UNITED STATES DISTRICT COURT
FOR THE 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

Plaintiff's Memorandum in Opposition to
Federal Defendants' Motion to Strike Extra-Record Materials

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Plaintiff, Pegasus Equine Guardian Association (Pegasus), respectfully submits this Opposition to Federal Defendants' Motion to Strike Extra-Record Materials. ECF No. 51. Pegasus's exhibits to its Motion for Preliminary Injunction (ECF No. 44-1) are excepted from the "record rule" and thus, should be admitted into the record.

Introduction

This Court should admit Pegasus's evidence into the record under exceptions to the "record rule," including the preliminary injunction and NEPA exceptions. "Extra-record evidence consists of evidence outside of or in addition to the administrative record that was not necessarily considered by the agency. For a court to review extra-record evidence, the moving party must prove applicable one of the eight recognized exceptions to the general prohibition against extra-record review." *Calloway v. Harvey*, 590 F. Supp. 2d 29, 38 (D.D.C. 2008). Cases involving preliminary injunctions and NEPA are established exceptions to the record rule. *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.").

Legal Standard

I. The Fifth Circuit recognizes eight exceptions to the "Record Rule."

Courts reviewing agency action are "normally confined to the full administrative record before the agency at the time the decision was made." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 211 (D.C. 1981). But the Fifth Circuit recognizes three circumstances "justifying a departure" from the record rule:

> "1. The agency deliberately or negligently excluded documents that may have been adverse to its decision; 2. The district court needed to supplement the record with

> "background information" in order to determine whether the agency considered all of the relevant factors; or 3. The agency failed to explain administrative action so as to frustrate judicial review."

Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd., 602 F.3d 687, 706 (5th Cir. 2010).

From these three circumstances, the Fifth Circuit has further articulated eight situations in which courts have "considered extra-record evidence":

> 1. When agency action is not adequately explained in the record before the court;
> 2. When looking to determine whether the agency considered all relevant factors;
> 3. When a record is incomplete;
> 4. When a case is so complex that a court needs more evidence to enable it to understand the issues;
> 5. When evidence arising after the agency action shows whether the decision was correct or not;
> 6. In certain NEPA cases;
> 7. In preliminary injunction cases; and
> 8. When an agency acts in bad faith.

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*, 249 F. Supp. 2d at 776). The eight *Davis Mountains* exceptions "fit within the three broader categories in *Medina*." *Pueblo Entero* 141 F. Supp. 3d at 694, citing *Gulf Coast Rod Reel & Gun Club*, 2015 WL 1883522 (S.D.Tex. 2015) (concluding that the difference between the two lists "does not have much practical significance for the materials" sought to be added in that case).

II. Courts commonly consider extra-record evidence in cases at the preliminary injunction stage.

The admission of extra-record evidence is proper "in cases where relief is at issue, especially at the preliminary injunction stage." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). To succeed on a motion for preliminary injunction the movant must show: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not

disserve the public interest." *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009). The elements for a preliminary injunction are different from the issue that an agency considers when making its administrative decision. "[S]ince injunctive relief is usually not an issue in the administrative proceedings below, *there usually will be no administrative record developed on these issues*. Accordingly it will often be necessary for a court to take new evidence to fully evaluate these issues." Stark & Wald, *Setting No Records: The Failed Attempts to Limit the Record in Review of Administrative Action*, 36 ADMIN. L. REV. 333, 345 (1984) (emphasis added).[1]

In both NEPA and National Historic Preservation Act cases in particular the irreparable harm, balance of hardship, and public interest elements are often inextricably linked to the merits. Such evidence will invariably be absent from the administrative record in these cases. The very merits of a NEPA or National Historic Preservation Act case often speak to the failure of agencies to consider impacts like irreparable harm or impact on public interest:

> "In NEPA cases in particular, courts routinely look outside the record when reviewing agency compliance. The cornerstone case for the NEPA exception to the record rule is *County of Suffolk v. Secretary of the Interior*, which held that a primary function of the court is to insure that the information available to the decision maker includes an adequate discussion of environmental effects and alternatives, which can sometimes be determined only by looking outside the administrative record to see what the agency may have ignored." 562 F.2d 1368, 1384 (2d Cir. 1977).

City of Dallas, Tex. v. Hall, 2007 WL 3257188, at *6 (N.D. Tex. 2007); s*ee also* Stark & Wald at 345. The absence of this information in the administrative record makes it impossible for a court to rule on a preliminary injunction without extra-record evidence.

[1] In *Esch*, the Court relied on the article by Stark & Wald to develop the eight extra-record evidence exceptions, including the preliminary injunction exception – the Fifth Circuit adopted these eight exceptions in *Davis Mountains*. *See supra Esch*; *see generally Davis Mountains*, 249 F. Supp. 2d 763; *Davis Mountains*, 116 F. App'x 3.

Therefore, "at the preliminary injunction stage it is necessary to consider [extra-record] evidence concerning, for example, the substantial threat of irreparable harm, the balance of hardships, and the impact on the public interest at stake." *Nat'l Fed'n of Indep. Bus. v. Perez*, 2016 WL 3766121, at *24 (N.D. Tex. 2016); *City of Dallas*, 2007 WL 3257188, at *13; *Nat'l Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908, 916 n. 10 (D.D.C., 1996) (admitting extra-record evidence of ongoing deterioration of historic site to demonstrate irreparable harm); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F.Supp.2d 1 (D.D.C. 2009) (admitting extra-record evidence declaring plaintiff's "will suffer irreparable harm from Defendants' actions.").

III. Courts consider extra-record expert opinions in NEPA and National Historic Preservation Act cases.

The admission of extra-record expert opinions is appropriate under the NEPA case exception when the opinions are necessary to determine if the agency took a hard look at environmental impact. *See Davis Mountains* 116 Fed. Appx. 3. The Fifth Circuit has held that "[w]hen adverse impacts are set forth in great detail in extra-record written submissions, 'the court properly can consider this record in determining whether there exists a rational basis for the [agency] decision.'" *Davis Mountains*, 249 F. Supp. 2d 763, 776, citing *Exxon Corp. v. Fed. Energy Admin.*, 398 F. Supp. 865, 874 (D.D.C. 1975).

NEPA is instructive in deciding whether to admit extra-record expert opinions in National Historic Preservation Act cases:

> "[I]t is instructive to examine case law decided under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4361. While Section 106 of the NHPA and NEPA are not identical, many courts fruitfully compare them, and their similarities shed light on the issue of agency action and inaction. *See McMillan Park Committee v. Nat'l Capital Planning Comm'n*, 968 F.2d at 1290 (Randolph, J., concurring)."

Nat'l Trust v. Blanck, 938 F. Supp. at 919. Like NEPA an extra-record expert opinion cannot simply disagree with the agency's experts in National Historic Preservation Act cases. Extra-record expert opinion evidence is properly admitted in National Historic Preservation Act cases when the opinions show the "agency ignored relevant factors it should have considered or considered factors left out of the formal record." *Coal. of Concerned Citizens To Make Art Smart v. Fed. Transit Admin. of U.S. Dep't of Transp.*, 843 F.3d 886, 900 (10th Cir. 2016). The Fifth Circuit rejects extra-record expert opinions when they do not help the court determine whether the agency took a "hard look" at environmental impacts or when the administrative record already contains an opinion that proves the agency took a "hard look." *See Davis Mountains*, 116 Fed. Appx. 3.

Argument

Pegasus seeks to introduce extra-record evidence that is subject to one or more of the eight *Davis Mountain* exceptions. 116 Fed. Appx. 3. Additional arguments in support of the admission of Ex. C (ECF No. 43-3), Exs. E-L (ECF No. 43-5 – 43-12), and Ex. O (ECF No. 43-15) are already filed in the record in Pegasus's Motion to Submit Extra-Record Evidence (ECF No. 49), and need not be repeated here. This memorandum incorporates all of these arguments from the Memorandum in Support of Plaintiff's Motion to Submit Extra-Record Evidence (ECF No. 49-1) by reference. Exhibits B (ECF No. 43-2) and M (ECF No. 43-13) were demonstrative exhibits.

I. The Court should consider extra-record evidence because the preliminary injunction exception applies.

The preliminary injunction exception applies to Pegasus's exhibits. The Army contends that all extra-record evidence in support of the merits should be stricken. (ECF No. 52-1). But

this is contrary to the preliminary injunction and NEPA exceptions to the "record rule." *See Esch*, 876 F.2d 976; *Nat'l Fed'n of Indep. Bus.*, 2016 WL 3766121 at *23-24.

A. Ex. C, Declaration of Thomas F. King

The Declaration of Thomas F. King shows "the potential harm [the movant] would suffer if it does not receive preliminary injunctive relief." *City of Dallas*, 2007 WL 3257188 at *13. In his declaration, King states "[t]he wild horses of Peason Ridge and Fort Polk contribute importantly to the character of the landscape(s) as perceived by the Heritage Families of Peason Ridge and Fort Polk (Heritage Families), and perhaps by other interested parties." (ECF No. 43-3). The declaration demonstrates the cultural and historic value of the horses to Pegasus' members and the public. The horse population at Fort Polk is culturally unique and cannot be replaced. The removal of culturally and historically significant horses irreparably harms Pegasus.

B. Ex. D, Louisiana Board of Animal Health Agenda

The Louisiana Board of Animal Health Agenda listing the adjudicatory hearing of Jacob Thompson should be admitted under the preliminary injunction exception. "At this January 2018 adjudicatory hearing, Jacob Thompson was adjudicated liable for five La. Dept. of Ag. Violations…" (ECF No. 44-1). The agenda provides evidence that this adjudicatory hearing took place during the same time frame that the Army was allowing Fort Polk horses to be rounded up. Inhumane treatment of the horses irreparably harms Pegasus members. Accordingly, this evidence should be admitted in support of the motion for preliminary injunction.

C. Ex. E, Declaration of Jeff Dorson

The Declaration of Jeff Dorson should be admitted under the preliminary injunction exception. Extra-record evidence is appropriately admitted to show "the potential harm [the movant] would suffer if it does not receive preliminary injunctive relief." *City of Dallas*, 2007 WL 3257188 at *13. In his declaration, Dorson states that his organization received complaints

that "the horses being rounded up and stored at Fort Polk are not being treated humanely." (ECF No. 43-5). Any inhumane treatment of the horses irreparably harms Pegasus. Accordingly, this evidence should be admitted in support of the motion for preliminary injunction.

D. Ex. F, Declarations of Rickey Robertson and Video Statement of Rickey Robertson

The Declaration of Rickey Robertson, a member of Pegasus, should be admitted under the preliminary injunction exception. Extra-record evidence is appropriately admitted to show "the potential harm [the movant] would suffer if it does not receive preliminary injunctive relief." *City of Dallas*, 2007 WL 3257188 at *13. In his declaration, Robertson describes the horses at Peason Ridge as indigenous, undomesticated horses. ECF No. 43-6. If the Army eliminates these indigenous horses, that will irreparably harm Robertson, his family, and his community. *Id.*

The video statement of Rickey Robertson should be admitted under the preliminary injunction exception. In the statement, Robertson illustrates the historical and cultural importance of the horses to Pegasus and the public. "I have one piece of my heritage and my history and my culture that's still here and that is the wild horses of Peason Ridge. That is the last vestige that I have of my heritage…Our heritage is precious to us, if it's gone we can't ever get it back." (ECF No. 43-16).

The statement demonstrates the cultural and historic value of the horses to Pegasus's members and the public. The horse population at Fort Polk is culturally unique and cannot be replaced. The removal of culturally and historically significant horses irreparably harms Pegasus's members.

E. Ex. G, Book excerpt from "A Good Home for a Poor Man: Fort Polk and Vernon Parish, 1800-1940;" Ex. J, Robertson Article; Ex. K, Tribute to the Families, Ex. L, Heritage Project Brochure

The article written by Robertson describing the history of the Town of Peason, the Army's article "Remembering Fort Polk's Heritage: A Tribute to the Displaced Families of Camp Polk and Peason Ridge," the Fort Polk Heritage Project brochure, and an excerpt from a book about the area's history funded by the Department of Defense titled A GOOD HOME FOR A POOR MAN: FORT POLK AND VERNON PARISH, 1800-1940 should be admitted under the preliminary injunction exception. Extra-record evidence is appropriately admitted to show "the potential harm [the movant] would suffer if it does not receive preliminary injunctive relief." *City of Dallas*, 2007 WL 3257188 at *13.

These exhibits prove that horses have lived at Fort Polk for generations, and substantiate the relationship among the horses, the landscape, and the community that treasures them. Had the Army conducted any National Historic Preservation Act consultation or analysis, these documents would likely have been considered. All of these publication could have been easily accessed by the Army. For example, the book A GOOD HOME FOR A POOR MAN: FORT POLK AND VERNON PARISH, 1800-1940, was funded by the Department of Defense's Legacy Resource Management Program and "Remembering Fort Polk's Heritage: A Tribute to the Displaced Families of Camp Polk and Peason Ridge" was written by member of the Fort Polk Military Installation. Good Home book, Ex. G, ECF 43-7; Robertson Article, Ex. J, ECF No. 43-10; Tribute to Families article, Ex. K, ECF No. 43-11; Heritage Project Brochure, Ex. L, ECF No. 43-12. Rickey Robertson works as a tour guide for the Army on Peason Ridge, and "[if] the Army would have held a public meeting or otherwise sought comments on the historic and cultural value of the horses, [he] would have made the same kinds of comments to them." Ex. F 4 ¶4, ECF No. 43-6. The book excerpt demonstrates that horses have lived at Fort Polk since at

least the early 1800s, proving the historic value of the horses to Pegasus's members and the public. The Army's removal of these historically significant horses irreparably harms Pegasus's members. This book was funded by the Department of Defense and was available to the Army had it conducted a Historic Preservation Act Section 106 review. GOOD HOME FOR A POOR MAN excerpt 1, ECF No. 43-7.

F. Exs. H and I, Letter from Jeanette Beranger and Statement from D. Phillip Sponenberg

The letter from Jeanette Beranger and statement from D. Phillip Sponenberg should be admitted under the preliminary injunction exception. Extra-record evidence is appropriately admitted to show "the potential harm [the movant] would suffer if it does not receive preliminary injunctive relief." *City of Dallas*, 2007 WL 3257188 at *13. In the letter, Beranger states "[i]nitial visual assessments point to the possibility of the horses being a remnant population of a Colonial Spanish strain of horses known as the Choctaw horse. If this is the case it would mean that the horses could be of genetic, cultural, and historical importance to the region." ECF No. 43-8. In his statement, D. Phillip Sponenberg writes that "[i]f the horses are of Colonial Spanish type, then the location and the origin indicate that they should be included within the Choctaw horse conservation effort. Strains such as this, long isolated from others, are disproportionately valuable for conservation efforts because of the genetic diversity they provide to the population." ECF No. 43-9.

The horse population at Fort Polk is biologically and culturally unique and cannot be replaced. The removal of these genetically, culturally, and historically significant horses irreparably harms Pegasus's members.

G. Ex. N, Photographs

The photographs, attached as Exhibit N, will be used at trial in conjunction with testimony to show both irreparable harm and likelihood of success on the merits. The witnesses will use these photographs to illustrate their testimony about different types of horses at Fort Polk and the members' connection to these particular horses.

H. Ex. O, FOIA Responses from the USDA and the Army

The Freedom of Information Act (FOIA) responses should be admitted under the preliminary injunction exception and NEPA case exception. The letters indicate that any USDA Natural Resources Conservation Service data relied on by the Army is at least five years old and possibly outdated. ECF No. 43-15. This indicates that the Army failed to consider baseline data necessary to understand the horses' nature, history, and environment, and that the Army had no documents showing what happened to horses that the Army have already removed from Fort Polk during the early stages of the horse-elimination plan (or under the Army's previous policy of allowing people to come onto the base and remove horses themselves under a permitting program).

Courts admit extra-record evidence to show "the potential harm [the movant] would suffer if it does not receive preliminary injunctive relief." *City of Dallas*, 2007 WL 3257188 at *13. These FOIA responses illustrate the Army failed to consider important data when making a decision that irreparably harms Pegasus's members. The overlap between the merits of the case and a showing of irreparable harm does not foreclose the court from admitting this evidence. *City of Dallas*, 2007 WL 3257188 at *6*; Cnty. of Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1384 (2d Cir. 1977).

II. The King, Robertson, Beranger, and Sponenberg documents prove irreparable harm and the Army's failure to take a "hard look" under NEPA and the Historic Preservation Act.

The declaration of Thomas F. King and Ricky Robertson and letters from Jeanette Berannger and D. Phillip Sponenberg do not supplant any expert opinion in the Administrative Record. The Army contends – incorrectly and without any support – that "permitting expert testimony to second-guess the substantive decision of the agency would subvert the entire administrative review process, transforming the discretionary review of the administrative record into a *de novo* proceeding." This reasoning is inconsistent with Fifth Circuit precedent allowing extra-record evidence and expert opinions for NEPA cases and preliminary injunctions. *See Davis Mountains*, 116 F. App'x at 16; *Citizens To Make Art Smart*, 843 F.3d at 900 (applying NEPA exception for extra-record expert opinions to National Historic Preservation Act cases).

A. Declarations of Thomas F. King and Ricky Robertson

The declarations of Thomas F. King and Rickey Robertson show the historic and cultural value associated with the horses at Fort Polk and do not "supplant" any expert opinion or "second-guess the substantive decision of the agency". (ECF Nos. 43-3 and 43-6). Pegasus cannot find, and the Army in its Motion to Strike does not put forth, any information from the administrative record that shows the Army conducted a proper Section 106 Consultation under the National Historic Preservation Act. If the Army had done so and held a public hearing, sought comments, or complied with the consultation requirements under the National Historic Preservation Act, there would be evidence in the administrative record. 36 C.F.R. § 800.16(F). For example, in his declaration, Robertson states "[i]f the Army had held a public meeting or otherwise sought comments on the historic and cultural value of the horses on Fort Polk, I would have made these same types of comments . . ." 2d Robertson Decl. 2, ECF No. 43-6. The Army never even considered whether the Fort Polk horses contributed to a historic landscape or are

eligible for inclusion on the National Register of Historic Places. Due to this failure, there is no evidence or expert opinion in the administrative record for this Court to rely on to determine whether the horse-elimination plan "has the potential to cause effects on historic properties." 36 C.F.R. § 800.3. For the reasons stated in the Plaintiffs' Reply Memorandum in Support of its Motion for Partial Preliminary Injunction (ECF No. 54 at pp. 4-5), the memo from the museum curator is not evidence of a good-faith effort to comply with the Historic Preservation Act's Section 106 mandates. JRTC-E-003206, Ex. R, ECF No. 54-2. Pegasus incorporates those arguments here by reference. Reply, ECF No. 54 at pp. 4-5.

The Army relies on its conclusory statement that "[it]…determined that the proposed actions would not have the potential to cause effect to historic properties" as evidence that it complied with the National Historic Preservation Act. ECF No. 51-17. However, this statement was made in a response to a public comment to the EA. JRTC-B-000855." This statement was not made in reference to a Section 106 analysis, nor was it made available for public comment. Having reviewed the Army's analysis King states:

> Instead of the process of consultation spelled out in the NHPA Section 106 regulations ("seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process"), at 36 CFR §800.16(f) the Army appears simply to have announced its intentions, as part of its environmental assessment process, given concerned parties some opportunity to comment, and done little or nothing in response to the comments regarding the historical and cultural impacts of its decision.

King Decl. 3, ECF No. 43-3. Pegasus can find no record that the Army issued any report under the National Historic Preservation Act regarding the Fort Polk horse-elimination project or consulted with the Advisory Council on Historic Preservation, the Heritage Families, pertinent Native American Tribes or their Tribal Historic Preservation Officers, the Louisiana State Historic Preservation Officer, or other stakeholders.

The declarations of King and Robertson do not "supplant" or disagree with the Army's expert opinion. Rather, the declarations fill the gap, to show the "agency ignored relevant factors it should have considered ...." under the National Historic Preservation Act. *Citizens To Make Art Smart*, 843 F.3d at 900.

B. Letters from Jeanette Berannger and D. Phillip Sponenberg

The letters from Beranger and Sponenberg also do not seek to "supplant" the Army's expert opinion, or "determine the correctness or wisdom" of the Army's decision. Rather the letters prove the unique biological characteristics and genetic, cultural and historical importance of the horses. (ECF Nos. 43-8 and 43-9). The letters also discuss the negative impacts that the Army's horse removal operation may have on the broader horse population. Impacts on genetic diversity and the conservation efforts of a unique population were not considered by the Army at all in the Environmental Assessment process, and could not be considered during the Historic Preservation Act Section 106 consultation because there was none.

In numerous ways, the Army's Environmental Assessment is legally inadequate, and violates NEPA. First, the Army failed to consider the effect of its plan on the horses themselves. 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 or their roaming patterns. The Army also did not consider a meaningful range of alternatives, including herd management programs that would preserve some of the horses. 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 lack of information in the administrative record shows the Army has not "adequately considered the environmental impact

under NEPA of a particular project." *Sierra Club v. Peterson*, 185 F.3d 349, 370 (5th Cir. 2000); *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992); *Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 247 (5th Cir. 2006); *La. Crawfish Producers Ass'n-W. v. Mallard Basin, Inc.*, No. 10-CV-1085, 2014 WL 4207607, at *4 (W.D. La. Aug. 25, 2014).

The Beranger and Sponenberg letters do not supplant the Army's expert opinions, but demonstrate the holes in the Army's analysis, set forth the adverse impacts, provide the Court with the necessary information to consider whether there was a rational basis for the Army's actions, and prove that the public interest will be harmed if the partial preliminary injunction is denied. *Davis Mountains*, 116 F. App'x 3.

Conclusion

For these reasons, this Court should deny the Federal Defendants' Motion to Strike, ECF No. 52.

Respectfully submitted on January 24, 2018

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Certificate of Service

I hereby certify that on January 24, 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