the maximum number which results in a thriving natural ecological balance and avoids a deterioration of the range and the AML lower limit at a number that allows the population to grow (at the annual population growth rate) to the upper limit over a 4-5 year period without any interim gathers to remove excess wild horses. The AML will specify the number of adult wild horses to be managed within the population (excludes current year's foals)."

c. Delete Guideline 5B (LRMP, 4-19) which states: "Monitor the impacts of wild horses on rangelands in allotments where horses are present. Determine if wild horse numbers should be adjusted on high impact areas." Replace Guideline 5B (LRMP, 4-19) with the following: "Monitor the impacts of wild horses on range ecological condition. Monitoring data may include studies of grazing utilization, range ecological condition and trend, actual use, and climate (weather) data. Population inventory, use patterns, animal distribution, and progress toward attainment of other site-specific and landscape-level objectives may also be considered. Three to five years of data is preferred.

d. Add Guideline 5C (LRMP, 4-19) as follows: "Cooperate with the Bureau of Land Management to capture and remove excess wild horses when analysis of grazing utilization and distribution, trend in range ecological condition, actual use, climate (weather) data, current population inventory, wild horses located outside the WHT in areas not designated for their long-term maintenance and other factors such as the results of land health assessments demonstrate removal is needed to restore or maintain the range in a thriving natural ecological balance with other uses and the productive capacity of their habitat.

Establish a boundary for the WHT based on the long-term needs of the Devils Garden wild horse herd and within the herd's known territorial limits (1971 WFRHBA) rather than for administrative convenience. This boundary will provide for future management of two distinct home ranges: West and East.

4. Establishment of an AML upper limit of 402 adult wild horses and a lower limit of 206 adult wild horses, based on the evaluation of monitoring data. The evaluation of monitoring data will determine if future changes in the AML are necessary, which would be implemented, pending additional site-specific environmental analysis.

5. Use of helicopters as the primary gathering method, supplemented by bait trapping where

feasible. All gathering operations will be in accordance with the Standard Operating Procedures as specified in Appendix D of the EA, or as modified by most current gathering contract(s).

6. Gathers to achieve AML will commence as soon as practical, beginning in the fall/winter of 2013 or the summer of 2014.

7. Animals that have established home ranges outside the territory boundary would receive first priority for removal.

8. Implementation of fertility treatments using the 1 year and 22 month formulations of PZP to slow rate of herd growth. Fertility control will be administered to all mares of the age one and older that are turned back to the WHT. Fertility control will be administered in accordance with the Standard Operating Procedures described in Appendix E of the EA, or the latest revision.

9. Establishing a baseline for genetic diversity through sampling of the animals gathered. Genetic diversity would be re-assessed through further sampling every 8-10 years. If genetic monitoring indicates that Observed Heterozygosity (Ho) falls below the mean for feral populations (0.66 for DNA based hair samples, 0.31 for blood samples) actions to improve diversity such as introducing young animals (mares) from the opposite home range or maximizing the number of breeding animals in the herd will be implemented.

10. Actions to adjust the sex ratio of the herd to a 50/50 males/female will be taken. This will be done by releasing additional males during AML maintenance gathers.

11. The feasibility of developing additional water sources in currently dry areas of the WHT will be examined. Construction of additional water sources will be completed pending site specific environmental analysis and available funding.

12. No new fencing would be constructed in the WHT, with the exception of small riparian pasture fences if found necessary to meet riparian objectives. Re-construction of existing allotment/pasture fencing would be completed pending the results of site-specific environmental analysis.

13. 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.

14. Population and Habitat monitoring will occur as described in the EA, pp. 29-32, and DGPWHT Plan (pp. 13-17) to determine progress in meeting objectives. Adjustments to population or habitat management will be based on the results of monitoring data and implemented pending additional site-specific environmental analysis.

The Modoc Forest Supervisor found that the Proposed Action (Alternative 2) best meets the purpose and need to develop and implement a territory management plan to ensure the herd is

managed as a self-sustaining population of healthy animals in a thriving natural ecological balance with other uses and the productive capacity of their habitat as required by the 1971 WFRHBA, as amended. This alternative establishes an AML based on monitoring as prescribed by law and numerous legal rulings and not for administrative convenience. From the analysis presented in the EA (p. 125), the management of 206-402 adult animals would ensure there are adequate forage and water supplies to support the herd on a year-long basis for the long term, including adequate winter range to carry the animals each year. Maintaining this level of animals would result in improvement of ecological conditions for upland and riparian habitats (EA, p. 125). The AML range is wide enough so gathers to maintain AML would only be necessary every 4-5 years, preventing annual disruption of social structure and disturbance to the animals in their habitat (EA, p. 115). Additionally, the analysis shows that competition for space, cover, forage and water would be reduced among the horses and other uses, including livestock and wildlife. Instances of animals emigrating outside the territory for essential habitat components would be minimized (EA, p. 124). Designation of the Modoc National Forest as lead agency and the non-significant amendments to the Modoc Land and Resource Management Plan will facilitate improved management of the animals and their habitat.

The boundary of the territory would be returned to the one established at the passage of the WFRHBA of 1971 (EA, p. 6), bringing it into compliance with the Act. The analysis presented in the EA (p. 113) reveals that helicopter gathering is a humane and effective method of achieving and maintaining the population at AML. Also based on the analysis, the Responsible Official is convinced that helicopter gathering (supplemented by bait trapping) would be necessary to achieve and maintain AML in the WHT and conduct fertility treatments. The implementation of fertility control, as described on p. 118 of the EA, would slow the annual rate of increase to below the average of 25% currently being experienced. She believes the monitoring of genetic health and possible corrective actions as described on pg. 123 of the EA will allow the forest to maintain genetic diversity objectives for this herd.

Finally, the comprehensive monitoring program described in the DGPWHT Plan (pp. 13-19) will help us determine if the forest is meeting population and habitat objectives for the herd. Any adjustments in AML or other see if further adjustments are necessary for the long-term management of wild horses on the DGPWHT.

APPEAL SUMMARY

The Devil's Garden Wild Horse Plateau Wild Horse Territory Management Plan Project was listed in the Schedule of Proposed Actions on April 1, 2010. The scoping letter was mailed to approximately 113 local tribal organizations, other agencies, individuals, and groups potentially interested in or affected by the Proposed Action on July 27, 2011. Based on additional monitoring and other information collected during the summer of 2012, the Proposed Action was refined and a second scoping period commenced on December 14, 2012. In addition, a public meeting was held on May 16, 2013.

The project was discussed with the Pit River Tribe during regularly scheduled quarterly consultation meetings on March 29, 2013 and June 5, 2013. The Pit River Tribe also discussed

this project at the BLM/Pit River Tribal Consultation Meeting on May 2, 2013. Additionally, Tribal representatives provided verbal comments on January 7, 2013. The Tribe expressed no concerns regarding the Proposed Action.

Consultation with USFWS and the California Department of Fish and Wildlife has been an on-going during this planning effort. Consultation with the USFWS was conducted in relation to the development of Biological Assessments for threatened, endangered, and sensitive species.

The legal notice of availability of the preliminary EA for comment was published on May 2, 2013 in the Modoc County Record. Copies of the preliminary EA were sent to over 113 individuals, organizations, tribes, and government agencies. The Proposed Action was also placed on the Modoc National Forest web page. There were 39 individual comment letters and 7,606 with the same text that were received by the close of the comment period on June 3, 2013. Janet Lynch, Carla Bowers, and Deniz Bolbol (American Wild Horse Preservation Campaign) submitted timely comments and are eligible to appeal this decision.

The legal notice of decision was published August 29, 2013 and the deadline for filing appeals was October 14, 2013. The current appeals were filed on October 11, 2013 (Lynch) and October 14, 2013/amended November 18, 2013 (Bowers/ AWHPC) and they are timely. The Forest Supervisor had a conference call with the both of the Appellants on December 11, 2013. No issues were resolved.

As relief the Appellants request the following:.

Lynch

Reissue the decision and reconsider seriously implementing Alternative 4, which would be much more effective in achieving TNEB. Failing that, it must issue with a full Environmental Impact Statement taking into account the issues and deficiencies as noted the appeal.

Bowers/AWHPC

- Rescind Decision, FONSI and 2013 DGWHT Management Plan and corresponding amendments to the Forest Plan.

- Continue to maintain one contiguous Territory boundary as indicated in the original Forest Plan that more accurately reflects natural horse movement.

- Implement measures to restore acreage that was wrongfully removed from wild horse use over the years to total the original 300,000 acres that was legally designated to the animals in 1971 as previously shown in Exhibits 8, 9 and 13.

- Prepare an EIS analyzing issues identified in the Bower appeal prior to implementing a revised plan.

- The revised Plan must reflect the "principally" mandate of the 1971 Act by raising the wild horse AMLs while still fulfilling the "multiple-use" concept of the public lands, *i.e.*, raise AMLs for wild horses to 1,000 animals and lower the livestock and/or elk AUMs accordingly. This significant change would trigger preparation of an EIS under NEPA as

required by FSM 1926.52 with regard to changes to the Land Management Plan that are significant and that would alter the long-term relationship between levels of multiple-use goods and services originally projected in the Forest Plan. [36 CFR 219.10(e)].

- Conduct rangeland monitoring and assessments for the seasonal impact of different forage consumers (e.g. livestock, elk, wild horses) and for multiple years to be included in the new more complete findings and analysis in an EIS. Special emphasis should be paid to the impact on the range of seasonal livestock grazing.

- Include alternatives in an EIS for eliminating livestock grazing altogether, maintaining the current wild horse population, and for equitably distributing (50-50) forage resources between wild horses and livestock.

- Amend the Forest Plan and Management Plan taking into account the findings from the from the rangeland monitoring and assessments and EIS.

- Review and analyze the scientific justification and data which supports the current application of 1.2 AUM/horse. If USFS fails to provide scientific supporting data, the USFS shall implement the more standard and accurate 0.8 or 1.0 AUM per wild horse and raise the AMLs for the wild horses accordingly.

- Recalculate & reanalyze the livestock numbers allowed on the Devil's Garden WHT to reflect the increased size of modern cows and corresponding increased forage consumption. Adjust permitted livestock usage accordingly within the Devil's Garden WHT to reflect the forage consumption of modern cows. Set the livestock AUM at 1.5/cow/calf pair based on the aforementioned findings & recalculate the fees charged to the livestock operators. Amend the Grazing Allotment Management Plans accordingly.

- Revise the "Socio-Economic Specialist Report" utilizing credible and public resources, current California and Modoc County public lands grazing data and the most recent IMPLAN model that details the direct/indirect/induced costs, values, jobs and job earnings attributed to the livestock industry on public lands in the County. Revise all the alternatives with the updated, corrected findings and include them in a comprehensive EIS that is required for the reasons stated elsewhere in this Appeal.

- Revise the "Socio-Economic Specialist Report" by incorporating analysis of the non-market value of the wild horses on the DGWHT including that they are an aesthetic and national heritage species, that they are living symbols of the historic and pioneer spirit of the West, that they contribute to the diversity of life forms within the nation and enrich the lives of the American people, and that they are an integral part of the natural system of the public lands. All of these qualities and more demonstrate their non-market resource "value" to the American people. Include the updated Report findings in an EIS.

- Revise the "Socio-Economic Specialist Report" to reflect the potential economic benefits of wild horse viewing/photographing/tours/scientific research in the Devil's Garden WHT to develop eco-tourism that is growing throughout California. Include the updated

Report findings in a comprehensive EIS.

- Revise the "Socio-Economic Specialist Report" incorporating data regarding the costs of permitting livestock grazing on the Devil's Garden WHT and include in an EIS.

- Revise the "Socio-Economic Specialist Report" incorporating economic analysis of the proposed gather plan, including disclosure of all costs associated with the capture operation itself, as well as the costs for short- and long-term holding and adoption preparation for the horses removed from the range and include in an EIS.

- Reevaluate AMLs for wild horses in the WHT without incorporating the BLM "Wild Horses and Burros Management Handbook and include this reevaluation in an EIS.

- Address new amendments based on a revised Devil's Garden WHT Management Plan at the time the entire Forest Plan is revised and an accompanying EIS is undertaken.

- Stay this contested Decision and any planned roundups and removals of the DGWHT wild horses until this Appeal is resolved. Remand the environmental analysis back to the USFS with instructions to complete an EIS that complies with the 1971 Act, FLPMA, NEPA, and all other applicable laws and that includes other alternatives with all of the remedies and suggestions as set forth in this Appeal.

ISSUES AND RESPONSES

Issue 1A

The proposal to change the boundary of the Wild Horse Territory (WHT) and dividing one territory into two smaller, separate areas in an unlawful violation of the WFRHBA of 1971.

Because of the 1971 Act language, USFS lacks legal or other authority to reduce the original "range" size and habitat where the horses were found in 1971 in the DGWHT, which included some private lands within the Territory, and to divide the WHT into two separate areas.

Also, the USFS has multiple versions of the purported "1975 Map" depicting two WHTs… Given the contradictory representations of the so called "1975 Map," the record does not provide any, or sufficient, evidence for the determination that the wild horses which existed in 1971, when the original 1971 Act was passed, did not occupy the areas which this Decision will eliminate from the WHT.

In addition, Congress mandated that the "range" is to be used "principally" for the wild horses' "welfare." However, this Decision to divide the WHT into two areas in the current Plan is done for "administrative convenience" or some other human "convenience" rather than for the benefit of the wild horses or necessary protection of the range, as the divisions follow most allotment/pasture fence lines as shown in Map 3 dated February, 2013, from page 11 of the "Wild Horse Specialist Report" (see Exhibit 12 attached). As such, this Decision to permanently alter and reduce in size this WHT is illegal under the 1971 Act.

Given that the Forest Plan is scheduled for a complete revision and an EIS in the near future, it appears these amendments are being implemented now in an effort to avoid the required "hard look" that accompanies an EIS review. It is Appellants' position that boundaries may only be changed when USFS undertakes a programmatic revision of its entire Forest Plan and not in a site-specific decision (Bowers/AWHPC, pp. 5-7).

Response

The 1971 Wild Free-Roaming Horse and Burro Act (WFRHBA) (pg. 1) states that wild horses are to "be considered in the area where presently found" on public lands.

Under 36 CFR 222.60 (b)(13) wild free-roaming horses are those animals that used lands of the National Forest System on or after December 15, 1971. The CFR states that this does not include horses introduced onto the National Forest System on or after December 15, 1971, by accident, negligence, or willful disregard of private ownership.

Wild-horse and burro range means an area of National Forest System specifically so designated by the Chief, Forest Service, from wild horse and burro territory, for the purpose of sustaining an existing herd or herds of wild free-roaming horses and burros, provided the range does not exceed known territorial limits and is devoted principally, but not necessarily exclusively, to the welfare of the wild horses and burros, in keeping with the multiple-use management concept for the National Forest System (222.60 (b)(14)).

Wild horse and burro territory means lands of the National Forest System which are identified by the Chief, Forest Service, as lands which were territorial habitat of wild free-roaming horses and/or burros at the time of the passage of the Act (222.60 (b)(15)).

The Forest Service Manual (FSM) 2260, sec. 2260.3 policy states that wild horses are to be confined to managed Horse and Burro Territories as established in 1971, to the extent possible. The FSM defines wild free-roaming horses as "all unbranded and unclaimed horses and burros and their progeny using National Forest System lands on or after December 15, 1971" and defines a Wild Horse and Burro Territory as National Forest land identified by the Chief as the territorial habitat of wild free-roaming horses and/or burros when the WHBPA was passed.

The 1975 Wild Horse Territory Plan describes the Devil's Garden horse territory as being broken into two large units covering approximately 236,000 acres (1975 WHT Plan pg. 2). The 1975 plan includes a map similar to the one in the EA (pg. 4). The EA (pg. 3) states that during the 1980's the Forest appears to have adjusted the original boundary for "administrative convenience" to include 23,631 acres of land including a ranch (Triangle Ranch) which was acquired by the Forest Service in 1976, five years after the establishment of the territory. The boundary adjustment also included a second ranch, the Avanzino Ranch, 41 percent of which currently remains in private ownership. This expanded the territory to approximately 258,000 from what had been originally established (see EA map pg. 5). The 1991 Modoc LRMP incorporated the existing Wild Horse Management Plan by reference. The Forest's current proposed boundary change is to correct an administrative error in the development of the Forest Plan in 1991 where they incorrectly depicted the horse territory.

Additionally, the area covered by the decision is not a formally designated "range" under 36 CFR 222.60 (b)(14). Therefore, there is no statutory or regulatory duty to manage "principally"

for horses or otherwise give priority. The requirement under the Act is to "protect and manage" the horses, consistent with ecological integrity and the multiple use mandate is what applies.

See response to issue 3 for discussion of whether this project and amendment requires programmatic revision of the Forest Plan.

I find that the Forest is in compliance with the WFRHBA as well as the CFR and FSM. The Forest proposes to reinstitute the boundary of the territorial habitat of the Devil's Garden horse Territory as it was determined at the time of the passage of the Act in 1971.

Issue 1Bi(a)
The USFS is violating the following sections of FLPMA and NFMA with regard to the change in WHT boundaries.

Sec. 302 of FLPMA states: *(a) The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 202 of this Act when they are available,* ***except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law,"*** [43 U.S.C. 1732] and Sec. 102 *"(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and* ***shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law*** [43 U.S.C. 1701]. (Bowers/AWHPC, pg. 7)

Response
Section 102 and 302 of FLMPA does not direct the National Forest System on wild horse management. Wild Horse's management falls under the Wild Free-Roaming Horse and Burro Act. Wild Horses "are to be considered in the area where presently found, as an integral part of the natural system of the public lands". The provisions of 36 CFR 222.61 (formerly 222.21) direct the USFS.

The Triangle lands were under private ownership at the time the Act passed, and Avanzino was and presently remains 41% private property. As a result, these lands did not meet the criteria for inclusion in the Wild Horse Territory. The 1975 Devil's Garden Plateau Horse Management Plan included a map designating the Territory boundary. This map shows the Avanzino and Triangle Ranch Lands were specifically excluded. Little or no use by wild horses of these areas occurred during this time due to the number of fences and the ongoing livestock operations on this privately owned land (1975 WHT Plan, pp.2, 18; EA, pp. 3-5; Response to comment pg. 10)

The EA states "An administrative error was made in expanding the WHT beyond the herd's known territorial limits". Boundary expansions in 1980's identified lands that did not fall under the administrative management actions for the original allocation of the Historic Wild Horse Management Territory found in the 1975 WHT Plan. The boundary adjustment from the 1980's WHT Revised Plan map does not depict the intended management territory habitat that is reflective 1975 plan habitat description. The proposed boundary clarification of this proposed action states the original boundary will be reinstated (1971 WFRHBA; 1975 WHT Plan, pp. 2, 18; 1980 WHT Revised Plan, pg. 2; EA, pg. 3).

The boundary of the territory would be returned to the reflect habitat descriptions (WFRHBA of

1971, EA, pg. 6). The boundary adjustment is consistent with applicable laws, policy, or regulation. When the WHT was established in 1975, it was established as two distinct Home Ranges and did not include the lands that are displayed is the Triangle or Avanzino private ranch lands. The habitat description and the1980 map differ. The Proposed Action would return the map display to the lawful boundary as defined.

I find that the amendment to return the territories to their original designation is consistent with FLPMA and NFMA.

Issue 1Bi (b)

In addition, FLPMA requires the public lands to be administered for "multiple-use," which Congress defined as:

the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people . . . ***with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.*** [43 U.S.C. § 1702(c)].

Similarly, NFMA requires that "[i]n developing, maintaining, and revising plans for units of the National Forest System …, the Secretary shall assure that such plans – (1) provide for multiple use and sustained yield of products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. §§ 528-31]." 16 U.S.C. § 1604(e)(1). The Multiple-Use Sustained-Yield Act, in turn, contains the same requirement as FLPMA, namely that the resources of the national forests are managed:

so that they are utilized in the combination that will best meet the needs of the American people … ***with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.*** [16 U.S.C. § 531(a).]

Accordingly, since wild horses and livestock constitute the two primary uses of the public lands at issue, it would violate the *multiple*-use mandate for USFS required by FLPMA and NFMA to completely remove all wild horses from any particular WHT – i.e., to remove one of the main uses – while continuing to allow livestock grazing in those areas. (Bowers/AWHPC, pp. 7-8)

Response

36 CFR 219.1(f) Plans must comply with all applicable laws and regulations, including NFMA, MUSYA, the Clean Air Act, the Clean Water Act, the Wilderness Act, and the Endangered Species Act. There are determinations for legal compliance in the FONSI and other places in the DN and EA.

The EA fully discusses multiple use activities and affected environment/ environmental impact occurring within the Devil's Garden WHT, "In addition to providing habitat for wild horses, other uses include timber harvest, livestock grazing, wood cutting, hunting, fishing, camping and day use" (EA pp. 45-150).

NFMA is the leading act that directs National Forest land management planning; FLPMA does not. NFMA directs National Forest Land and Resource Management Plan (Forest Plan). The

needs for these amendments are to facilitate more efficient and adaptive management of all uses found in the local planning area. These proposed amendments are site-specific and apply only to the WHT (DN, pg. 1, EA, pp. 45-150, Response to Comment pg. 73).

Under the Proposed Action Alternative, an AML would be established as a population range of 206-402 wild horses. Alternative 2 was found to be the implementing decision for this plan, (1971 WFRHBA, as amended, DN, pp. 1-2, EA on pp. 27-32).

I find that the decision is consistent with the requirements of NFMA.

Issue 1Bii

Even if this change somehow did not violate the USFS's multiple-use mandate, given the specific substantive mandate of the 1971 Act requiring that then-existing wild horse and burro range be managed "principally" for the welfare of these animals, the USFS's multiple-use mandate must defer to this Congressional priority... By improperly downsizing and dividing the original WHT in order to make room for additional livestock grazing, the 2013 DGWHT Management Plan violates the FLPMA and NFMA as they incorporate and relate to the Congressional priorities contained in the prevailing 1971 Act. *See* 36 CFR 219.1(f) (Bowers/AWHPC, pp. 7-8)

Response

The WFRHBA, as amended, is a land and resource management statute which requires the Forest Service and Bureau of Land Management to "manage wild free-roaming horses and burros as components of the public lands" and "in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands" 16 U.S.C. §1333 (a)). As enacted in 1971, the WFRHBA states that ranges should be "devoted principally but not necessarily exclusively to horse and burro welfare in keeping with the multiple-use management concept for the public lands" (16 U.S.C. §1333 (c)).

36 CFR 219.1(f) Plans must comply with all applicable laws and regulations, including NFMA, MUSYA, the Clean Air Act, the Clean Water Act, the Wilderness Act, and the ESA.

Please see 1Ai and 1Bi for the response to the Appellant's position of improperly downsizing and dividing the original WHT.

The Devils Garden Wild Horse Territory is defined as a territory not a "range" and therefore would not fall under the requirement of principally delimitated for wild horse management. Specialist reports, monitoring data, along with historical analysis of the habitat identify current conditions as suitable or not to sustain the current population. As stated in the EA, "wild horses are present only in certain pastures". The current wild horse population has resulted in animals moving outside the WHT in search of water and has led to the "deterioration of key portions of the range". The EA and all supporting reports analyzed four differing alternatives and all allotment conditions on a case by case basis. The alternatives describe how to manage the population and how that would affect the conditions on the ground. The EA discloses all past, current, and foreseeable uses found in the planning location as described in all guiding regulation (DN pg.11, EA pp. 6-9, 15-16, 74, 99-111).

I find the analysis of this EA fully analyzed the boundary adjustment and livestock grazing in how the decision was determined. The proposed action complies with 36 CFR 219.1(f).

Issue 1C
Unlawful Boundary Change to the Wild Horse Territory (WHT) – eliminating historic range from the WHT and dividing one territory into two smaller, separate areas – Violation of NEPA: (Bowers/AWHPC, pp. 8-9)

Issue 1Ci
NEPA requires that an EIS be prepared for all major Federal actions that "may significantly affect the quality of the human environment." 42 U.S.C. § 4332(2)(C). With regard to decisions which dictate management of wild horses, the horses themselves are considered to be part of the "human environment." This EIS requirement is supported by FSM 1926.52 with regard to changes to the Land Management Plan that are significant and would alter the long-term relationship between levels of multiple use goods and services originally projected [36 CFR 219.10(e)].

Response
"Preparation of an EA is intended to provide evidence as to whether an EIS must be prepared (40 CFR 1508.9; FSH 1909.15, chapter 41.23). 36 CFR 220.7 describes what must be analyzed in an EA and conclusions made in the DN. 36 CFR 220.7(b)(3) states "An EA must include the following: ... (3) Environmental Impacts of the Proposed Action and Alternative(s)".

"A FONSI (40 CFR 1508.13) presents the reasons why an action will not have significant effects, as defined in (40 CFR 1508.27), on the human environment and for which an EIS will not be prepared" (40 CFR 1508.9).

FSM 1926.52 "Establishes a new code and incorporates direction on changes to the land management plan that are significant, which was previously contained at FSM 1922.52.

FSM 1922.5 "The need to amend a forest plan may arise from several sources, including:(1) Recommendations of the Forest interdisciplinary team based on findings that result from monitoring and evaluating implementation of the forest plan (36 CFR 219.12(k) and FSM 1922.7)(4) Changes to correct planning errors;(5) Changes necessitated by changed physical, social, or economic conditions; and (6) Implementation of management practices outside the scope of the forest plan.

Upon receiving advice of the interdisciplinary team that the plan requires change, the responsible official shall:

(1) Determine whether proposed changes to a forest plan are significant or not significant in accordance with the requirements of 36 CFR 219.10(e) and (f), 36 CFR 219.12(k), and sections 1922.51 and 1922.52 that follow;

(2) Document the determination of whether the change is significant or not significant in a decision document; and

(3) Provide appropriate public notification of the decision prior to implementing the

changes."

FSM 1926.51(a) states "Actions that do not alter the multiple-use goals and objectives for the long-term land and resource management are not considered a significant amendment. FSM 1926.52 only applies if there is a significant alteration of the long-term relationship between levels of multiple-use goods and services originally projected (36 CFR 219.10(e))".

Refer to the responses to issues 1Cii, 1Cv, 3 and 9 for a discussion supporting the determination for a non-significance Forest Plan amendment associated with dividing the Territory.

The Devil's Garden Plateau WHT Management Plan and Forest Plan Amendments Decision Notice (DN) describe the Finding of No Significance Impact specific to the Devil's Garden WHT areas (EA, pp. 8-9). The DN states "Designation of the Modoc National Forest as lead agency and the non-significant amendments to the Modoc Land and Resource Management Plan will facilitate improved management of the animals and their habitat" (DN, pg. 4).

The DN states "After considering the environmental effects described in the EA (beginning on pg. 45 of the EA), I have determined that these actions will not have a significant effect on the quality of the human environment considering the context and intensity of impacts (40 CFR 1508.27). Thus, an environmental impact statement will not be prepared. I base my finding on the following considerations of both context and intensity" (DN/FONSI, pg. 7).

All action alternatives were designed to return management of wild horses within the WHT to the lawful boundary as defined in the WFRHBA by correcting an administrative error in how the WHT boundary is defined in the Forest Plan (EA, pp. 1 – 4, 8, 24). As this corrects a boundary established for administrative convenience with no effect on wild horses or their habitats, there would be no change to the long-term relationship between levels of multiple use goods and services or significant changes to the original projections in the Modoc Land and Resource Management Plan (EA, pp. 116-.118, 150 -151; EA Appendix G, pg. 27).

"The selected alternative, including the adoption of the non-significant Forest Plan amendment, is consistent with the Modoc National Land and Resource Management Plan, as required by Section 6 of the National Forest Management Act" (DN/FONSI, pg. 11).

I find there is sufficient evidence and analysis, including the environmental impacts of the proposed action and alternative(s) disclosed in the EA, to determine the preparation of an EIS is not required, and the FONSI complies with NEPA and 40 CFR 1508.9.

My review of the of the EA and supporting documentation indicates that the Responsible Official's decision to authorize amendments will be non- significant per FSM 1926.51, as the long-term relationship between levels of multiple-use goods and services originally projected (36 CFR 219.10(e) in the Modoc's Land and Resource Management Plan, as amended, would not be altered. This change would establish the territory limits in the Forest Plan as established following direction in the wild horse territory enabling legislation.

Issue 1Cii

Regarding division of the DGWHT into two reduced-sized areas, the "Wild Horse Specialist Report" to the EA states, "...this amendment has no effect on wild horses or their habitat . . ."

this statement is erroneous and is unsupported by the evidence in the record...

Response

The Devil's Garden Wild Horse Territory Management Plan (DGWHTMP) serves to document the goals, objectives, management actions, and monitoring requirements as they relate to wild horses management in the Devil's Garden Plateau Wild Horse Territory.

40 CFR 1508.8 defines Effects. *Effects* include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

"Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial." (40 CFR 1508.8)

NEPA regulations define a cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions…" (40 CFR 1508.7). The Forest Service Handbook establishes a framework for cumulative effects analysis, which includes (1) defining the affected spatial analysis area, (2) defining the temporal boundaries for the analysis, (3) documenting the rationale for the boundaries, (4) describing the effects of past, present, and reasonably foreseeable future actions that overlap in time and space with effects of the proposed action and alternatives, and (5) describing key assumptions (FSH 1909.15, Chap. 10; also 36 CFR 220.4(f)).

The management of wild horses is allotted to a specific territory including East and West Home Ranges (WHTMP, pp. 2-3). The Avanzino and Triangle Ranch Lands were excluded from the Territory, as there was little or no use by wild horses of these areas occurred during this time due to the number of fences and the ongoing livestock operations on this privately owned land (EA appendix G, pp. 10-11). See issues 1A and 1Ci for discussion of the two areas of the WHT.

All alternatives analyzed in detail are designed to sustain healthy population of wild horses in a thriving natural ecological balance with other multiple uses over the long term within the boundaries of the Territory, as designated in 1975. These alternatives form the basis for a reasoned choice by the Responsible Official (EA appendix G, pg. 27).

The direct, indirect and cumulative effects to wild horses within this Territory, along with the removal of wild horses that are residing outside the WHT, are disclosed (EA, pp. 111-129; RTC, pg.8). The EA states, "Alternatives 1-4 have the potential to disrupt the social structure of individual bands of wild horses" (EA, pg. 115). The EA also discloses that the adjustments to

AML will have positive effects on the population of wild horses by minimizing the frequency of gathers and potential disturbance to social structure of the animals by ensuring adequate forage and water supplies are available to support a healthy, self-sustaining herd of wild horses year-round (EA, pp. 115, 116, 122-125).

The Wildlife Biological Evaluation (BE) discloses the direct, indirect and cumulative effects of wild horse management combined with livestock use on a number of wildlife species. The BE indicates that while some species may be affected, the project was unlikely to cause a further loss of habitat or species viability (EA appendix G, pg.20; BE, pp. 19, 39).

I find that the EA and DN/FONSI adequately disclosed the direct/indirect and cumulative effects to wild horses, including the effects associated with correcting the 1975 Devil's Garden Plateau Wild Horse Management Plan designated Territory and non-significant amendments to the 1991 Modoc National Forest Land and Resource Management Plan, as amended.

Issue 1Ciii:
Dividing the territory into two distinct units may have a significant effect on the public's ability to view and enjoy these wild horses... This also significantly impacts the ability to better develop wild horse tourism. The EA utterly failed to address this issue.

Response
40 CFR 1508.8 Effects. (b) "…Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative…"

The opportunities for wild horse related tourism are discussed in the EA (pg. 78). As stated on page 78, only a small fraction of the recreation use occurring on the Forest is attributable to wild horse viewing. More specifically, less than 10 public inquiries regarding wild horse viewing have been received over the last decade according to Devil's Garden Ranger District staff. Additionally, the Devil's Garden WHT is one of a number of wild horse management areas in the northeastern-California/northwestern Nevada. Because the Devil's Garden has heavy tree cover and limited road access, management areas in other locations will continue to provide greater wild horse viewing potential over the long-term.

Alternatives are analyzed for impacts to wild horse viewing in the Environmental Impacts section of the EA (EA pp. 79, 80, 81) and in the Recreation Specialist Report (pp. 6, 8, 9, 10) Wild horse tourism was addressed in the Comment Summary Table pages 232-233 where the extremely low public participation in wild horse viewing is described.

I find that the EA is consistent with NEPA because the impacts to wild horse viewing are sufficiently covered in both the EA and Recreation Specialist Report. Sufficient evidence and analysis is provided to conclude that impacts to wild horse viewing and associated tourism will not be significant under any alternative.

Issue 1Civ
Because there is the potential that this Decision will significantly affect the wild horses in this

WHT and the public's ability to view and enjoy them, preparation of an EIS was required.

Response

"Preparation of an EA is intended to provide evidence as to whether an EIS must be prepared. A FONSI (40 C.F.R. 1508.13) presents the reasons why an action will not have significant effects, as defined in (40 C.F.R. 1508.27), on the human environment and for which an EIS will not be prepared" (40 CFR 1508.9).

40 CFR 1508.9 "Environmental Assessment": (a) Means a concise public document for which a federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

40 CFR 1508.27 "Significantly" as used in NEPA requires considerations of both context and intensity: (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short and long-term effects are relevant. (b) Intensity.

See response to issue 1Ciii. In addition, the Devil's Garden Plateau WHT Management Area prescriptions relative to wild horse management indicate the desired condition is to provide a variety of opportunities to view wild horses along with different methods of transportation; horseback, hiking, mountain bikes, two and four wheel drive vehicles accessed from paved and gravel roads, consistent with the ROS classification and character of the area (EA, pg. 6, Recreation Specialist Report, pp. 1, 2, 6).

The EA and Recreation Specialist Report prepared to evaluate the Devil's Garden Wild Horse Territory (WHT) Plan indicate in the past, there has been very low visitor use activity on the Modoc as the chances of seeing wild horses are quite low. According to staff from the Devil's Garden Ranger District, there have been less than ten public inquiries regarding wild horse viewing tourism over the last decade (Recreation Specialist Report, pp. 232-233). Because the Devil's Garden Plateau WHT Management Area features heavy tree cover and limited road access, management areas in other locations in the northeastern-California/northwestern Nevada will continue to provide greater wild horse viewing potential over the long-term. (EA, pg. 78).

Although in the last year, it appears that interest in the Devil's Garden wild horses is increasing, all alternatives would maintain the opportunity for wild horse viewing and opportunities for wild horse related tourism (Recreation Specialist Report, pp. 6, 8, 11; EA, pp. 43, 78,79; EA appendix G, pg. 27). All alternatives were analyzed for impacts to wild horse viewing (EA, pp. 79, 80, 81; Recreation Specialist Report, pp. 6, 8, 9, 10). Alternatives 2 would maintain the opportunity for wild horse viewing) while Alternatives 3 and 4 will allow for improved viewing opportunities, despite dividing one territory into two small separate areas (EA, pg. 43). The EA states "Once AML is attained (275-335 animals) there would be fewer wild horses available for potential viewing" under the No action Alternative 1 (EA, pg. 43).The DN/FONSI discloses the impacts to wild horse viewing opportunities were determined to be non-significant (DN/FONSI, pg. 8).

I find sufficient evidence and analysis is provided in the EA and Recreation Specialist Report to conclude that impacts to wild horse viewing and associated tourism resulting from the restoration of the two smaller, separate areas will not be significant under any alternative to warrant the preparation of an EIS.

1Cv

The Service attempts to avoid its duty to consider in a programmatic revision of the operative Forest Plan, accompanied by an EIS, the loss of more than 25,000 acres of the WHT that have long been available for wild horse use as a result of this major boundary revision by simply asserting that this is one of many "non-significant Forest Plan amendments." *See* DN/FONSI at 2… Thus, the agency's mere assertion that the amendments are "non-significant"… is not applicable to this major boundary change, and therefore it was arbitrary, capricious, and an abuse of discretion to authorize this major boundary modification in a site-specific decision based on an EA rather than a programmatic decision and an EIS.

Response

"Preparation of an EA is intended to provide evidence as to whether an EIS must be prepared. A FONSI (40 CFR 1508.13) presents the reasons why an action will not have significant effects, as defined in (40 CFR 1508.27), on the human environment and for which an EIS will not be prepared" (40 CFR 1508.9).

40 CFR 1508.9 "Environmental Assessment": (a) Means a concise public document for which a federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

40 CFR 1508.27 "Significantly" as used in NEPA requires considerations of both context and intensity: (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short and long-term effects are relevant. (b) Intensity.

Section 706(2)(A) of the Administrative Procedure Act (APA) instructs courts reviewing regulations to invalidate any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The arbitrary or capricious test is used by judges when reviewing the factual basis for agency rulemaking. Courts can overturn agency decisions if they find that the underlying rationale or factual assertions are unreasonable.

The EA and DN/FONSI indicate the proposed boundary change would bring the Forest Plan into alignment with the 1971 WFRHBA within the territorial limits established in the 1975 Wild Horse Management Plan, along with the logic for why effects of dividing one territory into two smaller, separate areas would not be NFMA significant. Additionally, effects to wild horses would be mitigated to the extent feasible with the application of standard operating procedures (EA, pg. 9 and appendices D and E; DN/FONSI, pp. 7, 8; Wild Horse Specialist Report, pp. 8, 21, 22, 31). See also the responses to issues 1A and 1Ci for discussion of the boundary change.

The EA indicates all action alternatives maintain the key elements of the underlying Forest Plan strategy, enabling legislation, and are consistent with the multiple-use goals and objectives. All action alternatives include non-significant amendments as defined under the NFMA to the 1991 Modoc Forest Plan are to facilitate more efficient and adaptive management of the WHT and to correct an administrative error in how the WHT boundary is defined in the Forest Plan. These amendments are site-specific and apply only to the WHT (EA, pp. 1).

Although the Devil's Garden Plateau Wild Horse Territory area would be reduced, the extent would be limited to less than ten percent, where few, if any, wild horses have been found. The decision indicates the return to the management of wild horses within the WHT boundary established in 1971 in conformance with the WFRHBA represents a non-significant Forest Plan amendment (WHT Plan, pp. 2, 18; EA, pp. 3-5, 6, 9; DN/FONSI, pg. 7).

"The actions proposed were designed to achieve the objectives identified in the Modoc Forest Plan, as amended, and in conformance with the 1971 WFRHBA, as amended. The analysis shows the effects of the action are not uncertain, and do not involve unique or unknown risks. This conclusion is based on the consideration of results from other similar projects; past local experience; and expected environmental consequences based on the best available science" (DN, pg. 9). Since the proposed amendment was determined to bring the Forest Plan into alignment with the 1971 WFRHBA for a finding of no significant impacts, a programmatic revision or EIS was not deemed warranted (EA, pp. 3-5, 9; DN/FONSI, pg. 7-9, 11).

I find the preparation of an EIS or programmatic forest plan revision is not required. The EA and DN/FONSI adequately disclose the change to the WHT boundary would be consistent with the multiple-use goals and objectives in the Forest Plan and is not arbitrary and capricious.

Issue 2A

The following general definition of "range" in the 1971 Act applies to all public lands where the horses were "presently found" in 1971 and thus applies to the DGWHT.

Definitions . . . (c) 'range' means the amount of land necessary to sustain an existing herd or herds of wild free roaming horses and burros, which does not exceed their known territorial limits, and which is devoted principally but not necessarily exclusively to their welfare in keeping with the multiple-use management concept for the public lands; . . . [PL 92-195 § 1332]

The Plan designates the AML range of 206-402 wild horses to be allowed in the two-area, reduced-size Territory. That AML range corresponds to 2,472-5,789 AUMs (at 1.2 AUM/horse) allocated to the wild horses per year. Actual livestock AUMs used in the Territory are 19,255 AUMs/year and actual usage by 600 elk in the Territory is about 7,200 AUMs/year. Even at high AML, the wild horses are far from being considered "principally . . . to their welfare" in their restricted Territory "range."

The AML range of 206-402 wild horses will not support a self-sustaining population of healthy animals as the EA purports, especially if the Territory is divided into two areas with 103-201 animals per area. Additionally, the low AML of 206 was determined based on a 4-5 year roundup schedule. It was not based on science or the herd's long-term genetic health. (Bowers/AWHPC, pp. 11-12)

Response

The WFRHBA of 1971 (92 P.L. 195), as amended by the Public Rangelands Improvement Act of 1978 (95 P.L. 514), requires the Forest Service (FS) to determine appropriate management levels for wild free-roaming horses and burros on [designated] public lands." The legislation makes FS responsible for deciding how these appropriate management levels (AMLs) of free-ranging horses and burros should be achieved within the agency's multiple-use mandate, including consideration for wildlife, livestock, wilderness, and recreation. FS is also directed to manage for a thriving natural ecological balance, to prevent deterioration of the range, and to use minimal management for free-ranging horses and burros.

36 CFR 222.61(formerly 222.21) states that the Forest Service shall analyze each wild horse or burro territory and, based on the analysis, develop and implement a management plan, which analysis and plans will be updated, whenever needed, as determined by conditions on each territory (36 CFR 222.61(a)(4)); and maintain a current inventory of wild free-roaming horses and burros on each territory to determine whether and where excess animals exist (36 CFR 222.61(a)(5)). Based on 36 CFR 222.61(a)(4) and (5), the Forest Service shall determine appropriate management levels, whether action should be taken to remove excess animals and what actions are appropriate to achieve removal or destruction of excess animals (222.61(a)(6)).

Wild-horse and burro range means an area of National Forest System specifically so designated by the Chief, Forest Service, from wild horse and burro territory, for the purpose of sustaining an existing herd or herds of wild free-roaming horses and burros, provided the range does not exceed known territorial limits and is devoted principally, but not necessarily exclusively, to the welfare of the wild horses and burros, in keeping with the multiple-use management concept for the National Forest System (222.60 (b)(14)).

Wild horse and burro territory means lands of the National Forest System which are identified by the Chief, Forest Service, as lands which were territorial habitat of wild free-roaming horses and/or burros at the time of the passage of the Act (222.60 (b)(15)).

Additionally, 36 CFR 222.61(a)(1) (formerly 222.21(a)(1)): states the Forest Service shall administer 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, and regulating their population and accompanying need for forage and habitat in correlation with uses recognized under the Multiple-Use Sustained Yield Act of 1960 (70 Stat. 215; 16 U.S.C. 528-531).

Forest Service Manual 2200, Chapter 2260, sections 2262 and 2263 provide direction for Inventories and Studies, and Management of Wild Free Roaming Horses and Burros, including preparation of territory plans (FSM 2263.1) and describing elements of such plans (FSM 2263.11). Wild Horse and Burro Territory plans shall follow the outline for allotment management plans (FSM 2214 now found at FSH 2209.13, 94.1). In addition, the plans shall include a section on management of the animals, addressing such items as population level, special consultation and coordination considerations, and plans for the removal or disposal of excess animals. Range analyses and wildlife inventories are the primary sources of information about habitat of wild free-roaming horses and burros (FSM 2262.2). When information is not available, procedures described in FSM 2213 (formerly, now found at FSH 2209.13,91.1)

and FSM 2620 for gathering habitat information shall be followed. Information available in other resource inventories may also be used in evaluating habitat."

See response to issue 1A and 1Bii regarding definition of "range" and that the area covered by the decision is not a formally designated "range" under 36 CFR 222.60 (b)(14), such that there is no statutory or regulatory duty to manage "principally" for horses or otherwise give priority.

See responses to issues 1A and 1Bi as they address the issue of the divided territory having been originally established at the time of the Act. Little or no use by wild horses of these areas occurred during this time due to the number of fences and ongoing livestock operations on this privately owned land (1975 WHT Plan pp.2, 18; EA pp 3-5; Response to comment pg. 10). Returning the territory to the original boundary would likely have little effect on the current horse use of the area removed.

The Appellant has not provided information on why a herd of 206-402 wild horses would not be self-sustaining. The EA addressed management for a genetically diverse, healthy herd. On page 120, the EA states "A minimum population size of 50 effective breeding animals (i.e., a population size of about 150-200 animals) is currently recommended to maintain an acceptable level of genetic diversity within reproducing WH&B populations (Cothran, 2009). The current AML of 275-335 adult animals would be expected to retain a sufficient number of individuals in each home range and provide for adequate movement between the areas to maintain a healthy and genetically diverse population of wild horses over the long-term." (BLM Handbook 4700-1).

As stated in the DN "if necessary to maintain genetic diversity (based on monitoring), animals will only be introduced from the alternate home range in the Devil's Garden WHT. For example, if monitoring indicates a concern with genetic diversity in the West Home Range, only similar animals from the East Range would be introduced. This change is made to address public concern regarding the introduction of animals from other Territories or Herd Management Areas into the Devil's Garden WHT."

I find the Forest is in compliance with the WFRHBA and related regulations. The Forest made an appropriate and reasoned decision in determining the AML to support a self-sustaining population of healthy animals.

Issue 2B

Unlawful Setting of AMLs - Violation of FLPMA and NFMA.

More balanced allocations of forage are also supported by FLPMA, which, as the Service states, governs its management of wild horses:

Both the Forest Service and Bureau of Land Management are "multiple-use" agencies, and the Federal Land Policy and Management Act of 1976 requires that the agencies ***balance wild horse and burro use with other resources, such as livestock and wildlife****.*
http://www.fs.fed.us/rangelands/ecology/wildhorseburro/whb_faqs.shtml)

It is Appellants' position that FLPMA's mandate to "balance wild horse and burro use with other resources" equates at minimum a 50-50 allocation of available forage between wild horses and livestock on the wild horses' limited size legal herd areas, whether on USFS or BLM lands.

The setting of improperly low AMLs violates the multiple-use mandates of FLPMA and NFMA,

because they prioritize the use of the WHT's forage and water resources for livestock over wild horses. (Bowers/AWHPC, pg. 12)

Response
The Appellant did not previously comment on alleged violations of FLPMA and NFMA

36 CFR 222.61 (formerly 222.21)(4) Analyze each wild horse or burro territory and, based on the analysis, develop and implement a management plan, which analysis and plans will be updated, whenever needed, as determined by conditions on each territory.

The WFRHBA of 1971 (92 P.L. 195), as amended by the Public Rangelands Improvement Act of 1978 (95 P.L. 514), requires the Forest Service (FS) to "determine appropriate management levels for wild free-roaming horses and burros on [designated] public lands." The legislation makes FS responsible for deciding how these appropriate management levels (AMLs) of free-ranging horses and burros should be achieved within the agency's multiple-use mandate, including consideration for wildlife, livestock, wilderness, and recreation. FS is also directed to manage for a thriving natural ecological balance, to prevent deterioration of the range, and to use minimal management for free-ranging horses and burros.

36 CFR 222.61 (formerly 222.21) Administration of wild free-roaming horses and burros and their environment.(a) The Chief, Forest Service, shall: (1) Administer 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, and regulating their population and accompanying need for forage and habitat in correlation with uses recognized under the Multiple-Use Sustained Yield Act of 1960 (70 Stat. 215; 16 U.S.C. 528–531).

FLMPA and NFMA do not direct the National Forest System in how to set limits on Wild Horse Territory Allocations (36 CFR 222.61 (formerly 222.21) (4)).

The 2013 DGWHT Plan states the DGWHT "is not a formally designated "range" under 36 CFR 222.60 (b)(14), such that there is no statutory or regulatory duty to manage "principally" for horses or otherwise give priority, and that only the Act's general duty to "protect and manage" the horses, consistent with ecological integrity and the multiple use mandate applies."

See responses to issues 2Ci, 2Civ, and 5 for discussion of setting of AMLs.

I find FLMPA and NFMA do not limit the forest regarding allocation. The WHT plan is in compliance with FLMPA, NFMA, and the CFR. I find that the WHT Plan meets the direction found in FSM 2263.1 Wild Horse and Burro Territory Plans.

Issue 2C
Unlawful Setting of AMLs - Violation of NEPA. (Bowers/ AWHPC, pp. 13-14)

Issue 2Ci
Failure to take a "hard look" at potential impacts required by NEPA of all grazing impacts of the DGWHT, not just wild horse impacts, through rangeland monitoring and assessments of degradation/deterioration upon which to base a final decision regarding the setting of AMLs for

wild horses.

The USFS failed to consider other alternatives in its EA process. Thus, the following alternatives must be analyzed as part of an EIS in order to amend the Forest Plan and Management Plan: Alternatives for eliminating livestock grazing altogether in the WHT and for equitably distributing (50-50) forage resources between wild horses and livestock in the WHT.

Response

Under NEPA, an agency must take a "hard look" at the impacts of a proposed action and must ensure the scientific integrity of its analyses. The Supreme Court has interpreted these requirements using a "rule of reason," and has held that NEPA documents need only discuss information that is useful to the decision-making process. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 & n.2 (2004). Thus, NEPA's implementing regulations direct agencies to focus only on issues "that are truly significant to the action in question rather than amassing needless detail," 40 C.F.R. § 1500.1(b), and to discuss environmental impacts "in proportion to their significance." 40 C.F.R. § 1502.2(b).

NEPA (42 U.S.C. 4321, section 102(e)) requires federal agencies to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts of alternative uses of available resources.

The EA shall briefly describe the proposed action and alternative(s) that meet the need for action. No specific number of alternates is required or prescribed (FSH 1909.15, 14). When there are no unresolved conflicts concerning alternative uses of available resources (NEPA, section 102(2)(E)), the EA need only analyze the proposed action and proceed without consideration of additional alternatives (36 CFR 220.7(b)(2)(i)).

The range of alternatives considered by the responsible official includes all reasonable alternatives to the proposed action that are analyzed in the document, as well as other alternatives eliminated from detailed study. Alternatives not considered in detail may include, but are not limited to, those that fail to meet the purpose and need, are technologically infeasible or illegal, or would result in unreasonable environmental harm (FSH 1909.15, 14.4). Because alternatives eliminated from detailed study are considered part of the range of alternatives, the project or case file should contain descriptions of the alternatives and the reasons for their elimination from detailed study. (FS Handbook 1909.15 Chapter 14.4) The reasonable range of alternative is based on the nature of the proposal and the facts of each case (42 U.S.C. 4321, section 102(e), 40 CFR 1502.14, and CEQ 40 FAQs, Question 1a).

The EA discloses the analysis of four alternatives considered in detail including the Proposed Action, responsive to the purpose and need and the key issues identified (EA, pp. 1, 17, 19-20, 24-40). The DN indicates monitoring is an integral component of the decision to result in a thriving natural ecological balance and avoid deterioration of the range within the WHT (DN, pp. 2-5; EA appendix G, pp. 15, 69).

An additional seven alternatives were considered but eliminated from detailed study (EA, pp.22-44). Specifically, the Environmental Assessment considered an alternative to eliminate livestock grazing altogether within the WHT. "This alternative was eliminated from detailed study because this issue was previously decided. Total removal of livestock grazing use would not be

in conformance with the decision made in the 1991 Forest Plan to make forage available for use by livestock, wildlife and wild horses" (EA, pg. 45).

The EA discloses the rationale for dismissing these alternatives from detailed study including, but are not limited to: The management approach is conjectural and is not supported by scientific or factual evidence; the approach would be expected to result in wild horses eventually expanding hundreds of miles beyond the habitat they occupied in 1971 which is specifically prohibited in the 1971 WFRHBA; action alternatives (2-4) contain the elements of the approach to varying degrees; action would require a significant amendment to the Modoc National Forest Land and Resource Management Plan as it would require a change in resource allocations and is outside the scope of this environmental analysis; the alternative assumed there is not sufficient data available to evaluate whether or not the existing AML is still valid or needs to be adjusted; alternative was previously decided; data is currently limited from which to assess effects of experimental or new fertility drugs in wild horse populations on the range; and Surgical methods would be considered in the future if safe, effective and humane surgical methods and post-operative care procedures can be perfected for use on wild horses, IUDS during pilot studies have failed to demonstrate a long-lasting effect on conception in mares (EA, pp. 44-45).

Chapter 4 of the EA includes a brief description of the general environment, the affected environment in detail and the environmental consequences of the alternatives in comparative form, within the context of the key issues identified in Chapter 1 providing a clear basis for choice among alternatives by the Responsible Official (EA, pp. 19, 20, 45-150).

Chapter 2 of the EA discloses a range of Herd Size (AML) of 275-335 under No action, 206-402 under Alternatives 2 and 3, and 700-900 under Alternative 4 (EA, pp. 36, 40). It presents how the four alternatives considered in detail provide a range of unique forage resource allocations between wild horses and livestock. Under Alternative 2, an estimated 1,390 AUMs of livestock forage could be lost due to the increase in authorized wild horse AML, compared to Alternative 3 designed to reduce 4,424 AUMs of livestock forage due to the increase in the wild horse AML and fence removal, and 11,594 AUMs of livestock forage reduction due to increased AML and the removal of 50 miles of fence under Alternative 4 (EA, pp. 42-43). See response to issue 10.

Chapter 4 of the EA discusses direct, indirect and cumulative effects for each resource (EA, pp. 45-151). Effects to range and wild horses are described in detail in specialist reports (Wild Horse Specialist Report, pp. 28-31, Range Specialist Report, pp. 16-19).

The Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level for DGWHT states, "The purpose of this document is to evaluate the current available information to determine if the appropriate management level (AML) established in the 1991 Forest Plan remains valid or should be adjusted. The goal is to establish and maintain an AML that will lead to the management of wild horses in a TNEB and desired multiple-use relationship over the long-term" (Evaluation of Monitoring Report, pg. 1).

> Monitoring has been conducted on an ongoing basis. Rangeland monitoring has focused mainly on the key use areas. In addition, comprehensive monitoring was completed in 2012. Detailed data and information about the current wild horse population and their habitat was collected to facilitate revision of the Devil's Garden Wild Horse Territory Management Plan. Data collected included forage

> utilization and use patterns, stream bank alteration or riparian area trampling and residual stubble heights, rangeland and riparian habitat health, animal distribution and ground observations of animal populations (including animal health and number of foals and adults).
>
> Utilization, stubble height and bank alteration measurements were made in accordance with the 2008 Modoc National Forest Implementation Monitoring Guide. Apparent ecological condition was estimated for each area in consideration of the parameters found in the Forest Service's 2003 publication titled: "Indicators of Rangeland Health and Functionality in the Intermountain West". The ecologic condition of riparian habitats (streams and springs) was estimated in consideration of those attributes found in the Riparian Condition Matrix(2000) developed by the MDF (Evaluation of Monitoring Report, pg. 10).

I find the Responsible Official rigorously explored and objectively evaluated all reasonable alternatives responsive to the purpose and need and key issues, and for alternatives which were eliminated from detailed study, the EA provided the reasons for their having been eliminated in compliance with NEPA. I find the Responsible Official took the requisite "hard look".

Issue 2Cii

Failure to take a "hard look" at updated scientific information on the AUM and its impacts to the action as required by NEPA, including the utilization of the 1.2 AUM/horse and failing to update the cow/calf AUMs to reflect 1.5-1.8 AUMs based on current scientific research on cattle weights and forage consumption. These determinations significantly affect the unlawful forage allocations, and thus the low AMLs and AUMs set for wild horses, as reflected in the Final EA and Decision. USFS is underestimating forage consumption for all cattle, including cow/calf pairs. USFS failed to respond to Bowers' substantive comment about this point made on May 31, 2013, #4, and to AWHPC's substantive comment about this point made on June 1, 2013, in Appendix G of the Final EA and Decision.

Response

Under NEPA, an agency must take a "hard look" at the impacts of a proposed action and must ensure the scientific integrity of its analyses. The Supreme Court has interpreted these requirements using a "rule of reason," and has held that NEPA documents need only discuss information that is useful to the decision-making process. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 & n.2 (2004). Thus, NEPA's implementing regulations direct agencies to focus only on issues "that are truly significant to the action in question rather than amassing needless detail," 40 CFR 500.1(b), and to discuss environmental impacts "in proportion to their significance." 40 CFR 1502.2(b).

40 CFR 1508.27 "Significantly" as used in NEPA requires considerations of both context and intensity: (a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short and long-term effects are relevant. (b) Intensity.

40 CFR 1502.24 establishes a scientific integrity requirement for Environmental Impact

Statements. The Forest met this requirement in the current Environmental Assessment: "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements" (40 CFR 1502.24).

Animal Unit is defined as: One mature (1,000 lbs.) cow or the equivalent based upon an average daily forage consumption of 26 pounds dry matter per day. Animal unit month (AUM) is the amount of feed or forage required by an AU for 1 month. The forage requirement of both adults and offspring should be considered. FSH 2209.15.12, item 14; FSH 2209.15.12, item 29;

AU-Factors:

Class	Factor
Mature Cow	1.00
Mature cow w/nursing calf	1.32
Yearling (9-18 months)	0.70
Weaner calf	0.50
Bull	1.50
Horse or mule	1.20
Burro, pony, or donkey	0.60

Under the 1991 Forest Plan, allowable forage utilization of key plants is established as follows: Up to 50% utilization by weight on permanent rangelands in satisfactory ecological condition. No more than 30% utilization by weight on permanent rangelands in unsatisfactory ecological condition.

All action alternatives are in compliance with the 1991 Forest Plan, Range Standards and Guidelines (4-18 & 4-19) D. (G) to measure forage utilization using key forage plants. An assumption is to allow up to 50% utilization by weight on permanent rangelands in satisfactory ecological condition. On permanent rangelands in unsatisfactory ecological condition, allow no more than 30% utilization by weight (Range Report, pg. 4).

The EA discloses the mitigations designed to be responsive to the key issues, the analysis method assumptions, modeling protocol and scientific literature to determine the environmental effects to cattle and wild horses (EA, pp. 19, 38, 39, 70-75, 99-111; EA appendix F; AML Evaluation Report, pp. 4-7, 10, 11, 75; Range Report, pp. 16-19; Wild Horse Specialist Report [population modeling], pp. 18, 19-37; Wild Horse Specialist Report appendix C, pp. 46-53).

The EA incorporates by reference best available science from the 1996 Biological Assessment for Grazing Management on Allotments within the Range of Lost River, shortnose and Modoc suckers. The 2004 Sierra Nevada Framework Plan Amendment) amended the provision for allowable livestock utilization and utilization monitoring. Annual resource monitoring includes:

1. Range readiness (R5 method).

2. Pre-livestock turnout monitoring in key wild horse-use areas.

3. Monitoring total herbivore use within established key areas (Landscape Appearance Method) at the end of the livestock grazing season.

4. Monitoring utilization, stubble height, bare soil (alteration) and use on shrubs (if

applicable) of key springs, seeps and meadows annually using methods outlined in the MDF 2008 Implementation Monitoring Guide.

5. Observations of wild horse body condition as part of routine range and riparian monitoring (Henneke Body Condition Method) (EA, pp. 19, 21, 26, 30, 120; Range Report, pg. 4).

"Each fall, livestock operators report their actual use for the past grazing season. These reports summarize the number of animals and dates of AUM use for the permitted livestock. An AUM is 1,000 pounds of air-dried forage needed to support one cow (one animal unit) for one month. A horse or mule is considered 1.2 Animal Units (AUs) per Forest Service Policy" (EA, pg. 106; Range Specialist Report, pp. 11-16). The Forest Service provides standard Animal Unit (AU) factors (FSH 2209.15,12 (29)) in order to estimate forage consumption for cattle, including cow/calf pairs and wild horses. The standard AU factor for estimating forage consumption by a single horse is 1.2 AUs for one month (AUM), 1.0 for a mature cow and 1.32 for a mature cow with a nursing calf. Discretion is given within the handbook to individual Forests to "develop local conversion factors to express local differences in class of livestock and forage consumption." However, the handbook notes that: "The degree of accuracy is not high in using animal weights to arrive at local conversion factors. Caution should be exercised. Conversion factors which are locally derived should reflect the precision inherent in available conversion equations and local livestock weight information." Therefore, most Forests do not try to derive their own conversion factors due to inherent inaccuracies.

The 1991 Forest Plan authorized 4,400 AUMs of forage for use by AML of 275-335 wild horses. As of January 2013, wild horse population size is estimated at 1,124 animals (about 3.4 times the AML upper limit). Of these, about 855 (approximately 76 percent) reside within the WHT. This number is expected to increase by 25 percent (average annual population growth rate) following foaling during the spring of 2013 to about 1,405 animals (1,130 animals above the AML lower limit). The resulting forage use would increase to about 20,232 AUMs (nearly 16,000 more than is authorized) in 2013 (AML Report, pp. 16, 28, 44, 76; Range Specialist Report, pp. 13, 17).

"After considering the environmental effects described in the EA (beginning on p. 45 of the EA), I have determined that these actions will not have a significant effect on the quality of the human environment considering the context and intensity of impacts (40 CFR 1508.27). Thus, an environmental impact statement will not be prepared. I base my finding on the following considerations of both context and intensity. The selected alternative for Devil's Garden Plateau Wild Horse Territory Management Plan would not pose significant short or long term adverse effects, as described in the EA (Chapter 4) and supporting documentation. Proposed activities are consistent objectives in the Modoc National Forest Land and Resource Management Plan, as amended (EA, p. 8), and applicable law and regulations" (DN/FONSI, pp. 7- 8). See also Issues 2A and 2B, 16.

The EA Appendix G includes a response to Bowers' comment about this point dated May 31, 2013, and to AWHPC's comment about the methodology dated June 1, 2013. As stated in Appendix G:

AUs: Response to comment 5-14: "The information in the literature provided is well known. It is unclear how this would directly apply to management of wild horses and cattle in a rangeland setting in which various factors can affect forage utilization, including the forage species

available and energetic needs. The Proposed Action specifically calls for management on the basis of forage and resource conditions as well as the health of the wild horses. The referenced research paper by Dr. Carter was reviewed. However, in accordance with U.S. Forest Service policy, the forage intake value for a horse is 1.2 AUMs per month. As this concern relates to a change in USFS policy, it is outside the scope of this planning effort" (EA appendix G, pp. 14 and 15).

Bowers Issue #4: Response to comment 12-4: "The EA (pg. 46) documents 600 head of elk as the estimated population of elk within the entire Devil's Garden/Warner Mountain area, not just the WHT. A reliable estimate of elk population size within the WHT is not currently available and the actual number likely varies depending on the time of year and available forage. Elk seen in and around the Devil's Garden and Warner Mountain area have migrated outside their historic range from Oregon. Even if the WHT were completely fenced, it would be impossible to keep elk out of the WHT. Also note that management of elk populations is outside the Forest Service's jurisdiction and is instead the responsibility of the California Department of Fish and Wildlife" (EA appendix G, pp. 25 and 26).

I find the Responsible Official considered to public comments and adequately disclosed scientific evidence in the EA with consideration for both context and intensity and provided clear rationale for determining non-significance in compliance with NEPA in the DN/FONSI. I also find that the Responsible Official took the requisite "hard look".

Issue 2Ciii:
Failure to take a "hard look" at accurate data and potential impacts regarding socio-economic issues in Modoc County required by NEPA. Outdated socioeconomic data and inaccurate reporting mislead the public and decision-makers and significantly affect the unlawful forage allocations, and thus the low AMLs and AUMs set for wild horses, as reflected in the Final EA and Decision.

The "'Socio-Economic Specialist Report" attached to the EA contains assumptions and outdated, exaggerated and biased socio-economic data that forms the basis for favoritism and preference to livestock grazing uses of public land in the DGWHT. The alleged economic benefits of the livestock industry to Modoc County are inflated and over-emphasized to falsely stress the "importance" of the industry to the County.

The "'Socio-Economic Specialist Report" states, "Government is the largest sector in Modoc County followed by agriculture." This is incorrect. A well-established economic analysis organization reports that the trade, transportation & utilities sector (15%) follows the government sector (49%) with agriculture third (13%). (See chart from Northern Rural Training and Employment Consortium (NoRTEC) July 2011, Exhibit 20 attached.)

Additionally, the Socio-Economic portion of the EA fails to take a "hard look" at the potential economic value of wild horses in the DGWHT, including for tourism and scientific research purposes, as required by NEPA. This lack of information devalues the wild horses on their legal public lands, and significantly affects the unlawful forage allocations, and thus the low AMLs and AUMs set for wild horses, as reflected in the Final EA and Decision.

The Decision Notice and EA failed to consider or analyze information from the 2012

Congressional Research Report, the analysis in the EA is legally deficient.

Lastly, the Decision Notice and EA failed to analyze the socio-economic impacts of the action for the cost of the proposed removal of wild horses from the DGWHT. Removing and warehousing of wild horses must be itemized as a socio-economic impact.

Response

Under NEPA, an agency must take a "hard look" at the impacts of a proposed action and must ensure the scientific integrity of its analyses. The Supreme Court has interpreted these requirements using a "rule of reason," and has held that NEPA documents need only discuss information that is useful to the decision-making process. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 768 & n.2 (2004). Thus, NEPA's implementing regulations direct agencies to focus only on issues "that are truly significant to the action in question rather than amassing needless detail," 40 CFR §1500.1(b), and to discuss environmental impacts "in proportion to their significance." 40 CFR 1502.2(b).

Environmental Impacts of the Proposed Action and Alternative(s). The EA:

(i) Shall briefly provide sufficient evidence and analysis, including the environmental impacts of the proposed action and alternative(s), to determine whether to prepare either an EIS or a FONSI (40 CFR 1508.9);

(ii) Shall disclose the environmental effects of any adaptive management adjustments;

(iii) Shall describe the impacts of the proposed action and any alternatives in terms of context and intensity as described in the definition of "significantly" at 40 CFR1508.27;

(iv) May discuss the direct, indirect, and cumulative impact(s) of the proposed action and any alternatives together in a comparative description or describe the impacts of each alternative separately; and

(v) May incorporate by reference data, inventories, other information and analyses.

(36 CFR 220.7(b)(3)

Effects include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

The data used in the analysis is from the U. S. Census Bureau, 2010 and State of California Employment Development Department, 2010. The description of the affected environment, pages 82-84 of the EA, accurately depicts the social-economic climate in Modoc County.

The EA addresses tourism on page 81 by stating "The analysis of socio-economics is limited to impacts to the local economy due to the potential changes in livestock management. The inclusion of wild horse viewing into the socio-economic analysis was considered, but not analyzed in detail. The potential for horse viewing is extremely limited by lack of access and juniper cover over much of the WHT. For this reason, wild horse viewing opportunities are extremely poor as compared to BLM herd management areas in the vicinity. Additionally, public interest in wild horse viewing in the Devil's Garden WHT has been extremely low."

The Appellant alleges the EA failed to consider the 2012 Congressional Research Report concerning grazing fees. The Appellants did not submit the research report during the comment period for consideration in the EA. This appeal is the first time this report has been brought forward for consideration. In addition the report discusses grazing fees, not AMLs which are the heart of the WHT Plan.

Finally, the social-economic section does not address the impacts of removal of the wild horses because the forest found that it was outside of the scope of this analysis. (Response to comments, page 79, comment 15-49) Although the Forest deferred to the BLM regarding costs for the long-term care of the horses and concluded that as BLM had custody of the horses it was outside the scope of this analysis, NEPA requires that the costs associated with the gather of horses on National Forest System (NFS) lands be analyzed and disclosed. I find the Responsible Official took the requisite hard look at social-economic impacts, but that the record doesn't disclose the costs of the gathers.

Issue 2Civ

Arbitrary and capricious decision in establishing AML. In one of the EA's supporting documents, "Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level for DGWHT," January 2013, the following is stated: *Methodology - Evaluation of AML will be completed in accordance with the procedures outlined in H-4700-1 (Wild Horses and Burros Management Handbook, BLM, July 2010) [4].*

The above-mentioned BLM Handbook procedures were determined to be inadequate in guiding the determination of AMLs by a recent significant finding in the NAS Report on the BLM WHB Program dated June 2013, to wit:
FINDING: The Wild Horses and Burros Management Handbook lacks the specificity necessary to guide managers adequately in establishing and adjusting appropriate management levels."
And, *"...it does not provide detail related to monitoring and assessment methods.* p. 11
Thus, the USFS's reliance on the BLM's "Handbook" runs afoul of 36 CFR 219.3's requirement that "the best available scientific information" be utilized to inform the planning process.

Response

Section 706(2)(A) of the Administrative Procedure Act (APA) instructs courts reviewing regulations to invalidate any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The arbitrary or capricious test is used by judges when reviewing the factual basis for agency rulemaking. Courts can overturn agency decisions if they find that the underlying rationale or factual assertions are unreasonable.

36 CFR 219.22 The overall role of science in planning.
(a) The responsible official must ensure that the best available science is considered in planning. The responsible official, when appropriate, should acknowledge incomplete or unavailable information, scientific uncertainty, and the variability inherent in complex systems.
(b) When appropriate and practicable and consistent with applicable law, the responsible official should provide for independent, scientific peer reviews of the use of science in planning. Independent, scientific peer reviews are conducted using generally accepted scientific practices that do not allow individuals to participate in the peer reviews of documents they authored or co-authored.

The Forest prepared the January 2013 document titled *Devil's Garden Plateau Wild Horse Territory, Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level"* (re: hereafter as AML Evaluation). The NAS report was released on June 5, 2013. Decision Notice was made on August 27, 2013. Except for one public comment, there is no mention of considering or incorporating the NAS report recommendations into the AML determination. The Appellant did not previously comment on this issue.

As stated in the AML Evaluation (pg. 1) "The purpose of this document is to evaluate the current available information to determine if the appropriate management level (AML) established in the 1991 Forest Plan remains valid or should be adjusted.

The goal is to establish and maintain an AML that will lead to the management of wild horses in a TNEB and desired multiple-use relationship over the long-term. In accordance with Forest Service policy and procedures, the AML is set as a population range with an upper and lower limit. The AML upper limit is defined as the maximum number of wild horses which results in a TNEB and maintains or improves conditions of the range. The AML lower limit is established at a number that allows the population to grow (at the annual population growth rate) to the upper limit over an extended period of time (four or more years), without interim gathers to remove excess wild horses."

The AML Evaluation (pg. 2) states "When evaluating AML, Forest Service policy and procedures require the in-depth analysis of grazing utilization, range ecological condition and trend, actual use, and climate data (precipitation), population inventory, use patterns and animal distribution, among other data and information".

"The proposed AML for the Devil's Garden WHT has been determined through in-depth analysis and evaluation of the current available monitoring data and other information. It has been completed in compliance with direction provided by Forest Service regulations and policy, the 1991 Forest Plan, procedures found *in BLM Handbook H-4700-1 (Wild Horses and Burros Management Handbook)*, and in compliance with the 1971 WFRHBA" (AML Evaluation Report, pg. 6)

The EA states in Summary Response to Comments, page 207, "Current law, regulation and policy require AML be established on the basis of an in-depth evaluation of resource monitoring data and other available information and not for administrative convenience. Accordingly, the proposed AML of 206-402 wild horses was determined on the basis of a site-specific and in-

depth evaluation of the available population inventory, resource monitoring data, and other information (EA, pg. 27). The AML was evaluated on the basis of specific areas (allotments). The evaluation found wild horses were contributing to over-utilization of forage species and a decline in range conditions in specific areas across the Territory, with a few exceptions and that over-winter utilization by excess wild horses is exceeding Forest Plan standards across large areas, and placing the health of these areas at risk. "

The EA (pp. 26-37) incorporates continued monitoring to determine if the proposed management actions will result in reduced utilization levels and improved upland and riparian conditions. Also found in the Territory Management Plan (pg. 6) which tiers to AML Evaluation Report, is a description and rationale for setting the upper and lower AML. The DN/FONSI states (pg. 4) a rationale and discussion for the proposed AML of 206-405 meeting the purpose and need.

The National Research Council of the NAS was asked by the BLM to conduct independent technical evaluation on 11 scientific challenges and questions. Question #9 was stated as: "Appropriate Management Level (AML) establishment or adjustment: Evaluate BLM's approach to establishing or adjusting AML as described in the 4700-1 Wild Horses and Burros Management Handbook. Based upon scientific and technical considerations are there other approaches to establishing or adjusting AML BLM should consider? How might BLM improve its ability to validate AML?"

The NAS report recommended a six step process for establishing and validating AMLs. It is an adaptive management approach which addresses five (5) major challenges that were considered to be inadequate in the BLM handbook:
1. **Inventorying the landscape** to assess the current states of the system quantitatively and qualitatively.
2. **Developing conceptual models** and hypotheses for the processes that have led to the current states, particularly differentiating the relative roles of climate, horses and burros, livestock, wildlife, and other factors.
3. **Developing predictions of future changes** based on conceptual and quantitative models, particularly of changes in response to alternative management practices that are hypothesized to lead to alternative desired states.
4. **Developing monitoring approaches** to assess the success of the adopted management approach in bringing about a hypothesized, predicted change.
5. **Refining the models** to improve accuracy and predictive power in setting AMLs.
6. **Providing transparent information** about the data and decision-making process to stakeholders and obtaining their responses.

Essentially, this is an adaptive-management approach in that it calls for the development of a model or set of hypotheses, predictions of responses to management and environmental variables, learning from observed responses to management, and refinement of the model. It can fit a state-and-transition format.

To carry out this adaptive management process, BLM needs to solve five major challenges, which its handbook does not adequately address. Specifically, BLM should:

- Increase the specificity and consistency of its protocols for establishing and adjusting

AMLs.

- Develop a scientific approach to identifying objectively the constraints on equid populations and their explicit effects on the expression of natural processes under minimal management.
- Improve transparency of forage allocation.
- Manage for change and unpredictability in ecosystems and in social contexts.
- Improve the scientific validity of the concept of a thriving natural ecological balance.

Upon review of the planning record, it is evident that the decision for selection of the proposed upper and lower AMLs was not arbitrary and capricious. Use of the BLM methodology as guidance in determining the proposed AML is best available scientific information to inform the planning process as described in 36 CFR 219.3. Other factors were taken into consideration. See also the response to issue 5 for a discussion of the NAS Report.

The EA and supporting record provided explanation of requirement to establish upper and lower AML limits based on a detailed, site specific evaluation of resource monitoring data and pertinent other available information. The proposed AML of 206-402 wild horses took into account recent wild horse population surveys, utilization monitoring, resource damage locations relative to wild horse distribution and other information in specific areas and locations. The AML Evaluation and Range Specialist Report distinguished between permitted cattle and wild horse use. It was found that wild horses were contributing to over-utilization of forage species and a decline in range conditions at specific areas across the Territory, also that over-winter utilization by excess wild horses is exceeding Forest Plan standards across large areas. Finally, the AML Evaluation concluded that excess use was placing the health of these areas at risk.

The EA (pp. 26-37) incorporated adaptive management by using present and future monitoring to determine if the proposed management actions will result in reduced utilization levels and improved upland and riparian conditions. Although the AML Evaluation Report was completed six months prior to release of the NAS report, it features many of the recommended NAS steps using an adaptive management approach. The AML Report was based on site specific inventories. Rationale for the selected alternative was also based analysis provided in Appendix F which describes the use of the WinEquus population modelling to predict future population growth under each alternative. It disclosed the management and environmental constraints on the horse population and it provided transparency in the forage allocation process. The DN, EA and planning record described why forage allocations for wild horses were being increased as expressed by the upper AML based on availability and distribution of forage for horses, livestock and wildlife. It also provided rationale on why the lower limit was adjusted downward to account for population growth and scheduled gathers.

I find that the Forest Supervisor was not arbitrary and capricious in her decision to establish a new upper and lower AML. Although the decision did not specifically address the NAS recommendations regarding the BLM's AML protocols for establishing and adjusting AMLs, there would not have been any significant change to the approach the Forest used in determining these new upper and lower AMLs or the outcome in selecting the preferred alternative.

Issue 3

Significant amendments to the Forest Plan are included in this Decision, specifically the boundary line changes, which may only be made when USFS undertakes a programmatic revision of its entire Forest Plan and not in a site-specific decision (Bowers/AWHPC, pg. 18).

Response

NFMA (16 U.S.C. § 1604) requires that "If an amendment to a Forest Plan results in a significant change in the Plan, the NFMA and its 1982 implementing regulation require that the amendment process follow the procedures used in the initial development of the Forest Plan (sections 219.10(f) and 219.12 of the planning regulations in effect before November 9, 2000 (36 CFR parts 200 to 299, revised as of July 1, 2000)). If the proposed amendment to Plan are not significant, public notification and completion of NEPA procedures are still required (16 U.S.C. § 1604 (f) (4)). Determining whether a plan amendment results in a significant change uses different criteria than those used in evaluating significance during the NEPA process."

Per FSM 1900 Chapter 1920, Section 1926.51, changes to the land management plan that are not significant can result from: (1) actions that do not significantly alter the multiple-use goals and objectives for long-term land and resource management; (2) adjustments of management area boundaries or management prescriptions resulting from further on-site analysis when the adjustments do not cause significant changes in the multiple-use goals and objectives for long-term land and resource management; (3) minor changes in standards and guidelines; and/or (4) opportunities for additional projects or activities that will contribute to achievement of the management prescription. If determined that the plan amendment is not significant, the Forest administrative unit Supervisor must prepare an amendment to the land management plan to accommodate a change determined not to be significant. Appropriate public notification is required prior to implementation of the amendment.

The 1971 WFRHBA states that the management of wild horses and burros is limited to the areas where wild horses and burros were found in 1971 (36 CFR 222.20(b) (13)). Per FSM 2260.3: (1) Confine wild free-roaming horses and burros to managed Horse and Burro Territories as established in 1971, to the extent possible; and (6) Relocate wild free-roaming horses and burros only to territories identified in 1971, and only where a receiving territory has sufficient suitable habitat to sustain planned population levels.

The DN establishes a boundary for the Devil's Garden WHT based on the long-term needs of the Devils Garden wild horse herd and within the herd's known territorial limits rather than for administrative convenience (DN/FONSI, pg. 3), bringing it into compliance with the 1971 Act (DN/FONSI, pg. 6). Under the Act, the management of wild horses and burros is limited to the areas where wild horses and burros were found in 1971. The Triangle lands were under private ownership at the time the Act passed, and Avanzino was, and remains, 41 percent private property. As a result, these lands did not meet the criteria for inclusion in the Wild Horse Territory in 1971. The 1975 Devil's Garden Plateau Horse Management Plan included a map designating the Territory boundary (EA, pg. 4). This map shows the Avanzino and Triangle Ranch Lands were excluded from the Territory. Little or no use by wild horses of these areas occurred during this time due to the number of fences and ongoing livestock operations (1975 WHT Plan pp. 2,18, EA, pp. 3-5, EA, pg. 220 response to comments 2-3, 2-5).

The EA also states that "an administrative error was made in expanding the WHT beyond the herd's known territorial limits" (EA, pg. 6). The boundary expansions in the 1980's, which included Triangle Ranch lands that were not acquired by the Forest Service until 1976, nearly five years after the 1971 Act passed, was in error. In the 1991 Forest Plan, the Forest Service made the decision to manage wild horses on about 258,000 acres, which represents the number designated for wild horse management in the mid-1980s, however, zero AML allocations were assigned to the Avanzino and Triangle Ranch Lands as they did not fall under the administrative management for the original allocation of the Historic Wild Horse Management Territory in the 1975 WHT Plan (1975 WHT Plan, pp. 2, 18; 1980 WHT Revised Plan, pg. 2, EA, pp. 3, 6).

The proposed amendment for the boundary change is site-specific and applies only to the WHT that would manage wild horses within the territorial limits established in the 1975 Wild Horse Management Plan. It would not significantly alter the multiple-use goals and objectives of the Forest Plan (DN, pg. 1, EA, pp. 45-150, Response to Comment, pg. 73). The EA fully discusses the multiple use activities or affected environment/environmental impact occurring within the Devil's Garden WHT, "In addition to providing habitat for wild horses, other uses include timber harvest, livestock grazing, wood cutting, hunting, fishing, camping and day use" (EA, pp. 45-150). Appropriate management of wild horses to meet the goals and objectives identified in the Forest Plan would occur and the proposed change would bring the Forest Plan into alignment with the 1971 WFRHBA. The boundary line change would establish the territory limits in the Forest Plan as established following direction in the wild horse territory enabling legislation. The reduction in territory size would not prevent attainment of Forest Plan goals and objectives (EA, pg. 9). The analysis of cumulative effects begins with consideration of the direct and indirect effects on the environment that are expected or likely to result from the alternative proposals for agency action, including the boundary line change. An analysis of the cumulative effects pertaining to each resource is included in the EA (EA, pp. 45-150). All Alternatives considered in the environmental assessment are consistent with the Modoc Forest Plan (1991), as amended. The effects of the proposed Forest Plan amendments, as proposed under Alternatives 2-4, have been analyzed in the EA and associated resource analyses, and were found to be non-significant (EA, pp. 150-151). See also response to issue 2Cv.

I find that the Responsible Official's decision that the proposed amendment to return the WHT boundary to the one established at the passage of the 1971 Act as non-significant is in accordance with the criteria listed in FSM 1900, Chapter 1920, Section 1926.5, (4) changes in plan guidance needed to correct planning errors. The boundary change is consistent with applicable law, policy and regulation. When the WHT was established in 1975, it was established as two distinct Home Ranges and did not include the Triangle or Avanzino private ranch lands and the Decision returns management of wild horses within the WHT to the lawful boundary as defined in the WFRHBA.

Issue 4

Conduct mandated NEPA analysis for any roundup and/or removal action on public lands (in or outside of the WHT) or adjustment of AMLs through the issuance of an Environmental Assessment or EIS in order to analyze current conditions to determine appropriate actions as required by law. Without current data analysis, USFS cannot fulfill NEPA requirements that the

proposed action is necessary and lawful. The Act mandates that all management be at the minimum feasible level – and that removals only take place after the need to remove has been established which can only be done through the NEPA process. (Bowers/AWHPC, pg. 21).

Response

A FONSI (40 CFR 1508.13) presents the reasons why an action will not have significant effects, as defined in (40 CFR 1508.27), on the human environment and for which an EIS will not be prepared" (40 CFR 1508.9).

40 CFR 1508.9 "Environmental Assessment": (a) Means a concise public document for which a federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

The Modoc National Forest Land and Resource Management Plan (USDA-Forest Service 1991a), as amended, guides all natural resource management activities and establishes standards and guidelines for the Modoc National Forest. Standards and guidelines on page 4-19 relative to wild horse management to provide for healthy ecosystems and making forage available for use by livestock, wildlife and wild horse herds include:

> 8. Manage the wild free-roaming horse herds to achieve a Forest population between 275 and 335 (on the average, 305 animals)
>
> 9. Every ten years revise the herd management plan for each territory, including forage allocation for horses within the carrying capacity of the territory. Cooperate with the Bureau of Land Management in the capture and placement of animals
>
> 10. Monitor the impacts of wild horses on rangeland in allotments where wild horses are present. Determine if wild horse numbers should be adjusted on high impact areas.

The Modoc LRMP establishes AML as a population range of 275-335 animals and a total 4,400 AUMs for their use. Since the Forest Plan was approved, wild horses have been gathered periodically in an attempt to manage population size within the AML, and in balance with available forage and water, and other uses occurring under the 1982 Devil's Garden Wild Horse Management Plan (Wild Horse Specialist Report, pg. 3).

The Forest Service prepared an EA to determine if preparation of an EIS was warranted. The context and intensity of effects associated with developing and implementing a Territory Management Plan (TMP) for all wild horse management actions within the WHT, designed under the authorities per Forest Service Manual 2261.1, 36 CFR 222, and the amended 1971 WFRHBA, was determined to be non-significant (EA, pp. 99-111; DN/FONSI, pg. 7).

The analysis shows the effects of roundup and removal on public lands are not uncertain, and do not involve unique or unknown risks. This conclusion is based on consideration of results from other similar projects; past local experience; and expected environmental consequences based on the best available science. These effects are well known and documented through similar projects throughout the west. Standard Operating Practices and a comprehensive monitoring

section is included in the WHT Plan from which to measure progress in meeting population health and habitat objectives (EA, pp. 29-31; WHT Plan, pp. 13-19; DN/FONSI pp. 9).

The DN indicates AML will be based on monitoring as prescribed by law and numerous legal rulings (EA, pg. 3). From the analysis presented in the EA (pg. 125), the management of 206-402 adult animals would ensure there are adequate forage and water supplies to support the herd on a year-long basis for the long term, including adequate winter range to carry the animals each year (DN/FONSI, pp. 3, 4). The AML range was considered to be wide enough so gathers to maintain AML would only be necessary every 4-5 years, preventing annual disruption of social structure and disturbance to the animals in their habitat (EA, pg. 115).

The AML was calculated using a systematic, logical analysis that incorporated factual field monitoring data (EA, pg. 106; Devil's Garden AML Evaluation, pp. 6-7, 12-73). Evaluation of AML was completed in accordance with the procedures outlined in H-4700-1 of the BLM Wild Horses and Burros Management Handbook of July 2010. This methodology is described in the project record (Devil's Garden AML Evaluation, pg. 4). Aerial inventory (February 2013) using the direct count method updated this estimate to 1,260 adult wild horses. Site-specific evaluations of allotments were completed (Devil's Garden AML Evaluation, pp. 6-7, 12-73).

These numbers are consistent with the AML evaluation (Devil's Garden AML Evaluation, pp. 12-73) and the Wild Horse Territory Plan (Devil's Garden Plateau Wild Horse Territory Management Plan, pg. 7; Response to Comments Report, pg. 14). The EA analysis of herd size and growth rate under the proposed action is based on the AML evaluation (EA, pg. 122). See Issue 12 for further discussion of how the evaluation of the range of AMLs was based upon appropriate scientific methods and data.

I find the Decision Notice/FONSI and the analysis and disclosure in the EA robust to indicate current data was considered and the selected alternative including gather and removal sufficiently analyzed to determine a finding of no significance and that further NEPA is not required.

Issue 5

New Information that must be considered: National Academy of Science (NAS) Report. Because the Decision Notice and EA referenced the BLM's "Wild Horses and Burros Management Handbook" for setting AMLs… The NAS report was harshly critical of the BLM's current approach to wild horse and burro management, and specifically noted among the findings: *"The committee could not identify a science-based rationale used by BLM to allocate forage and habitat resources to various uses …"* p. 303

In addition, *"How AMLs are established, monitored, and adjusted is not transparent to stakeholders, supported by scientific information, or amenable to adaptation with new information and environmental and social change"* and *"It is therefore necessary to develop and maintain standards for transparency, quality, and equity in AML establishment, adjustment, and monitoring."* p. 12 (Bowers/AWHPC, pg. 22-23)

Response

36 CFR 219.22 The overall role of science in planning.

(a) The responsible official must ensure that the best available science is considered in planning. The responsible official, when appropriate, should acknowledge incomplete or unavailable information, scientific uncertainty, and the variability inherent in complex systems.

(b) When appropriate and practicable and consistent with applicable law, the responsible official should provide for independent, scientific peer reviews of the use of science in planning. Independent, scientific peer reviews are conducted using generally accepted scientific practices that do not allow individuals to participate in the peer reviews of documents they authored or co-authored

40 CFR 1502.24 establishes a scientific integrity requirement for Environmental Impact Statements. The Forest met this requirement in the current Environmental Assessment: "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." (40 C.F.R. 1502.24)

The EA provided explanation of current law regulation and policy requiring AML establishment based on an in-depth evaluation of resource monitoring data and other available information. The proposed AML of 206-402 wild horses was determined on the basis of a site-specific evaluation of the wild horse population, resource monitoring data, and other information in specific areas and locations. The evaluation found wild horses were contributing to over-utilization of forage species and a decline in range condition at specific areas across the Territory. Also that over-winter utilization by excess wild horses is exceeding Forest Plan standards across large areas, and concluded that excess use was placing the health of these areas at risk.

Please see 2Civ for the response to the Appellant's contention on the NAS report and use of BLM methodology for determining AMLs. The Appellant did not comment on this issue.

Although the AML Evaluation Report was completed six months prior to release of the NAS Report, it features many of the recommended NAS steps using an adaptive management approach. The AML report was based on site specific inventories. It relied on the WIN model to predict future population growth under each alternative. It disclosed the management and environmental constraints on the horse population and it provided transparency in the forage allocation process. The DN, EA and planning record described why forage allocations for wild horses were being increased as expressed by the upper AML based on availability and distribution of forage for horses, livestock and wildlife. It also provided rationale on why the lower limit was adjusted downward to account for population growth and scheduled gathers.

I find the Responsible Official considered the best available science. Upon review of the record, it is evident that use of the BLM methodology as guidance in determining the proposed AML did not run afoul of using best available scientific information to inform the planning process as described in 36 CFR 219.22 and 40 CFR 1502.24. Other factors were taken into consideration.

Issue 6

Failure to consider substantive comments and omissions/errors in Final EA. Appellants note that a number of concerns they raised in their comment letters (Exhibits 1 through 6) were not addressed in the EA, or were inadequately addressed. Those concerns include:

(Bowers/AWHPC, pg. 23)

Issue 6A
EA Response # 1-12 – Provide author(s) and their qualifications for the "Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level for DGWHT," dated January 2013.

Response
Forest Service Handbook 1909.15 Chapter 40 states that an Environmental Assessment must include a list of agencies and persons with whom the Agency engaged in discussions as part of the Environmental Assessment (36 CFR 220.7(b) and 40 CFR 1508.9(b)). Per Forest Service Handbook 1909.15 Chapter 20, an Environmental Impact Statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the Environmental Impact Statement or significant background papers, including basic components of the statement (§1502.6 and 1502.8). There is no such requirement for an EA.

The statement in the January 14, 2013 comment letter in response to the second scoping notice and proposed action states that the EA "show who did the monitoring & assessments, what their qualifications were, who compiled and analyzed the data collected, & who sponsored & paid for the data collection/analysis in 2012" (January 14, 2013 Comment Letter emailed from Carla Bowers to Jenny Jayo, page 3). This statement is not specific to the *January 2013 Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level* for the Devil's Garden Wild Horse Territory. Section 5.0 of the EA (EA, pg. 152) lists the Interdisciplinary Team members.

I find that the Forest Service was not required to supply specific authorship of the *January 2013 Devil's Garden Plateau Wild Horse Territory Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level* document and is in compliance with (36 CFR 220.7(b) and 40 CFR 1508.9(b).

Issue 6B
EA Response # 1-13 – Provide all details of cases regarding establishing AMLs as "required by law and a number legal rulings" as stated in USFS's response.

Response
The Appellant did not previously comment on court rulings establishing AMLs and has alleged no violation of law, regulation or policy. It is beyond the scope of this analysis/appeal response to provide all details of the several final court rulings as requested by the Appellants. However direction regarding the establishment of AML is contained within 36 CFR 222 (supra 36 CFR 222, as the CFR numbering was updated on July 1, 2013).

The selected alternative establishes an AML based on monitoring data as directed by 36 CFR 222 and numerous legal rulings and not for administrative convenience (FONSI, pg. 4). The Forest's response to comment 1-13 (EA, pp. 207-208) regarding the opposition to removing animals (gathering) from the DGWHT addresses how AMLs were determined through the

evaluation of monitoring data as required by law (EA, pg. 208). For the DGWHT, the Forest calculated lower and upper AMLs based on an in-depth evaluation of resource monitoring data and other available information (EA, pg. 217, comment 1-27; EA, pg. 214, comment 1-29; and EA, pg. 218, comment 1-41). An AML for wild horses was determined based on in-depth analysis of all available data including and population inventory, resource monitoring, and other current available information and data (December 2012 Resource Monitoring Report, pg. 4) and climatic, upland and riparian habitat conditions, utilization, and stream bank alteration (August 2013 Wild Horse Territory Management Plan, pg. 6) in accordance with the procedures outlined in H-4700-1 (Wild Horses and Burros Management Handbook, July 2010). The detailed analysis contained in the January 2013 Devil's Garden Plateau Wild Horse Territory Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level clearly demonstrates the evaluation of the AML was completed on an allotment-specific basis using current available information and in-depth evaluation of the monitoring data. Detailed allotment/area-specific evaluations and recommendations for upper and lower AMLs are included (pp. 10-73) and this information is incorporated into the August 2013 Devil's Garden Plateau Wild Horse Territory Management Plan.

I find that the Forest Service is in compliance regarding the establishment of an AML for the DGWHT. An in-depth analysis of resource monitoring data was undertaken to establish an upper and lower limit AML in accordance with with 36 CFR 222 and the direction contained within Forest Service Manual 2200, Chapter 2260, sections 2262 and 2263.

Issue 6C

EA Response # 1-26 – Provide all details of the "several court rulings" referred to in USFS's response. Note that the ruling dated November 15, 2012 is not a final ruling. The case was appealed to the Ninth Circuit Court and is awaiting further rulings.

Response

The Appellant did not previously comment on court rulings regarding assigning priority to wild horses over livestock grazing and has alleged no violation of law, regulation or policy.
The forest considered the comments from the Appellant that wild horses should be given priority over private livestock by reducing forage allocations to livestock and increasing AML to the current population level of wild horses (EA, pp. 171, 213) and that grazing should be reduced or eliminated within the WHT to benefit the wild horse herd (EA, pg. 213) referring them to the applicable law, regulation and policy. It is beyond the scope of this analysis/appeal response to provide all details of the several final court rulings that describe how wild horses are considered priority-wise in relation to other uses.

I find that Forest was responsive to Appellant's concerns raised during the scoping and comment period on the EA in regard to wild horses being given priority over private livestock and increasing AML to the current population level of wild horses. Through development of the August 2013 Devil's Garden Plateau Wild Horse Territory Management Plan, the Forest Service is in compliance with 16 U.S.C. §1333 (a) and (c), and 43 U.S.C. §1701 and 1732.

Issue 6D

No response was provided to AWHPC's comment on p. 6 of their letter dated June 1, 2013 about

the Potters or East Grizzlie allotments.

Response

36 CFR 215.6 (b) states that (1) the Responsible Official shall consider all substantive written and oral comments submitted in compliance with paragraph 36 CFR 215.6 (a); and (2) all written comments received by the Responsible Official shall be placed in the project file and shall become a matter of public record.

It is not clear which specific comments the Appellant is referring to, however the DN and FONSI address the concern in the June 1, 2013 letter regarding permanent sterilization and placement of gelded animals in portions of the Potters allotment (that contain necessary habitat components but where no or few animals presently exist) through selection of Alternative 2. Alternative 2 does not include placement of gelded horses at any location within the DGPWHT (DN/FONSI, pp. 1-4). Alternative 3 proposed placement of a small number of geldings in areas where no or few animals exist (Potters allotment), though it is anticipated this would be as few as 20 animals, plus or minus in accordance with the established AML. The EA (pg. 126), Wild Horse Report (pg. 32) and response to comment 1-20 (EA, pg. 210) assess that geldings are sedentary animals, and very little mixing with other animals would be expected. Placement of animals would be monitored to document herd response and release of animals would be adjusted as necessary. Concerns regarding permanent sterilization were also considered and incorporated into Issue 1 in the EA (EA, pp. 172 and 177) and are addressed within the Response to Comments_Final document (a catalog and response to all comments submitted during the Notice and Comment period of May 2 to June 3, 2013) contained in the project record (comment 16-19, pp. 93-94; comment 22-38, pg. 142; and comment 36-20, pg. 200).

The EA and supporting documents demonstrate there is insufficient space for reproducing wild horses on the Potters and East Grizzlie allotments. Habitat for wild horses is composed of four essential components: forage, water, cover and space (Wild Horses and Burros Management Handbook H-4700-1, pg. 12; AML Evaluation, pp. 4-5). These habitat components were evaluated [for each allotment in the Territory] in order to determine the suitability of each area to support populations of wild horses on a long-term year-round, continuous basis (AML Evaluation, Table 2, pg. 6). Suitability/sufficiency was determined through an in-depth analysis and evaluation of the current available monitoring data and other information in compliance with direction provided by Forest Service regulations and policy, the 1991 Forest Plan, procedures found in Wild Horses and Burros Management Handbook H-4700-1, and the 1971 WFRHBA. The Wild Horses and Burros Management Handbook (pg. 12) describes that wild horses and burros require sufficient space to allow the herd to move freely between water and forage within seasonal habitats; cover and space are interrelated. If there are barriers (natural or human-caused) preventing free movement of wild horses and burros throughout a herd management area, or between forage and water, it would not have sufficient cover and space. Per the Forest Plan's standards and guidelines, areas that are inaccessible, including areas with physical barriers, may be designated unsuitable (Forest Plan, pg. 4-19). Based on evaluation of site-specific allotment data, neither the Potters nor East Grizzlie allotments appear to provide adequate space to sustain a year-round population of reproducing wild horses (AML Evaluation, pp. 6, 53). For the Potters allotment, no data exists to validate or adjust AML as the area is not currently occupied by wild horses and the current upper/lower AML from the Forest Plan was carried forward

(AML Evaluation, pg. 7). The recommendations for the Potters allotment include utilization of monitoring data to adjust the AML at such time wild horses establish a home range pending evaluation of monitoring data and other available information and leaving the gates open during the late fall/winter/spring to encourage free-roaming behavior and provide the opportunity for wild horses to establish a home range in the Potters allotment (AML Evaluation, pg. 53).

I find that the Responsible Official considered the concerns regarding permanent sterilization and the Potters and East Grizzlie allotments in detail, as emphasized in the Decision Notice and FONSI, the EA (including Appendix G), the AML Evaluation, and the catalog and response to all comments submitted during the Notice and Comment period.

Issue 6E
Inadequate response to AWHPC's comment on p. 9 of their letter about new recommended humane standards for helicopter roundups and humane management in family bands.

Response
36 CFR 215.6 (b) states that (1) the Responsible Official shall consider all substantive written and oral comments submitted in compliance with paragraph 36 CFR 215.6 (a); and (2) all written comments received by the Responsible Official shall be placed in the project file and shall become a matter of public record.

36 CFR 222 provides direction for the Forest Service in regard to management of wild free-roaming horses and burros. 36 CFR 222.64 authorizes the use of helicopters, fixed-wing aircraft, and motor vehicles in a manner that will ensure humane treatment of wild free-roaming horses and burros, as provided in paragraphs (a) through (d). Paragraph b outlines how helicopters may be used in all phases of administration of the 1971 WFRHB Act. When utilizing helicopters, the condition of the animals shall be continuously observed by the authorized officer and, should signs of harmful stress be noted, the source of stress shall be removed so as to allow recovery. During roundups, helicopters shall be used in such a manner that bands or herds will tend to remain together; and horses or burros will not be moved at a rate which exceeds limitations set by the authorized officer who shall consider the rate of movement depending on terrain, weather, distance to be traveled, and condition of the animals (36 CFR 222.64 (b)(1) and (2)). Standards are in place to: assure that animals shall be moved in such a way as to prevent harmful stress or injury, communicate with the pilot and direct the use of the helicopter, and be able to observe effects on the well-being of animals (36 CFR 222.64 (b)(4) and (5)).

The Forest addressed and responded to the concerns in Appellant's June 1, 2013 comment letter (Response to comments_final, pg. 100, comment 16-28; pg. 16 Comment 5-16; pg. 37, comment 12-22; pg. 46, comment 13-17; pg. 164, comment 27-12; pg. 190, comment 35-14). The Forest also addressed the comments during disposition of scoping comments (EA, Appendix A, pg. 168) and issue incorporation (Appendix C, pg. 177). The impacts associated with helicopter gathers are discussed in detail in the EA (pp.113-116). This analysis finds the Standard Operating Procedures (SOPs) currently in effect for helicopter gathering; holding and transport of animals are humane and result in very few injuries and deaths to animals (EA, pg. 203, comment 1-2). The SOPs are modified on a continuing basis as experience and knowledge is gained in order to ensure the most humane treatment of the animals. The most current SOPs will

be implemented by the Forest Service and the Contractor over the life of the DGPWHT Management Plan (EA, pg. 113). The EA describes the distance, weather and condition of animals parameters under which animals may be gathered using helicopters, noting that terrain, physical barriers, weather, condition of the animals and other factors would be considered and that this travel should not exceed 10 miles, and may be much less dependent on ground conditions, animal health, or extreme high/low temperatures (EA, pp. 183-184) and measures to insure family bands remain intact to the extent practicable (EA, pg. 203, comment 1-3; Response to comments_final, pg. 37, comment 12-22). The incorporation of the Catch, Treat and Release (CTR) is included in Alternatives 3 and 4 (Response to comments_final, pg. 100, comment 16-28). For these alternatives, additional mares would be gathered, treated with fertility control and released back to the Territory. Methods for how helicopter gathers would be conducted, in accordance with 36 CFR 222.64, the mitigations for all gather operations and the expected effects of gathers on individuals and herd social structure are detailed within the EA and supporting documents (EA, pp. 21, 38, 113; DGPWHT Plan, pp. 11-12; Wild Horse Specialist Report, pp. 8, 21-23) and are also addressed in response to comments (EA, pg. 203, comments 1-2 and 1-3). Appendix D of the EA (pp. 183-188) and Appendix A of the DGPWHT Plan (pp. 20-25) list and describe the procedures and stipulations to ensure the welfare, safety and humane treatment of wild horses during gathers, as described in the provisions of 43 CFR 4700 that the Forest Service has adopted as they are compatible with the provisions in 36 CFR 222.64.

I find that the Forest Service considered Appellants comments fully and in accordance with 36 CFR 215.6 (b)(1) and (2) and has addressed 36 CFR 222.64 as emphasized in the EA (including Appendix A, C, D and G) and the DGPWHT Management Plan.

Issue 6F

No response or inadequate response to AWHPC's comments on p. 10 of their letter, Items 1, 2, 3, 5, 6, and 8 re "EA Failed to Analyze Complete Data."

Response

36 CFR 215.6 (b) states that (1) the Responsible official shall consider all substantive written and oral comments submitted in compliance with paragraph (a) of said section; and (2) all written comments received by the Responsible official shall be placed in the project file and shall become a matter of public record.

The Forest addressed and responded to the concerns regarding documentation of all predator-killing activities in and around the DGPWHT by correctly stating that it does not engage in programs that remove predators unless as support to other agencies and only where there is a direct threat to public health. The California Department of Fish and Wildlife has jurisdiction over wildlife and the Forest Service has no authority to engage in predator management and documentation of such data (EA, Appendix G, pp. 224-226 RTCs 3-1 and 3-2; Appendix A, pg. 163; and Appendix C, pg. 122). This concern is also addressed in the Response to Comments_Final document (a catalog and response to all comments submitted during the Notice and Comment period of May 2 to June 3, 2013) contained in the project record. Specific comments and responses regarding documentation of predator control include that for coyotes and depredation permits issued by the California Department of Fish and Wildlife (RTC 12-21, pp. 36-37; RTC 14-15 and 15-19, pp. 55-56; RTC 15-42, pg. 78; and RTC 16-23, pp. 96-97).

The DGPWHT Management Plan incorporates previous gather data to estimate the current sex ratio within the herd (pg. 13). The Forest also addressed and responded to the concern regarding the skewing of sex ratio, noting that based on the response to the comments received, the decision does not include implementation of the sex ratio adjustments to favor males. If this action, coupled with fertility control does not slow herd growth by at least 5 percent, the sex ratio adjustments to favor males may be considered in under additional site-specific environmental analysis (EA, pg. 210 RTC 1-18; Appendix A, pg. 164).

The locations of fences within the DGPWHT are displayed in the EA (pg. 48, Figure 5) and the AML Evaluation Report displays the boundary and pasture fencing, as well as existing water developments (pp. 23, 35, 39, 52, 62 and 74). Comments regarding display of fencing are catalogued in the EA (Appendix A, pg. 163; Appendix C, pg. 173). The effects of fence removal (and conversely existing fences) on affected resources are described in the Environmental Consequences section of the EA (pp. 46-143). Fencing within the DGPWHT was also addressed in the Response to Comments_final document (pg. 54, RTCs 14-12 and 14-13). The DGPWHT Management Plan includes monitoring of habitat management actions of constructing new water sources, and maintaining existing sources (pg. 18). The developments of any additional springs and/or wells would allow for use by livestock, wild horses and wildlife (EA, pg. 41; Response to Comments_final, pp. 52, RTCs 14-7, 14-8 and 14-9).

Gates in pasture and allotment fences remain open during the seasons when livestock are absent (late fall-early spring) to facilitate the seasonal migration of wild horses (EA, pp. 211-212). The Proposed Action includes widening of gates in horse concentration areas to further facilitate seasonal movements and no problems with seasonal migrations of the animals have been observed and no new fencing would be constructed (EA, pg. 41; Response to Comments_final, pg. 52, RTC 14-9; pg. 54 RTC 14-12). As described in the Response to Comments_final (pg. 79, RTC 15-47), as there is little difference in elevation over the WHT, distinct migratory patterns have not been observed with the exception of the East portion of the Territory where animals move towards the east (Pine Springs, Emigrant Spring areas) during the late fall/winter period. The EA describes the proposal to use scientifically-based methods and procedures to produce a reliable estimate of wild horse population numbers (pp. 29, 34, 37; Tables 4, 5, 6).

The socioeconomics section within the EA (pg. 81) and specialist report describe that the analysis is limited to the impacts to the local economy due to the potential changes in livestock management that would occur under the DGPWHT Management Plan. As described in the Response to Comments_final document (pp. 1-2, RTC 1-1), addressing the availability of long-term holding space was considered to be outside the scope of the EA and the DGPWHT Management Plan. Completing an economic analysis of the proposed gather plan, including disclosure of all costs associated with the capture operation and the costs for short and long-term holding and adoption preparation for horses removed from the territory was also considered by the forest to be outside the scope of the EA (Response to Comments_final, pp. 79-80, RTC 15-49 and pg. 11, RTC 5-7). Please see responses to issues 2Ciii and 13 for discussion of analysis and diclosure of costs associated with gathers. The Forest notes that the average cost of holding and adoption can be obtained from the BLM. The comments received during the 2011 and 2012 scoping notice periods and the EA notice and comment period regarding this concern are

included in the EA (Appendix A pg. 163; Appendix B, pg. 169; and Appendix C, pp. 172,180).

I find that the Responsible Official considered comments in accordance with 36 CFR 215.6 (b) and 220.7 (c), and analyzed complete data in the EA in regards to the scope of the proposed action in accordance with 36 CFR 220.7 (b) (3). This finding is based on my review of the DN/FONSI, the EA (including Appendices A, B, C and G), applicable specialist reports, and the catalog and response to all comments submitted during the Notice and Comment period.

Issue 6G

There was no response, or inadequate response, to their comment on p. 11 of their [June 1, 2013 EA comment] letter about keeping the Forest Plan's 10-year review schedule for the DGWHT Management Plan instead of lengthening it to 15-20 years via amendment.

Response

36 CFR 215.6 (b) states that (1) the Responsible Official shall consider all substantive written and oral comments submitted in compliance with paragraph (a) of said section; and (2) all written comments received by the Responsible official shall be placed in the project file and shall become a matter of public record.

A review of the EA and supporting analyses demonstrate that the concerns were addressed. The Forest Plan directs that the herd management plan for each wild horse territory, including forage allocation for horses within the carrying capacity of the territory, be revised every ten years (Forest Plan, pg. 4-19). The DN approved site-specific, non-significant Forest Plan amendments that will revise the herd management plan for the DGPWHT every 10 to 20 years, using the evaluation of the AML for wild horses as part of the herd management plan analysis and decision process (DN/FONSI, pg. 2; EA, pp. 17, 24 and 116). The DGPWHT Plan, also approved under the Decision, will guide the management of the DGPWHT for the next 15 to 20 years. The EA discloses the impacts from the Forest Plan Amendments (EA, pp. 116-118), describing that the DGPWHT Plan, including established AMLs, would be evaluated on a 10 to 20 year basis, unless resource monitoring shows a revision may be necessary before that time (EA, pg. 117). The EA also describes that when resource monitoring and population inventory data indicates the AML is no longer appropriate, an in-depth analysis of resource monitoring data will be completed. Per the DGPWHT Plan, range monitoring would occur every five years, with aerial surveys occurring every three years (DGPWHT Plan, pp. 5, 7, 14-16). Based on the physical and population monitoring results, the AML may be adjusted up or down in order to maintain a thriving natural ecological balance and multiple-use relationship within the WHT in accordance with the 1971 Act. Per the analysis in the EA and supporting documents, expressing the AML as a population range with a lower and upper limit allows for wild horses to be managed for the long-term, ensuring there is adequate forage and water supplies to support the herd on a year-long basis, including adequate winter range to carry the animals each year (EA, pg. 125; Wild Horse Specialist Report, pg. 31). It avoids deterioration of the range, resulting in improvement of ecological conditions for upland and riparian habitats (EA, pg. 125, Soils Report, pg. 15; Hydrology Report, pp. 12-14; Wildlife BE, pp. 19, 23 and 26-27; Wildlife BA, pg. 10). It also allows the population to grow, at the annual population growth rate, to the upper limit over a four to five year period without any interim gathers to remove excess wild horses, preventing annual disruption of social structure and disturbance to the animals in their habitat (EA, pp. 115, 117;

Wild Horse Specialist Report, pp. 20, 23, 31). The analyses also show that competition for space, cover, forage and water would be reduced among horses and other uses, including livestock and wildlife. Instances of animals emigrating outside the territory for the essential habitat components would be minimized (EA, pg. 124).

I find that the Forest Service considered Appellant's concern regarding the proposed herd management plan revision timelines through analysis of direct, indirect and cumulative effects of each action alternative as disclosed in the DN/FONSI, EA and applicable specialist reports.

Issues 6H and 6I

Error correction for report "Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level for DGWHT," dated January 2013, p. 1: Change 2006 to 1976 (6H); and Error correction for EA, under 2.2 Background, p. 3: Within "as an integral part of the **national** system of public lands", change "national" to "natural."

Response

Appellant requests a correction on pg. 1 of the "Evaluation of Monitoring Data for the Purpose of Determining an Appropriate Management Level for DGWHT," dated January 2013, requesting that "2006" be changed to "1976"; and a correction on p. 3 of the EA under section 2.2 Background, requesting that "national" be changed to "natural" within this sentence: "as an integral part of the **national** system of public lands." (Bowers/AWHPC, pg. 23)

In accordance with FSH 1909.15, Chapter 10, Section 18.4, the Forest Service may consider preparation of errata to make simple factual corrections to an environmental assessment.

Based on a review of the EA and AML Evaluation report, these typographical errors in regard to the acquisition year of the Triangle Ranch lands and specific language from the 1971 Wild Free Roaming Horses and Burro Act were made unintentionally, in no way represent a violation of law, regulation or policy, and have no bearing on the decision made. I find these errors were not previously commented on prior to Appellants' filing of their appeal however the Forest may consider preparation of errata in accordance with FSH 1909.15 Chapter 10, Section 18.4.

Issue 7

Failure to conduct adequate analysis. The National Environmental Policy Act (NEPA) requires federal agencies to consider environmental effects that include, among others, impacts on social, cultural, and economic resources, as well as natural resources. Thus, the USFS must consider both legal and social factors and impacts in making land use decisions, such as setting and maintenance of AML and grazing allocations.

Public opposition, together with the Congressional mandate expressed in the 1971 Act, constitutes a "prevailing public preference" that wild horses remain on the range. This fact provides sufficient reason for USFS to reanalyze the 2013 DGWHT Management Plan and amendments to the Forest Plan, taking into account the public's strong preference.

An EIS must be conducted in order to consider the social factors that play a role in land use

decisions and management policies, and it must adequately consider the USFS's authority to modify land use decisions, such as wild horse AMLs and livestock grazing allocations, through a variety of tools, including the agency's adaptive management strategy as well as agency regulations… By allowing amendments to the Forest Plan, all options are on the table – including a reallocation of resources to achieve a fairer distribution of forage Animal Unit Months (AUMs) in the Devil's Garden WHT in order to achieve reasonable multiple use. (Bowers/AWHPC, pg. 24)

Response

The Appellant alleges that the Forest failed to address "legal and social factors and impacts" in violation of NEPA. The EA/FONSI addresses several such factors including "Socio-economics" (EA, pages 81 to 84), and "Findings Required by Other Laws" (FONSI, pages 11-12). Social factors addressed included wild horse viewing, hunting, watchable wildlife, economic impact to community, employment and environmental justice. The proposal also conforms to legal requirements including the WFRHBA of 1971 (PL 92-195), as amended; National Forest Management Act; National Historic Preservation Act; Clean Air Act: Clean Water Act; Endangered Species Act; and Executive Order 12898, relating to Environmental Justice.

Appellant suggests that the decision is skewed because the decision was not what the Appellant would choose. Appellant claims the weight of comments from wild horse supporters should sway the decision in favor of horses versus cattle, and therefore the proposal should be reanalyzed. Both, the Forest Service NEPA rule at 36 CFR 220. 4(e)(2)- Scoping, and Forest Service Appeal rule at 36 CFR 215.6(b) – Consideration of Comments, provide that public comments be considered by the Responsible Official. The Responsible Official considered comments during scoping (Dec. 2012.-Jan. 2013) and during the EA comment period (May-June 2013). There is no rule requiring the Responsible Official to skew the decision in favor of a majority of commenters.

Finally, the Appellant suggests that an EIS is required in order to address "social factors" relevant to the proposal. In this case, the Forest has relied on an EA/FONSI to determine whether the proposal would have significant impacts. Social factors were considered in the EA/FONSI and were not found to be significant. There is no rule forbidding the examination of social factors through an EA.

I find that the EA sufficiently addresses "social" factors related to the proposal and that the decision was reached appropriately with due consideration of public comments and that an EIS is not required.

Issue 8A

The Decision and FONSI were not accompanied by a "convincing statement of reasons" to explain why the project's impacts were insignificant. The Decision clearly is in nonconformance with NEPA by stating on page 8 that the "context" used was based on impacts to the "locale" not on a "national scale" thereby eliminating all Americans in the decision-making process and only incorporating those living within the "locale" of the Devil's Garden WHT. Appellants strongly oppose this blatant disregard for scientific data analysis, consideration of all stakeholders and the public impacted by this Decision. The Devil's Garden WHT is owned by the American people,

as are the wild horses upon it. This is a "national scale" issue. (Bowers/AWHPC, pg. 25)

Response

40 CFR 1508.13 – Finding of no significant impact states "Finding of no significant impact" means a document by a federal agency briefly presenting the reasons why an action, not otherwise excluded (§1508.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It shall include the environmental assessment or a summary of it and shall note any other environmental documents related to it (§1501.7(a)(5)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

Appellant claims that the "statement of reasons" in the FONSI are not convincing. NEPA requires that reasons be briefly presented in the FONSI. The FONSI provided rationale, based on the ten significance factors outlined in 40 CFR 1508.27, for why the proposal will not have significant impacts. The reasons include citations to the EA, where more robust impact analyses and findings are documented.

Regarding Appellant's assertion that the context for determining significance was inappropriate, the proposal would affect approximately 250,000 acres in Modoc County, CA. Wild horse management is a national issue as evidenced by the WFRHBA of 1971 (PL 92-195), as amended. However, while the well-being of wild horses, generally, is of national concern, the environmental impacts caused by wild horses are site-specific and largely of local concern. This is reflected in the FONSI (pg. 8) which states: "Context means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. As this is a site specific project, significance would depend on effects in the locale rather than at a national or world scale."

The Appellant also suggests that scientific data and stakeholder input were "disregarded" due to the context being focused on the locale. No rationale is provided for this assertion. The project record includes extensive consideration of comments during scoping (Dec. 2012.-Jan. 2013) and during the EA comment period (May-June 2013). Comments received from the public both local and national were considered.

I find that the rationale in the FONSI meets NEPA requirements at 40 CFR 1508.13. I find that the context for determining the significance of environmental impacts was appropriate given the scale and scope of the proposed action. Further, the Appellant has provided no evidence indicating what stakeholder input and/or scientific data was disregarded. The record shows ample opportunity for all stakeholders to provide input to the EA.

Issue 8B

Factors which may require an EIS include "whether the project is highly controversial." The management of wild horses and burros and the setting of AMLs on the public lands fits into this category – as the government agencies, including the USFS in this case, consistently claim that roundups and maintaining low levels of wild horses for decades has no potential to significantly impact these animals because it will improve the range, while the public consistently disputes the impacts of these actions on the wild horses themselves, as well as whether the claimed impacts to the range (which supposedly support the agency's Decision to reduce and remove wild horses)

are actually attributable to wild horses in the first place. (Bowers/AWHPC, pg. 25)

Response
40 C.F.R. 1508.27 (b)(3) defines significance for NEPA purposes: "Significantly as used in NEPA requires consideration of both context and intensity:…The following should be considered in evaluating intensity…(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

40 CFR 1502.24 establishes a scientific integrity requirement for EISs. The Forest met this requirement in the current EA: "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements."

The Decision Notice states that legitimate controversy must be based on credible scientific evidence. The Forest Service responded to public comments regarding this project in Appendix G of the EA- Response to Comments. Opposing viewpoints do not necessarily constitute scientific controversy. The project record, including specialist reports, other supporting documentation, and the EA documents all rely on scientific information including papers, reports, literature reviews, review citations, peer reviews, opposing views and results of ground-based observations (DN, p. 9). In particular, the analysis found on pages 99-130 of the EA, the Wild Horse Specialist Report, the Range Report, and the AML evaluation provide evidence the Forest Service met the requirements of 40 CFR 1502.24.

I find the Responsible Official completed the appropriate analysis to support a FONSI and an EIS is not necessary.

Issue 8C
If there is any substantial question that a proposed action may be "significant," then the agency is required by NEPA to perform a full EIS. This Appeal outlines numerous "substantial questions." (Bowers/AWHPC, pg. 26)

Response
The Appellant alleges the Forest Service is required to complete an EIS if there is substantial question that a proposed action may be "significant". The Appellant does not state the applicable law, regulation or policy the Forest Service violated.

40 CFR 1501.4 (Whether to prepare an environmental impact statement) states "In determining whether to prepare an environmental impact statement the Federal agency shall:

A) Determine under its procedures supplementing these regulations (described in 1507.3) whether the proposal is one which:
   1) Normally requires an environmental impact statement, or
   2) Normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion)

B) If the proposed action is not covered by paragraph a) of this section, prepare an environmental assessment (1508.9).

C) Based on the environmental assessment make its determination whether to prepare an environmental impact statement,

D) Commence the scoping process (1501.7), if the agency will prepare an environmental impact statement.

E) Prepare a finding of no significant impact (1508.13), if the agency determines on the basis of the environmental assessment not to prepare a statement…..

The Decision Notice/FONSI states on page 7 that it was determined that the actions would not have a significant effects on the quality of the human environment considering the context and intensity of impacts (40 CFR 1508.27). It also stated on page 7 of the Decision Notice "Thus, an environmental impact statement will not be prepared".

I find the Responsible Official completed the appropriate analysis to support a FONSI and an EIS is not necessary.

Issue 8D

The FONSI states that "significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment" and that the cumulative impacts of livestock grazing, among other things, are "relatively minor . . . and not significant." Appellants strongly disagree and science can refute this. Scores of scientific articles and publications abound that show the deleterious and "significant" effects of livestock grazing on public lands. (Bowers/AWHPC, pg. 26)

Response

40 CFR 1508.27(b)(3) defines significance for NEPA purposes: "Significantly as used in NEPA requires consideration of both context and intensity:…The following should be considered in evaluating intensity…(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

"Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." (40 CFR 1502.24)

The Decision Notice states that legitimate controversy must be based on credible scientific evidence. The Forest Service responded to public comments regarding this project in Appendix G of the EA- Response to Comments. The project record, including specialist reports, other supporting documentation, and the EA documents all rely on scientific information including papers, reports, literature reviews, review citations, peer reviews, opposing views and results of ground-based observations (DN, p. 9).

In particular, the analysis found on pages 99-130 of the EA, the Wild Horse Specialist Report, the Range Report, and the AML Evaluation provide evidence the Forest Service addressed relevant scientific articles and publications meeting the requirements of 40 CFR 1502.24.

Cumulative effects were addressed in the EA (pp. 45-151) and in the specialist reports. See also response to issue 2Cii regarding the effects of grazing.

I find the Responsible Official completed the appropriate analysis to support a FONSI.

Issue 9

The loss of over 20,000 acres from this territory is significant and as such, an EIS should have been prepared to evaluate the impacts of this significant loss of area from the WHT on both the wild horses of the DGPWHT and the American public, many of whom have expressed concern regarding the ill treatment of wild horses by government agencies charged with their management. (Lynch, pp. 1-2)

Response

A FONSI (40 C.F.R. 1508.13) presents the reasons why an action will not have significant effects, as defined in (40 C.F.R. 1508.27), on the human environment and for which an EIS will not be prepared" (40 CFR 1508.9).

The EA states "All action alternatives include non-significant amendments as defined under the National Forest Management Act (NFMA) to the 1991 Modoc National Forest Land and Resource Management Plan (Forest Plan). The needs for these amendments are to facilitate more efficient and adaptive management of the WHT and to correct an administrative error in how the WHT boundary is defined in the Forest Plan" (EA, pg. 1). These proposed amendments are limited in extent as they only to the WHT (EA, pg. 1).

Although alternatives 2-4 would require site-specific amendments to the 1991 Forest Plan, the Forest Service determined the proposed amendments would be non-significant, as the action alternatives would not alter the objectives and multiple-use goals of the MDF's Land and Resource Management Plan as amended, are consistent with the 1971 WFRHBA as amended, and the DN includes a Finding of No Significant Impact that covers all 10 factors included in the CEQ definition of significance at 40 CFR 1508.27(b)(3) (DN, pp. 7-10). This FONSI is based on effects analysis in Chapter 4 of the EA disclosing direct, indirect and cumulative effects for each resource (DN, pg. 7; EA, pp. 45-151). Effects to wild horses are described in detail in specialist reports (Wild Horse Specialist Report, pp. 28-31, EA, pp. 111-129).

The mitigation and monitoring disclosed in the EA for all action alternatives are designed to ensure the humane treatment of wild free-roaming horses. Gathers would be conducted in accordance with the Standard Operating Procedures (SOPs) detailed in the most current approved Gather Contracts (EA, appendix D). The agencies have developed these SOPs over time specifically to ensure the safe and humane care and handling of the animals to minimize stress (EA, pp. 21). See also the responses to issues 1A, 1B, and 1C.

I concur with the Finding of No Significant Impact. My review showed that the finding was based on extensive resource analysis and considered all of the relevant factors.

Issue 10

I strongly object to the decision to establish "an AML upper limit of 402 adult wild horses and a lower limit of 206 adult wild horses, based on the evaluation of monitoring data." This change could result in the removal of up to 1,369 wild horses, while continuing to allow the annual equivalent of 2,240 cow/calf pairs on these lands… Reliance on the BLM methodology for

determining AML consistently results in dangerously low AMLs below levels necessary for healthy, genetically diverse populations, and it cannot be scientifically justified in light of the NAS report and other recent studies on population management of wild ungulates. Therefore, the decision must be amended and an EIS prepared. (Lynch, pg. 2)

Response

The WFRHBA of 1971 (92 P.L. 195), as amended by the Public Rangelands Improvement Act of 1978 (95 P.L. 514), requires the Forest Service (FS) to "determine appropriate management levels for wild free-roaming horses and burros on [designated] public lands." The legislation makes the FS responsible for deciding how these appropriate management levels (AMLs) of free-ranging horses and burros should be achieved within the agency's multiple-use mandate, including consideration for wildlife, livestock, wilderness, and recreation. The FS is also directed to manage for a thriving natural ecological balance, to prevent deterioration of the range, and to use minimal management for free-ranging horses and burros.

36 CFR 222.61 (formerly 222.21) states that the Forest Service shall analyze each wild horse or burro territory and, based on the analysis, develop and implement a management plan, which analysis and plans will be updated, whenever needed, as determined by conditions on each territory (36 CFR 222.61(a)(4)); and maintain a current inventory of wild free-roaming horses and burros on each territory to determine whether and where excess animals exist (36 CFR 222.6 (a)(5)). Based on 36 CFR 222.61(a)(4) and (5), the Forest Service shall determine appropriate management levels, whether action should be taken to remove excess animals and what actions are appropriate to achieve the removal or destruction of excess animals (222.61 (a) (6)).

Additionally, 36 CFR 222.61(a)(1) (formerly 222.21(a)(1)) states that the Forest Service shall administer 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, and regulating their population and accompanying need for forage and habitat in correlation with uses recognized under the Multiple-Use Sustained Yield Act of 1960 (70 Stat. 215; 16 U.S.C. 528-531);

36 CFR 222.60(d) (formerly 222.20(d)): Excess animals means wild free-roaming horses and burros which have been removed by authorized personnel pursuant to applicable law or which must be removed from an area in order to preserve and maintain a thriving natural ecological balance in coordination with other resources and activities.

Forest Service Manual 2200, Chapter 2260, sections 2262 and 2263 provide direction for Inventories and Studies, and Management of Wild Free Roaming Horses and Burros, including preparation of territory plans (FSM 2263.1) and describe elements of such plans (FSM 2263.11). Wild Horse and Burro Territory plans shall follow the outline for allotment management plans (FSM 2214 now found at FSH 2209.13, 94.1). In addition, the plans shall include a section on management of the animals, addressing such items as population level, special consultation and coordination considerations, and plans for the removal or disposal of excess animals. Range analyses and wildlife inventories are the primary sources of information about habitat of wild free-roaming horses and burros (FSM 2262.2). When information is not available, procedures described in FSM 2213 (formerly, now found at FSH 2209.13,91.1) and FSM 2620 for gathering

habitat information shall be followed. Information available in other resource inventories may also be used in evaluating habitat."

Livestock Grazing: 36 CFR 222.2: (b) Each allotment will be analyzed and with careful and considered consultation and cooperation with the affected permittees, landowners, and grazing advisory boards involved, as well as the State having land within the area covered, and an allotment management plan developed. The plan will then be approved and implemented. The analysis and plan will be updated as needed. (c) Forage producing National Forest System lands will be managed for livestock grazing and the allotment management plans will be prepared consistent with land management plans.

"Preparation of an EA is intended to provide evidence as to whether an EIS must be prepared. A FONSI (40 CFR 1508.13) presents the reasons why an action will not have significant effects, as defined in (40 CFR 1508.27), on the human environment and for which an EIS will not be prepared" (40 CFR 1508.9).

40 CFR 1508.13 defines FONSI: "Finding of No Significant Impact means a document by a Federal agency briefly presenting the reason why an action, not otherwise excluded, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared."

Please see issues 2Civ1 and 5 for the response to the Appellant's position on the NAS report and use of BLM methodology for determining AMLs.

Review of the DGPWHT Evaluation shows use of standardized methods of rangeland inventory and monitoring (as recommended by NAS), the Forest described the method used to distinguish between horse and livestock use. Site-specific evaluations of allotments were completed (Devil's Garden AML Evaluation pp. 6-7, 12-73). Some allotments/pastures, did not have permitted use in some seasons, so the Forest knew use was from horses. Other use areas were outside allotments and still exceeded allowable standards. The Forest also had several horse use observations, and winter monitoring outside of permitted livestock season of use. In addition, the Forest established some exclosures (as recommended) to compare use. The Forest considered water availability, cover and space as well as climate data – all recommended by the NAS. The Forest fully disclosed their methods of evaluation and rationale (transparency).

The AML was calculated using a systematic, logical analysis that incorporated factual field monitoring data (Devil's Garden AML Evaluation pp. 6-7, 12-73). The Decision includes an AML upper limit of 402 adult wild horses and a lower limit of 206 adult wild horses (DN, pg. 3). These numbers are consistent with the AML evaluation (Devil's Garden AML Evaluation pp. 12-73) and the wild horse territory plan (Devil's Garden Plateau Wild Horse Territory Management Plan, pg. 7). The EA analysis of herd size and growth rate under the proposed action is based on the AML evaluation (EA, pg. 122). Options listed in the legislation for keeping horses and burros within set population levels include removal of animals from the range, destruction of animals, sterilization, and natural controls on population levels, although the legislation does not limit FS to these actions or specify acceptable types of sterilization or natural controls (16 USC §1333(b)(1)). See also response to issue 2Civ for discussion of AMLs.

Law, regulation and policy require AML be established on the basis of an in-depth evaluation of resource monitoring data and other available information and not for administrative convenience. Accordingly, the proposed AML of 206-402 wild horses was determined on the basis of a site-specific and in-depth evaluation of the available population inventory, resource monitoring data, and other information (EA, pg. 27). The AML was evaluated on the basis of specific areas (allotments). The evaluation found wild horses were contributing to over-utilization of forage species and a decline in range conditions in specific areas across the Territory, with a few exceptions and that over-winter utilization by excess wild horses is exceeding Forest Plan standards across large areas, and placing the health of these areas at risk (Response to Comment 5-15). The WFRHBA requires the USFS to manage wild horses within the established AML in order to achieve and maintain a thriving natural ecological balance and prevent a deterioration of the range (Response to Comment 1-3).

The EA (pp. 26-37) incorporates continued monitoring to determine if the proposed management actions will result in reduced utilization levels and improved upland and riparian conditions.

Livestock use adjustments are outside the scope of this EA. Any adjustments in the term permitted livestock use would be done during the environmental analysis for grazing permit renewal (Response to Comment 5-6).

The EA (pg. 75) states that actual livestock use for the past 7 years has averaged only about 18,548 AUMs or 69% of the term permitted grazing use. "During 2006-2012 actual livestock use averaged about 18,548 AUMs (approximately 69 percent of that permitted). Wild horse population size has exceeded the AML upper limit since 2002. Since 2006, actual use by wild horses has exceeded by 140-369 percent of the forage allocated for their use in the 1991 Forest Plan (Figure 11). As of January 2013, wild horse population size was estimated at 1,124 animals (about 3.4 times the AML upper limit). Of these, about 855 (approximately 76 percent of the total number) reside within the WHT" (EA, pg. 75 Livestock Use Compared to Wild Horse Use for Allotments within WHT (2006-2012)

"As wild horse population size has increased, competition between permitted livestock and wild horses for the available forage and water has also increased. Livestock operators report the current wild horse overpopulation in the Carr, Emigrant Spring, Pine Springs and Timbered Mountain Allotments has substantially increased their operating costs for fence maintenance, monitoring, and replacement pasture rental for the grazing the operators were required to forego due to the degree of wild horse use" (EA, pg. 75 Current Impacts to Livestock from the Existing Wild Horse Population Size)

As discussed in Issues 12 & 16, The DN includes a FONSI that covers all 10 factors included in the CEQ definition of significance at 40 CFR 1508.27 (b)(3) (DN. pp. 7-10). This FONSI is based on effects analysis in the EA (DN, pg. 7).

Although the AML Evaluation Report was completed six months prior to release of the NAS report, it features many of the recommended NAS steps using an adaptive management approach. The AML report was based on site specific inventories. It relied on the WIN model to predict future population growth under each alternative. It disclosed the management and environmental constraints on the horse population and it provided transparency in the forage

allocation process. The DN, EA and planning record described why forage allocations for wild horses were being increased as expressed by the upper AML based on availability and distribution of forage for horses, livestock and wildlife. It also provided rationale on why the lower limit was adjusted downward to account for population growth and scheduled gathers.

I find that the AML numbers in the decision are clearly based on the AML evaluation and that the AML evaluation used appropriate scientific methods and data. Use of the BLM methodology as guidance in determining the proposed AML did not run afoul of using best available scientific information to inform the planning process. Other factors were taken into consideration. In addition, I concur with the Finding of No Significant Impact.

Issue 11

I strongly object to the decision to use helicopters "as the primary gathering method". In January, I wrote, "helicopter roundups are *prima facie* inhumane. Any planned roundups must incorporate the elements outlined in the American Wild Horse Preservation Campaign's Standard Operating Procedures (SOP) for the humane treatment of horses during roundups. This includes the capture of horses for PZP application to be kept in intact social groups in order to minimize trauma and stress and a number of other humane measures. (Lynch, pg. 2)

Response

36 CFR 215.6 (b) states that (1) the Responsible Official shall consider all substantive written and oral comments submitted in compliance with paragraph 36 CFR 215.6 (a); and (2) all written comments received by the Responsible official shall be placed in the project file and shall become a matter of public record.

36 CFR 222 provides direction for the Forest Service in regard to management of wild free-roaming horses and burros. 36 CFR 222.64 authorizes the use of helicopters, fixed-wing aircraft, and motor vehicles in a manner that will ensure humane treatment of wild free-roaming horses and burros, as provided in paragraphs (a) through (d). Paragraph b outlines how helicopters may be used in all phases of administration of the 1971 WFRH&B Act. When utilizing helicopters, the condition of the animals shall be continuously observed by the authorized officer and, should signs of harmful stress be noted, the source of stress shall be removed so as to allow recovery. During roundups, helicopters shall be used in such a manner that bands or herds will tend to remain together; and horses or burros will not be moved at a rate which exceeds limitations set by the authorized officer who shall consider the rate of movement depending on terrain, weather, distance to be traveled, and condition of the animals (36 CFR 222.64(b)(1) and (2)). Standards are in place to: assure that animals shall be moved in such a way as to prevent harmful stress or injury, communicate with the pilot and direct the use of the helicopter, and be able to observe effects on the well-being of animals (36 CFR 222.64(b)(4) and (5)).

With regard to helicopter gathers, this issue was also addressed under Issue 6E. With regard to capture of horses for PZP application to be kept in intact social groups in order to minimize trauma, mitigations for all gather operations and the expected effects of gathers on individuals and herd social structure are detailed within the EA and supporting documents (EA, pp. 21, 38, 113; DGPWHT Plan, pp. 11-12; Wild Horse Specialist Report, pp. 8 and 21-23)

The Appellant previously commented on these issues. The Forest responded to the concerns in Appellant's June 1, 2013 comment letter on the EA (Response to comments final, pg. 203, comments 1-2 and 1-3). The Forest also addressed the comments during disposition of scoping comments (EA, Appendix A, pg. 163, 24&25; Appendix C, pp. 171, 177).

The Standard Operating Procedures included in the EA (Appendix D, starting on pg. 183) have been developed by the agencies after years of experience in the gathering of animals. The impacts of helicopter gathering, which was one of the main concerns in gathering, are discussed starting on page 113. The analysis and documentation cited indicates that the SOPs for helicopter gathering, holding and transport of animals currently in effect, are in fact, humane, and result in very few injuries and deaths to animals. (EA, pg. 203, Comment 1-2)

The SOPs are modified on a continuing basis as experience and knowledge is gained in order to ensure the most humane treatment of the animals. The most current SOPs will be implemented by the Forest Service and the Contractor over the life of the DGPWHT Management Plan (EA, pg. 113). The EA describes the distance, weather and condition of animals parameters under which animals may be gathered using helicopters, noting that terrain, physical barriers, weather, condition of the animals and other factors would be considered and that this travel should not exceed 10 miles, and may be much less dependent on ground conditions, animal health, or extreme high/low temperatures (EA, pp. 183-184) and measures to insure family bands remain intact to the extent practicable (EA, pg. 203, comment 1-3); Response to comments final, pg. 37, comment 12-22). The incorporation of the Catch, Treat and Release (CTR) is included in Alternatives 3 and 4 (Response to comments final, pg. 100, comment 16-28). For these alternatives, additional mares would be gathered, treated with fertility control and released back to the Territory. Methods for how helicopter gathers would be conducted, in accordance with 36 CFR 222.64, the mitigations for all gather operations and the expected effects of gathers on individuals and herd social structure are detailed within the EA and supporting documents (EA, pp. 21, 38, 113; DGPWHT Plan, pp. 11-12; Wild Horse Specialist Report, pp. 8 and 21-23) and are also addressed in response to comments (EA, pg. 203, comments 1-2 and 1-3). Appendix D of the EA (pp. 183-188) and Appendix A of the DGPWHT Plan (pp. 20-25) list and describe the procedures and stipulations to ensure the welfare, safety and humane treatment of wild horses during the administration of gathers, as described in the provisions of 43 CFR 4700 that the Forest Service has adopted as they are compatible with the provisions in 36 CFR 222.64.,

I find that the Forest Service considered Appellant's comments fully and in accordance with 36 CFR 215.6 (b) (1) and (2) and has addressed 36 CFR 222.64 as emphasized in the EA (including Appendix A, C, D and G) and the DGPWHT Management Plan. I find that the standard operating procedures adequately minimize the risk for potential adverse effects to wild horses.

Issue 12

I strongly object to the proposal that "gathers to achieve AML will commence as soon as practical", as this would result in major environmental impacts and irreparable harm to the horses of the DGPWHT, as well as to thousands of Americans who cherish these animals as having ecological, cultural and historical significance. USFWS has relied on outdated and discredited methodology to set AMLs dangerously, arbitrarily and capriciously low.

a) "Gathers" would be based on proposed AMLs set dangerously, arbitrarily and capriciously low without regard to recent population management science with potentially devastating impacts on this wild horse herd and the interested public, and b) illegal, as the impacts of the proposed action would in fact be so significant as to warrant the preparation of an Environmental Impact Statement (EIS) before any such actions could be undertaken. (Lynch, pg. 2)

Response

Evaluation of AML was completed in accordance with the procedures in H-4700-1 of the BLM Wild Horses and Burros Management Handbook of July 2010. This methodology is described in the project record (Devil's Garden AML Evaluation, pg. 4). Site-specific evaluations of allotments were completed (Devil's Garden AML Evaluation, pp. 6-7, 12-73). The AML was calculated using a systematic, logical analysis that incorporated factual field monitoring data (Devil's Garden AML Evaluation, pp. 6-7, 12-73). The Decision includes an AML upper limit of 402 adult wild horses and a lower limit of 206 adult wild horses (DN, pg. 3). These numbers are consistent with the AML evaluation (Devil's Garden AML Evaluation, pp. 12-73) and the wild horse territory plan (Devil's Garden Plateau Wild Horse Territory Management Plan, pg. 7). The EA analysis of herd size and growth rate under the proposed action is based on the AML evaluation (EA, pg. 122). See response to issue 2Civ for discussion of AMLs.

As discussed in Issue 16, The DN includes a FONSI that covers all 10 factors included in the CEQ definition of significance at 40 C.F.R. 1508.27 (b)(3) (DN, pp. 7-10). This FONSI is based on effects analysis in the EA (DN, pg. 7). Chapter 4 of the EA discusses direct, indirect and cumulative effects for each resource (EA, pp. 45-151). Effects to range and wild horses are described in detail in specialist reports (Wild Horse Specialist Report, pp. 28-31, Range Specialist Report, pp. 16-19). The DN (pg. 4) discusses how establishing the AML was found to be beneficial to wild horses because it will ensure there is adequate forage and water supplies to support the herd on a year-long basis for the long term, including adequate winter range to carry the animals each year. Maintaining this level of animals will result in improvement of ecological conditions for upland and riparian habitats (EA, p. 125). The AML range is wide enough so gathers to maintain AML would only be necessary every 4-5 years, preventing annual disruption of social structure and disturbance to the animals in their habitat (EA, p. 115). Additionally, the analysis shows that competition for space, cover, forage and water would be reduced among the horses and other uses, including livestock and wildlife. Instances of animals emigrating outside the territory for the essential habitat components would be minimized (DN, pg. 4). The EA describes the risk of adverse effects and how the project incorporates standard operating procedures to minimize stress and injury to horses during gather operations (EA, pp. 113-116, EA Appendix D, pp. 183-188). Based on information from BLM, over 26,000 wild horses have been gathered in California and Nevada since 2004. During this period, mortality has averaged 0.5% to 1.0% which is extremely low when handling wild animals (EA, pg. 113).

I find that the AML evaluation used appropriate scientific methods and data, and that the AML numbers in the decision are appropriate and clearly based on the AML evaluation. In addition, I concur with the Finding of No Significant Impact. I find that the standard operating procedures adequately minimize the risk for potential adverse effects to wild horses.

Issue 13

The EA fails to consider the major economic and environmental impacts of the large and growing number of wild horses removed from public lands at public expense and stockpiled in government holding facilities, currently over 50,000. The proposed action would substantially add to this significant problem. The Decision and Finding of No Significant Impact incorrectly claim that the proposed action of drastically reducing AML in the DGPWHT would not have significant impacts, both in and of itself, and considered together with actions by both the BLM and the USFWS to round up, remove and stockpile tens of thousands of federally protected wild horses from federal lands. (Lynch, pg. 3)

Response

This concern was addressed in the Response to Comments (Comment 15-49), page 79. The response states "This comment is outside the scope of this environmental analysis. The 1971 WFRHBA requires wild horse population size to be managed within the AML in order to achieve and maintain a TNEB and avoid a deterioration of the range. However, if you are interested, information about the average cost of gathers, holding and adoption can be obtained from the BLM."

See response to issues 2Ciii for discussion of analysis and disclosure of the costs of gathers.

I find the economic analysis addressed the impacts of the actions proposed by alternative with the exception that the record did not analyze and disclose the costs of gathers.

Issue 14

The action would have both short and long-term adverse effects, on the horses directly affected, on the interested public at large, and on taxpayers forced to pay for a broken system for "managing" wild horses and burros which is resulting in their extermination and which utterly fails to achieve healthy populations or TNEB". (Lynch, pg. 3)

Response

The Appellant does not allege any violation of law, regulation or policy. Nor do they specify the short and long term effects to which they refer. Please see the responses to issues 1Ci, 1Ciii, and 1Civ for discussion of effects to the interested public at large.

Please see the response to issue 1Cii addressing both short and long-term adverse effects. Short term and long- term adverse effects for the DGWHT is discussed in detail under every alternative and can be found under "Environmental Consequences Direct and Indirect Effects" starting on page 45. Each header has a dedicated topic and clearly defines impacts associated with the action taken. The DN clearly identified actions that will be taken regarding short and longer term effects when implementing the DGWHTP (DN pg. 4, EA pp. 45, 111-130).

The 1971 WFRHBA dictates how federal land management agencies shall manage the wild horse population found on public lands. The Forest Service does not have the authority to change the law on how wild horses are managed on public lands.

Authorities and regulation found in 36 CFR 222.21 Management of Wild Free- Roaming Horses and Burros provide the regulation that directs the National Forest System how to carry out wild horse management. Management plans like the DGWHTP are identified under the CFRs "Analyze each wild horse or burro territory and, based on the analysis, develop and implement a management plan, which analysis and plans will be updated, whenever needed, as determined by conditions on each territory" (36 CFR 222.21(4)).

I find that the information disclosed in the effects analysis clearly discloses impacts as required by NEPA and the regulations under 36 CFR 222.21.

Issue 15

The decision is highly controversial and not based on credible scientific evidence (Lynch, pg. 3). For this issue the Appellant refers to Issue 10 regarding the AML evaluation and establishment.

Response

40 CFR 1508.27 (b)(3) defines significance for NEPA purposes: "Significantly as used in NEPA requires consideration of both context and intensity:…The following should be considered in evaluating intensity…(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

40 CFR 1502.24 establishes a scientific integrity requirement for EISs. The Forest met this requirement in the current EA: "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements."

The DN states that legitimate controversy must be based on credible scientific evidence. The Forest Service responded to public comments in Appendix G of the EA- Response to Comments. Opposing viewpoints do not necessarily constitute scientific controversy. The project record, including specialist reports, other supporting documentation, and the EA documents all rely on scientific information including papers, reports, literature reviews, review citations, peer reviews, opposing views and results of ground-based observations (DN, pg. 9).

As discussed above in the responses to Issues 1Civ, 10 and 12, Evaluation of AML was completed in accordance with the procedures outlined in H-4700-1 of the BLM Wild Horses and Burros Management Handbook of July 2010. This methodology is described in the project record (Devil's Garden AML Evaluation, pg. 4). Site-specific evaluations of allotments were completed (Devil's Garden AML Evaluation, pp. 6-7, 12-73). As discussed in the responses to Issues 2Civ and 5, the AML evaluation used standard methods for inventory, monitoring and clear disclosure of data, which are recommended by NAS Report. The NAS report discusses a phased approach for implementing new tools stating, "The committee recognizes that the multipronged approach of science-based tools that it is proposing would require substantial financial resources from BLM in the short term. It therefore recommends the identification of sentinel populations and HMAs…Selecting sentinel HMAs would be more cost-effective than studying every herd, and it is a scientifically sound strategy." (NAS Report, pp. 305-306) As discussed in Issue 12 establishing the AML was found to be beneficial to wild horses (DN, pg. 4, EA, pg. 125). Adverse effects to horses during gathers will be minimized (DN, pg. 4; EA, pp.

113-116; EA Appendix D, pp. 183-188).

I find that the differences between the AML evaluation used for the project and the recommendations in the NAS Report do not rise to the level that I would consider "highly controversial". In this context the term "controversial" refers to cases where substantial scientific dispute exists to the size, nature or effects of the project. The Appellant specifically disagreed with the use of BLM's AML evaluation method in light of the 2013 NAS Report. While I recognize the importance of this new report, I don't believe the recommendations in this report constitute a substantial scientific dispute.

Issue 16

The decision is both individually and cumulatively significant. (Lynch, pg. 3)

Response

"Preparation of an EA is intended to provide evidence as to whether an EIS must be prepared. A FONSI (40 CFR 1508.13) presents the reasons why an action will not have significant effects, as defined in (40 CFR 1508.27), on the human environment and for which an EIS will not be prepared" (40 CFR 1508.9).

40 CFR 1508.27 (b)(3) defines significance for NEPA purposes: "Significantly as used in NEPA requires consideration of both context and intensity:…The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

The definition of cumulative effects is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." (40 CFR 1508.7)

The FONSI covers all 10 factors included in the CEQ definition of significance at 40 C.F.R. 1508.27 (b)(3) (DN. pp. 7-10). This FONSI is based on effects analysis in the EA (DN, pg. 7). Chapter 4 of the EA discusses direct, indirect and cumulative effects for each resource (EA pp. 45-151). The resource effects analysis in the EA includes botany, which covers threatened, endangered, and sensitive plants and noxious weeds (EA, pp. 59-62), heritage resources (EA, pp. 68-70), livestock grazing (EA, pp. 75-77), recreation (EA, pp. 78-81) socioeconomics (EA, pp. 84-86), watershed (EA, pp. 92-98), wild horses (EA pp. 111-130), wildlife and fisheries (EA pp. 134-147), climate change (EA, pp. 149-150). The cumulative impacts assessment area and past, present and foreseeable future activities considered in the analyses are described in the EA (EA, pp. 46-51). The project record contains supporting specialist reports for all resources.

I concur with the Finding of No Significant Impact. My review showed that the finding was based on extensive resource analysis and considered all of the relevant factors.

FINDINGS

The Forest Supervisor's decision and supporting rationale are clearly presented in the Decision Notice. Her reasons for selecting Alternative 2, are logical and responsive and consistent with direction contained in the Modoc National Forest Land and Resource Management Plan. The purpose of the proposal as stated above is clear and the benefits are displayed.

Public participation was adequate and well documented. The project was added to the quarterly Schedule of Proposed Actions. The Forest mailed scoping letters, hosted a public meeting, and distributed draft and final EAs to interested groups and individuals. The Modoc National Forest has maintained current information on planning and activities on its web page. Responses to the comments received are detailed and included as part of the EA. The decision of the Forest Supervisor indicates she considered and responded to public input.

RECOMMENDATION

My review was conducted pursuant to and in accordance with 36 CFR 215.19 to ensure the analysis and decision is in compliance with applicable laws, regulations, policy, and orders. I reviewed the appeal record, including the comments received during the comment period and how the Forest Supervisor used this information, the Appellants' objections and recommended changes.

Based on my review of the record, I recommend the Forest Supervisor's decision be affirmed on all issues including the issues pertainging to the Forest Plan amendments, with the exception of

the portion of issues 2Ciii and 13 regarding the lack analysis and disclosure of the costs associated with the proposed gathers of wild horses. I recommend that the Appellants' requested relief be denied on all issues, except in response to the aforementioned issues.

Laurence Crabtree
Appeal Reviewing Officer
Forest Supervisor, Eldorado National Forest