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 Reply Memorandum in Support of its
Motion for Partial Preliminary Injunction

I. The Army's NEPA process was a post-hoc rationalization for the Army's pre-made decision to eliminate the horses.

On June 18, 2015, the Army personnel sought to start the National Environmental Policy Act (NEPA) process to solve this problem: "How to eliminate trespass horses from Fort Polk [in accordance with] state and federal laws." JRTC-G-000006. Even before the start of the NEPA process, the Army's proposed mission was: "The [JRTC] and Fort Polk will eliminate trespass horses from [Fort Polk, Louisiana]…." *Id.* The Army issued notice of its plan to "eliminate" the horses on August 2, 2015. Notice of Intent, ECF No. 43-1. While the Army listed seven "Courses of Action," in truth it considered only to real alternatives: total elimination and "no action." Pegasus will present evidence at the hearing on this motion that there are alternatives, besides just total elimination or "no action," that the Army should consider to manage the horses and make Fort Polk safe for soldiers and their families. The Army's failure to consider any meaningful alternatives to its decision to eliminate all of the horses at Fort Polk violates NEPA. Therefore, Pegasus is likely to succeed on the merits.

II. The Army conflates actual events and hypothetical events.

The Army conflates "*risks*" of hypothetical events with things that *actually have* happened in its argument on the "balance of harms." As the Army points out, it started keeping track of incidents involving horses in November of 2015. EA, App. B, JRTC-V-000157-191 & ECF No. 17-4; Leslie Decl., ECF No. 51-1. In the Administrative Record, it states that "from November 2015 to January 2016, there were 17 reported and documented incidents related to the trespass horses…" JRTC-G-000108. These events include "road hazards" and "deceased horses" and "encroachments," and are listed in the EA in Appendix B and in the Administrative Record in part F. EA, App. B, JRTC-B-000157-191 & ECF No. 17-4; JRTC-F-000001-258. In its opposition and the Leslie declaration (ECF No. 51-1), the Army mixes these more mundane actual events with *hypothetical* events from the Leslie Declaration. The Army does not explain or quantify why the hypothetical risks of encountering horses is "unacceptable" for soldiers training to go into war zones. In fact, its own risk assessment documents do not categorize the risks related to the horses as "catastrophic" or "unacceptable." JRTC-B-000192-233. The first place that Pegasus can find in the record where the Army describes the risks that the Fort Polk Horses as "unacceptable" is in the January 19, *2018* Leslie declaration. ECF No. 51-1. Such "post hoc rationalizations…must be viewed critically."[1]

III. This Court can and should look behind the curtain of the Army's deficient NEPA and Historic Preservation Act decision-making process.

Rather than address Pegasus's evidence in support of the preliminary injunction, the Army insists that the Court cannot look at anything outside of the Army's own Administrative

[1] *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971); *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168–69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action); *Luminant Generation Co. v. U.S. E.P.A.*, 675 F.3d 917, 925 (5th Cir. 2012) ("We must disregard any post hoc rationalizations of the EPA's action and evaluate it solely on the basis of the agency's stated rationale at the time of its decision").

Record. Opp., ECF No. 51. If this were in fact the legal standard, it would almost always be impossible for any plaintiff to find evidence to support a preliminary injunction request, because the elements of a preliminary injunction are different from the elements that the administrative agency considers in building its record. That is why, under Fifth Circuit precedent, a court can and should consider extra-record evidence for a preliminary injunction.[2] Pegasus addresses this issue in greater detail in its concurrently filed Opposition to the Defendants' Motion to Strike, and Pegasus incorporates those arguments here by reference.

IV. The Army's evidence about its alleged Historic Preservation Act analysis supports Pegasus's case.

The Army argues that it "determined that the proposed actions would not have the potential to cause effect to historic properties," citing its response to a public comment on the EA. Opp. 17, ECF No. 51; JRTC-B-000855. To support its reliance on only a response to a public comment as adequate documentation of compliance, the Army cites to 36 C.F.R. § 800.3, "[i]f the undertaking is a type of activity that does not have the potential to cause effects on historic properties, *assuming such historic properties were present*, the agency official has no further obligations under section 106 or this part." But this statutory language "assuming such historic properties were present" indicates that the Federal agency must initiate the section 106 process, including identifying the area of potential effects. To support its interpretation, the Army cites *McGehee v. U.S. Army Corps of Engineers*, as support for their interpretation that no Section 106 analysis was necessary, before committing to their horse elimination plan.[3] Not only is that case from a District Court in the Sixth Circuit, but the Federal agency merely issued a

[2] *La Union del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 141 F. Supp. 3d 681, 694 (S.D. Tex. Sept. 30, 2015) (citing *Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force*, 249 F. Supp. 2d 763, 776 (N.D. Tex. 2003), vacated on other grounds sub nom. *Davis Mountains Trans-Pecos Heritage Ass'n v. Fed. Aviation Admin.*, 116 F. App'x 3, 16 (5th Cir. 2004) (confirming that "the district court correctly stated the law regarding extra-record evidence in NEPA cases")).

[3] No. 3:11-CV-160-H, 2011 WL 3101773 (W.D. Ky. July 19, 2011).

Nation-Wide Permit for a road construction project; it had no other involvement. *Id.* at 1. Further, the Court stated that a "no potential to cause effects" determination terminates the section 106 process, *not* that the agency was exempt for any National Historic Preservation Analysis. *Id.* at 4.

Second, the Army seems to have conflated the term "cultural resource" with "known archaeological site." The Army's narrow view may suffice to meet its obligations under the Archeological Resources Protection Act, 16 U.S.C. § 470aa-470mm, but the Historic Preservation Act is broader in its scope. The Historic Preservation Act requires consideration of potential impacts on "districts, sites, buildings, structures, and objects," which may be significant not just in archaeology but in history, architecture, engineering, and culture, and which can include landscapes, including animals as contributing elements to landscapes.[4]

Further, the "memo" from the museum curator provides evidence that the Army did not engage in a good-faith effort to consider impacts on historic properties. Without any research at all, the curator completely discards the information from life-long resident Rickey Robertson, only because he "did not substantiate these claims with historical citations." JRTC-E-003206, Ex. R. He then argues that the Fort Polk horses are not *purebred* army stock:

> The trespass horses…cannot be considered 'army stock.' Had a cavalry mare been turned loose on the Fort Polk range in 1941, it might have been covered by a local stallion, but the resulting foal would have been of a different stock…the Army thoroughbred stock would have been diluted over successive generations...

JRTC-E-003207, Ex. R. But a descendent of a cavalry horse whose "stock" is "diluted" is still a descendent of a cavalry horse. Further, this paragraph admits the possibility that horses other

[4] The Army argues that eliminating the horses is no problem because Pegasus's "members will still have other ways to connect to their heritage." This is silly and callous. The point of the Historic Preservation Act and NEPA is to make sure that negative impacts are reduced or avoided where possible, and that mitigation can be done, *before* something is destroyed.

than cavalry horses were present in 1941. Yet based on the scant "evidence" in this memo, the curator concludes that the Fort Polk horses "were introduced to the ranges after WW2 as abandoned saddle horses." JRTC-E-003208. Even if this Court were to accept this memo as presenting valid, supported research, the Fort Polk horses may still be descended from the Heritage Family horses, which would also fit the curator's description of them.

V. The "trespass horse" misnomer is a red herring.

A. The Wild Free-Roaming Horses and Burros Act does not apply to Army-owned land, and in the Opposition the Army clarified that its plan only authorized horse-elimination on Army-owned land.

The Army states in both its Environmental Assessment (EA) and its Opposition that the Army is only removing horses from Army-owned land. EA, Envtl. Assmnt. 4, ECF No. 17-1; Opp. 21, ECF No. 51 (citing JRTC-A-000001; Fariss Decl. ¶ 15). The Wild Free-Roaming Horses and Burros Act ("Wild Horses Act") applies only to Bureau of Land Management land and Forest Service land. 16 U.S.C. § 1331-40.[5] The questions about the nature of the horses under NEPA and Historic Preservation Act is a *factual* issue, not a *legal* definition. And Pegasus will show at the evidentiary hearing that as a scientific, technical and factual issue, the more than 700 free-roaming horses at Fort Polk cannot easily be lumped into one single description or definition.

A. Even if the Wild Horses and Burros Act did apply, the definition of "wild horse" plainly contemplates the Fort Polk horses.

The definition of "wild horse" under the Wild Horses Act is broad: "(b) 'wild free-roaming horses and burros' means all unbranded and unclaimed horses and burros on public

[5] "The Secretary shall maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands." 16 U.S.C.A. § 1332. And "(a) 'Secretary' means the Secretary of the Interior when used in connection with public lands administered by him through the Bureau of Land Management and the Secretary of Agriculture in connection with public lands administered by him through the Forest Service; (e) 'public lands' means any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service." 16 U.S.C. § 1332.

lands of the United States." 16 U.S.C. § 1332. The Army's Administrative Record includes photos of the Fort Polk horses, and brands are not visible in these photos. *See, e.g.*, JRTC-E-3140-3205; -H-000009-11; -H-000025-31. Also, the Army has not proven that the Fort Polk horses are branded or that any person claims to own these horses. Rather, the Administrative Record and Pegasus's evidence supports the conclusion that the Fort Polk horses would be defined as "wild horses" if the Wild Horses Act applied to this case.

The Army may try to argue that the Fort Polk horses move between Forest Service land and Army land, and are therefore subject to the Wild Horses Act under the umbrella of the Forest Service. But under Forest Service regulations, this does not make sense. First, Forest Service regulations apply only to national forests. 36 C.F.R. §§ 222.60-22.62. In response to Pegasus's FOIA request, the Army stated that it *has* no documents responsive to the request for "all data on the origin and roaming patterns of the horses." P.'s Ex. O, ECF No. 43-15. Nothing in the record proves that the horses originate on the national forest. Second, under the Forest Service regulations, horses (and their progeny) that were free-roaming on the National Forests before 1971, and horses introduced later than 1971 that have intermingled with wild free-roaming horses, are "wild horses." 36 C.F.R. §§ 222.60(13) & 222.63. Here, there is no evidence that the horses did not arrive at Fort Polk until after 1971. In fact, both the Administrative Record and the evidence Pegasus submitted on the record provide evidence that there were wild or free-roaming horses on Fort Polk before 1971. Even the Army's museum curator indicates that horses were introduced "after World War II," which was well before 1971. JRTC-E-003208. Therefore, the Fort Polk horses meet the definition of wild horses under the Wild Horses Act.

B. "Trespass" horses is not an applicable legal term.

"Trespass" horse is not a legal term under the Wild Horses Act or the Forest Service implementing regulations. 16 U.S.C. §§ 1331-40; 36 C.F.R. Chapter II—Forest Service,

Department of Agriculture; 36 C.F.R. § 222.60-222.76. The Army's use of this term has no legal meaning. If the Army does want to apply Forest Service laws to its horse-elimination plan, it would also need to obey the laws attached as Exhibit Q. For example, a forest officer should impound "unauthorized livestock" after a 15-day notice, then sell the horses in a process and at a price set by the Forest Service. 36 C.F.R. § 262.10. But the Army is not doing any of these things. As the Army pointed out, the horse-elimination program will be carried out on Army-owned land only. Therefore, Pegasus can find no law under which the term "trespass" has any meaning in this case. Rather, the term "trespass" means:

> 1. An unlawful act committed against the person or property of another; esp., wrongful entry on another's real property. Cf. unlawful entry under entry (1). 2. At common law, a lawsuit for injuries resulting from an unlawful act of this kind. • The lawsuit was instituted by a writ of trespass. 3. Archaic. misdemeanor.

TRESPASS, Black's Law Dictionary (10th ed. 2014). But this makes no sense to describe the Fort Polk Horses. Instead, the term "cattle-trespass" may be more fitting:

> Hist. Trespass by one's cattle or other animals on another's land, as a result of which the other might either distrain them damage feasant or sue for trespass in the local courts.

TRESPASS, Black's Law Dictionary (10th ed. 2014). But all of the evidence indicates that most of the Fort Polk Horses were born on Fort Polk and have lived there their entire lives. They do not meet this definition either. The term "trespass" is a meaningless term that simply does not describe the Fort Polk Horses and is not helpful to either this Court or the public.

Further, if these horses were "trespassing," the Army's plan would not comport with Vernon Parish ordinances. Under Vernon Parish law, the Sheriff has a responsibility to try to find the owners of loose horses, and if no owner is found to sell them. Vernon Parish ordinances

§§ 4-20 – 4-29.[6] And the Army also has a duty to "provide adequate feed, adequate water, shelter, [and] medical care. Vernon Parish ordinance § 4-45.[7] Finally, if the horses were "trespassing," the owners may be committing crimes, and the Army could do something about this criminal behavior. It is a state crime to abandon any animal. La. Rev. Stat. § 14:102.1. It is also illegal under Vernon Parish ordinances to abandon horses. Vernon Parish ordinance § 4-45.[8] Therefore, if the owners are allowing their domestic horses to trespass on Army-owned land, they are committing crimes. The Army can report these crimes to the local sheriff, Louisiana Attorney General, or State Police. But there is no evidence in the record that the Army has taken these steps to deal with the "trespass" horses, because the Army knows that these horses are not "trespassing" under any meaningful definition of that word.

C. The COLAA decision is not relevant to this case.

The COLAA court ruled based only on the "administrative record that was considered by the agency decision maker at the time the decision was made." JRTC-B-000148. In that case, the plaintiff did not put evidence into the administrative record to support its claim that the horses on Forest Service land could be defined as "wild." JRTC-B-000148-50. Therefore, the court found that the agency decision based on *that* record was not arbitrary and capricious. *Id. This* record is different. The COLAA decision has no legal bearing on this case. Furthermore, Pegasus is not even asking this Court to rule that the Wild Horses Act applies here.

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[6] Available at https://library.municode.com/la/vernon_parish_police_jury/codes/code_of_ordinances.
[7] According to the Army's Opposition, the Army does not appear to be providing medical care to the horses, but rather is only having veterinarians draw blood for specific tests. Opp., ECF No. 51; Farris Decl., ECF No. 51-2.
[8] "Sec. 4-45. - Cruelty. It shall be unlawful to be cruel or inhumane to any animal. Such cruelty or inhumaneness shall include, but not be limited to, beating, torturing, overloading, overdriving, mutilating, failure to provide adequate feed, adequate water, shelter, medical care, abandoning an animal, poisoning an animal, or cruelly killing an animal."

In addition, the COLAA district court decision was filed on August 17, 2001. JRTC-B-000142. The horses living on Fort Polk today have been largely born and grown up on Fort Polk since that time, and have not been domesticated. As a factual matter, they live as wild horses.

VI. Pegasus's proposed injunction is reasonable.

The injunction requires only limited action on the part of the Army for only a limited duration.[9] Pegasus's proposed injunction asks the Army to slow down its horse-elimination program for only the limited time that it takes this Court to reach a decision on the merits. P.'s Mem. 1-3, ECF No. 48. Further, the injunction allows the Army to remove horses, but introduces necessary transparency and accountability, by agreeing that the Army may remove horses with limited restrictions that providing some (1) transparency, by having the Army post documents on a website the Army has already created for its horse-elimination program and by allowing Pegasus to document the horse-elimination program activities, and (2) accountability, so that the Court can know that the Army is not thwarting this Court's power to render a meaningful decision, and ensuring that the horses are treated with basic humane care and are not sold or adopted out only to be promptly abused or killed. If, in fact, the Army's program is as humane, well managed, and limited as it claims in its Opposition, the Army should have no objections to providing greater accountability and transparency. But if the program does have problems, greater accountability and transparency can preserve the status quo until this Court can rule, and can protect the Army from even bigger problems than just this lawsuit.

The Army claims that "Plaintiff's request would take control of the capture and removal process away from the agency and its contractor, who have the knowledge and experience in operating Fort Polk and managing such livestock, and gives it to Plaintiff, who has no identified

[9] In its Opposition, the Army did not provide any support for a higher bond amount. Opp., ECF No. 51. Therefore this Court should set the bond at $0.

experience or special knowledge," and create "a process that was not approved or considered by the public during the agency's NEPA review." Opp. 24, ECF No. 51. This is false. The proposed injunction provides this Court with some notice and control; provides Pegasus with notice, an opportunity to document the process, and an opportunity to object before this Court; and provides some public notice. Nowhere does Pegasus ask to *control* or *manage* any aspect of the horse-elimination project.

The Army complains that the proposed injunction "raise[s] more concerns than a complete prohibition." But if the Army wants a complete prohibition, the Army can simply choose not to eliminate horses until this Court reaches its decision on the merits. Indeed, this appears to have originally been the Army's plan. JRTC-G-000008.

VII. Pegasus's delay in seeking this partial preliminary injunction was reasonable.

Contrary to the Army's allegation that "Plaintiff has not explained its delay or how it would be harmed…" (Opp. 22, ECF No. 51), Pegasus explained the timing of this motion on the first page of its Memorandum. ECF No. 48. This lawsuit was served on December 19, 2016. ECF Nos. 4-2 & 5-2. The Army chose to conduct no round-ups or removals from then until November 2017. Opp. 12, ECF No. 51. There was no urgent reason to file a preliminary injunction until the Army chose to start eliminating Fort Polk horses in November 2017.

VIII. The Army did not deny that Jacob Thompson is rounding up the horses.

While the Army denied that Jacob Thompson is caring for the horses once they are in the Army's control, nowhere does the Army deny that he is rounding up the horses or assisting with other horse management activities. Fariss Decl., ECF No. 51-2.

Conclusion

For the reasons stated above, this Court should grant the Plaintiff's Motion for Partial Preliminary Injunction.

Respectfully submitted on January 23, 2018

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Certificate of Service

I hereby certify that on January 23, 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