

DCN: 7248

REALISTIC BOMBER TRAINING INITIATIVE (RBTI)

Dyess AFB

**LITIGATION ISSUE:
IMPACT OF
CURRENT AND FUTURE LIMITATIONS
ON
TRAINING QUALITY AND ACCESS**

Re: Ellsworth AFB closure recommendation

MILITARY VALUE OF THE AERIAL TRAINING ROUTES AND MILITARY OPERATING AREAS (MOA) SUPPORTING DYESS AFB

SUMMARY

The USAF relied upon flawed and incomplete analysis in the BRAC process with respect to the availability, capability and future access to aerial training routes and MOAs supporting Dyess AFB. Inexplicably, the USAF failed to acknowledge in its analysis, scoring and recommendations that Dyess' primary training route (IR-178) and Lancer MOA, together known as the Realistic Bomber Training Initiative (RBTI), are in fact operating subject to a Federal District Court order that has placed limits on its availability and operating conditions. The USAF failed to consider that this training route and MOA have been under continuous litigation since 2000 and are, in fact, vulnerable to future litigation that could further limit USAF operations and access. The service also failed to reveal in its recommendations that these key Dyess training assets will remain subject to Court imposed restrictions until the USAF prepares a supplemental Environmental Impact Statement (EIS) and both the court and FAA issue new decisions on whether to retain these airspace training assets. Any such decision could result in yet further operational limitations. Finally, the USAF failed to consider the cumulative effects from an increase of training requirements resulting from the addition of B-1s coming from Ellsworth and a possible court imposed cap on sortie-operations. As a consequence, the final DoD scoring value for Dyess AFB lacks integrity and was based upon flawed scores related to proximity to Airspace Supporting Mission (ASM) and Low Level Routes under the Current and Future Mission category. The over-inflation of Dyess' assessed military value in this category – in comparison to Ellsworth AFB - was a principle determining factor in placing Ellsworth on the closure list. Therefore, DoD substantially deviated from its evaluation of military criteria and the recommended consolidation of the B-1 fleet at Dyess AFB should be rejected.

LITIGATION BACKGROUND

As early as 1997, the Air Force recognized that the aerial training ranges available to aircraft proximate to Dyess and Barksdale AFB were inadequate for realistic and effective training to ensure readiness. The Realistic Bomber Training Initiative was the result of that requirement. As such, an environmental impact statement (EIS) was initiated in December 1997. The AF initiative generated significant controversy with over 1,500 written and oral comments in opposition. The Final Environmental Impact Statement (FEIS) was published in January, 2000. The AF Record of Decision selected a route and range complex (IR-178 and the Lancer MOA) which it deemed critical to the effective training and readiness of bomber air crews stationed at Dyess and Barksdale AFB. After the FEIS was published in January, 2000, litigation was initiated in the United States District Court for the Western District of Texas on behalf of residents and organizations adversely affected by the noise, vibration, vortices and loss of value of their property resulting from the training flights over their land.¹

- Two cases were decided by the District Court and were consolidated on appeal to the United States Court of Appeals for the Fifth Circuit, which decided on October 12, 2004 that the Air Force and FAA compliance with the National Environmental Policy Act, 42

¹:Davis Mountains Trans-Pecos Heritage Assoc., et. al., ("Plaintiffs"), v. United States Air Force, et. al., ("Defendants"), 249 F. Supp. 2d 763 (N.D. Tex. 2003); Welch v. USAF, 2001U.S. Dist. LEXIS 21081 (N.D. Tex., Dec. 19, 2001)

U.S.C. 4321-4370(f), was defective. The Court of Appeals vacated the AF's Record of Decision, the decisions of the district court and the FAA orders approving the Realistic Bomber Training Initiative (RBTI) and ordered the AF to prepare a supplemental EIS (SEIS) (Westlaw at 2004 WL 2295986, No. 02-60288 (5th Cir. Oct. 12, 2004)).

- On January 31, 2005, the appellate court on petition for rehearing, denied the Air Force a rehearing but granted continued use of the RBTI pending the preparation of the EIS "under conditions of operation set by the district court." (2005 U.S. App. LEXIS 1620)
- On June 29, 2005, the district court issued an order imposing flying restrictions proposed by the USAF (under FCIF A05-01) to allow limited use pending the SEIS; thus setting limitations on the Air Force that no aircraft will fly lower than 500 ft. AGL, AP/1B altitude in IR-178, and no lower than 12,000 ft. MSL when utilizing Lancer MOA.

From the foregoing, it is apparent that Dyess' access to the RBTI throughout the foreseeable future is far from being a settled issue. The approval of the SEIS is a lengthy process, potentially lasting up to two years, assuming no further legal challenges. The RBTI's future availability as an optimal training range is, in fact, tenuous at best and vulnerable to finding itself in a continuous litigation limbo. In effect, Dyess access to RBTI is presently under the control of the district court, not the Air Force. And, it is operating under altitude limitations which render the training inadequate when compared to alternative MOAs (e.g. compare to Powder River MOA, Hays MOA, Belle Fourche MTR, Nevada Test & Training Ranges (NTTR) and the Utah NTTR).

QUALITY OF TRAINING UNDER COURT ORDER

On January 5, 2005, the Director of Air and Space Operations, Air Combat Command, filed with the appellate court two separate declarations. First, he asserted the essential nature of IR-178 and the Lancer MOA to the readiness and training of the Dyess AFB bombers. His declaration described the continued use of the RBTI as critical. Second, he asserted the Air Force will make temporary operational changes to its use of the RBTI by flying no lower than 500 feet above ground level or the published minimum altitudes on IR-178, whichever is higher and that aircraft will fly no lower than 12,000 feet mean sea level (an increase of approximately 6,000 ft.) during normal training operations in the Lancer MOA (FCIF A05-01).

- As to the matters of military value, two major discrepancies are generated by the declarations. First, these proffered changes are characterized as temporary, implying that these limitations will be abandoned when the Supplemental EIS and resulting Record of Decision are completed. No doubt, this will be challenged in the courts by the plaintiffs when the Supplemental EIS is completed, unless the Air Force abandons the present location of the RBTI site. At a minimum, this represents substantial delay in final judicial approval, if such final approval can ever be obtained. The second declaration is an acknowledgement that the court accepted limitations are inadequate for Air Force training; "[T]he changes to the bomber training program, which would be in effect while the Air Force completes the SEIS and the FAA takes action accordingly, do not, in my opinion, allow aircrews to fully meet necessary realistic training objectives."

Thus, by the admission of the Director of Air and Space Operations, Air Combat Command, adequate training objectives for the B-1B bomber crews presently stationed at Dyess AFB cannot be met with the court imposed restrictions of June 29, 2005.

FUTURE LITIGATION

As this matter has been in litigation since at least 2001, it is reasonable to conclude that litigation could, and probably will, continue pending the results of the SEIS.² However, the recommended consolidation of all USAF B1-B operations at Dyess AFB raises numerous new issues that have yet to be addressed:

- The court order of June 29, 2005, and prior filings, make no mention of Air Force plans to consolidate and double the number the B-1B aircraft at Dyess AFB.
- Although the January, 2005 court order was well before the BRAC recommendations were announced, it should be noted that the USAF failed to advise the district court of the BRAC recommendations after their release and the possibility of increased flight activities at Dyess (an estimated 35% increase in annual missions utilizing the RBTI).
 - Whatever the existing baseline of flight operations in the RBTI, that number will increase significantly if all B-1Bs are located to Dyess AFB - unless the Air Force accepts a significant decrease in readiness and training. As noted by the appellate court in its reversal and remand of the case, the implementing regulations of NEPA, promulgated by the President's Council on Environmental Quality, at 40 C.F.R. 1502.9(c)(1), ". . . require agencies to supplement an EIS if the agency makes substantial changes to the proposed action or significant new circumstances or information arise bearing on the proposed action or its impacts."
- It is clear that the Air Force will be required to supplement the RBTI EIS to reflect the impacts associated with the increase in use of the RBTI training areas. The potential increases of required sortie-operations will only exacerbate the complaints raised by plaintiffs, thereby leading to further litigation delaying and jeopardizing the final approval of the RBTI project.
 - While the failure of the Air Force to inform the court of these issues is a matter for the court to address, the failure of the Air Force to apprise the Base Closure Commission of the limitations on use and challenges to the RBTI represents a serious omission and should be sternly addressed by the Commission in the context of its evaluation of the Air Forces credibility in preparing their military value assessments.
 - Of particular note, the Air Force's analysis of the environmental implications of the recommended closure of Ellsworth and the movement to Dyess reflects that ". . . flight operations at Dyess have been diverted, delayed or rerouted because of noise. Additional operations may further impact this constraining factor and

² It should be noted to the Commission as a matter of significance, the State of Texas submitted an Amicus Curiae brief in support of Plaintiffs in their successful appeal before the Fifth Circuit.

therefore further restrict operations.” This particular comment is noteworthy for three reasons:

- By placing it in the analysis for environmental implications of the recommendation, the Air Force has relegated this constraining factor to a category of the statutory criteria that does not pertain to military value, thereby avoiding the clear implication of the constraint on readiness;
- The language used is similar to that reported for other gaining bases, thereby masking the constraint and implying that this limitation on use is not worthy of special attention as a matter embroiled in litigation;
- By commenting on the need for analysis under NEPA in a routine manner, the Commission would not be alerted to the predictable contentiousness of the addition of significantly more sortie-operations in these range areas.³

CONCLUSION

In assessing the military value of IR-178 and Lancer MOA, the analysis performed by the Air Force for the purposes of BRAC 2005 implies that these training assets will be available to Dyess AFB without limitation or qualification. As the facts suggest, the related USAF data and assumptions used were grossly incorrect. In fact, the continued use of these ranges is now under the aegis of the judicial system and is potentially subject to additional litigation that renders the future use of the ranges supporting Dyess AFB problematic, at best.

³ Although the Base Closure statute includes an exemption from NEPA for the recommendations of the Department of Defense and the actions of the Commission, this exemption does not extend to the implementation of the decisions of the Commission. Under ordinary circumstances, it would be appropriate for the Commission to assume that the Air Force can implement the decision of the Commission. However, no such assumption would be appropriate where, as here, there is a serious challenge to the closely related actions of the Air Force.

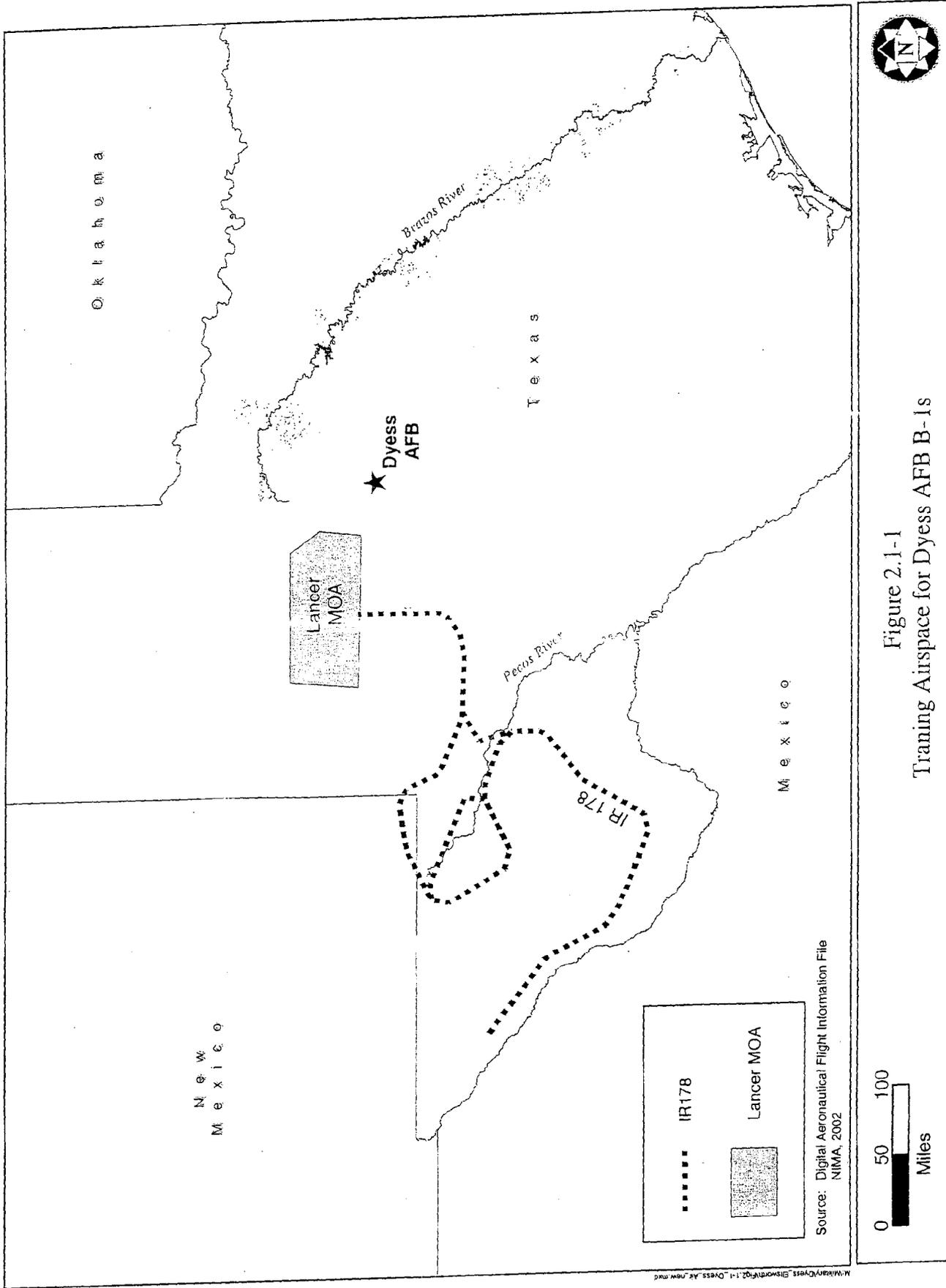


Figure 2.1-1
Training Airspace for Dyess AFB B-1s



**RECORD OF DECISION
FOR THE
REALISTIC BOMBER TRAINING INITIATIVE**

An Environmental Impact Statement (EIS) was prepared to aid in determining whether to establish the Realistic Bomber Training Initiative (RBTI). The purpose of RBTI is to:

- (1) Permit aircrews from Barksdale and Dyess Air Force Bases to train for their various missions while maximizing combat training time;
- (2) Provide the type and linked arrangement of airspace and other assets that support realistic training for bomber aircrews, and
- (3) Ensure that flexibility and variability in training supports bomber combat missions.

RBTI will fulfill this purpose by establishing a set of linked training assets comprising an Electronic Scoring Site system that will provide realistic bomber training close enough to Barksdale and Dyess AFBs to effectively use limited flying hours. These assets would be located within approximately 600 nautical miles of Barksdale and Dyess AFBs and would involve:

- (1) A Military Training Route (MTR) that offers variable terrain for use in terrain following and terrain avoidance, overlies lands capable of supporting electronic threat emitters and electronic scoring sites, permits flights down to 300 feet above ground level (AGL) in some segments, and links to a Military Operations Area (MOA).
- (2) A MOA measuring at least 40 by 80 nautical miles with a floor of 3,000 feet AGL and extending to 18,000 feet above mean sea level (MSL) used for avoiding simulated threats and simulated attacks.
- (3) An Air Traffic Control Assigned Area (ATCAA) above the MOA at 18,000 to 40,000 feet MSL to be used for high-altitude training.
- (4) Establishing, through lease or purchase, a set of five locations (15 acres each) under or near the MTR corridor, and an additional five locations (15 acres each) under or near the MOA, for placing electronic threat emitters that would simulate the variety of realistic threats expected in combat.
- (5) Constructing two Electronic Scoring Sites co-located with operations and maintenance centers, one under or near the MTR corridor and the other en route from the bases to the MTR and MOA on leased, purchased, or AF-owned property.
- (6) Decommissioning two existing Electronic Scoring Sites in Harrison, Arkansas and La Junta, Colorado that do not fulfill the B-1 and B-52 training requirements. These sites do not provide the required training assets outlined above in items 1, 2 and 3.

ALTERNATIVES ANALYZED

Four alternatives were analyzed, a no-action alternative (Alternative A), and three action alternatives, Alternatives B, C and D. All three action alternatives fulfill the need defined

under the proposed action. Alternative B: IR-178/Lancer MOA and Alternative C: IR-178/Texon MOA are almost entirely in western Texas. Only a small portion of airspace in these alternatives extends into New Mexico. Alternative D: IR-153/Mt. Dora MOA is located primarily in northeastern New Mexico with portions of the MTR extending into northwestern Texas. All three action alternatives predominantly coincide with existing MTR or MOA airspace; little area not currently exposed to overflights would be affected. Under Alternative A: No-Action, the Air Force would continue using existing assets and airspace would remain unchanged. All three action alternatives meet operational goals defined for RBTI. Based on the analysis presented in the EIS, agency input, and public comments, the Air Force believes Alternative B is preferable to Alternatives A, C and D. Alternative B meets all operational requirements with less potential for adverse environmental impacts than Alternative C and significantly less than Alternative D. Therefore, Alternative B is the Air Force's environmentally and operationally preferred alternative.

PUBLIC INVOLVEMENT

The public involvement process followed by the Air Force for RBTI included:

- (1) Community meetings prior to issuing a Notice of Intent (NOI) to prepare the RBTI Environmental Impact Statement (EIS);
- (2) Scoping comment period and meetings;
- (3) Intergovernmental /Interagency Coordination for Environmental Planning (IICEP) and Agency consultation; and
- (4) Public comment period and hearings.

Efforts for early public involvement began in December 1997. These efforts consisted of six informal community meetings in Texas and New Mexico to gain input on the RBTI alternative identification process. Input from the community meetings helped shape the alternatives.

Official notification of the Air Force RBTI proposal began with publication of the NOI in the Federal Register on December 19, 1997. In late January and early February 1998, 11 scoping meetings were held in affected communities in Texas, New Mexico, Colorado and Arkansas. This started the scoping period during which the Air Force solicited comments from the public, interest groups and agencies to help define the scope of analysis for the EIS and to aid in identification of additional alternatives. All comments and letters were considered and used to help develop the scope for the analysis for the draft EIS. The scoping period lasted through April 3, 1998, including a 45 day extension. Public involvement continued in April 1998 (following the formal scoping period), when Air Force representatives were invited to participate in two community meetings held in Taos and Angel Fire, New Mexico.

As part of Government-to-Government consultation for RBTI, 32 tribes and/or tribal-affiliated organizations that historically resided in the affected area were notified. At their request, ongoing discussions and consultations have continued throughout the National Environmental Policy Act (NEPA) process with the Jicarilla Apache Tribe and the Taos Pueblo in New Mexico.

Through the IICEP process, appropriate federal, state and local agencies were notified of the proposed action. In total, over 100 IICEP letters were sent to agencies and officials. Comments from these agencies and officials were reviewed for incorporation into the environmental analysis. The IICEP process also provided the Air Force an opportunity to seek and obtain data on resources within the jurisdiction of each agency or organization, and to gather relevant information on issues affecting the RBTI proposal. Meetings with several agencies were conducted, including with the U.S. Fish and Wildlife Service (USF&WS) as part of consultation for Section 7 of the Endangered Species Act.

The Federal Aviation Administration (FAA) was a cooperating agency for this EIS.

A 45 day public comment period on the draft EIS began with publication of the Notice of Availability (NOA) on March 19, 1999. As with scoping, a 45-day extension was granted, allowing 90 days total for the public comment period. Fifteen meetings were held in 11 locations in Texas, New Mexico, Colorado and Arkansas. All comments were reviewed and considered in development of the final EIS, and this decision.

The Air Force goal is to continuously balance readiness training with the environment and community concerns. This includes actions during the proposal development process, management actions coincident with project start-up, and most importantly, those long-term actions that continuously address community concerns throughout the life of the project.

DECISION

After considering the operational utility and potential environmental consequences of the three RBTI action alternatives and the No-Action Alternative, the Air Force chooses to implement Alternative B, which involves locating the appropriate training assets under IR-178/Lancer MOA. The Air Force will take action required to request FAA implementation of the airspace modifications necessary to implement Alternative B.

IMPACTS

Historically, the affected airspace under RBTI accommodated aircraft overflights, including military flight training activities and civil aviation. Existing airspace will be used to the maximum extent possible for IR-178 and Lancer MOA. Some airspace will be eliminated and new airspace added. Under Alternative B, airspace management will remain similar to that found today. The potential for conflicts with civil aviation will not be significant, although coordinating with civilian aviators involving weather-modification, crop dusting, ranching and other similar management activities will require increased attention and resources from the Air Force. For Alternative B, average daily sortie operations will range from 1 to 10, depending upon the segment of the MTR. Sortie numbers will vary from an increase of 1 to 6 to a decrease of up to 5 per operational day as compared to historic airspace use on given segments.

Noise levels will range from 45 to 61 dB (Average Day-Night Sound Level [DNL]) for Alternative B. There will be an increase in noise of 2 to 13 dB depending on the route/MOA segment examined. Noise analysis indicated an increase in the percentage of people potentially

highly annoyed under RBTI. For Alternative B, the percentage of highly annoyed people could rise to a maximum of 8 percent for portions of IR-178. Under the Lancer MOA, the analysis showed approximately one percent of the people could be highly annoyed.

Effects of aircraft emissions on air quality and the potential for aircraft mishaps will be inconsequential for Alternative B.

Overall, there would be no likely effects to designated land use, recreation or visual resources. Increases in noise levels from aircraft could be perceived by some as affecting their quality of life. However, the analysis revealed no impacts on recreation, property values, or hunting leases. This is evidenced in other MOAs within the region where recreation, property values and hunting leases remain unaffected by aircraft overflights more numerous than those projected for RBTI. Six communities under Alternative B could experience increases in noise levels of 2 to 8 dB. Aircrews, however, will avoid overflights of communities by the standards set forth in FAA regulations.

Field surveys at the emitter and Electronic Scoring Sites for Alternative B did not identify any threatened, endangered or sensitive species. Under Alternative B, increased overflights would occur over estimated historic Aplomado Falcon habitat; however, only 11 sightings have occurred in the region since 1992. The Air Force has consulted with the USF&WS on the Endangered Species Act relative to RBTI. The USF&WS concurs with the Air Force determination that this action is not likely to adversely affect threatened and endangered species.

Construction of the Electronic Scoring Sites in Texas will result in a beneficial socioeconomic impact. Decommissioning of the Electronic Scoring Sites in Harrison, Arkansas and La Junta, Colorado will result in minimal negative socioeconomic impacts. The effects of flying activities are not expected to produce measurable impacts on the economic value of the land since this area has been generally overflowed since the 1940's. Other factors, such as drought, market prices, community amenities, and proximity to urban areas are more likely to affect land values than military aircraft overflights. The environmental justice analysis established that implementation of Alternative B will have no adverse impact.

The Air Force surveyed the proposed emitter and Electronic Scoring Sites for cultural resources that could be affected by construction and ground operations. One archaeological site could be affected under Alternative B. However, impacts to this site could be avoided or mitigated to insignificance through completion of the Section 106 process of the National Historic Preservation Act and employment of a combination of avoidance, monitoring, testing, and data recovery (if needed), or selection of an alternative site. Existing research and consultation with appropriate Native American tribes indicated no identified traditional resources within the affected airspace of Alternative B. Although 15 National Register-listed properties could be overflowed, overflights will occur in areas already subject to military aircraft overflights and aircraft would not create a new visual or audible feature in an otherwise historic or traditional landscape. Noise from aircraft overflights would not reach levels likely to damage structures. Therefore, the effects of visual or audible intrusions or damage from noise or vibrations would be negligible. No National Historic Landmarks are located under Alternative B.

Proper management will be followed to reduce effects of any potential short-term wind and water erosion of surface soils to insignificant levels. Landowners will retain control of any mineral or water rights. No long-term impacts to water resources will occur as a result of construction or use of the Electronic Scoring Sites or emitters.

There would be no cumulative impacts from the interaction of RBTI Alternative B with other past, present or reasonably foreseeable actions.

MITIGATION MEASURES

The mitigation measures presented below reflect specific actions the Air Force will take to reduce the potential for particular effects to resources, as identified in the EIS.

- (1) The Air Force will reduce potential impact (as identified by USF&WS) to Aplomado Falcon habitat by:
 - (a) Evaluating the areas under IR 178 that are not currently being surveyed.
 - (b) Expanding the ongoing Aplomado Falcon survey into areas the evaluation determines may be Aplomado Falcon habitat.
- (2) The Air Force will avoid or reduce potential impacts to biological and cultural resources from construction or modification of access roads, power lines, and telephone lines by:
 - (a) Consulting with State Historic Preservation Office (SHPO).
 - (b) Consulting with USF&WS.
 - (c) Surveying rights-of-way for cultural and biological resources.
 - (d) Realigning rights-of-way to avoid resources, where feasible.
 - (e) Developing and implementing site-specific mitigation measures, if required.
- (3) The Air Force will avoid or reduce potential impacts to cultural resources from the decommissioning of the La Junta Electronic Scoring Site, including disposition of lands out of federal ownership, by completion of the National Historic Preservation Act's Section 106 process.

MANAGEMENT ACTIONS

In addition to the mitigation measures described above, two types of management actions are designed to address concerns:

Management Actions incorporated into the proposal: These actions used project design, configuration, and/or component location to reduce or eliminate potential impacts to a resource or suite of resources. Such actions include the use of existing information or data collected as part of the public involvement process to avoid siting alternative components in areas or settings known to contain resources that could be significantly

affected. Such avoidance is not absolute; rather it is balanced with training and operational considerations needed to perform realistic bomber training.

- (1) Citizens expressed concerns about creating new military airspace. The Air Force followed the FAA policy of using existing airspace to the maximum extent possible. This proposal used 85% existing airspace by:
 - (a) Linking segments of existing MTRs to form a complete MTR, IR 178.
 - (b) Linking portions of three existing MOAs to form a complete MOA, the Lancer MOA.
- (2) Concerns were expressed about the structure of the proposed MTR, IR 178. The Air Force reduced noise related to individual overflights and associated effects by raising the floor of several segments of the proposed IR 178.
- (3) Agencies expressed concerns that flexibility was needed in the number and siting of emitter sites and Electronic Scoring Sites to address potential environmental impacts. The Air Force provided flexibility and minimized impact by:
 - (a) Considering more sites than would be required for the Electronic Scoring Sites and emitter sites.
 - (b) Eliminating many candidate sites that contained known historical sites, or were located too close to homes, large structures, and obvious bodies of water.
- (4) The public expressed concerns with potential environmental consequences due to site and infrastructure construction associated with emitter sites and Electronic Scoring Sites. The Air Force minimized impact by:
 - (a) Selecting candidate sites as close as possible to existing roads, as well as power and telephone lines so that less area would be affected by construction.
 - (b) Choosing previously disturbed areas, where feasible.
 - (c) Conducting surveys to locate sensitive cultural or biological resources to avoid or minimize disturbance.
- (5) Citizens expressed concerns about exposing the public to radio frequency energy from emitters. The Air Force minimized risk and ensured public safety by using sites that contain an 800 X 800 foot fenced area that provides 150 feet of extra safe-separation distance.
- (6) Concerns were expressed that construction and maintenance of emitter sites and Electronic Scoring Sites could increase erosion and therefore affect soils and water resources. The Air Force will minimize impacts, preserve wetlands and drainages, and reduce erosion by specifying best management practices and selecting sites that avoid wetlands, drainages, and areas with sloped terrain.

- (7) The public and agencies expressed concerns regarding the altitude of the MOA floor. The Air Force will provide additional separation between military operations and civil aviation by establishing the floor of the MOA above the Instrument Approach Procedures minimum altitudes for all airports under or adjacent to the Lancer MOA.

Management Actions to address community/agency concerns: These actions were developed to address concerns voiced by the public and agencies. These concerns were received through oral and written comments during the public comment period.

- (1) Citizens expressed concerns about the increased number of flights proposed for IR 178. The Air Force will reduce the impact of individual low-altitude-flights, compared to projections in the EIS, by limiting the annual sortie-operations to 1,560 (about 6 per day), instead of the proposed 2,600 (about 10 per day).
- (2) The public expressed concerns that the floor of some segments of the proposed IR 178 were proposed to be lower (200 feet AGL) than the minimum flight altitude of 300 feet AGL. The Air Force will institute IR 178 segment altitudes that correspond with minimum flight altitudes by raising the floor of all segments of IR 178 to a minimum of 300 feet AGL.
- (3) Agencies and the public expressed concerns about the interaction between military use of the Lancer MOA and underlying airport traffic. They also indicated concern about the interaction between military use of IR 178 and the Lancer MOA with general aviation activities in the region. The Air Force will increase communication opportunities with civil aviators by establishing a 1-800 telephone number to Dyess AFB for airspace schedule information. Additionally, the Air Force will allow easier access to local airports, raise awareness and avoid potential conflicts between military and general aviation aircraft flying in local airspace by establishing a Military Radar Unit (MRU) and real-time communications. The MRU will be operational concurrently and co-located with the en route Electronic Scoring Site, and will become a critical part of the long-term actions that continuously address community concerns.
- (4) The public expressed concerns about conflicts between military flights and local aviation in the vicinity of the proposed re-entry route on IR 178. The Air Force will reduce the potential for conflicts by raising the floor of the IR 178 re-entry route to 6,000 feet MSL.
- (5) Concerns were expressed that there could be an increase in noise complaints and some citizens indicated that noise complaints are not handled effectively. The Air Force will provide improved communication opportunities between the public and the Dyess AFB Public Affairs Office by publicizing an existing 1-800 telephone number, and encouraging citizens to contact the base with concerns or complaints.

- (6) The public and agencies expressed concern about the potential adverse effect on known cultural resources associated with locating the en route Electronic Scoring Site near Dyess AFB. The Air Force will continue to develop and examine ways to minimize these potential effects to include the possibility of locating the en route Electronic Scoring Site on an evaluated candidate site under the Lancer MOA, at a local municipal airport, or other suitable location. In the event this management action leads to a substantive change, the Air Force will undertake any additional environmental analysis required by this change. Additionally, aircraft overflights will be limited to 5,000 AGL or higher when within 3 nautical miles of the en route Electronic Scoring Site.
- (7) Although not addressed in the EIS, the Air Force will also implement the following initiatives to further enhance public involvement:
 - (a) Designate Dyess AFB as the single point of contact for all noise complaints within the confines of the Lancer MOA.
 - (b) Create a web site to provide the public RBTI information.
 - (c) Establish a team to routinely gather public issues and information to address citizen concerns.

SUMMARY

The Air Force will continue to work with the FAA and other federal agencies, state agencies, and local communities during and after the establishment of the Realistic Bomber Training Initiative. This interaction will aid in the reduction of noise impacts on the affected area and form the basis for long-term actions that will continuously address community concerns throughout the life of the project. These actions will help achieve the Air Force goal to continuously balance readiness training with the environment and community concerns.

The EIS used public involvement to identify alternatives and impacts, and assess the environmental consequences associated with the Realistic Bomber Training Initiative. Where feasible, the Air Force developed mitigation measures and management actions to minimize the environmental impact and address the concerns and comments of agencies and the public.



MARVIN R. ESMOND, Lt Gen. USAF
Deputy Chief of Staff
Air & Space Operations



FILED

October 12, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-60288

DAVIS MOUNTAINS TRANS-PECOS HERITAGE
ASSOCIATION, a Texas non-profit corporation,

Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION;
MARION C. BLAKEY, Administrator, FEDERAL
AVIATION ADMINISTRATION; NORMAN Y.
MINETA, SECRETARY, DEPARTMENT OF
TRANSPORTATION,

Respondents.

No. 03-10506

DAVIS MOUNTAINS TRANS-PECOS HERITAGE
ASSOCIATION; DALE TOONE; SUSAN TOONE;
TIM LEARY; REXANN LEARY; EARL BAKER;
SYLVIA BAKER; MARK DAUGHERTY; ANN
DAUGHERTY; DICK R. HOLLAND; J. P. BRYAN;
JACKSON BEN LOVE, JR.; KAARE J. REEME,

Plaintiffs-Appellants,

versus

UNITED STATES AIR FORCE; JAMES G. ROCHE;
Secretary United States Air Force; UNITED STATES
DEPARTMENT OF DEFENSE; DONALD H. RUMSFIELD,
Secretary of Defense,

Defendants-Appellees.

No. 03-10528

BUSTER WELCH; JOHN F. OUDT; LESA OUDT;
JOHN DIRK OUDT; CINDY ANN SPIRES; ET AL,

Plaintiffs-Appellants,

versus

UNITED STATES AIR FORCE; F. WHITTEN
PETERS, Secretary of the United States Air Force;
WENDELL L. GRIFFIN, Colonel, Commander,
7th Bomb Wing, Dyess Holloman Air Force Base;
CURTIS M. BEDKE, Brigadier General, Commander,
2nd Bomb Wing, Barksdale Air Force Base; UNITED
STATES DEPARTMENT OF DEFENSE; DONALD H.
RUMSFIELD, SECRETARY DEPARTMENT OF
DEFENSE,

Defendants-Appellees.

Petitions for Review of an Order of the
Federal Aviation Administration

Before REAVLEY, JONES and DENNIS, Circuit Judges.

REAVLEY, Circuit Judge:*

In these consolidated appeals, petitioners challenge various actions by the United States Air Force (Air Force) and the Federal Aviation Administration (FAA) in connection with the Realistic Bomber Training Initiative (RBTI).¹ Petitioners allege that the Air Force and FAA failed to follow procedures mandated by the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f (NEPA) and its implementing regulations, 40 C.F.R. §§ 1500.1-1508.28 (2003) (CEQ regulations), 32 C.F.R. §§ 989.1-989.38 (2004) (Air Force regulations), and ask this court to set aside those agency actions and remand to the agencies for NEPA-sufficient procedure.² We agree that the Environmental Impact Statement (EIS)

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

¹ A list of acronyms used in this opinion is appended.

² This case comes to us as two appeals from two district court decisions (*Davis Mountains Trans-Pecos Heritage Association v. U.S. Air Force*, 249 F. Supp. 2d 763 (N.D. Tex. 2003) and *Welch v. U.S. Air Force*, 249 F. Supp. 2d 797 (N.D. Tex. 2003)), consolidated for briefing, and a direct appeal from two orders of the FAA brought by Davis Mountains Trans-Pecos Heritage Association in which the Welch parties have intervened.

prepared by the Air Force and adopted by the FAA does not satisfy NEPA and therefore remand to the agencies to prepare a supplemental EIS in accordance with this opinion.

I. Background

The basis of petitioners' complaints is the RBTI, a plan to provide airspace and ground-based assets for realistic and integrated B-52 and B-1 Bomber flight training within 600 miles of Barksdale and Dyess Air Force Bases. The RBTI includes a Military Operations Area (MOA), linked to a Military Training Route (MTR) by an Electronic Scoring Site system. The MOA provides space, identified to civil and commercial aircraft, where military aircraft can practice air-to-ground and air-to-air training. The MTR is a flight corridor where pilots can practice low-altitude navigation and maneuvers.

Concluding that implementation of the RBTI would constitute a "major action" under NEPA, the Air Force prepared an EIS.³ The FAA participated in the NEPA process as a cooperating agency.⁴ The EIS analyzed three alternative locations for the RBTI and a no action alternative. Two months after issuing the final EIS, the Air Force issued a Rule of Decision (ROD) adopting its preferred

³ 42 U.S.C. § 4332(C).

⁴ 40 C.F.R. § 1501.6.

alternative (Alternative B). Alternative B, located mostly in western Texas, would modify and enlarge existing MTR Instrument Route 178 (IR-178) and create Lancer MOA by consolidating and expanding three existing MOAs. The FAA adopted the final EIS and approved Lancer MOA and the IR-178 modifications.

Petitioners are Davis Mountains Trans-Pecos Heritage Association (DMTPHA), a nonprofit corporation whose members are farmers, ranchers, and business people living and working in the areas underlying the RBTI airspace, and similarly situated named individuals. Concerned with potential impacts of the RBTI on underlying land, petitioners challenged the NEPA compliance of the Air Force and several named federal defendants in the district court. *Davis Mountains Trans-Pecos Heritage Association v. U.S. Air Force*, 249 F. Supp. 2d 763 (N.D. Tex. 2003); *Welch v. U.S. Air Force*, 249 F. Supp. 2d 797 (N.D. Tex. 2003) (hereinafter “Air Force cases”). Petitioners seek review of that court’s summary judgments in favor of defendants as well as the FAA’s approval of Lancer MOA and modified IR-178.

II. Jurisdiction

This court has jurisdiction to review the district court’s grants of summary judgment in the Air Force cases under 28 U.S.C. § 1291. We have jurisdiction to review the FAA’s approvals under 49 U.S.C. § 46110(a), providing for review of

FAA orders in the Courts of Appeals. We lack jurisdiction, however, to hear any claims of the Welch intervenors in the FAA appeal not raised by petitioners in that case. *United Gas Pipe Line Co. v. FERC*, 824 F.2d 417, 434-38 (5th Cir. 1987). In *United Gas*, we held that intervenors in a suit challenging FERC action under the Natural Gas Act could not raise issues in addition to those raised by petitioners, in order to prevent intervenors from effectively appealing outside the sixty day statutory period for appeal. *Id.* The same reasoning applies in the present case, where intervenors did not appeal the FAA decisions and filed their motion to intervene well outside the sixty day period for appeal provided for in § 46110(a). Therefore, we will not address intervenors' argument that the FAA failed to adequately consider the effects of the RBTI on Lubbock, Texas.

III. Standard of Review

We review the district court's grants of summary judgment in the Air Force cases *de novo*.⁵ Our review of the FAA orders is also *de novo*, and we may "affirm, amend, modify, or set aside any part" of the orders approving Lancer MOA and modified IR-178.⁶ As petitioners in both the Air Force cases and FAA appeal challenge those agencies' NEPA compliance, we must determine whether the

⁵ *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

⁶ 49 U.S.C. § 46110(c).

actions complained of were arbitrary or capricious under the Administrative Procedure Act.⁷ Generally, agency action is arbitrary and capricious

if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.⁸

Preparation of an EIS under NEPA furthers two broad goals. First, it ensures that the agency will consider relevant factors when making its decision. Second, its disclosure requirements foster meaningful public participation in the decisionmaking process.⁹ NEPA does not, however, mandate a particular result.¹⁰

In determining the adequacy of an EIS, this court considers three factors:

- (1) whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives;
- (2) whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and
- (3) whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action.¹¹

⁷ 5 U.S.C. § 706(2)(A); *Sierra Club v. Sigler*, 695 F.2d 957, 964 (5th Cir. 1983).

⁸ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

¹⁰ *Westphal*, 230 F.3d at 175.

¹¹ *Id.* at 174.

The EIS must provide information satisfying these criteria, and its conclusions must be supported by evidence in the administrative record.¹²

IV. Environmental Effects of the RBTI

A. *Livestock*

Petitioners raise several challenges to the EIS's analysis of the RBTI's environmental effects. First, petitioners claim that the Air Force, and the FAA in adopting the EIS, did not adequately consider the effects of the proposal on the livestock on ranches underlying the RBTI route. Presumably relying on the principle that agencies must follow their own rules¹³, petitioners argue that the Air Force failed to take the requisite "hard look"¹⁴ at livestock impacts because it did not follow its 1993 handbook, "The Impact of Low Altitude Flights on Livestock and Poultry" (Handbook).¹⁵ Petitioners argue that, because the Air

¹² *Id.* at 174-75.

¹³ *Lyng v. Payne*, 476 U.S. 926, 934 (1986).

¹⁴ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989).

¹⁵ In its "Findings" section, the Handbook states:

Any establishment of new low altitude airspace will seek to minimize potential impacts on livestock and poultry. An initial consideration is the regional distribution of sensitive livestock and poultry operations in the geographical region being considered for low altitude flight. This regional distribution will be determined by identifying those counties that are among the leading counties for livestock and poultry commodities in their respective

Force did not undertake the county- and individual-level inquiry outlined in the Handbook, but instead relied on several studies of the effects of low-level overflights on livestock and a general overview of the underlying region, its analysis was inadequate under NEPA.

Petitioners rely on *Idaho Sporting Congress, Inc. v. Rittenhouse*, in which the Ninth Circuit invalidated a Forest Service EIS, because it analyzed impact on certain species on a “home range” scale, contrary to a Forest Service report stating, “the habitat needs of these species must be addressed at a landscape scale.”¹⁶ Contrary to *Rittenhouse*, however, cases have generally required that an agency pronouncement have the force and effect of law in order to bind the agency.¹⁷ To have the force and effect of law, an agency pronouncement

state. ...

In addition to consideration of counties, individual livestock and poultry operations within an area proposed for an MTR will also be considered.

¹⁶ 305 F.3d 957, 973-74 (9th Cir. 2002); *see also Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002) (stating that “[a]gencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departure” and invalidating EIS because agency did not follow its own regulation).

¹⁷ *See, e.g., Lyng*, 476 U.S. at 937 (stating that “not all agency publications are of binding force”); *Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981) (holding that Social Security Administration Claims Manual was not binding agency rule); *Fano v. O’Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987) (holding that INS Operations Instructions did not bind agency “because they are not an exercise of delegated legislative power and do not

normally “must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.”¹⁸ Petitioners do not argue, nor does the record show, that the Air Force’s Handbook was promulgated according to the APA’s procedural requirements. *See* 5 U.S.C. § 553. Thus the Air Force retained discretion to analyze impacts on livestock by methods other than those contained in the Handbook, and we must address the adequacy of the Air Force’s chosen method according to the arbitrary and capricious standard and the relevant criteria announced in *Westphal*.

Because determining whether the RBTI overflights will have a significant adverse effect on livestock requires resolution of issues of fact, we defer

purport to be anything other than internal house-keeping measures.”); *Western Radio Servs. Co. v. Espy*, 79 F.3d 896, 900-01 (9th Cir. 1996) (“[W]e will review an agency’s alleged noncompliance with an agency pronouncement only if that pronouncement actually has the force and effect of law.”); *Gatter v. Nimmo*, 672 F.2d 343, 347 (3d Cir. 1982) (holding that Veteran’s Administration publications did not bind agency, because they were not promulgated using APA procedural requirements for rulemaking); *Fed. Land Bank in Receivership v. Fed. Intermediate Credit Bank*, 727 F. Supp. 1055, 1058 (D. Miss. 1989) (holding that agency directive not promulgated according to APA procedure did not have force and effect of law).

¹⁸ *U.S. v. Fifty-Three Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir. 1982); *see also Gatter*, 672 F.2d at 347; *McGrail & Rowley v. Babbit*, 986 F. Supp. 1386, 1393-94 (S.D. Fla. 1997); *Fed. Land Bank*, 727 F. Supp. at 1058.

substantially to the Air Force's expert analysis of the relevant data.¹⁹ The EIS and administrative record reveal that the Air Force considered several studies and comments regarding potential impacts on livestock, including those indicating adverse effects. "[I]n making the factual inquiry whether an agency decision was 'arbitrary or capricious,' the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'"²⁰ After reviewing the administrative record, we conclude that the Air Force's determination that no conclusive evidence showed adverse effects, based on its consideration of relevant studies, was not a clear error of judgment. In addition, the Air Force included a discussion of these studies in the main body of the EIS and its appendices, providing "detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved."²¹ We therefore find the EIS's analysis of livestock impacts adequate.

¹⁹ *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976)).

²⁰ *Marsh*, 490 U.S. at 378 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

²¹ *Westphal*, 230 F.3d at 174.

Because the Air Force's analysis complied with NEPA, the FAA's adoption of this portion of the EIS did not violate its obligations under that statute.²²

B. *Economic Effects*

Petitioners' second challenge to the EIS's adequacy concerns its analysis of the RBTI's economic impacts. Specifically, petitioners fault the Air Force and FAA for failing to analyze in depth the effect that the RBTI will have on the values of underlying land for ranching, eco-tourism, and hunting lease income.²³ As studies regarding the effects of low level overflights on rural land values were unavailable, 40 C.F.R. § 1502.22 governed the Air Force's duty to obtain this information. That section provides: "[w]hen an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking." *Id.* It also mandates certain procedures, but only where adverse effects are "reasonably foreseeable." *Id.*

²² 40 C.F.R. § 1506.3(a) (stating that cooperating agency may adopt lead agency's EIS if it concludes that its NEPA requirements have been satisfied).

²³ *See* 42 U.S.C. § 4332(C)(ii) (stating that EIS must discuss environmental effects of proposed action); 40 C.F.R. § 1508.8 (defining "effects" to include economic impacts).

In response to facts similar to the present case, two courts have held that impacts of overflights on land values are not reasonably foreseeable and thus do not require detailed analysis.²⁴ We find the reasoning of these courts persuasive. As in *Lee v. U.S. Air Force*, the flights in the present case will take place along a corridor miles wide, and primarily over areas that have been overflown for years, and potential noise increases experienced by owners of land underlying the RBTI are not significant.²⁵ In addition, the Air Force examined available studies indicating that aircraft overflights near air bases and airports did not cause significant economic impacts. We find the Air Force's consideration of economic impacts adequate. Accordingly, neither the Air Force's nor the FAA's determination that economic impacts were unlikely was arbitrary or capricious.

C. Wake Vortex Effects

Petitioners also allege that the Air Force and FAA failed to take a "hard look" at the effects of wake vortices (trails of disturbed air) that would be

²⁴ *Lee v. U.S. Air Force*, 354 F.3d 1229, 1241-42 (10th Cir. 2004) (holding Air Force's conclusion that decreased land values were not reasonably foreseeable and would be minimal based on prior airspace use and dispersion of flight paths reasonable); *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582, 598 (E.D. Va. 1999), *aff'd without opinion*, 217 F.3d 838 (4th Cir. 2000); *see also Norfolk v. U.S. EPA*, 761 F. Supp. 867, 887-88 (D. Mass. 1991) (upholding EIS that did not quantify property value decline due to proposed action where EIS stated that such decline was unquantifiable), *aff'd without opinion*, 960 F.2d 143 (1st Cir. 1992).

²⁵ *See* 354 F.3d at 1241-42.

generated by aircraft training in the RBTI. Petitioners argue that wake vortices damage ground structures like the windmills used by ranchers to provide water to livestock and wildlife. The Air Force responds that the EIS's discussion of wake vortex effects is adequate, because it "provides a narrative description of what causes vortices and points out that actual, not modeled, B-52 aircraft flying as low as 300 feet [above ground level] ... would generate a surface wind speed of less than 4 mph." Although CEQ regulations require agencies to "make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement,"²⁶ the EIS does not reveal the source of this data. Petitioners point out that the information came from an e-mail from the Boeing Company, stating that tests conducted between 1970 and 1986 "at flight level 300" resulted in "[n]o effect on the ground from the B-52 vortexes."

The Air Force presumably contends that "flight level 300" refers to 300 feet above ground level. In fact, it refers to 30,000 feet above ground level.²⁷ It is not clear whether the Boeing e-mail was a miscommunication, because the Air

²⁶ 40 C.F.R. § 1502.24.

²⁷ Petitioners note that "flight level" is defined at 14 C.F.R. § 1.1 as "three digits that represents hundreds of feet. For example, flight level 250 represents a barometric altimeter indication of 25,000 feet ..." This court also found the term's definition through a simple internet search. See <http://encyclopedia.thefreedictionary.com/Flight%20level>.

Force did not include the actual Boeing study in the administrative record.

Therefore, the e-mail alone cannot provide an adequate basis for the Air Force's conclusion that flights at 300 feet above ground level would generate low surface winds. To uphold that conclusion, we must find a more satisfactory basis than the Boeing e-mail.

The Air Force also relied on a graph providing a "rough estimate" of B1-B wake vortex effects at low altitudes. The administrative record shows that the equation used to generate the chart came from a 1949 aerodynamics text by James Dwinnell, but the Air Force did not include the equation or its inputs in the EIS or administrative record.²⁸ Petitioners urge this court to consider two extra-record documents - excerpts from the Dwinnell text and its expert's declaration - to determine whether the Air Force's chart was reliable and thus constituted a hard look at wake vortex effects.

Generally, the "record rule" limits judicial review of agency action to the administrative record before the agency at the time of its decision.²⁹ This court

²⁸ 40 C.F.R. § 1502.24 states: "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used ... for conclusions in the statement."

²⁹ *Fla. Power & Light v. Lorion*, 470 U.S. 729, 743-44 (1985).

has recognized an exception to the general rule, however, where examination of extra-record materials is necessary to determine whether an agency has adequately considered environmental impacts under NEPA.³⁰ In the present case we find it necessary to look at the Dwinnell text to determine whether the Air Force's use of the equation therein was sound. Because we lack technical expertise in aerodynamics, we also consider extra-record materials to aid our understanding of the science involved.³¹

Our review of the Dwinnell text and the declarations of petitioners' and the Air Force's experts reveal that the Air Force failed to take a hard look at the possible effects of wake turbulence on ground structures. Although an illustration in the EIS shows that the wake turbulence of an airplane at 300 feet above ground would generate wind speed around two mph at thirty-five feet (the height of a windmill as depicted on the illustration), the Air Force's own expert, Dr. Ojars Skujins, admits that a B1-B at this altitude could generate wind speeds

³⁰ *Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir. 1999), *vacated on other grounds on reh'g*, 228 F.3d 559 (5th Cir. 2000); *Sabine River Auth. v. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992); *accord Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14-15 (2d Cir. 1997).

³¹ *Friends of Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993) (stating that courts may consider extra-record evidence when "necessary to explain technical terms or complex subject matter.").

as high as forty-seven mph just twenty-two feet above ground. Dr. Skujins also declares that the chart generated by the Air Force based on the Dwinnell equation is “oversimplified” and “does tend to underestimate the maximum vortex strength.” Dr. Skujins concludes, however, that the Air Force was correct in finding that vortices would not create a significant impact, because average wind speeds in the RBTI area are similar to wind speeds generated by wake vortices.

The Air Force is entitled to rely on its own qualified experts’ reasonable opinions in determining the significance of impacts.³² The Air Force did not rely on Dr. Skujins’s opinion, however, in addressing the wake vortex issue in the EIS process, but rather relied on the Boeing e-mail and the chart generated from the Dwinnell equation. As discussed above, neither document presents a reliable picture of the impact of wake vortices on surface structures, misinforming both public participation and the Air Force’s conclusion.³³ The Air Force’s reliance

³² *Sabine River Auth.*, 951 F.2d at 678.

³³ *See Methow Valley*, 490 U.S. at 349. Although the Air Force now argues that wake vortex effects would be speculative and thus need not be discussed in the EIS, during the NEPA process they took the position that wake vortex effects would not be significant based on the two pieces of evidence discussed. Courts may only uphold agency action on the bases articulated by the agency at the time of the action, and may not consider appellate counsel’s “post hoc rationalizations.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 49-50.

on this data cannot satisfy the hard look requirement of NEPA and thus this portion of the EIS is inadequate.³⁴ This determination applies equally to the FAA, which, as an adopting agency, was required to satisfy itself that the wake vortex discussion in the EIS complied with NEPA.³⁵

D. Effects on Civil and Commercial Aviation

Petitioners' final challenge to the EIS's analysis of environmental effects concerns potential conflicts between training flights in IR-178 and Lancer MOA and civil and commercial aviation in western Texas. Petitioners contend that the Air Force's conclusion in the EIS that the RBTI would have little effect on airspace management is contradicted by an FAA study in the administrative record. In addition, petitioners claim that the Air Force violated its own regulations by failing to adequately address mitigation measures proposed by the FAA study in the EIS.

The Air Force argues that effects on aviation are "aeronautical" rather than "environmental," and thus do not require discussion in an EIS. Counsel for the Air Force acknowledged in oral argument, however, the difficulty involved in

³⁴ See *Westphal*, 230 F.3d at 174-75 (stating that "the conclusions upon which an [EIS] is based must be supported by evidence in the administrative record.")

³⁵ 40 C.F.R. § 1506.3(a); Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, question 30, 46 Fed. Reg. 18026 (Mar. 23, 1981).

drawing a bright line between effects that are purely “aeronautical” and those that are “environmental.” Because “[e]nvironment’ means something more than rocks, trees, and streams, or the amount of air pollution [- i]t encompasses all the factors that affect the quality of life,”³⁶ we are reluctant to draw such a line.

Civil and commercial aviation are part of the modern human environment broadly defined, and because the RBTI would impact aviation, NEPA required the Air Force to address that impact in the EIS.³⁷

“It is a familiar rule of administrative law that an agency must abide by its own regulations.”³⁸ The Air Force regulations implementing NEPA provide that an EIS must include “responses to comments on the Draft EIS by modifying the text and referring in the appendix to where the comment is addressed or providing a written explanation in the comments section, or both.”³⁹ In the present case the Air Force responded to the FAA solely by modifying the text. It did not refer in the appendix to where the FAA’s comments were addressed or provide any written explanation, neglecting much of its responsibilities under the

³⁶ *Jones v. U.S. Dep’t of Hous. and Urban Dev.*, 390 F. Supp. 579, 591 (E.D. La. 1974).

³⁷ 42 U.S.C. § 4332(C)(i).

³⁸ *Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990).

³⁹ 32 C.F.R. § 989.19(d).

regulation. We therefore conclude that this portion of the EIS is also inadequate.

V. Mitigation

A. *Omission of Mitigation Discussion in Draft EIS*

In addition to their complaints regarding the EIS's environmental inadequacies, petitioners take issue with several aspects of the EIS's discussion of mitigation measures. First, they argue that the Air Force and FAA violated NEPA by failing to discuss mitigation measures in the draft EIS. CEQ regulations require agencies to prepare a draft EIS prior to issuance of a final EIS.⁴⁰ The draft "must fulfill and satisfy to the fullest extent possible the requirements established for final statements."⁴¹ A final EIS must contain a discussion of possible mitigation measures.⁴² Whether the draft EIS must also contain a discussion of mitigation measures is a question of first impression in this circuit.⁴³

⁴⁰ 40 C.F.R. § 1502.9(a).

⁴¹ *Id.*

⁴² *Methow Valley*, 490 U.S. at 351-52.

⁴³ As yet, the issue appears to have been directly addressed by only the Eastern District of California, in *Westlands Water District v. U.S. Dep't of the Interior*, 275 F. Supp 2d 1157, 1187-89 (E.D. Cal. 2002). In that case, the Department of the Interior

The Supreme Court has stated that, absent a discussion of possible mitigation measures, “neither the agency nor other interested individuals can properly evaluate the severity of the adverse effects.”⁴⁴ Although the Court there referred to inclusion of a mitigation discussion in a final EIS, the same reasoning can apply to the draft. Under the structure created by the CEQ regulations, the lead agency must request comments from other agencies and the public on the draft EIS before preparing the final EIS.⁴⁵ Following that structure in the present case, the Air Force provided a public comment period on the draft which closed before the Air Force issued the final EIS. Thus, by excluding mitigation measures from the draft, the Air Force prevented the public from commenting on those measures during the comment period.

On the other hand, even if the agency omits the mitigation discussion from the draft, nothing prevents the public from commenting on the mitigation measures once the agency issues the final EIS, and petitioners do not argue that

prepared a draft EIS without a discussion of mitigation measures that were later included in the final EIS. The court found the EIS inadequate under NEPA. The Ninth Circuit later reversed the district court, finding that the Department’s draft EIS did contain a discussion of mitigation measures. 376 F.3d 853, 872-75 (9th Cir. 2004). Thus, the court of appeals did not address the question of whether the final EIS would have been adequate had the draft not contained such a discussion.

⁴⁴ *Methow Valley*, 490 U.S. at 352.

⁴⁵ 40 C.F.R. § 1503.1.

they were prevented from commenting during the two months between the issuance of the final EIS and the Air Force's ROD.⁴⁶ Given these considerations, we find it unnecessary in the present case to adopt a rigid rule that a draft EIS *must* contain a mitigation discussion, although we note that inclusion of such a discussion is ideal.

B. Adequacy of Mitigation Discussion in Final EIS

Petitioners also attack the discussion of mitigation measures in the final EIS and those adopted by the Air Force in its ROD.⁴⁷ First, petitioners argue that the final EIS does not adequately discuss measures to mitigate potential adverse effects on underlying livestock operations. Contrary to petitioners' assertions, however, the final EIS does recognize that overflights may injure livestock and provides mitigation in the form of a claims process for ranchers whose livestock suffer injury. In light of the Air Force's non-arbitrary

⁴⁶ See 40 C.F.R. § 1503.1(b) ("An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision"). The public can access the final EIS under the Freedom of Information Act. 42 U.S.C. § 4332(C). The agency may not issue its decision until thirty days after publication of notice of the final EIS in the Federal Register. 40 C.F.R. §1506.10(b)(2). Thus, the public can obtain and comment on the final EIS during that period.

⁴⁷ CEQ regulations require a discussion of possible mitigation measures in an EIS. 40 C.F.R. §§ 1502.14(f), 1502.16(h).

conclusion that adverse effects on livestock were unlikely, we find the Air Force's limited discussion of measures to mitigate those effects reasonable.⁴⁸

Petitioners also argue that reducing the annual number of sorties from the proposed 2,600 to 1,560 and utilizing existing military airspace to the maximum extent possible in creating Lancer MOA did not provide any mitigation because the RBTI would still impose more overflights on certain areas than they had experienced before implementation of the RBTI. This argument is premised on a misunderstanding of the term "mitigation." The CEQ regulations define "mitigation" as "[a]voiding the impact altogether by not taking a certain action or parts of an action" or "[m]inimizing impacts by limiting the degree or magnitude of the action and its implementation."⁴⁹ By reducing the number of sorties proposed for Alternative B by over 1,000 and avoiding creation of new airspace, the Air Force limited the magnitude of the RBTI. Thus, petitioners' argument that these measures did not truly "mitigate" is without merit, and the EIS is not invalid for failure to adequately address mitigation measures.

⁴⁸ See *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 377 (D.C. Cir. 1981) ("NEPA does not require federal agencies to examine every possible environmental consequence. Detailed analysis is required only where impacts are likely.")

⁴⁹ 40 C.F.R. § 1508.20.

VI. Extra-Record Materials

In addition to the evidence pertaining to wake vortex effects, petitioners sought in the Air Force cases to introduce extra-record evidence regarding livestock, socioeconomic, and noise effects. The district court excluded all extra-record submissions. Petitioners argue that, by not considering the extra-record evidence, the district court could not adequately review the Air Force's NEPA compliance.

Because district courts have discretion to consider extra-record evidence, we review the district court's decision not to consider such evidence for abuse of discretion.⁵⁰ "A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts."⁵¹ In the present case, the district court correctly stated the law regarding extra-record evidence in NEPA cases.⁵² Without

⁵⁰ *Northcoast Envtl. Ctr. v. Glickman*, 136 F.3d 660, 665 (9th Cir. 1998); *Hoffman*, 132 F.3d at 16; see *Davidson Country Oil Supply Co. Inc. v. Klockner, Inc.*, 908 F.2d 1238, 1245 (5th Cir. 1990) (stating that "[t]he trial court's discretion to admit or exclude evidence is generally broad").

⁵¹ *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003).

⁵² *Davis Mountains*, 249 F. Supp. 2d at 775-76; *Welch*, 249 F. Supp. 2d at 809-10; see *supra* section IV.C.

discussing its rationale, however, it excluded all of petitioners' proffered extra-record evidence.

As discussed in section IV.C., consideration of the Dwinell text and expert declarations is necessary to determine whether the Air Force took a hard look at wake vortex effects. Thus, by excluding that evidence, the district court "misapplie[d] the law to the facts." Because this court has reviewed the extra-record submissions in its *de novo* review, however, we need not remand to the district court, but instead dispose of this issue by remanding to the Air Force to prepare an adequate supplemental EIS.

The remaining items of evidence consist of declarations of DMTPHA members and experts on livestock, economic, and noise effects of the RBTI. We conclude that the district court did not abuse its discretion in excluding this evidence. The DMTPHA members' declarations are largely cumulative of evidence already in the administrative record. In addition, the Air Force was entitled to rely on the reasonable opinions of its own experts regarding livestock, economic, and noise effects.⁵³ None of petitioners' proffered evidence on these issues shows that those experts' opinions were unreasonable, but instead

⁵³ *Sabine River Auth.*, 951 F.2d at 678.

presents opposing expert opinions. Because the Air Force's reliance on its own experts does not render its decisions arbitrary and capricious, admission of petitioners' opposing expert opinions would not show that the Air Force failed to take a hard look at these effects. Thus, admission of petitioners' extra-record evidence on all issues other than wake vortex was unnecessary to determine whether the Air Force adequately considered environmental impacts of the RBTI⁵⁴, and the district court's exclusion of that evidence was not an abuse of discretion.

VII. NEPA Documentation for Existing IR-178

Petitioners also claim that the Air Force failed to prepare necessary supplemental EIS's for IR-178 due to changes in the route and underlying land since the route's creation in 1985. CEQ regulations require agencies to supplement an EIS if the agency makes substantial changes to the proposed action or significant new circumstances or information arise bearing on the proposed action or its impacts.⁵⁵ A claim asserting that NEPA documentation must be supplemented has three elements: (1) ongoing or remaining federal

⁵⁴ See *Sierra Club v. Peterson*, 185 F.3d 349, 369-70 (5th Cir. 1999), vacated on other grounds on reh'g, 228 F.3d 559 (5th Cir. 2000); *Sabine River*, 951 F.2d at 678; accord *Nat'l Audubon Soc'y v. Hoffman*, 132 F.3d 7, 14-15 (2d Cir. 1997).

⁵⁵ 40 C.F.R. § 1502.9(c)(1).

action and (2) new circumstances or information relevant to the environmental impact of the proposed action that are (3) significant enough to warrant supplementation of existing NEPA documents.⁵⁶

The district court held this claim time-barred, finding that the Air Force's alleged NEPA failures occurred more than six years before petitioners filed suit.⁵⁷ Although NEPA and the APA do not contain limitations periods, this court has held that claims under the APA are subject to the general six-year statute of limitations for claims against the government.⁵⁸ The limitations period begins to run when the right of action first accrues.⁵⁹ Because petitioners allege

⁵⁶ *Marsh*, 490 U.S. at 374.

⁵⁷ *Davis Mountains*, 249 F. Supp. 2d at 794-96. A short history of IR-178 is necessary to understand petitioners' complaint. The Air Force completed an Environmental Assessment (EA) and established the route in 1985 as IR-165. When the Air Force combined IR-165 with IR-128/180 in 1991, it changed the route name to IR-178. In 1994 an alternate exit was added to the route, taken from IR-144. The Air Force has no NEPA documentation for IR-144. Petitioners contend that these changes, in addition to changes in underlying land use, necessitated preparation of some kind of NEPA documentation - either a supplemental EA or EIS.

⁵⁸ 28 U.S.C. § 2401(a) (“[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.”); *Geyen v. Marsh*, 775 F.2d 1303, 1306-07 (5th Cir. 1985); see also *Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180, 186 (4th Cir. 1999).

⁵⁹ 28 U.S.C. § 2401(a); 5 U.S.C. § 704; *Glendening*, 174 F.3d at 186.

agency inaction or delay under 5 U.S.C. § 706(1), we must determine whether this cause of action accrued more than six years before petitioners brought suit.

Petitioners argue that the limitations period does not apply to its IR-178 claim, because the Air Force's actions regarding IR-178 are ongoing. At least one court has concluded that the six-year limitations period does not apply to claims of unlawful delay under § 706(1), reasoning that unlawful delay of a statutory duty is a continuing violation of the statute.⁶⁰ Applying this line of reasoning in the present case would effectively remove the limitations period from claims that an agency has unlawfully delayed supplementation of NEPA documents, because a necessary element of such a claim is ongoing agency action.

We find the better view to be that a claim for agency delay in supplementing NEPA documents accrues when circumstances requiring supplementation first arise. Such a view prevents plaintiffs from circumventing the limitations period by phrasing their complaints against agencies as continuous delay (from the moment they failed to do something required by NEPA) rather

⁶⁰ *Am. Canoe Ass'n v. U.S. EPA*, 30 F. Supp. 2d 908, 925-26 (E.D. Va. 1998) (stating that applying limitations period to claim of unlawful delay would be "grossly inappropriate, in that it would mean that [the agency] could immunize its allegedly unreasonable delay from judicial review simply by extending that delay for six years.")

than a failure to act at a discrete point in time. Petitioners argue that certain modifications to IR-178 required supplemental NEPA documentation and that the Air Force did not prepare it. That cause of action accrued when the modifications were implemented without the required documentation. Because all modifications that may have warranted supplementation occurred more than six years before petitioners filed suit, petitioners' supplementation claim is barred.⁶¹

VIII. FAA's Procedure on Limited Remand

As published in the National Flight Data Digest, modified IR-178 included eleven segments with floor altitudes lower than those evaluated in the EIS. The FAA claimed this was an inadvertent error and this court granted a limited remand to correct it. Petitioners now argue that the FAA failed to follow its own regulations in making the correction.⁶²

⁶¹ Petitioners also assert that the original EA for IR-165 was insufficient under NEPA. This claim concerns past, rather than continuing, agency action (the Air Force's adoption of the EA). Because this past action occurred in 1985, the claim is barred by 28 U.S.C. § 2401(a).

⁶² Regardless of whether the FAA followed its own procedures on the limited remand, petitioners do not contest that the RBTI altitudes now conform to those evaluated in the EIS. Thus, their original argument that implementation of unevaluated adverse effects (lower altitudes) invalidates the EIS is now moot.

The FAA's Order on Special Military Operations, FAA Order 7610.4J, provides certain procedures for establishing or modifying a MTR. Order 7610.4J requires, *inter alia*, a certain form, coordination with the Regional Air Traffic Control Center and others, and consideration of minimization of disturbance to persons and property on the ground. The FAA did not follow these procedures on remand, and argues that Order 7610.4J does not apply to corrections like those at issue, which originate within the FAA. We find the FAA's argument persuasive. Order 7610.4J speaks of route revisions sought by "military unit[s]," not ministerial revisions to correct internal error. Moreover, the FAA sought the remand to correct the altitudes to conform to those in the EIS, which had already considered minimization of ground disturbance. Because the result would be the same—modification of the altitudes to conform to the EIS—whether the FAA followed the procedure of Order 7610.4J or not, petitioners have not been prejudiced by the FAA's chosen procedure on remand, and we see no reason to invalidate the correction.⁶³

⁶³ *Pacific Molasses Co. v. FTC*, 356 F.2d 386, 390 (5th Cir. 1966). Petitioners also argue that the FAA exceeded the scope of the limited remand by issuing an Addendum to the Lancer MOA NRDD. Petitioners contend that the FAA issued this document to shore up its assertion that the NRDD served as the ROD for both the Lancer MOA and modified IR-178 (see discussion below). As discussed in the next section, we find the NRDD as it existed before the FAA added the Addendum adequate as a ROD for the entire RBTI. Thus the FAA did not exceed the scope of the limited remand by issuing

IX. ROD for IR-178 Modifications

Lastly, petitioners argue that the FAA failed to issue a ROD for the IR-178 modifications.⁶⁴ The FAA responds that, because IR-178 and Lancer MOA are “environmentally and aeronautically linked,” its Non-Rulemaking Decision Document (NRDD) of December 11, 2001 for Lancer MOA serves as the ROD for both Lancer MOA and modified IR-178. Because we find the EIS inadequate and therefore must set aside both the Air Force’s and FAA’s RODs approving the RBTI, we need not address this issue.

X. Conclusion

For the foregoing reasons we vacate the decisions of the district court, the Air Force ROD and the FAA orders approving the RBTI. We remand to the Air Force and FAA to prepare a supplemental EIS which adequately addresses wake

the Addendum, which states: “[b]eyond describing these inadvertent altitude discrepancies and documenting their correction, this addendum does not otherwise reopen the [] NRDD.”

⁶⁴ Petitioners’ additional argument that the FAA failed to evaluate environmental factors within the NEPA process is without merit. Petitioners argue that the FAA violated NEPA by conducting studies after the Air Force published the final EIS. NEPA, however, allows a cooperating agency to adopt a lead agency’s EIS after its own review. 40 C.F.R. § 1506.3. Thus, in order for a cooperating agency to adopt the lead agency’s EIS, the NEPA process actually requires the cooperating agency to do some independent study *after* the final EIS has been prepared. Petitioners do not offer any support for the notion that the “NEPA process” concludes once the lead agency issues the final EIS.

vortex impacts and FAA comments as required by CEQ and Air Force
regulations.

Appendix

1. APA - Administrative Procedure Act
2. CEQ - Council on Environmental Quality
3. DMTPHA - Davis Mountains Trans-Pecos Heritage Association
4. EIS - Environmental Impact Statement
5. FAA - Federal Aviation Administration
6. IR - Instrument Route
7. MOA - Military Operations Area
8. MTR - Military Training Route
9. NEPA - National Environmental Policy Act
10. NRDD - Non-Rulemaking Decision Document
11. RBTI - Realistic Bomber Training Initiative
11. ROD - Record of Decision



United States Court of Appeals
Fifth Circuit

FILED

January 31, 2005

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 02-60288

DAVIS MOUNTAINS TRANS-PECOS HERITAGE
ASSOCIATION, a Texas non-profit corporation,

Petitioner,

versus

FEDERAL AVIATION ADMINISTRATION;
MARION C. BLAKEY, Administrator, FEDERAL
AVIATION ADMINISTRATION; NORMAN Y.
MINETA, SECRETARY, DEPARTMENT OF
TRANSPORTATION,

Respondents.

No. 03-10506

DAVIS MOUNTAINS TRANS-PECOS HERITAGE
ASSOCIATION; DALE TOONE; SUSAN TOONE;
TIM LEARY; REXANN LEARY; EARL BAKER;
SYLVIA BAKER; MARK DAUGHERTY; ANN
DAUGHERTY; DICK R. HOLLAND; J. P. BRYAN;
JACKSON BEN LOVE, JR.; KAARE J. REEME,

Plaintiffs-Appellants,

versus

UNITED STATES AIR FORCE; JAMES G. ROCHE;
Secretary United States Air Force; UNITED STATES
DEPARTMENT OF DEFENSE; DONALD H. RUMSFIELD,
Secretary of Defense,

Defendants-Appellees.

No. 03-10528

BUSTER WELCH; JOHN F. OUDT; LESA OUDT;
JOHN DIRK OUDT; CINDY ANN SPIRES, ET AL,

Plaintiffs-Appellants,

versus

UNITED STATES AIR FORCE; F. WHITTEN
PETERS, Secretary of the United States Air Force;
WENDELL L. GRIFFIN, Colonel, Commander,
7th Bomb Wing, Dyess Holloman Air Force Base;
CURTIS M. BEDKE, Brigadier General, Commander,
2nd Bomb Wing, Barksdale Air Force Base; UNITED
STATES DEPARTMENT OF DEFENSE; DONALD H.
RUMSFIELD, SECRETARY DEPARTMENT OF
DEFENSE,

Defendants-Appellees.

Petitions for Review of an Order

of the Federal Aviation Administration

ON PETITIONS FOR REHEARING

Before REAVLEY, JONES and DENNIS, Circuit Judges.

PER CURIAM: *

The petition for rehearing of The Air force is granted to this extent: The operation of the Realistic Bomber Training Initiative may continue pending outcome of the supplemental environmental impact statement under conditions of operation set by the district court. The case is remanded to that court for that purpose.

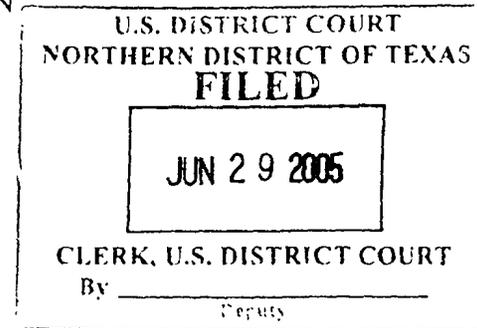
The petitions for rehearing are otherwise denied.

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

DAVIS MOUNTAINS TRANS-PECOS)
HERITAGE ASSOCIATION, et al.,)
)
Plaintiffs,)
)
v.)
)
UNITED STATES AIR FORCE, et al.,)
)
Defendants.)



Civil Action No.
5:01-CV-289-C

ORDER

On this date the Court considered:

- (1) Plaintiffs' (DMTPHA) Motion and Brief for Hearing on Operating Conditions for RBTI Pending Completion of SEIS and Issuance of Agency Decisions on Remand, filed April 21, 2005, by Davis Mountains Trans-Pecos Heritage Association, *et al.* ("Plaintiffs");
- (2) Defendants' Opposition and Brief in Response to Plaintiffs' Motion for Post-remand Hearing, filed May 11, 2005, by the United States Air Force, *et al.* ("Defendants");
- (3) Plaintiffs' (DMTPHA) Brief Addressing Operating Conditions for RBTI Pending Completion of SEIS and Issuance of Agency Decisions on Remand, filed March 9, 2005;

- (4) Defendants' Corrected Brief on Remand, filed April 27, 2005;¹
- (5) Plaintiffs' (DMTPHA) Reply Brief Addressing Operating Conditions for RBTI Pending Completion of SEIS and Issuance of Agency Decisions on Remand, filed April 15, 2005; and
- (6) Defendants' Post-Remand Reply Brief, filed April 15, 2005.

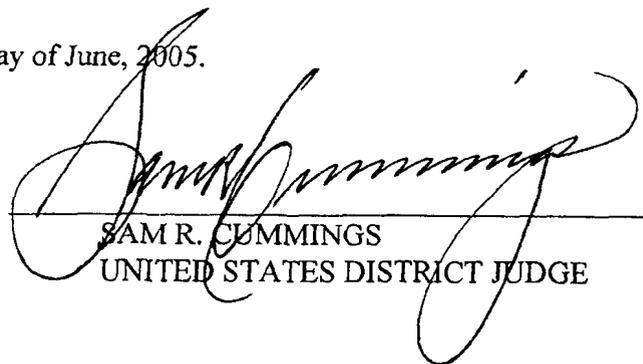
After considering all the relevant arguments and evidence, this Court finds as follows:

- (1) Plaintiffs' Motion for Hearing on Operating Conditions for RBTI Pending Completion of SEIS and Issuance of Agency Decisions on Remand is **DENIED** for the reason that adequate briefing on the issues has been completed by the parties;
- (2) The Fifth Circuit Court of Appeals Order issued January 31, 2005 On Petition for Rehearing allowed the operation of the RBTI to continue pending the outcome of the supplemental environmental impact statement. The Fifth Circuit directed this Court to set the conditions under which the RBTI may continue;
- (3) On January 12, 2005, the Air Force issued Flight Control Information File A05-01 ("FCIF A05-01"), titled "IR-178 and LANCER MOA Procedures," to Air Combat Command, Air National Guard, and Air Force Reserve Command units;

¹Defendants filed Defendants' Brief on Remand on March 10, 2005. Defendants filed their Corrected Brief on Remand because the declarations and exhibits filed in support of Defendants' post-remand brief did not conform to the appendix requirement of Local Rule 7.1(i).

- (4) FCIF A05-01 directs the following restrictions to be in effect until further notice: (a) Aircrews utilizing IR-178 will fly no lower than 500 ft. AGL, AP/1B altitude, or minimum altitudes set by the controlling airspace manager, whichever is higher, and (b) Aircrews utilizing the LANCER MOA will fly no lower than 12,000 MSL;
- (5) The RBTI may continue as previously conducted with the addition of the FCIF A05-01 restrictions, pending the completion of SEIS and issuance of agency decisions on remand;
- (6) The restrictions addressed by FCIF A05-01 adequately address the relevant issues until such time as the SEIS and agency decisions are completed; and
- (7) The RBTI is otherwise unchanged pending the SEIS and agency decisions on remand.

SO ORDERED this 29th day of June, 2005.


SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE



(IR-178) and the Lancer Military Operations Area (MOA). I understand the strategies and tactics employed by B-1 and B-52 aircrews. I am familiar with the litigation, *Davis Mountains v. USAF*. It is my personal and professional opinion that losing the ability to use IR-178 and the Lancer MOA as currently configured will cause grievous and irreparable harm to Air Force training and the ability of the Air Force to meet its national defense objectives.

3. Should this Court grant our petition for clarification, the Air Force can make the following temporary operational changes to the RBTI between the time the Court grants the petition and until the Air Force completes the Record of Decision for the Supplemental Environmental Impact Statement (SEIS) and the Federal Aviation Administration acts upon it:

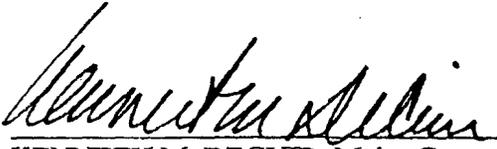
a. Aircraft will fly no lower than 500 feet Above Ground Level (500' AGL) or the published minimum altitudes on IR-178 as set forth in the AP/1B, whichever is higher, while engaged in normal training operations on IR-178.

b. Aircraft will not fly lower than 12,000 feet Mean Sea Level (12,000' MSL) during normal training operations in the Lancer Military Operations Area.

4. These voluntary operational changes are designed to minimize the potential for impacts on civil aviation and ground structures, which the Court determined was inadequately analyzed. The changes to the bomber training program, which would be in effect while the Air Force completes the SEIS and the FAA takes action accordingly, do

not, in my opinion, allow aircrews to fully meet necessary realistic training objectives. However, should the Court allow these temporary measures, our aircrews will adhere to them in the interim to preserve the opportunity to continue training as realistically as possible.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 5 JANUARY, 2005.


KENNETH M. DECUIR, Major General
Air Combat Command
Director of Air and Space Operations
Langley Air Force Base, VA 23665-2789



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DAVIS MOUNTAINS TRANS-PECOS
HERITAGE ASSOCIATION,

Plaintiffs-Appellants,

v.

UNITED STATES AIR FORCE,
et. al.

Defendants-Appellees.

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Case No. 03-10506

**DECLARATION OF
MAJOR GENERAL
KENNETH M. DECUIR**

Pursuant to 28 U.S.C. § 1746, I declare as follows:

1. I am Major General Kenneth M. DeCuir. Since March of 2004, I have served as the Director of Air and Space Operations for the Air Combat Command (ACC) at Langley Air Force Base, Virginia. Before that I served in various flying and staff positions within the United States Air Force (USAF) over the past 30 years. I make this declaration based on my own personal knowledge and experience, as well as information made available to me during the course of my commissioned service with the Air Force.

2. Air Combat Command's mission is to provide the primary force of combat air power to America's war fighting commands; to support global implementation of the United States' national security strategy; to operate fighter, bomber, attack,

reconnaissance, battle management and electronic combat aircraft; to operate command, control, communications and intelligence systems; and to conduct global information operations. My duties as Director of Air and Space Operations include direction of operational planning, training and command and control functions to deploy and employ active duty and Reserve component combat air forces, including more than 1,700 aircraft and their associated pilots worldwide, in support of United States security objectives.

3. I am familiar with the types of airspace used for training aviators throughout the Air Combat Command. I am familiar with the airspace and training assets associated with the Realistic Bomber Training Initiative (RBTI), which includes Instrument Route 178 (IR-178) and the Lancer Military Operations Area (MOA). I understand the strategies and tactics employed by B-1 and B-52 aircrews. I am familiar with other training ranges the bombers in question would have to resort to using as a replacement for RBTI. I am familiar with the litigation, *Davis Mountains vs. USAF*. It is my personal and professional opinion that losing the ability to use IR-178 and the Lancer MOA as currently configured will cause grievous and irreparable harm to Air Force training and the ability of the Air Force to meet its national defense objectives.

4. Dyess Air Force Base (AFB), Texas, and Barksdale AFB, Louisiana, units are home to over 70% of Air Combat Command's bomber force. The RBTI consists of consolidated and centralized training assets which maximize training opportunities per flying hour for Dyess and Barksdale AFB, B-1 and B-52 bomber aircrews. It provides

bomber aircrews the opportunity to develop the necessary skills and readiness for combat by linking a realistic sequence and speed of training activities into a single, cohesive mission resembling combat. It improves the efficiency and effectiveness of bomber aircrew training by situating ground-based facilities and airspace close enough to one another and to Dyess and Barksdale Air Force bases to maximize combat training time.

5. RBTI is the primary training airspace with underlying electronic assets for B-1s at Dyess AFB. Dyess AFB has four B-1 squadrons—one operational squadron, two training squadrons and one test squadron. The Dyess FTU uses electronic assets for subjecting bomber aircraft to simulated electronic attack on nearly every sortie.

Operational unit training is more flexible, but the Air Force Ready Aircrew Program (the combat training program designed to focus training on capabilities needed to accomplish a unit's core tasked mission) nevertheless requires each crewmember to get exposure to electronic attack on an absolute minimum of 50% of training sorties and 20 low altitude events per year. RBTI is currently the primary venue for Dyess B-1 crews to meet these requirements.

6. RBTI is also the primary training airspace with underlying electronic assets for B-52s at Barksdale AFB. Barksdale AFB has four B-52 squadrons—three operational squadrons (including one Reserve squadron) and one squadron in the FTU—as well as a weapons school and a test and evaluation unit. The Barksdale FTU uses ESS for electronic attack on nearly every sortie. Again, operational training is more flexible, but

the Ready Aircrew Program requires electronic attack to train Barksdale's Electronic Warfare Officers, who are part of the B-52 aircrew. Barksdale uses Lancer MOA on approximately 60% of its sorties.

7. Lancer MOA is capable of providing training for a variety of missions, including close air support (CAS) for ground troops, time sensitive target (TST), electronic attack (EA), air refueling, defensive tactics (DT), and dissimilar air combat training (DACT). Units from both Dyess and Barksdale use the Lancer MOA for aircrew pre-deployment and post-deployment training.

8. IR-178 is also used by units from both Dyess and Barksdale AFB. Low altitude employment capability and its associated training is a national resource. No other air force in the world maintains the all-weather, day/night, low-level flying capability of the USAF. Low altitude tactics drive the adversary's operational planning and strategic defense program to a surface-to-stratosphere air defense system. Low-altitude flight allows, on the very first day of a conflict, increased options for combatant commanders as they prosecute the air war and support the joint campaign. Retaining a low altitude capability will force potential adversaries to expend resources to counter the possibility of a multi-dimensional attack. Since the Gulf War, "packages" (groups of aircraft) at medium/high altitude are the predictable standard, but there may be times and places where low altitude ingress/egress works best and creates surprise. Aircrews who train only to fight the last war are doomed to failure. If aircrews are stopped from training at

low altitude, commanders will be limited in how they employ bomber aircraft and the enemy can plan better to counter our forces.

9. Certain threats can best be defeated in the low altitude environment, particularly early in a conflict, or where the stakes are high and some risk is acceptable. Low altitude flying is a viable tactic for surprise strike scenarios. Few early warning radars are able to track a low altitude strike aircraft, but almost all early warning radars can detect large force "packages." If an enemy infiltrates a high altitude "package" with air-to-air aircraft, descending rapidly to low altitude may be the only survivable tactic the friendly forces can employ. The Global War on Terrorism with its numerous fleeting targets proves the need to maintain a capability for rapid global strike scenarios utilizing low altitude tactics. A single B-1 could penetrate territory without radar detection at low-level, evade all threats, and then climb quickly to high altitude for weapons delivery. This tactic is especially critical to acquire mobile or time sensitive targets where the location is not known until just prior to strike and access may not be readily available. As with all combat skills, night and day low-level capability is a perishable commodity. Aircrews must train routinely in the low altitude regime to maintain this capability.

10. The B-1 has several low altitude mission scenarios. It has a low altitude mission requirement to follow terrain at night or in poor weather conditions. The B-1 can be tasked to employ mines, which can only be released from low altitude. Aircrews must be able to achieve low altitude ingress on the way to a high altitude target. They also

must be able to counter high altitude threats (e.g., a surprise attack by an enemy fighter) with a dive to low altitude. The 49th Training Squadron at Barksdale AFB uses IR-178 two to three times a month for low-level B-52 mission training as well. Closing IR-178 would force the Barksdale B-52s to try to schedule routes at the Granite Peak site at the Utah Test and Training Range for low-level training. This would increase sortie duration by about four hours and further aggravate the maintenance phase issue, described below. In FY 2004, 1,088 sorties were scheduled on IR-178. The actual numbers flown were less due to poor weather conditions and other limiting factors.

11. The Lancer MOA is critical for the higher altitude missions of the B-1 and B-52. In FY 2004, 1,697 sorties were flown in the Lancer MOA or in the Air Traffic Control Assigned Airspace (ATCAA) above the MOA. Aircrews scheduled 797 sorties for Lancer in FY 2003. It was activated for use and actually used 275 days in FY 2003. The FY 2003 numbers were lower than normal because of deployments in support of Operation Iraqi Freedom. From 28 Mar 02 (the date the MOA was first used) to 30 Sep 02, aircrews flew 266 sorties in Lancer. It was scheduled for use on 127 days but only activated and actually used for 107 days in FY 2002.

12. Training opportunities would be irretrievably lost and other costs incurred if Dyess and Barksdale units were forced to seek training airspace and assets elsewhere. No other site offers sequenced realistic training activities in a single, cohesive mission similar to what aircrews encounter in combat. Another common significant negative

impact on training if RBTI is lost is the amount of unproductive transit time required if aircrews must train elsewhere, which, in turn, negatively effects combat readiness and the Air Force's ability to support national security objectives under current worldwide threats. Aircrews would have to fly much longer sorties to get less effective training. The longer sorties would cause them to fly fewer sorties overall. If required to train elsewhere, training would be more difficult to schedule as B-1 and B-52 aircrews would now have to compete with other primary users of alternate locations. As the number of available training locations decreases, the density of operations in remaining locations would increase. This increase generally results in increased safety risks due to airspace conflicts and higher costs due to extended range operating hours (e.g., civilian or contractor overtime or over hires). Units from other than Dyess and Barksdale AFB would lose training as well if IR-178 and Lancer MOA were not available. Many aircraft from many Air Force bases train on IR-178 and in Lancer MOA, including use of the Pecos or Snyder electronic assets. The following units are a smaller part of Air Combat Command's bomber force, and they only use RBTI as an alternative with enhanced capability relative to training airspace and routes closer to their home station. Nevertheless, B-1s from Dyess AFB, TX and Ellsworth AFB, SD use both IR-178 and Lancer MOA. B-52s from Barksdale AFB, LA and Minot AFB, ND use both. F-16s from Cannon AFB, NM use both. C-130s from Kirtland AFB, NM and German Air Force Tornados from Holloman AFB, NM use IR-178. E-4 Airborne Weapons and

Control Systems (AWACS) from Tinker AFB, OK; Navy P-3s from Miramar, CA; and T-1 trainers from Laughlin and Vance AFBs, TX all use Lancer MOA.

13. Losing IR-178 and Lancer MOA would severely limit primary and alternate mission capability and would have ever-increasing second order effects on training. As a safety measure, the number of hours in a crew duty day is limited by Air Force instructions to 12 hours per day in most cases. In some cases, the instruction can be waived to 16 hours per day for FTU crews, but this is an exception. Pre-flight maintenance inspections for bombers can take up to eight hours. If maintenance is required, this time eats into the crew duty day. If crews were required to use more of their crew duty hours flying unproductive transit time, there would not be enough time for the aircraft to be "turned" or rotated for another flight crew to train in any given day, particularly if maintenance were necessary. Because of its close proximity (10 minutes in the air from Dyess AFB, for example), RBTI provides critical operational flexibility when maintenance, weather or scheduling conflicts would otherwise cause unrecoverable delays.

14. Unproductive, longer sorties also would have negative effects on aircraft maintenance. The negative effect of losing Lancer MOA and IR-178 on the maintenance "phase" would be common for both bases. Much like an automobile, military aircraft require scheduled maintenance after a certain number of flying hours, as opposed to miles. Using the B-52 as an example, typical maintenance phasing occurs as follows.

There is a pre-flight and post-flight maintenance check after each flight of the aircraft. After every 50 flying hours, a more detailed inspection occurs. After every 300 flying hours (which currently occurs roughly once a year), "phased" maintenance must occur. This involves scheduling a hangar (which is dependent on maintenance personnel manning) and putting the aircraft into a hangar for more detailed maintenance from two to three weeks. Every 300 hours, one phase of a three-part maintenance schedule is accomplished. Finally, every five years, the B-52 goes to a depot for approximately six months for complete overhaul. Increased unproductive transit time will nevertheless increase the number of hours logged on an aircraft and accelerate the maintenance schedule relative to the amount of training accomplished. Using the B-52s as an example again, Barksdale's phase capacity is not quite enough to cover the flying hours it needs to accomplish its required training even with RBTI in place. If average sortie duration increases due to increased unproductive transit times to other electronic asset sites, Barksdale aircrews will be unable to fly all of the training sorties required by the Ready Aircrew Program. A possible, although extremely costly, solution for Barksdale AFB would be to build another maintenance hanger and increase manpower authorizations by approximately 60 maintenance phase personnel. The estimated cost for a single B-52 maintenance bay is \$11 million. This would require congressional Military Construction authorization.

15. Another common impact of losing RBTI for both Dyess and Barksdale AFB

would be the inability to perform "crew swaps;" i.e., training more than one crew in the same aircraft with an intervening landing while keeping the engines running. These crew swaps do not require lengthy pre-flight maintenance checks when the engines continue to run. If forced to train elsewhere, the aircraft would not have enough fuel to take off again to the farther destination. If aerial refueling is required, refueling aircraft would have to be scheduled for the mission, further complicating the process and requiring more limited resources. If a refueling mission were already planned with the sortie, the refueling aircraft would have to accomplish the refueling twice for the same amount of training for each bomber crew. An example of the efficiency achieved by B-1 units is that typically, in only two and one-half hours using Lancer MOA and IR-178, a Dyess B-1 crew can accomplish low-level flight and terrain following on IR-178 as well as close-air support and high-level maneuvering in Lancer MOA. No other airspace/low-level combination provides this flexibility for aircrews stationed at Dyess AFB. The current configuration allows training for at least four and up to six pilots per day on each scheduled aircraft.

16. RBTI-trained aircrews are frequently employed in combat. Since RBTI was implemented in March 2002, Dyess B-1s have been deployed three times for a total of nine months. Since October 2001, the Barksdale B-52 squadrons have been deployed a total of 30 months. These aircrews have deployed in support of Operation Enduring Freedom, Operation Iraqi Freedom and other global missions. The training these aircrews receive in the RBTI airspace with its electronic assets is critical to their success in combat

and their safe return home.

17. We have carefully considered other alternatives for the Dyess and Barksdale units to meet their Ready Aircrew Program training requirements if IR-178 and Lancer MOA were no longer available. There are few sites in the western United States configured for bombers to accomplish their training requirements. The other sites, even collectively, would not be able to absorb the additional training hours required if the Dyess and Barksdale units were displaced from RBTI. Two sites with the required electronic assets for simulated training are within the RBTI complex. One is the Pecos electronic scoring site, which is located under IR-178. The other RBTI electronic scoring site is Snyder, located under the Lancer MOA airspace.

18. The next closest airspace and electronic assets are located at Melrose Range near Cannon AFB, NM. Melrose Range is approximately 226 nautical miles from Dyess AFB and 532 miles from Barksdale AFB. The training range is used extensively by the fighter aircraft units at Cannon AFB, and it would be difficult for the Dyess and Barksdale aircrews to compete for training time there. Traveling to Melrose Range would add approximately one-and-a-half to two hours to every mission for every sortie for both Dyess and Barksdale aircrews. In addition, electronic bomb scoring was recently removed from Melrose in favor of increasing electronic scoring hours at Lancer MOA (Snyder). The electronic scoring is particularly important for feedback on FTU missions.

19. Smoky Hill Air National Guard Range in central Kansas is another option.

Smoky Hill is approximately 382 nautical miles from Dyess and 416 nautical miles from Barksdale. Traveling to Smoky Hill Range would also add approximately one-and-a-half to two hours to every mission for every sortie for both Dyess and Barksdale aircrews. Both Melrose and Smoky Hill, however, are already stressed to near-capacity with other training requirements and would be difficult to schedule for training.

20. Another possible site is located in Belle Fourche, Wyoming. It is approximately 774 nautical miles from Dyess AFB, TX, and 890 nautical miles from Barksdale AFB, LA. Traveling to Belle Fourche Range would add up to four hours to every sortie for Dyess aircrews and four to five hours to every sortie for Barksdale aircrews. The EIS established 600 nautical miles, however, as the maximum distance the aircrews could travel to train efficiently.

21. Another site is the Granite Peak Site at the Utah Test and Training Range, which is approximately 800 nautical miles from Dyess and 1,056 nautical miles from Barksdale. Traveling to Granite Peak Range would add up to four hours to every sortie for Dyess aircrews and four to five hours to every sortie for Barksdale aircrews. In addition, Granite Peak is very difficult to schedule.

22. Electronic assets are also in place at Mountain Home AFB's Saylor Creek Range near Boise, ID. Saylor Creek, however, is approximately 959 nautical miles from Dyess AFB and 1,207 nautical miles from Barksdale AFB.

23. All of the possible alternate ranges offer less realistic training than that

provided by RBTI, the reason RBTI was developed in the first place. The electronic assets at Belle Fourche and Granite Peak that provide some degree of linked and sequenced combat training are distant from Dyess and Barksdale, requiring long and unproductive transit times. Such long transit times contribute little to combat training and do not efficiently use valuable and finite flight hours. The locations and arrangement of these alternative locations would force aircrews to use available flight time to fly to and among different realistic assets, causing disjointed training that does not replicate actual combat.

24. Dyess and Barksdale aircrews previously trained at La Junta ESS Range in southwestern Colorado and Harrison ESS Range in north central Arkansas. These sites lacked terrain variability and a linked system of airspace and ground-based assets necessary to provide realistic combat training. Both of these sites were completely deactivated when RBTI was implemented. Consequently, they are no longer available for training.

25. The possible alternate ranges have been environmentally analyzed for a maximum number of sorties. Scheduling issues aside, some of the ranges might be able to allow additional training sorties and remain within the limits analyzed in their Environmental Impact Statements (EIS). Other ranges, however, could require new or supplemental EIS to accommodate additional bomber sorties, with significant cost (approximately \$1.5 million for an EIS) and time (18 months minimum for an EIS)

commitments. There would be no guarantee, of course, that any EIS would result in a Record of Decision (ROD) that would allow the additional training at these alternate ranges.

26. Not allowing training in RBTI will have direct costs to the Air Force. For FY 2004, the B-1 cost approximately \$22,000 per hour to operate. For FY 2004, the B-52 cost approximately \$15,000 per hour to operate. IR-178 scheduled sorties numbered 1,088 for FY 2004, and Lancer MOA scheduled sorties numbered 1,697. Using the lower \$15,000 cost per hour figure, the following chart conservatively indicates direct annualized costs to train elsewhere, presuming the training sorties were available and could be scheduled:

Estimated Costs of Training at Alternate Ranges

Airspace	Number of transit hours	Cost per hour ¹	FY 2004 sorties	Total Annual Cost (\$ millions)
IR-178 (using Melrose or Smoky Hill as alternate)	1.5	\$15,000	1,088	\$24.48M
MOA (using Melrose or Smoky Hill as alternate)	1.5	\$15,000	1,697	\$38.18M
IR-178 (using Belle Fourche or Granite Peak)	4	\$15,000	1,088	\$65.28M
MOA (using Belle Fourche or Granite Peak)	4	\$15,000	1,697	\$101.82M

TOTAL Annual Costs (using most conservative figures)				\$62.66M ²
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Notes:

1. Based on the lower cost of the B-52.
2. \$24.48M + 38.18M

27. The Air Force employs a contractor to operate and maintain all of its primary training ranges throughout the United States, including the RBTI training assets. The portion of the FY 05 contract costs applicable to the RBTI Pecos site is \$87,606 per month or \$1,051,272 annually. The portion of the FY05 contract costs applicable to the RBTI Snyder site is \$90,034 per month or \$1,080,408 annually. These costs cannot be recovered. Total annual FY 04 contract and operating budget costs for the Pecos and Snyder sites were \$2,792,417.

28. Continued use of the RBTI during completion of the Supplemental EIS is critical.

I declare under penalty of perjury that the foregoing is true and correct. Executed on 5 JANUARY, 2005.


KENNETH M. DECUIR, Major General
Air Combat Command
Director of Air and Space Operations
Langley Air Force Base, VA 23665-2789



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

DAVIS MOUNTAINS TRANS-PECOS §
HERITAGE ASSOCIATION; DALE and §
SUSAN TOONE; TIM and REXANN §
LEARY; EARL and SYLVIA BAKER; §
MARK and ANN DAUGHERTY; §
DICK R. HOLLAND; J.P. BRYAN; §
JACKSON B. "BEN" LOVE, JR.; and §
KAARE J. REMME. §

Plaintiffs, §

v. §

Case No. 5:01-CV-289-C §

UNITED STATES AIR FORCE; §
DR. JAMES G. ROCHE, §
Secretary, United States Air Force; §
UNITED STATES DEPARTMENT OF §
DEFENSE; and DONALD H. §
RUMSFELD, Secretary, Department of §
Defense, §

Defendants. §

DECLARATION OF LT COL DALE L. GARRETT

1. I am Lieutenant Colonel Dale L. Garrett. I am the Chief of the Integration Branch in the Ranges, Airspace, and Airfield Operations Division at Air Combat Command, located at Langley Air Force Base, Virginia. Our team, consisting of professionals from aviation, environmental, acquisition, and legal fields, is the focal point for addressing a broad range of

airspace and range issues for the Air Combat Command. The Integration Branch has been heavily involved in the Realistic Bomber Training Initiative (RBTI).

2. I have served in the Air Force for over twenty-two years in a variety of aviation related jobs. I am an Instructor Radar Navigator with 2767 flying hours in the B-52 bomber with a total of 2932 hours. Additionally, I served as a B-52 war planner during Desert Storm for which I was awarded the Bronze Star. More recently, I served as the commander of the LaJunta Electronic Scoring Site located on Colorado and later as the commander at the Forward Operating Location in Manta, Ecuador handling counter-drug operations.

3. Based on my experience, I am familiar with low level flying training requirements and specifically with the use of the airspace in West Texas. In fact, I flew what is now known as IR-178, south of the current turn point N, frequently during my days as a new navigator from 1980 until 1986. That particular airspace provided and continues to provide invaluable training because of its unique terrain features.

4. The ability to train at all altitudes including low level in variable terrain is necessary to ensure the combat readiness of our aircrews. Low level training prepares our aircrews to be able to penetrate enemy airspace undetected and to avoid enemy threats. Flying at low levels in mountainous terrain is extremely demanding and requires considerable training and practice. Both B-52 and B-1 bombers are crew aircraft, requiring coordination between several aircrew members for safe operation. In order for our aircrews to be safe and effective in wartime, it is essential that they be able to effectively train in peacetime. Low level routes, such as IR-178, are critical to this training. Flying over flat terrain, or in simulators, while valuable training, is not a substitute for actual low level flying in mountainous or varying terrain such as IR-178. Failure to adequately

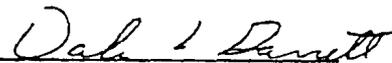
train would be detrimental both to the safety of our bomber aircrews and their ability to effectively complete their wartime missions.

5. Because of continuing population growth, forming new airspace suitable for effective training is becoming increasingly difficult. Aside from the nearly impossible job of finding suitable terrain with low population densities, the coordination process and required environmental analysis is a several year process. IR-178, with its ideal terrain for low level training and close proximity to air bases, is an irreplaceable asset. There are no substitutes within a reasonable flying distance of our bases in Texas and Louisiana. Establishing new training airspace is not feasible and traveling to more distant training routes is prohibitive in terms of time and costs. The latest estimates are that it costs \$6500 per hour to fly a B-52 and \$14,700 to fly a B-1. These exorbitant costs show the importance of IR-178, not only from the perspective of effective use of time and training, but also from a fiscal perspective.

6. I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct to the best of my knowledge, information, and belief.

Date:

NOV 26 2001


DALE L. GARRETT, Lt. Col., USAF
WING AIRSPACE MANAGER



19 July 2005

Inquiry Response

Re: BI-0135 (CT-0551) Dyess AFB and RBTI Litigation

Requester: BRAC Commission (Arthur Beauchamp)

Commission Provided Background: Attached memo was submitted to the BRAC. It outlines litigation filed by the Davis Mountains Trans-Pecos Heritage Association against the Air Force (Davis Mountains v. USAF).

The case centers on the adverse impacts to the community and organizations when B-1 Bombers use the Dyess LANCER Military Operation Area (MOA) and Instrument Route (IR) 178 (also know as the Realistic Bomber Training Initiative (RBTI)). The suit has resulted in a district court order issued on 29 Jun 05 imposing flying restriction on B-1s at LANCER and IR 178. The order reads: "_no aircraft will fly lower than 500 ft AGL (Above Ground Level) AP/IB altitude in IR-178, and no lower than 12,000 ft MSL (Mean Sea Level) when utilizing Lancer MOA."

In reviewing the information, the training restrictions were suggested by Air Combat Command as temporary measures to the court until the litigation is resolved.* The rationale being that it at least preserves the opportunity, even if limited, for use of the RBTI (reference: Additional Declaration of ACC Director of Air and Space Operations (Case No 03-10506) dated 5 Jan 05).

Given this litigation we request feedback on the following questions:

* **ACC Clarification of Commission Background:** Air Combat Command suggested the training restrictions as temporary measures to the court until the supplemental environmental impact statement (SEIS) and record of decision are completed and the FAA issues any implementing orders.

Questions:

1. Given the importance of training ranges and IR routes to the military value of an installation was this litigation factored into the MCI for Dyess?

Response: This litigation was not factored into the MCI score for any Air Force base. There was no viable method to consider ongoing litigation in computation of the MCI score.

2. Why has the Air Force changed its training to 500 ft AGL when in the past it was 300 ft AGL? Was this caused by the above litigation?

Response: The Air Force didn't change its training to 500 ft AGL--it proposed lowering its training altitude to 300 ft AGL when it created the RBTI along an existing route. The Air Force voluntarily returned its training altitude to 500 ft AGL pending the outcome of a SEIS. The presiding judge accepted the temporary return to 500 ft AGL pending the outcome of the supplemental wingtip vortices analysis, completion of an SEIS and issuance of FAA decisions as directed by the court.

19 July 2005

Inquiry Response

Re: BI-0135 (CT-0551) Dyess AFB and RBTI Litigation

3. Did an installation score higher for those ranges that allow for flying at 200 ft AGL (given the fact that the B-1 has the capability to fly at 200 ft AGL and in some cases this is required for B-1 testing).

Response: Installations were not scored on the altitude restrictions of instrument routes. The scoring methodology only considered the relative distance of entry and exit points to the subject installations. The greater the number of routes an installation had available within the prescribed distance of 300 nautical miles for the Bomber MCI, the better the installation's MCI score.

4. If the AF loses the suit and is permanently restricted to flying at 500 ft at the RBTI, how will this impact B-1 training? This is a particular concern given the fact that the AF recommends consolidating the B-1 fleet at Dyess.

Response: Currently, there is no permanent restriction issue pending in court. The 5th Circuit Court of Appeals ruled the original EIS analysis, which used wingtip vortices affects at high altitude extrapolated to 300 ft AGL, as insufficient. The Court therefore directed a new analysis at 300 ft AGL.

The Air Force is in the process of analyzing wingtip vortices at 300 ft AGL as part of the SEIS and will make an appropriate decision on RBTI use once the SEIS is complete. If the results support flight at 300 ft AGL, the Air Force will follow the normal process of obtaining FAA approval to use the RBTI as originally requested. None of the court's rulings require the Air Force to return to court for approval as part of this process.

If the results do not support operations at 300 ft AGL, the 500 ft restriction will most likely apply. The training requirement to fly at 300 ft AGL, however, can be accomplished at restricted ranges. Given that possibility, Dyess AFB still has access to closer low-altitude ranges and airspace than Ellsworth AFB. Even at 500 ft AGL, the RBTI is still valuable. See attachments for Dyess AFB and Ellsworth AFB for depiction of currently existing ranges.

5. Request the Air Force rescore the MCI for Dyess training range and IR capability with this restriction.

There is no impact to the MCI score for the Bomber MCI as a result of instrument route altitude restrictions. Altitudes were not factored into consideration of instrument routes when calculating MCI scores. As regards the volume of airspace, Dyess AFB has 2.3 times the volume of airspace

19 July 2005

Inquiry Response

Re: BI-0135 (CT-0551) Dyess AFB and RBTI Litigation

as Ellsworth and is still the higher scoring installation of the two given the voluntary altitude restriction of 12,000 MSL placed on the Lancer Military Operating Area.

Approved

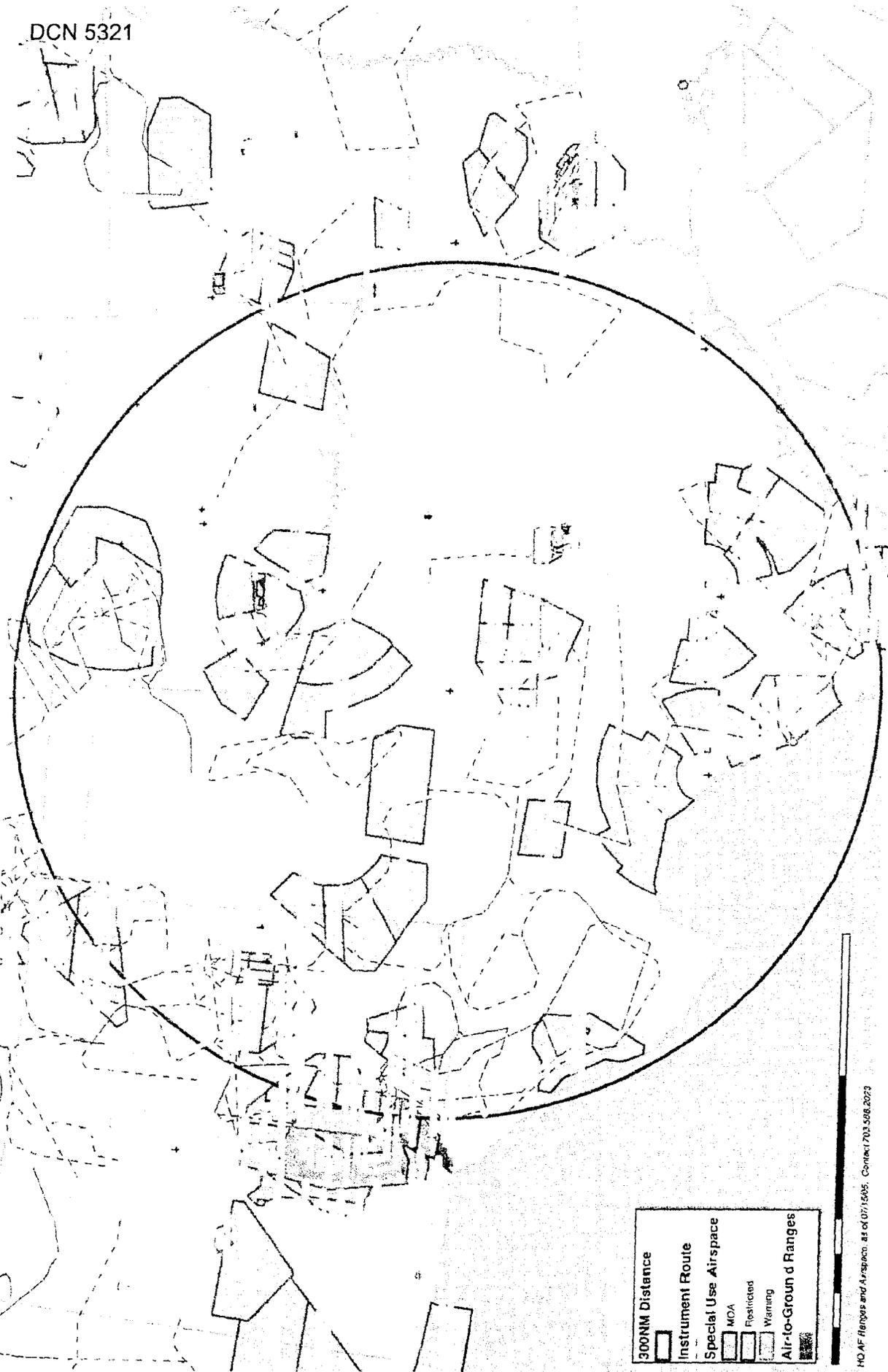


DAVID L. JOHANSEN, Lt Col, USAF
Chief, Base Realignment and Closure Division

- 2 Attachments (11" X 17" formats)
1. Dyess - Airspace within 300NM
 2. Ellsworth - Airspace within 300NM

DCN 5321

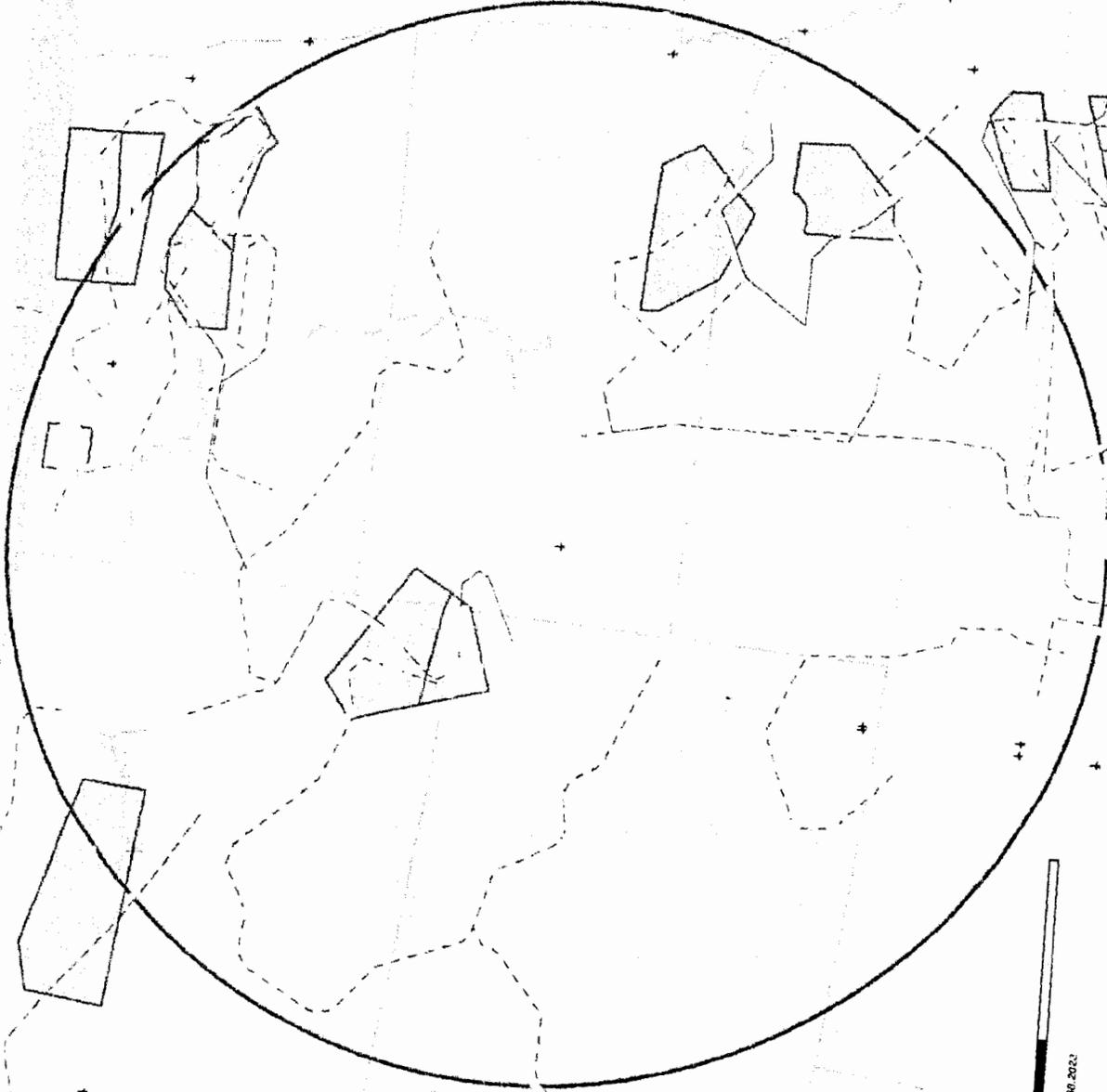
DUSS AFB



300NM Distance	□
Instrument Route	—
Special Use Airspace	- - -
MDA	□
Restricted	□
Warning	□
Air-to-Ground Ranges	□

HD AF Ranges and Airspace, as of 07/15/05, Contact 703.568.2023

DCN 5321



Elsworth AFB

300NM Distance	□
Instrument Route	□
Special Use Airspace	□
MCA	□
Restricted	□
Warning	□
Air-to-Ground Ranges	□

NO AF Ranges and Airspace, as of 07/13/04 Contact 703-589-2023

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JOHN THUNE
SOUTH DAKOTA

United States Senate
WASHINGTON, DC 20510

COMMITTEE
ARMED SERVICES
ENVIRONMENT & PUBLIC WORKS
SMALL BUSINESS
VETERANS' AFFAIRS

August 9, 2005

The Honorable Anthony J. Principi
Chairman
Base Realignment and Closure Commission
2521 Clark Street, Suite 600
Arlington, VA 22202

Dear Chairman Principi:

On July 19, 2005, the Air Force replied to an inquiry from the Base Realignment and Closure Commission concerning ongoing litigation and court imposed constraints on the use of the primary military operating area (MOA) and military training route (MTR) that serves the aerial training requirements for both Dyess and Barksdale AFB. I found some of the Air Force replies to the commission's questions to be incorrect and I would like the opportunity to comment.

Background

The commission inquiry was based upon an issue I raised, which calls into question the wisdom of DoD's recommendation to consolidate all 67 operational B-1s at a single location, Dyess AFB. It had come to my attention that the primary bomber training area, upon which Dyess' B-1s depend for close proximity training, had been mired in litigation for the last five years, thus making both its future availability and its capability to support consolidated B-1 training uncertain. The training area, in fact, now operates subject to court order. The training airspace includes IR-178 MTR and Lancer MOA, together known as the Realistic Bomber Training Initiative (RBTI). The litigation in question challenges the Air Force's Record of Decision (ROD) and Environmental Impact Statement (EIS), both prepared pursuant to requirements of the National Environmental Policy Act (NEPA) as part of the process of obtaining FAA approval for the RBTI – a process begun in 1997 and still not approved because of the litigation. On appeal, the 5th Circuit found the EIS to be inadequate and set aside the ROD on October 12, 2004. The court further directed the District Court to determine the conditions upon which the Air Force could continue operations in the MTR and MOA. On June 29, 2005, the District Court imposed significant operating conditions limiting the continued Air Force use of the MTR and the MOA pending a supplemental EIS. There was no evidence in any of DoD's or Air Force's released BRAC deliberation documents or meeting minutes that this issue was discussed or considered in any detail. In fact, the Air Force has subsequently admitted that neither the present impact, nor future risk, posed by this litigation were factored into its deliberation because it did not have a method to calculate it into the MCI scoring.

320 NORTH MAIN AVENUE
SIOUX FALLS, SD 57104
(605) 334-9596

1313 WEST MAIN STREET
RAPID CITY, SD 57701
(605) 348-7551

320 SOUTH 1ST STREET
SUITE 101
ABERDEEN, SD 57401

Air Force Statement: “This litigation was not factored into the MCI score for any Air Force base. There was no viable method to consider ongoing litigation in computation of the MCI score.”

Comment: In acknowledging that this litigation (and the consequent results) were not factored into the MCI score, nor considered under *military judgment*, the Air Force has conceded that a substantial liability on present and, potentially, future training access, was not factored into its deliberation to consolidate all B-1s at Dyess AFB and how that would affect training readiness and inherent costs involved with flying to more distant alternative training areas. The inability to determine "a viable method" to address the ongoing litigation calls into question the overall credibility of scores related to Dyess training areas, and represents a substantial deviation from the BRAC criteria.

Air Force Statement: “The scoring methodology only considered the relative distance of entry and exit points to the subject installations.”

Comment: The Air Force methodology for calculating the MCI score for bomber bases only included a quantitative assessment of ranges and routes, with no analysis of access, availability, flying limitations or true quality of heavy bomber training. This analysis fails to evaluate any factors that may cause adverse impact on training and readiness, and fails altogether to consider the ramifications of adding 24 B-1s to the Dyess inventory. The Director of Air Space Operations at Air Combat Command, Major General DeCuir, in a sworn statement to the court commented on the effect of the court imposed restrictions: *“It is my personal and professional opinion that losing the ability to use IR-178 and the Lancer MOA as currently configured will cause grievous and irreparable harm to Air Force training and the ability of the Air Force to meet its national defense objectives.”* He went on to state: *“These changes to the bomber training program, which would be in effect while the Air Force completes the SEIS and the FAA takes action accordingly, do not in my opinion, allow aircrews to fully meet necessary realistic training objectives.”*

Air Force Statement: “The Air Force voluntarily returned its training altitude to 500 ft AGL pending the outcome of a SEIS.”

Comment: It is disturbing that the Air Force would apparently represent the status of the court imposed flying limitations as being “voluntarily” self-imposed. The facts, however, are indisputable. On January 31, 2005, the 5th Circuit directed that the district court set operating conditions under which the Air Force could continue to use the RBTI, pending the outcome of the SEIS. These conditions would not be “voluntary.” The Air Force, seeking to avoid harsher restrictions requested by the plaintiffs, asked the court to accept certain limitations greater than those specified in the Air Force ROD that would still allow aircrews “the opportunity to train as realistically as possible.” The ROD would have allowed flights in the MTR down to 300 feet AGL, and in the MOA down to 3,000 feet AGL. On June 29, 2005, the district court incorporated the Air Force proposed restrictions and imposed a floor of 500 feet AGL in the MTR, and 12,000 feet MSL in the MOA, pending the SEIS. These limitations are set under a court order and are in no way

“voluntary.” It is inaccurate for the Air Force to imply that it willingly imposed these restrictions on itself, and thereby can change them at will.

Air Force Statement: “The Air Force didn’t change its training to 500 ft AGL -- it proposed *lowering* its training altitude to 300 feet AGL when it created the RBTI along an existing route.”

Comment: The Air Force was also incorrect when it made this statement, thus implying that 500 feet AGL was the normal training altitude on that same route. This statement is demonstrably false by the Air Force’s own words. First, the Air Force originally proposed the RBTI route to be as low as 200 feet AGL, which was the minimum altitude of some route segments for the pre-existing IR-178. This fact is well documented in the Air Force ROD on page 7 point (2) of the "Management Actions." The Air Force, in fact, raised it to 300 feet AGL when drafting the ROD to address “public expressed concerns.”

Air Force Statement: " [N]one of the court's rulings require the Air Force to return to court for approval as part of this process."

Comment: This litigation has been ongoing for years. The court clearly has oversight of any training conducted within the RETI. Yet, this reply to the Commission implies the litigation is essentially over. First, the case is still subject to appeal and the court still has oversight of both the RBTI and the preparation and approval of the SEIS. If the Air Force wants the court to relinquish jurisdiction and authority in the matter, they will have to apply to the court for a dismissal. Second, even a casual review of the history of this case reflects the persistence of the plaintiffs. Any perceived flaws in subsequent Air Force or FAA decision-making on the RBTI may, and likely will, be challenged in court. The plaintiff groups have achieved one victory and if the Commission approves the consolidation of the B-1B fleet at Dyess AFB, with the consequent doubling of B-1B training operations, these plaintiffs will have yet another target rich environment for years of future litigation. The Air Force’s response to the BRAC commission, implying that this litigation will be over (and that air operations will be unconstrained) when the Air Force and FAA complete their supplements does not reflect the history of the litigation or the implications of doubling the B-1B fleet at Dyess AFB. Indeed, the court has yet to even be informed by the Air Force that the number of B-1Bs and the training requirements at Dyess AFB may, in fact, double if the BRAC recommendation stands, though a supplemental EIS is underway per the court’s order. It is clear that increased training operations flown from Dyess would only exacerbate the adverse environmental impacts on the plaintiffs, while still under the aegis of the court and completely change the dynamics of the supplemental EIS now being prepared.

Air Force Statement: “If the results do not support operations at 300ft AGL, the 500 ft AGL restriction will most likely apply.”

Comment: It is very presumptive on the part of the Air Force to state that if the results of the supplemental EIS do not support operations at 300 feet AGL, “the 500 feet restriction will most likely apply.” The Air Force can not be certain as to the final outcome and

what restrictions might apply, before the supplemental EIS has even been completed and any subsequent plaintiff challenges to the Department's analysis have been heard. The Air Force seems to be suggesting advanced foresight in knowing with certainty that the court will dismiss as meritless any arguments to be made by plaintiffs seeking greater limitations (e.g. 1,000 ft AGL minimum floor in the MTR), something that should never be assumed in litigation.

Air Force Statement: "As regards the volume of airspace, Dyess has "2.3 times the volume of airspace as Ellsworth."

Comment: This is not only irrelevant, it is misleading. First, the amount of airspace in comparison to Ellsworth has nothing to do with the actual question, which is how Dyess AFB would fare under an MCI score that accounts for the restrictions imposed by litigation. Further, the issue is whether the Air Force has an equivalent alternative to the RBTI within the 300-mile radius of Dyess, not whether there is generic airspace available to Dyess (belonging to other installations and probably approved for other types of aircraft). The RBTI was designed specifically for heavy bomber training and is a unique creation designed to interface with permanently housed electronic emitters and threat simulators situated at intervals along a specific low-level ingress route. The Air Force would not have created the RBTI, if it was not needed. The available "airspace" the Air Force implies can serve as a substitute to the RBTI was there before the RBTI was established, but apparently not adequate – hence why the RBTI was created. So, it appears odd that the Air Force would now assert that this same airspace can adequately replace the RBTI if it should be closed-down or limited by action of the court. In a separate sworn affidavit by Major General DeCuir, he unequivocally stated, "*The other sites, even collectively, would not be able to absorb the additional training hours required if the Dyess and Barksdale units were displaced from RBTI.*"

Please understand, I am not advocating the consolidation of the nation's B-1B fleet at Ellsworth AFB, as an alternative to Dyess AFB. To the contrary, I believe it to be in this country's best interest to maintain the two separate B-1B bases we now have – in terms of preserving their security, operational effectiveness and overall quality of training. It is vitally important, therefore, that you receive the most accurate information available.

Thank you for your consideration.

Respectfully yours,



John Thune
United States Senator