UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

Pegasus Equine Guardian Association

Plaintiff,

v.

U.S. Army and Brigadier General Gary M. Brito, in his official capacity as Commanding General, JRTC and Fort Polk, Louisiana

Defendants.

Division: Lake Charles

Case No. 2:17-CV-00980

Judge: Unassigned

Magistrate Judge: Kathleen Kay

Ref. 137-002.2

Plaintiff's Memorandum in Support of its Motion for Partial Preliminary Injunction

Plaintiff Pegasus Equine Guardian Association ("Pegasus") hereby files this Memorandum in Support of its Motion for Partial Preliminary Injunction.

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Introduction

An injunction is urgently necessary at this time to avoid an irrevocable change to the environmental, historical and cultural resources at Fort Polk, and potential substantial harm to the wild horses that live there. Though the horses at Fort Polk, Louisiana, have coexisted with the Army for more than seventy years, and the vast majority of the horses were born on Fort Polk and lived wild and free-roaming for generations, the Army decided to eliminate them in 2016. After initially removing some horses under the horse-elimination plan at issue in 2016, the Army did not remove horses during the pendency of this lawsuit for most of 2017. But starting in late November 2017, the Army began rounding up and removing horses from Fort Polk. This Court's ability to render a meaningful decision on the merits will be in jeopardy if the Army eliminates the horses at Fort Polk. This injunction would merely preserve the decades-long status quo until this case can be heard on the merits.

For the reasons explained in this Memorandum, Pegasus asks this Court to:

1. Enjoin the Army (including its contractors and subcontractors) from rounding up or removing horses from Fort Polk (and surrounding Forest Service land) for the modest time period until the Court decides the merits of the case, which will be decided on cross-motions for summary judgment, *except*:
2. If the Army wants to round up or remove horses from Fort Polk while this case is pending, it shall move the Court for permission to do so, explaining in an accompanying memorandum (1) its specific need to round up or remove horses at this time and from the area at issue, (2) the number of horses to be rounded up or removed, (3) the location on a map where the round-up or removal will take place, with such location limited to the area necessary to accomplish the Army's stated goals, and (4) information about the

contractor/s and subcontractor/s who will round up or remove the horses, the principals who will participate in the round-up or removal, and the methods that will be used in the round-up or removal. Pegasus shall have a reasonable opportunity to oppose this motion.

3. If such a motion is granted, the Army (including its contractors and subcontractors):
   a. will give Pegasus a 14-day notice before the Army (including its contractors and subcontractors) or any other persons round up or remove the horses, and Pegasus will be allowed to send a representative and up to two assistants to observe and document (including film and photograph) the round-up or removal activities, including food-baiting, trapping, any other capture methods, handling, corralling, and loading.
   b. shall allow Pegasus access to send a representative and up to two assistants to observe and document the horses and their shelter, feeding, watering, and grazing facilities at least once a week while the horses are in the Army's (including its contractors and subcontractors) control. The Army will give Pegasus 48-hour notice and allow Pegasus to send a representative and up to two assistants to observe any further horse-handling activities other than ordinary feeding and watering,[1] except that notice of emergency veterinary care may be made less than 48 hours in advance where necessary.
   c. shall provide food, water, shelter and veterinary care for the horses that is adequate to provide them with humane living conditions.
   d. shall provide copies of all applications and correspondence between parties seeking to acquire these horses and the Army (including its contractors and subcontractors).

[1] Including veterinary care, adoption or "give-away" or sale preparation activities or acquisition activities involving handling the horses, re-capture, corralling, or testing (including blood testing) activities.

These shall be provided on the Army's public website about the horse-elimination program.[2]

e. will post all authorizations to acquire these horses on its website at least 7 days before allowing the horses to be acquired or otherwise removed from Fort Polk, and

f. to provide transparency as to any transfer of horses to "kill buyers," shall require all adopters or buyers or other persons who have acquired Fort Polk horses under the horse-elimination program to update the Army every 6 months after acquiring the horses, until this case is finally resolved, as to their current status and care, including veterinary care and including current photographs of the horses. The Army shall post that information on the Army's public website about the horse-elimination program.[3]

Procedural History

Pegasus supports the U.S. Army and its ongoing high-quality training for U.S. troops at Fort Polk. But the Army has chosen a plan that will completely eliminate the wild and free-roaming horses living in and around Fort Polk without considering critical environmental and cultural factors as required by law. Nor does the plan accommodate the history and culture of the local residents (let alone the wild horses).

The Army issued a public notice entitled "Notice of Intent to Conduct an Environmental Assessment for Proposed Action to Eliminate Trespass Horses at Fort Polk, LA" on August 2, 2015. Ex. A. The Army's stated goal was to address horses in the area, which allegedly create "increasing conflicts with training activities and safety concerns for the Fort Polk and

[2] *Trespass Horses* (last updated March 16, 2017), http://www.jrtc-polk.army.mil/trespass_horses.html.
[3] *Id.*

surrounding communities." Envtl. Assessment ("EA"), FONSI 1, ECF No. 17-2 at 3.[4] The Army received more than 700 public comments. Jeff Matthews, *Army closer to decision on Fort Polk horses*, THE TOWN TALK (Sept. 23, 2015), Ex. B;[5] EA, App. D – Comments, ECF Nos. 17-6 – 17-12; EA, App. G – Public Comments, ECF No. 17-15.

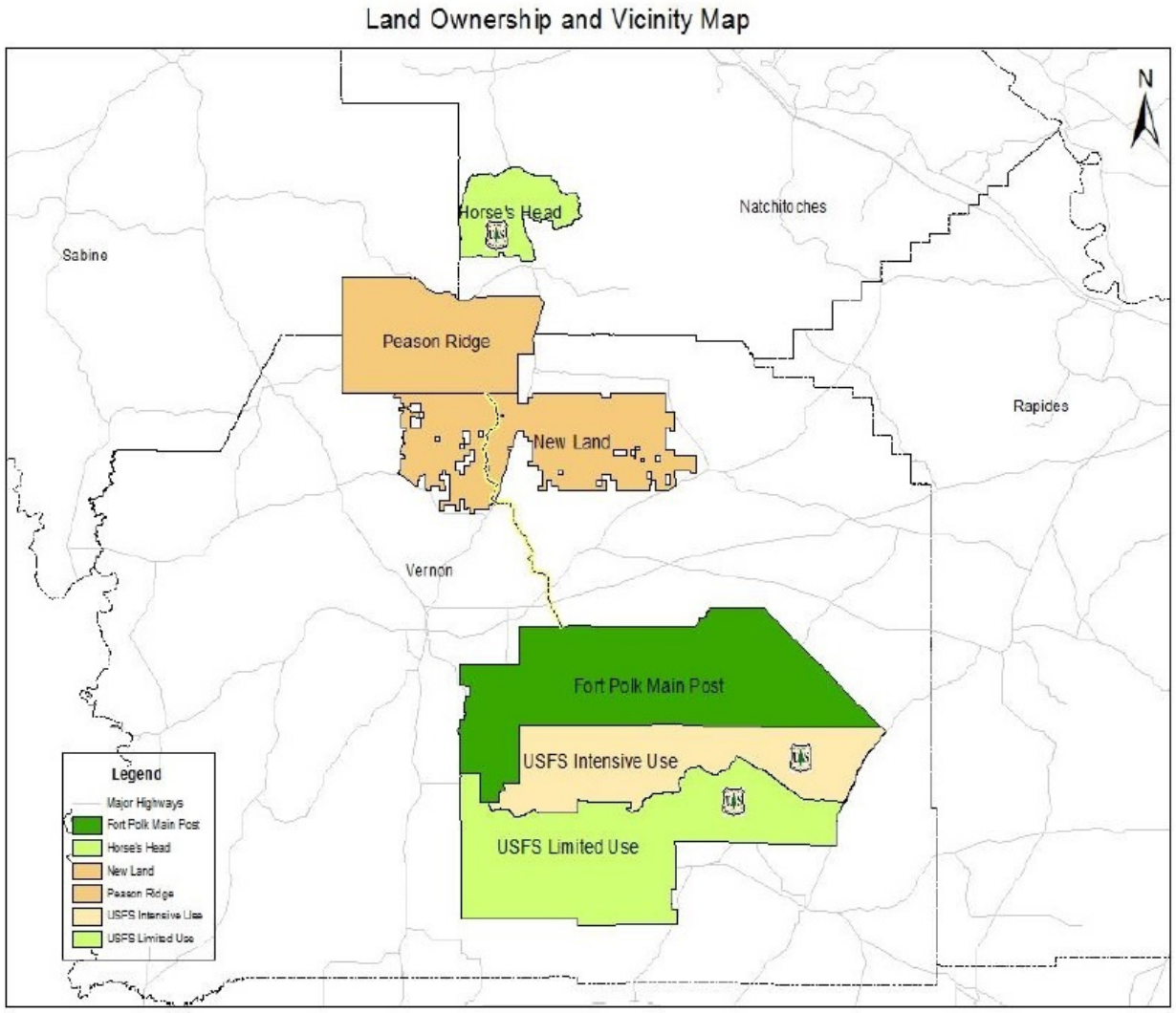
On May 4, 2016, the Army made its EA and Draft Finding of No Significant Impact available for public review with a thirty-day comment period. The Army extended the comment period's deadline to June 17, 2016. The Army received 180 comments in response to the plan. On August 8, 2016, the Army published a Finding of No Significant Impact. The Brigadier General concluded that none of the Army's primary or proposed alternative "Courses of Action" would have a significant impact on the environment. Therefore, he concluded that the Army did not need to prepare an Environmental Impact Statement ("EIS"). EA, FONSI, ECF No. 17-1.

The Army intends to eliminate all horses from Fort Polk. EA, FONSI 1, ECF No. 17-1 at 3. The Fort Polk Army Installation totals more than 260,000 acres, 139,468 acres of Army-owned land and 113,621 acres of U.S. Forest Service land the Army has contracted to use. EA, Envtl. Assmnt. 2-3, ECF No. 17-2 at 18-19. Fort Polk includes: (1) the Fort Polk Main Post (65,363 acres, where the most intensive training occurs), (2) the United States Forest Service land the Army uses for training just south of the Main Post (a 40,267-acre parcel of "intensive use" land and another 60,567-acre parcel of "limited use" land), (3) Peason Ridge (an area of about 74,105 acres of land about 30 miles north of the Main Post), (4) the newly acquired land just south of Peason Ridge ("To date, approximately 40,660 acres of new training lands have

[4] The entirety of Exhibit B (ECF Nos. 17-2 – 17-15) to Plaintiff's Opposition to Defendants' Motion to Transfer Venue (ECF No. 17) is the Army's full Environmental Assessment from the Army's Website. However, this Environmental Assessment document actually comprises both the FONSI and the EA (ECF No. 17-2), as well as a number of Appendices. Therefore, in citations, Pegasus will cite to the Finding of No Significant Impact as "EA, FONSI" and to the actual Environmental Assessment portion of the larger document as the "EA, Envtl. Assmnt." to clarify the specific sub-documents of ECF No. 17-2.

[5] *Available at* http://www.thetowntalk.com/story/news/2015/09/23/armycloserdecisionfortpolkhorses/72688274/.

been purchased"), and (5) Horse's Head (12,787 acres of Forest Service land where the Army may conduct low-impact training under a "Special Use" permit). *Id.*



Land Ownership and Vicinity Map, EA, Envtl. Assmnt. 2-3, ECF No. 17-2 at 18-19.

Notwithstanding this pending litigation, the Army has not made clear whether the Army will eliminate the horses from all Army-*owned* land or all Army-*controlled* land (which also includes Forest Service-owned land where the Army trains). In the description of the proposed action on page 1 of the Finding of No Significant Impact, the Army indicates that it shall remove horses from all Army *and* Forest Service owned-land used by the Army, except the Horse's Head special use area:

> **2. PROPOSED ACTION:** The Joint Readiness Training Center (JRTC) and Fort Polk proposes to eliminate trespass horses from Fort Polk. The purpose of the proposed action is to eliminate the trespass horses. The need for the action is to reduce safety risks and training impacts posed by their presence on Army-controlled property at Fort Polk, Louisiana. The action does not include the part of Fort Polk used under a special use permit from the Kisatchie National Forest.

EA, FONSI 1, ECF No. 17-1 at 3; compare with EA, Envtl. Assmnt. 2-3, ECF No. 17-2 at 18-19 (describing the Horse's Head area as the "special use." area). But the Environmental Assessment purported to only analyze eliminating the horses on Army-owned land, as described in the purpose and scope sections on page 4:

> *1.2.1 Purpose of the Proposed Action*
> The purpose of the proposed action to eliminate the trespass horses is to reduce the safety risks, training impacts, and threats to the health of the horses posed by their presence on Army-owned property at Fort Polk, Louisiana.
>
> *1.2.2 Scope of the Proposed Action*
> The proposed action encompasses only actions to be taken for elimination of the existing population of horses currently located on Army-owned property at Fort Polk and Peason Ridge and the elimination of any horses which travel onto, or otherwise become located on, Army-owned property at Fort Polk and Peason Ridge in the future. The Army's proposed action does not contemplate the Army eliminating horses when they are located on land owned by any other entity.

In the Finding of No Significant Impact, Brigadier General Brito announced that the Army would implement alternative Course of Action 7 as described in the EA (and modified by the Finding of No Significant Impact). EA, FONSI 1-6, ECF No. 17-1 at 3-8. Under this plan, Fort Polk personnel will initiate the capture of horses in groups of ten to thirty. *Id.* As capture becomes more difficult, contract personnel will capture remaining horses. The Army will create a list of charitable nonprofit (26 U.S.C. § 501(c)(3)) animal welfare organizations and a list of members of the public who could potentially take the horses. The Army will first contact the organizations on the list and those organization will have three working days to notify Fort Polk that it will take the horses, and eight days to pick them up. If an organization fails to respond

within three days, declines to take all available horses, or fails to pick up horses within the eight-day deadline, that organization may be permanently removed from the adopter list and not be permitted on future lists absent a showing of good cause. If no such organizations on the list can pick up the horses, the Army will then offer horses to people or entities on a "giveaway" list. They will have forty-eight hours to notify Fort Polk that they will take the horse(s), and five days to pick them up. If they fail to pick up the horse(s), they will be permanently removed from the giveaway list. All remaining horses will either be transported to a livestock sale facility or will be combined to the next lot of captured horses to cycle through the process again. The process will then continue until all horses are eliminated from Fort Polk. Additionally, Fort Polk may relocate the horses to a private landowner or other government entity. *Id.*

In numerous ways, the Army's Environmental Assessment is legally inadequate, and violates the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act. First, the Army failed to consider the effect of its plan on the horses themselves. The Army did not evaluate the current market for wild and free-roaming horses in the United States and neighboring countries, thereby failing to evaluate the likelihood that the horses would not be adopted but would instead be sold to "kill buyers" who ship horses to Mexico for slaughter, or sold for other inhumane purposes such as laboratory use or bucking stock rather than adopted and treated humanely. The Army also failed to include safeguards in its plan to ensure that the horses would be treated humanely during capture and transport or after the horses are acquired by third parties. The Army failed to distinguish between the wild and free-roaming horses born at Fort Polk and the small minority of horses that may be partially domesticated, or between historically significant horses and other horses. The Army also failed to distinguish the differences in where the different kinds of horses live. The Army uses more than 200,000 acres

for training, and surely horses who live in some areas pose different risks than horses who live in other areas. Finally, the Army did not consider a meaningful range of alternatives, including herd-management programs that would preserve some of the horses, like partial horse-removal mixed with herd management techniques. Rather, the Army's alternatives consist of a "no action" alternative and six alternatives that each completely eliminate the horses. EA, FONSI 1-2, ECF No. 17-1 at 3-4 of 104; EA, Envtl. Assmnt. 23-33, ECF No. 17-1 at 39-49 of 104.

The Army also failed to do a proper analysis of the horse-elimination plan's adverse effects on historical and cultural resources, particularly on the historic landscape at Peason Ridge and other historic landscape areas on the Fort – which may be eligible for listing on the National Register of Historic Places. King Decl., Ex. C ("Peason Ridge, together with all or part of Fort Polk itself, constitutes a cultural landscape…[that] may be eligible for inclusion in the National Register of Historic Places…"). There is no evidence in the EA that the Army conducted a consultation with stakeholders, including the Native American tribes that have an interest in this area, regarding the harm the horse-elimination plan poses to historical and cultural resources. Pegasus can find no record that the Army issued any report under the Historic Preservation Act regarding the Fort Polk horse-elimination project.

These questions affect, among other things, the (1) planning needed to minimize the risk of injury and death, and also the long-term detrimental impact of the associated traumas, (2) different risks the different horses at different locations pose to the Army's operations, (3) likely success of different round-up and removal measures, (4) likelihood the horses will be adopted into a humane situation, (5) risks to and effects on the horses themselves of being removed, (6) how the wild horses will be desensitized to contact with and handling by humans, (7) how the horses will be held in captivity to avoid social chaos that can physically and psychologically

damage them, (8) what precautions and training will be needed to assure safe transport, (9) historical and cultural impacts, and (10) possible mitigation measures.

Further, the Army does not have procedures in place to ensure that the horses are not primarily sold to "kill buyers," people who sell horses to ship them to Mexico for slaughter. The program is not being carried out in a transparent manner and publicly available information suggests reputable non-profit organizations and members of the public are being arbitrarily rejected and removed from the potential adopter list, increasing the likelihood that "kill buyers" will be able to acquire the horses.

Nor does the Army have any mechanism to ensure that the horses are treated humanely once they are rounded up and in the possession of the Army or its contractors. Upon information and belief, the Army is using a round-up contractor or sub-contractor involving Jacob Thompson, who has been in legal trouble with the Louisiana Department of Agriculture, State of Texas, and State of Oklahoma for abuse, theft or other violations involving livestock.[6] Upon further information and belief, including but not limited to complaints to the Humane Society of Louisiana, the Army's current contractors or subcontractors are not treating the horses humanely, failing to provide adequate and non-moldy hay and sufficient clean food and water, using inhumane round-up techniques, or engaging in practices that will favor moving the horses to kill buyers over animal welfare organizations or humane adopters. *See* Dorson Decl., Ex. E.

[6] *See, e.g.*, TSCRA, *TSCRA News Release: Louisiana Man Arrested Second Time on Cattle Theft Charges* (Aug. 21, 2014), http://tscra.org/tscra-news-release-louisiana-man-arrested-second-time-on-cattle-theft-charges/; Eddie Northcutt Updated Docket (April 25, 2016), http://tools.cira.state.tx.us/users/0403/docs/8th/2016/04Apr/2016.April%2025.updated%20docket.pdf; East Texas Radio, *Man Sentenced for Livestock Theft* (April 26, 2016), http://easttexasradio.com/man-sentenced-for-livestock-theft/; La. Dept. of Agric.—Bd. of Animal Health Agenda (Jan. 5, 2018), Ex. D (At this January 2018 adjudicatory hearing, Jacob Thompson was adjudicated liable for five La. Dept. of Ag. violations which were: 1) selling livestock without a permit, 2) engaging in commercial sale of livestock without a surety bond; 3) transportation of animals across state lines without proper health certificates; 4) transportation of equines across state lines without EIA (Coggins) certificates; and 5) improper disposal of animal remains.).

Despite these and other problems with the EA and Finding of No Significant Impact, the Army has already begun the process of eliminating the horses, and "will continue until all horses are eliminated from Army-owned land." EA, Envtl. Assmnt. 32, ECF No. 17-2 at 48. This will irreparably harm the horse population, the cultural heritage related to Fort Polk, and Pegasus members.

The proposed injunction would prevent the Army from eliminating all the horses at Fort Polk before this Court can rule. Each of the four elements required for a preliminary injunction are met here. First, Pegasus members will suffer irreparable harm if no injunction issues. The horses at Fort Polk are a critical component of the region's cultural heritage and historical landscape. Robertson Decl., ECF No. 1-1; 2d & 3d Robertson Decl., Ex. F; King Decl., Ex. C. Once the horses are removed they cannot be replaced, and this permanent loss causes irreparable harm to Pegasus members. Robertson Decl., ECF No. 1-1; 2d & 3d Robertson Decl., Ex. F. Second, Pegasus can show that the Army violated the National Environmental Policy Act and the National Historic Preservation Act, thus there is a substantial likelihood Pegasus will succeed on the merits. Third, the Plaintiff's threatened harm weighs more heavily than any potential harm to the Army. Harm to the Plaintiff if no injunction issues is irreversible and undermines the preservation of its members' heritage and environment. But this injunction will not interrupt the Army's use of the land for training, as it has done since the 1940s, and still allows the Army to remove horses as needed. Finally, an injunction of modest duration is in the public interest because it would require the Army to adhere to federal regulations and state animal welfare laws, recognize the voices of hundreds of Americans who submitted comments on this program, and put the brakes on a program that was created without the opportunity for local citizens and

stakeholders, including Pegasus members and American Indian Tribes, to participate in historic and cultural protection efforts.

Factual Background

I. Horses have roamed the Fort Polk area since before settlers arrived.

For generations, horses have roamed the lands surrounding Peason Ridge and Kisatchie National Forest ("Kisatchie") in Western Louisiana. Wild and free-roaming horses lived at Fort Polk at least as long as the homesteaders who settled the land in the early 1800's. STEVEN D. SMITH, A GOOD HOME FOR A POOR MAN: FORT POLK AND VERNON PARISH, 1800-1940 50 (Univ. of S.C. Scholar Commons 1999) ("The first Anglo-American settlers often found wild horses and cattle in the woods, lost by the Spanish or other settlers pushing west."); *see also* p. 62 (describing how Gustav Dresel chronicled his journey through the area in August 1839 when a grazing horse wandered into the camp) (*available at* https://scholarcommons.sc.edu/anth_facpub/50/), Ex. G. Based on descriptions and photographs of the horses at Fort Polk, some of the horses may be "Spanish Colonial horses" or possibly "Choctaw horses." *Letter from Jeannette Beringer, Senior Programs Manager*, The Livestock Conservancy (Feb. 12, 2017), Ex. H. Choctaw horses in particular would be "disproportionately valuable for conservation efforts because of the genetic diversity they provide to the population." Letter from D. Phillip Sponenberg, DVM, PhD, Professor, Pathology and Genetics, Virginia Tech, Ex. I.

In the early 1800s, settlers and homesteaders, including Pegasus members' ancestors, began to settle Peason Ridge. They brought more horses with them. The local subsistence farmers set aside a large parcel of land exclusively for grazing for their horses and other animals. *See* EA, Envtl. Assmnt. 34-35, ECF No. 17-1 at 50-51 of 104. Horses have remained on that property ever since. *Id.* The area's population boomed with the arrival of the railroad and the lumber industry, birthing the town of Peason in 1917. *See* Ricky Robertson, *The Sawmill Town of*

Peason, Louisiana, STEPHEN F. AUSTIN STATE UNIVERSITY CENTER FOR REGIONAL HERITAGE RESEARCH, http://www.sfasu.e du/heritagecenter/2439.asp (Aug. 2011), Ex. J. Peason boasted a drug store, hotel, church, schools, electricity, and running water. *Id.*

II. For the more than seventy years that Fort Polk has operated as a military training facility, horses were born on Fort Polk and coexisted there.

During World War II, the Army used eminent domain to take possession of the property and homes owned by Peason residents to create what is now known as the Fort Polk Military Installation. MG Daniel P. Bolger, Installation Commander, JRTC & Fort Polk, *Preface*, *Remembering Fort Polk's Heritage: A Tribute to the Displaced Families of Camp Polk and Peason Ridge* at p. i ("More than 200 families were displaced from their homesteads when the War Department exerted emergency powers under eminent domain to take land and create Camp Polk.") and p. 4 ("Through the Federal court system, the land was condemned and a judgment was rendered declaring eminent domain. After this, the local Parish Clerk's Office carried out the eviction of the residents from the property.") (U.S. Army 2007), Ex. K.[7] The Army refers to the families whose property was taken, and their living descendants, as the Heritage Families. *See Id.* at 6. Nearly all vestiges of the community have been lost or destroyed. Robertson Decl. 3 ¶ 11, ECF No. 1-1. The horses and certain cemeteries are the last remnants of the Heritage Families' old homes and way of life. *Id.*

The Army has stated that it is committed to "ensur[ing] that our cultural history remains relevant and sustainable for future generations," so that they "will not forget [their] Heritage Families for they are unsung heroes who surrendered their homes and way of life for the sake of this nation." JRTC & Fort Polk, *The Fort Polk Heritage Family Project*,

[7] *Available at* The Fort Port Heritage Project, http://www.polkhistory.org/Publications/Publications/Remembering%20Fort%20Polk%20Heritage%202007.pdf.

http://www.polkhistory.org/publications/publications/Heritage%20Project%20Brochure.pdf (last visited Jan. 8, 2018), Ex. L. The Heritage Families gather annually for a reunion celebrating their heritage. Accordingly, the Army is aware of the cultural history of the region, and the deep connection Heritage Family members feel with the landscape. This landscape includes the horses that have roamed there for at least 200 years.

Originally termed Camp Polk and Peason Ridge Training Center, the installation continued to grow, and has since been used for more than 70 years to train thousands of troops.

III. Different types of horses live on the Fort Polk Military Installation.

Horses have lived on the land that now makes up the Fort Polk Military Installation and Kisatchie National Forest for generations, but other horses also populate the area. Domesticated horses are abandoned on or find their way to Fort Polk. EA, Envtl. Assmnt. 35, ECF No. 17-1 at 51 of 104; 2d Robertson Decl. at ¶ 7-12, Ex. F. Accordingly, the horses on Fort Polk include primarily indigenous horses that were born on Fort Polk and have lived their lives without significant human contact for generations as well as a minority of horses that are comfortable with human presence.

Horses at Peason Ridge and on historic Fort Polk landscapes are particularly important to Pegasus members. Horses at Peason Ridge generally "are undomesticated, and have never been tamed. When you come into contact with them, the first thing they are going to do is break and run away from you. You cannot walk up to them. You cannot pet them. They are very skittish. They are wild horses," and they have "never worn a bridle, halter, or saddle." 2d Robertson Decl. at ¶ 7 & 9, Ex. F. Whereas on Fort Polk Main Post, some of the horses are "different colors than the horses in Peason Ridge," are not "skittish, and did not break and run when they came into contact with humans," and "[s]ome of them still have a halter on them." 2d Robertson Decl. at ¶ 8-9, Ex. F.

Legal Standard

A plaintiff seeking a motion for preliminary injunction must show "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

"[T]he function of a preliminary injunction is to preserve the status quo pending a trial on the merits." *Collum v. Edwards*, 578 F.2d 110, 113 (5th Cir. 1978). Additionally, "the most compelling reason in favor of [granting a preliminary injunction] is the need to prevent the judicial process from being rendered futile by defendant's action or refusal to act." *Calloway*, 489 F.2d at 572 (quoting WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2947). By continuing to eliminate the Fort Polk horses during this litigation, the Army is altering the status quo and disrupting the goals of NEPA and the National Historic Preservation Act.

Further, the "Fifth Circuit has acknowledged that the amount of the security [for a preliminary injunction under Fed. R. Civ. P. 65] is within the discretion of the district court, who can elect to impose no security at all." *New Orleans Home for Incurables, Inc. v. Greenstein*, 911 F. Supp. 2d 386, 412–13 (E.D. La. 2012).

Argument

Pegasus will prove each of the four elements required for a preliminary injunction using the documentary evidence attached to or referenced in this memorandum and through witness testimony at the hearing on this motion.

First, without a preliminary injunction, the Army will execute the horse-elimination program, potentially completing all or a large part of its horse-elimination plan before the merits of this case can be heard. The horses are a critical component of the region's cultural heritage, historical landscape and environment. Once the horses are eliminated they cannot be replaced, and this loss causes irreparable harm to Pegasus members that cannot be fixed through monetary compensation. Second, because Pegasus can show that the Army violated NEPA and the National Historic Preservation Act, there is a substantial likelihood Pegasus will succeed on the merits. Third, Plaintiff's threatened harm weighs more heavily than any potential harm to the Army. The Army's horse-elimination plan undermines the preservation of Pegasus members' heritage and environment (which the Army has stated that it also values). In contrast, this injunction will not prevent the Army's use of its land for training troops as it has done for more than seventy years with horses present, and further allows the Army to remove horses if needed, thus the harm to the Army is minimal. Finally, this limited preliminary injunction will not disserve the public interest. Again, the Army will not be prevented from conducting training just as it has been doing, the Army can still remove horses if needed, and the injunction prevents permanent harm to public environmental and cultural resources. The preliminary injunction in fact serves the public interest because it would require the Army to adhere to federal statutes and regulations, recognize the voices of hundreds of Americans who submitted comments on the program, and pump the brakes on a program that was created (1) without adequate considerations of the environmental impacts, and (2) without the opportunity for the Army to complete a proper historic and cultural review.

I. In the absence of injunctive relief, there is a substantial threat that the Army's horse-elimination program will irreparably and imminently injure Pegasus members.

Without this injunction, the Army may eliminate all of the horses at Fort Polk before this Court can rule on the merits. The cultural and environmental injuries at stake from the horse-elimination plan are both irreparable and imminent, and therefore justify this Court granting injunctive relief. Irreparable injuries are those injuries which cannot be adequately remedied by money damages or other legal remedies. In essence, irreparable injuries are those where failure to grant the injunction would render final judgment useless because the harm has already occurred. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975). The Fifth Circuit has noted that it is more important to consider the irreparability of the harm than the magnitude of the injury. *Callaway*, 489 F.2d at 574 (5th Cir. 1974) ("Assuming that the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction").

In contemplating whether an injury is irreparable, courts have given special consideration to environmental injuries. *See Callaway,* 489 F.2d at 574 ("[P]reliminary injunctions have often been properly granted in environmental litigation"). Environmental injuries are often irreparable because "environmental injury, by its nature, can seldom be adequately remedied by money damages and [are] often permanent or at least of long duration." *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). The Supreme Court has explained that "[i]f [environmental] injury is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Id*. But an adverse impact to the environment alone is insufficient – the plaintiff must show that the particular threatened environmental harm is irreparable. *Callaway*, 489 F.2d at 574.

A plaintiff can demonstrate irreparable harm if it has endured an "[i]njury to [its] 'aesthetic, educational and ecological interests' and enjoyment of an area." *Richland/Wilkin Joint Powers Authority v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1038 (8th Cir. 2016) (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 998 (8th Cir. 2011)). *See also Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (finding that a project that prevents the use and enjoyment of an area in a National Forest causes irreparable harm). Actions "that threaten the integrity of the cultural and archeological resources" also constitute irreparable harm. *Colorado River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1440 (C.D. Ca. 1985). When evaluating whether the action will cause irreparable harm to these resources, the court may consider the importance of the site to the group of people reliant on its cultural value, its importance to the general public, and how the site provides "a means by which to better understand the history and culture" of those most connected to it. *Id*. (holding that a riverside development that will affect nearby Native American historical sites caused irreparable harm sufficient to support a preliminary injunction).

The horse-elimination plan irreparably harms the Pegasus members by impairing their ability to enjoy and recreate in the Fort Polk and Kisatchie region as they have traditionally done. Plaintiff's members enjoy visiting the property and seeing the horses. The horses are beautiful, and generations of citizens in Western Louisiana have grown up watching them and interacting with them. *See* photographs of Fort Polk horses, Ex. N. The elimination plan contains no controls to prevent the majority of these horses from being shipped to Mexico for slaughter, and no methods to ensure that the horses will be treated humanely. This plan irreparably harms the horses that will be rounded up and eliminated, and irreparably harms the Plaintiff's members who will suffer the loss of these beloved horses.

Further, the plan will permanently prevent Plaintiff's members from connecting to their cultural heritage. As one of Plaintiff's members and a member of the Heritage Families explained:

> I'll be sixty-one years old in January, and I remember interacting with the horses since I was four or five years old…The horses that roam Fort Polk are likely the descendants of my kinfolk's livestock. I feel closely connected to the land, and these horses. They are a part of who I am, and a part of my culture and heritage . . . They have been here all my life, and I have interacted with these horses all my life. The homes, buildings, and barns of our ancestors who settled this area are all gone. The only part of my ancestors that I still have is these horses. These horses are our history.

Robertson Decl. ¶ 10-11, ECF No. 1-1. The horses are of great significance to members of the Heritage Families, as well as to the general public. They remind people of the community that once existed, and the sacrifice those families made for our Nation's safety and freedom—a heritage the Army even recognized as critically important. To destroy cultural resources of such value will irreparably and irreversibly harm Pegasus members.

Additionally, the Army's violations of NEPA and the National Historic Preservation Act cause irreparable harm because the Army made its decision to eliminate the horses with an incomplete understanding of important and relevant factors. Courts have recognized that "the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation. The difficulty of stopping a bureaucratic steam roller, once started [is] a perfectly proper factor for a district court to take into account in assessing that risk, on a motion for a preliminary injunction." *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989)); *see Sierra Club v. U.S. Army Corps of Eng's*, 645 F. 3d 978, 995 (8th Cir. 2011).

Without considering (1) the impact of the action on the horses themselves, (2) possible mitigation measures, (3) consultation about the historical significance of the landscape and the horses that live on that landscape as required by NEPA and the Historic Preservation Act, or (4)

a meaningful range of alternative courses of action, the Army could not have made a thoughtful and deliberate decision. And because it is so difficult to require a federal agency to re-do its decision-making once it has begun executing its course of action, like the Army has here, harm to the environment and to cultural stakeholders is inevitable. Further, Pegasus members cannot fully contribute to the notice and comment process on the impacts to historic and cultural resources without such a process taking place, and without the essential information needed to evaluate the merits of the Army's decision.

II. Pegasus is likely to succeed on the merits

Pegasus is likely to succeed on the merits, because the Army's actions violated NEPA and the Historic Preservation Act. The Army's violations of NEPA and the National Historic Preservation Act are reviewable under the Administrative Procedure Act. APA § 704. The APA mandates a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The "agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, [courts] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has. . .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. The reviewing court should not attempt itself to make up for such deficiencies [or] supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)

(internal citations omitted). "Under this standard, we must assure ourselves that the agency considered the relevant factors in making the decision, its action bears a rational relationship to the statute's purposes, and there is substantial evidence in the record to support it." *Public Citizen, Inc. v. U.S. E.P.A.*, 343 F.3d 449, 455 (5th Cir.2003).

A. Pegasus is likely to succeed on its claims that the Army violated the National Environmental Policy Act.

The Army violated NEPA in two ways. First, it published an inadequate Environmental Assessment (EA), and second, it should have completed an Environmental Impact Statement (EIS). The underlying purpose behind NEPA is to establish a national policy in favor of protecting and promoting environmental quality. 42 U.S.C. § 4321. More particularly, the goals include the government's responsibility to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations" and "preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice." 42 U.S.C. § 4331. To achieve this, NEPA mandates procedures to take a hard look at environmental impacts before enacting projects that affect the environment. "By forcing agencies to evaluate the environmental consequences of any proposed action, NEPA is able to achieve its substantive goals." *Texas Comm. on Nat. Res. v. Van Winkle*, 197 F. Supp. 2d 586, 597 (N.D. Tex. 2002). NEPA requires that "all agencies of the Federal Government shall. . .include in every recommendation or report on proposals for. . .major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official" on the environmental impacts of, and alternatives to, the proposed action. 42 U.S.C. § 4332(2)(C). This detailed statement is known as an EIS. 40 C.F.R. § 1508.11. Under NEPA, an agency may perform an EA to "provide

sufficient evidence and analysis for determining whether to prepare an environmental impact statement or [instead,] a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1).

a. The Army violated NEPA when it failed to meet its own regulations in preparing its Environmental Assessment.

The Army failed to provide an adequate EA. Under the Army's regulations at 32 C.F.R. § 651.34, an Army EA must include:

> (d) Alternatives considered. The alternatives considered, including appropriate consideration of the 'No Action' alternative, the 'Proposed Action,' and *all other appropriate and reasonable alternatives* that can be realistically accomplished. In the discussion of alternatives, any criteria for screening alternatives from full consideration should be presented, and the final disposition of any alternatives that were initially identified should be discussed.
>
> (e) Affected environment. This section must address the *general conditions and nature of the affected environment* and establish the environmental setting against which environmental effects are evaluated. This should include any relevant general *baseline conditions* focusing on specific aspects of the environment that may be impacted by the alternatives. EBSs and similar real estate or construction environmental baseline documents, or their equivalent, may be incorporated and/or referenced.
>
> (f) Environmental consequences. Environmental consequences of the proposed action and the alternatives. The document must state and assess the effects (direct, indirect, and cumulative) of the proposed action and its alternatives on the environment, and what practical *mitigation* is available to minimize these impacts. Discussion and comparison of impacts should provide sufficient analysis to reach a conclusion regarding the significance of the impacts, and is not merely a quantification of facts."

32 C.F.R. § 651.34 (emphasis added). Here, in its EA, the Army failed to consider: (1) the consequences of the horse-elimination plan on the horses themselves, (2) important baseline information such as analysis of the different types of horses, their roaming patterns, or updated information on the relationship between the horses and the other vegetation and animal life at Fort Polk (Freedom of Information Act responses, Ex. O), (3) "all appropriate and reasonable alternatives," because the Army only considered one "no-action" alternative and six alternatives that all called for complete elimination of the horses using similar methods, without considering

herd-management alternatives or a mix of horse-removal and herd management, or (4) any significant mitigation measures to minimize impacts.

Most importantly, the Army failed to consider the different types or groups of horses and their particular ranges, instead treating all of the horses as one monolithic group. But the wild and free-roaming horses living at Fort Polk for generations are significantly different from abandoned domesticated horses, and the Army should have considered different management options for different horse groups. The wild horses maintain small herds, travelling in family units of seven or eight horses. 2d Robertson Decl. ¶¶ 10-12, Ex. F. These horses are committed to protecting their families, and may react violently if threatened or separated during capture. The Army erred when it did not consider how the horses' behavioral patterns will affect their health and safety during capture, confinement, transport, separation of horse families, and other activities related to capture, transport, or relocation. All of this information is necessary to understand the "general conditions and nature of the affected environment" and the "direct, indirect and cumulative" impacts on the horses themselves, which are undeniably a part of the environment. Further, this information is baseline information that the Army failed to consider relevant to understanding the horses—a critical part of the affected environment.

In light of these issues, the Army should have considered other alternatives for managing the horses to prevent interruptions of training. Instead, it only considered alternatives that totally eliminated the horses. 32 C.F.R. § 651.34(d) ("EAs . . . will include . . . all other appropriate and reasonable alternatives that can be realistically accomplished."). Fort Polk is a large area—there is sufficient space for both horses and intensive military training to coexist, just as they have for more than seventy years. *See* sizing comparison of Fort Polk, EA, Envtl. Assmnt. 19, ECF No.

17-2 at 35. But the Army failed to consider any alternatives that would allow any level of coexistence.

b. The Army violated NEPA when it failed to publish an EIS.

The Army also should have prepared an EIS for at least three reasons. Under its regulation that determines when an EIS is warranted:

> An EIS is required when a proponent, preparer, or approving authority determines that the proposed action has the potential to:
>
> (a) Significantly affect environmental quality, or public health or safety.
>
> (b) Significantly affect historic (listed or eligible for listing in the National Register of Historic Places, maintained by the National Park Service, Department of Interior), or cultural, archaeological, or scientific resources, public parks and recreation areas, wildlife refuge or wilderness areas, wild and scenic rivers, or aquifers.
>
> …
>
> (d) Result in significant or uncertain environmental effects, or unique or unknown environmental risks.
>
> …
>
> (i) Be highly controversial from an environmental standpoint.
>
> (j) Cause loss or destruction of significant scientific, cultural, or historical resources.

32 C.F.R. § 651.41.

First, the Army should have completed an EIS due to the highly controversial nature of completely eliminating all of the horses at Fort Polk, as reflected in the more than 800 comments the Army received on the proposed plan. EA, Appendices D and G, ECF Nos. 17-6 – 17-12, 17-15. The many problems described in both this brief and the public comments evidence the "substantial dispute [that] exists as to the. . .nature or effect of the" horse-elimination plan. *Town of Cave Creek v. FAA*, 325 F. 3d 320, 331 (D.C. Cir. 2003).

Removing the horses would also destroy the last remnants of the community that the Heritage Families established at Peason Ridge. Roberston Decl. ¶ 10-11, ECF No. 1-1 ("The

homes, buildings, and barns of our ancestors who settled this area are all gone. The only part of my ancestors that I still have is these horses. These horses are our history."). The area may also lose the historical living artifacts of Spanish explorers and Native American trade networks – the historic horses at Fort Polk. *Letter from Jeannette Beringer, Senior Programs Manager*, The Livestock Conservancy (Feb. 12, 2017), Ex. H. Thus, the Army's horse-elimination plan has the potential to "[c]ause the loss or destruction of significant . . . cultural, or historical resources" or "[s]ignificantly affect historic [resources] eligible for listing in the National Register of Historic Places . . . or cultural . . . resources." 32 C.F.R. § 651.41.

Finally, the potential for significant, unique, and unknown environmental loss or destruction as a result of removing the horses on the horses themselves requires the Army to complete an EIS. *See* 32 C.F.R. § 651.41(D) (mandating the Army to prepare an EIS when the proposed action may "[r]esult in significant or uncertain environmental effects, or unique or unknown environmental risks"). The Army has no procedures in place to ensure that the horses are not primarily sold to "kill buyers," people who sell horses to ship them to Mexico for slaughter. Nor the have any mechanism to ensure that the horses are treated humanely once they are rounded up and in the possession of either the Army or its contractors. Accordingly, the Army has violated NEPA's procedural requirements by failing to prepare an EIS.

B. Pegasus is substantially likely to succeed on its claims regarding the Army's violation of the National Historic Preservation Act.

The Historic Preservation Act requires that where (1) an undertaking (2) may have an effect on historic property, the agency must (3) follow the consultation and consideration process outlined in Section 106 of the Act. But the Army failed to take into account how its horse-elimination program would adversely affect historic properties at Fort Polk. 54 U.S.C. § 306108. This failure cascaded into additional violations of the Historic Preservation Act. *Id.*

> The underlying purposes behind the Historic Preservation Act include to:
>
> (1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;
> … [and]
> (3) administer federally owned, administered, or controlled historic property in a spirit of stewardship for the inspiration and benefit of present and future generations;
> …

54 U.S.C. § 300101. To achieve this, the Historic Preservation Act requires that "[t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking . . . prior to the approval of the expenditure of any Federal funds . . . shall take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. The agency must consider how the proposed action "would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(A), (A)(1).

The Army's horse-elimination program is undeniably an undertaking as defined by the Historic Preservation Act. "Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency." 36 C.F.R. § 800.16.

Further, Fort Polk includes historic properties that will be materially affected by the horse-elimination plan. "Peason Ridge, together with all or part of Fort Polk itself, constitutes a cultural landscape . . . [that] may be eligible for inclusion in the National Register of Historic Places as a traditional cultural property or as multiple such properties." King Decl., Ex. C. The wild horses of Peason Ridge and Fort Polk contribute importantly to the character of the landscape(s)," and "[w]hether the wild horses themselves, as individual organisms, are eligible

for the [National Register of Historic Places] is an open question." *Id.* A historic property is "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior." 36 C.F.R. § 800.16(l)(1). A cultural landscape is "a geographic area, including both cultural and natural resources and the wildlife or domestic animals therein, associated with a historic event, activity, or person or exhibiting other cultural or aesthetic values." Charles A. Birnbaum, *Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes*, U.S. DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, CULTURAL RESOURCES DIVISION, PRESERVATION BRIEF 36, 1 (1994) (*available at* https://www.nps.gov/tps/how-to-preserve/preservedocs/preservation-briefs/36Preserve-Brief-Landscapes.pdf). There are four general types of cultural landscapes, which are not mutually exclusive: Historic Sites, Historic Designed Landscapes, Historic Vernacular Landscapes, and Ethnographic Landscapes. *Id.* A Historic Vernacular Landscape is "a landscape that evolved through use by the people whose activities or occupancy shaped that landscape. Through social or cultural attitudes of an individual, family or a community, the landscape reflects the physical, biological, and cultural character of those everyday lives. Function plays a significant role in vernacular landscapes." *Id.* at 2. An Ethnographic Landscape is "a landscape containing a variety of natural and cultural resources that associated people define as heritage resources." *Id.*

Additionally, if the Fort Polk horses are Spanish or Choctaw horses, they may be independently eligible for listing as historic property, as courts have found that the National Historic Preservation Act can protect culturally significant wild animals. *See Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1091 (N.D. Cal. 2008) (characterizing the dugong, a marine

mammal related to the manatee, as "a specific property of cultural and historical significance" under the National Historic Preservation Act).

The National Historic Preservation Act required the Army to take many steps relating to historic property before engaging in the horse elimination program. For example, the National Historic Preservation Act states that:

1. The agency "shall take the steps necessary to identify historic properties within the area of potential effects." 36 C.F.R. § 800.4(B).
2. The agency must "make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, [and] oral history interviews." 36 C.F.R. § 800.4(B)(1).
3. Once the agency has identified a historical property, the agency must "apply the criteria of adverse effect to historic properties within the area of potential effects." 36 C.F.R. § 800.5(A).
4. "An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(A)(1).
5. When applying the criteria of adverse effect, "[t]he agency official shall consider any views concerning such effects which have been provided by consulting parties and the public." 36 C.F.R. § 800.5(A).

But the Army did not follow these steps. Indeed, community members who commented during the EA's public notice and comment period used the words "history" and "historic" more

than 300 times in describing their concerns with the horse-elimination program. EA, Apps. D & G (public comments), ECF Nos. 17-6 – 17-2 & 17-15. The Army's response was to summarily reject the existence of any such problem without analysis or explanation. *See, e.g.*, EA, App. G 5, ECF No. 17-15. ("It is Fort Polk's determination that the actions proposed does not have the potential to cause effect to historic properties."). The Army arbitrarily denied that the horses are descended from Cavalry horses or heritage family horses, but concurrently admits that it does not know the origin of the horses. EA, Envtl. Assmnt. 34-35, ECF No. 17-1 at 50-51 of 104.

The Army failed to take any meaningful steps to identify the Peason Ridge and other historic properties potentially impacted by its horse-elimination undertaking as required by 36 C.F.R. § 800.4(b). That failure cascaded into additional National Historic Preservation Act violations. Because the Army did not attempt to identify any historic property, it failed to apply the mandated criteria to analyze adverse effects as described in 36 C.F.R. § 800.5(A). Because the Army did not apply this criteria, it failed to examine whether the undertaking may alter any of the characteristics of historic properties. 36 C.F.R. § 800.5(A)(1). The Army also failed to "consider any views concerning such effects which have been provided by consulting parties and the public." 36 C.F.R. § 800.5(A). The Army also failed to actually consult with the Heritage Families, Native American Tribes who have a cultural interest in Fort Polk and its historic horses, and other interested parties. "Instead of the process of consultation spelled out in . . . 36 C.F.R. § 800.16(f) ("seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them . . . ."), the Army appears simply to have announced its intentions…and done little or nothing in response to the comments regarding the historical and cultural impacts of its decision." King Decl. ¶ 2(g), Ex. C.

The Army covered its eyes by failing to adequately consider the information included in hundreds of public comments relating to historic property in response to its proposed horse-elimination program. Further, the Army never consulted any of the Native American Tribes or other stakeholders that have an interest in Fort Polk and its historic horses. Because the Army has so thoroughly disregarded the National Historic Preservation Act, Plaintiff is substantially likely to succeed on its claim that the Army violated the National Historic Preservation Act.

III. The threatened injury to Pegasus members outweighs the threatened harm the proposed injunction might cause the Army.

The threat posed by the Army's horse elimination program to Plaintiff's members, as well as the Fort Polk horses, far eclipses the corresponding inconvenience the Army may face in limiting the scope of its program as a result of a partial preliminary injunction. In weighing threatened harm to each party, courts consider what "might occur in the interval between the ruling on the preliminary injunction and trial on the merits." *Aquifer Guardians in Urban Areas v. Federal Highway Admin.*, 779 F.Supp.2d 542, 573 (W.D. Tex. 2011). In the present case, there is no need to speculate about what might occur. The Army is corralling the Fort Polk horses and giving or selling them away, never to return.

The potential harm to the Army, on the other hand, is difficult to discern in light of the limited nature of Plaintiff's motion for partial preliminary injunction. While on one hand the Army would no longer have free reign to eliminate every horse in the area, the Army's ability to continue its chosen course of action can proceed if needed with some protections in place. Plainly the Army's training program does not require that every horse in the area be immediately eliminated, so Plaintiff's partial preliminary injunction would not interfere with the Army's ongoing operations. The injunction, if granted, would not preclude the Army from managing the horses in the future; rather, it would impose a period of calm and careful consideration.

Finally, the Plaintiff's members are on the verge of permanently losing the iconic horses that have defined centuries of their heritage and are a cherished part of the landscape. They have been denied the protections Congress afforded them when it passed NEPA and the National Historic Preservation Act, and are now vulnerable to injuries both to their culture and to the environment. The Supreme Court, in examining such injuries, has held that, "if such an injury is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Supra*, *Amoco*, 480 U.S. at 545. Because the balance of harms overwhelmingly favors Plaintiff, this Court should grant its motion for partial preliminary injunction.

IV. Granting Plaintiff's requested injunction will not disserve the public interest.

The final element in a motion for partial preliminary injunction requires plaintiffs to show that granting the preliminary injunction will not disserve the public interest. First, the preliminary injunction is designed to effectively preserve the status quo until the case can be heard on the merits. The Army is already training with horses present at Fort Polk, just as it has been since Fort Polk was created in the 1940s and every year since. Further, the preliminary injunction requested here allows the Army to remove horses in the most critical areas if necessary because the Army's training would not be materially impaired, the public interest would not be disserved. Rather, the partial preliminary injunction would serve the public interest by maintaining the status quo until the Court can address the merits and by restoring the public's voice in the administrative process.

Granting the motion for partial preliminary injunction would also serve the public interest because it would redress the Army's noncompliance with NEPA and the Historic Preservation Act. Although alleged NEPA violations are not presumed to outweigh other public interests, "courts have generally found that the public interest in requiring agencies to comply with NEPA

prior to a project proceeding is sufficient to warrant an injunction." *West Alabama Quality of Life Coalition v. U.S. Federal Highway Admin.*, 302 F. Supp. 2d 672, 685 (S.D. Tex. 2004) (citing *Provo River Coalition v. Pena*, 925 F. Supp. 1518, 1525 (D. Utah 1996)). Additionally, other federal courts have recognized that "the public interest would be served by having the federal defendants address the public's expressed environmental concerns, as encompassed by NEPA, by complying with NEPA's requirements." *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (compliance with NEPA "ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision").

The partial preliminary injunction Pegasus requests here is materially different from the request in *Winter v. NRDC*, in which the Supreme Court declined to grant a preliminary injunction against the Navy's sonar training exercises. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 33 (2008). The plaintiff in *Winter* alleged that the Navy's sonar training caused irreparable injuries to marine mammals, but the Court held that the public interest in effective, realistic training of sailors outweighed the plaintiff's interest in halting the Navy's use of sonar training, which potentially could have harmed an unknown number of marine mammals. *Id.* at 25-26.

First, the alleged harm to Pegasus members is direct and easily ascertainable, which contrasts to the alleged harm in *Winter*. *Id.* While the sonar training employed by the Navy in *Winter* could have negatively impacted marine mammals in the area, no such harm had been

actually recorded in the forty years in which the Navy had previously conducted the exercises. *Id.* at 12. The alleged and actual harm to the horses as a result of the horse-elimination program, on the other hand, is not speculative. The horses will be eliminated; that is the plan the Army is implementing and will continue to implement until all the horses are gone. In *Winter*, the possible harm to marine mammals was alleged to be a side effect of the Navy's training; in the present case, eliminating horses is the Army's explicit goal. *Id.* at 32-33. And while both cases involve training exercises, if the Court had blocked the Navy's longstanding program, where there was no evidence that any marine mammals had actually been harmed by it, that injunction would have stopped ongoing training and interrupted the status quo. In contrast, the Army's horse-elimination program is a new program, and the status quo for the last seven decades has been for horses to be present at Fort Polk while Army training continues. Additionally, Plaintiff has carved out exceptions in its motion for partial preliminary injunction for areas critical to the Army's mission of training our Nation's soldiers. For these reasons, the public interest will not be disserved should this Court grant Plaintiff's motion for partial preliminary injunction.

The hundreds of comments submitted by the public in opposition to the Army's horse elimination program demonstrate the public's strong interest in Army compliance with NEPA and the Historic Preservation Act. Granting the Plaintiff's partial preliminary injunction would serve the public interest by restoring the public's voice in the Army's decision-making process.

V. The bond for this injunction should be set at $0.

Pegasus asks this Court to set the bond for this preliminary injunction at $0, which is consistent with Fifth Circuit precedent. Under FED. R. CIV. P. 65(C), a court may issue a preliminary injunction if "the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The "Fifth Circuit has acknowledged that the amount of the security is within the

discretion of the district court, who can elect to impose no security at all." *New Orleans Home for Incurables, Inc.*, 911 F. Supp. 2d at 412–13 (citing *City of Atlanta v. Metropolitan Atlanta Rapid Transit Authority*, 636 F.2d 1084, 1094 (5th Cir. Unit B Feb. 13, 1981)); *see also Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996) ("[W]e have ruled that the court may elect to require no security at all."). In *City of Atlanta*, the Fifth Circuit upheld the district court's decision to set no bond where

1. "plaintiffs were engaged in public-interest litigation, an area in which the courts have recognized an exception to the Rule 65 security requirement."
2. "the court could reasonably have concluded that the parties to this action were financially unable to post [a large bond]."
3. "[t]he short duration of the restraining order minimized the risk of serious harm to [the defendant]."

636 F.2d 1084, 1094. Here, Pegasus is bringing this case for the public interest, has no significant resources to pay a bond, and the requested injunction is limited in scope and in time. This is an administrative appeal, which will not require discovery, so the litigation process should be relatively short.

Furthermore, based on the horse-elimination program as described in the EA, the Army would not be suffering any "serious harm" as a result of this injunction. Indeed, the Army's current plan is to remove the horses itself and hold horses on Fort Polk property until non-profit groups or the public can transport the horses to other locations. The horse-elimination program produces no perceivable income, and instead imposes costs on the Army. And based on the Army's description of incidents involving horses in its EA, it does not appear that the Army would incur "serious harm" from horse activity for the relatively short duration of the

preliminary injunction. EA, App. B, ECF No. 17-4. Finally, as stated above, the Army has been doing its job of effectively training our troops for more than 70 years at Fort Polk with horses present, and it can continue to do so during the period of the injunction.

For these reasons, the partial preliminary injunction bond should be set at $0.

Conclusion

For the reasons stated above, this Court should grant the Plaintiff's motion for partial preliminary injunction.

Respectfully submitted on January 8, 2018

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Certificate of Service

I hereby certify that on January 8, 2018, this pleading was filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

s/ Machelle Lee Hall
Machelle R. L. Hall