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

FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO SUBMIT EXTRA-RECORD EVIDENCE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Federal Defendants hereby submit their memorandum in opposition to Plaintiff's Motion to Submit Extra-record Evidence, ECF No. 49, ("Pl.'s Mot.") and its supporting memorandum, ECF No. 49-1 ("Pl.'s Mem.").

I. INTRODUCTION

Plaintiff challenges the August 8, 2016 decision for the method of removing trespass horses from Fort Polk, alleging violations of the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"). Because this action was brought pursuant to the Administrative Procedure Act ("APA"), Federal Defendants compiled a record containing the documents directly or indirectly considered by the decision-maker and lodged it with the Court on November 17, 2017. ECF No. 37. The Administrative Record prepared in this case is more than sufficient for this Court to review Plaintiff's challenge to the Army's decision. Yet, Plaintiff now asks this Court to consider a number of other materials as a supplement to the Administrative Record, including several expert declarations and other exhibits that were attached to its preliminary injunction motion as well as testimony offered at the preliminary injunction hearing.[1] These items were not before the decision-maker, are acknowledged to be "extra-record evidence," and are not properly before the Court.

It is a basic principle of administrative law that the administrative record consists of those documents directly or indirectly considered by the agency in its decision-making process for the final agency action under review. The Administrative Record was compiled by the Army and

[1] Plaintiff also sought to submit evidence entered into the record at the preliminary injunction hearing, Pl.'s Mem. 1, but the Court excluded the evidence that Plaintiff attempted to produce at the hearing. Plaintiff states that it does not seek to submit to the Court the following exhibits to its motion for preliminary injunction, ECF No. 43: A, B, M, and N. Pl.'s Mem. 1.

was certified as complete. ECF No. 37-1 ("Admin. R. Certification"). Despite the agency's efforts and these legal principles, Plaintiff moves to submit extra-record evidence for the Court's review. While there are certain exceptions to allow such extra-record material, Plaintiff has failed to meet its burden to establish an applicable exception for any of these extra-record items. Thus, its motion should be denied.

II. BACKGROUND

In this action, Plaintiff challenges the Army's 2016 decision concerning the method of removal of trespass horses from Fort Polk. Prior to its decision, the Army engaged in a thorough environmental review process with numerous opportunities for public comment. At the conclusion of its review, the Army produced an Environmental Assessment ("EA") and Finding of No Significant Impact that identified the chosen course of action. JRTC-A-000001, JRTC-B-000038. Plaintiff alleges that the Army should have completed an Environmental Impact Statement, assessed the harm to the horses, considered a greater range of alternatives, and completed an analysis on historical and cultural resources. Compl., ECF No. 1. Despite the fact that prior litigation has already established that the horses are not "wild horses" within the meaning of the Wild Free-Roaming Horses and Burros Act and that the act does not apply, Plaintiff focuses a large portion of its allegations disputing the character of the horses. Instead, the focus should be on the alleged NEPA and NHPA violations.

Federal Defendants lodged the Administrative Record with the Court on November 17, 2017. ECF No. 37. Plaintiff filed this motion without any discussion with Federal Defendants as to the documents it seeks to submit to the Court. Federal Defendants oppose all of the extra-record material provided by Plaintiff.

III. LEGAL STANDARD

A. APA Review Is Limited to the Administrative Record Already in Existence and Provided by the Agency.

Plaintiff's claims in this case are subject to judicial review under the APA. The APA allows courts to review agencies' decisions only on the basis of the administrative record that was before the agency at the time it made that decision. 5 U.S.C. § 706; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *abrograted on other grounds by Califano v. Sanders*, 430 U.S. 99, 105, 107 (1977). "The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision *based on the record the agency presents to the reviewing court*." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (emphasis added) (citing *Overton Park*, 401 U.S. 402). The Supreme Court and Fifth Circuit have emphasized that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam); *Fla. Power & Light*, 470 U.S. at 743; *Harris v. United States*, 19 F.3d 1090, 1096 n.7 (5th Cir. 1994).

The administrative record is that which was before the agency at the time that it made its decision and includes all documents and materials directly or indirectly considered by the agency decision-maker. *See Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 549 (1978) ("[W]hen there is a contemporaneous explanation of the agency decision, the validity of that action must 'stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the [agency] decision must be vacated and the matter remanded to [the agency] for further consideration.'" (quoting *Camp*, 411 U.S. at 143)).

B. Extra-record Evidence is Only Allowed in Certain Narrow Circumstances.

Consistent with these principles of judicial review based upon an administrative record, the use of extra-record evidence is unusual and quite limited. Supplementation of the record is sometimes sought when a plaintiff asserts that material exists that the agency should have considered before rendering their decision. *See Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010). However, "[s]upplementation of the administrative record is not allowed unless the moving party demonstrates 'unusual circumstances justifying a departure' from the general presumption that review is limited to the record compiled by the agency." *Id.* at 706 (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)).

> Supplementation may be permitted when:
> (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.

Id. (alteration in original) (citation omitted). This information would then become part of the administrative record if the motion is granted.

Instead, Plaintiff seeks to submit extra-record evidence for the Court's review of the agency decision. "[E]ven when considered by a court, the additional material is 'extra' and does not alter record against which the agency's decision is reviewed." *Gulf Coast Rod Reel & Gun Club, Inc. v. U.S. Army Corps of Eng'rs*, No. 3:13-CV-126, 2015 WL 1883522, at *4 (S.D. Tex. Apr. 20, 2015). The Fifth Circuit has allowed such extra-record evidence only when needed to determine whether the agency's final action meets the test of rationality under the following circumstances:

1. when agency action is not adequately explained in the record before the court;
2. when the agency failed to consider factors which are relevant to its final decision;
3. when an agency considered evidence which it failed to include in the record;
4. when a case is so complex that a court needs more evidence to enable it to understand the issues clearly;
5. in cases where evidence arising after the agency action shows whether the decision was correct or not;
6. in cases where agencies are sued for a failure to take action;
7. in cases arising under NEPA; and
8. in cases where relief is at issue, especially at the preliminary injunction stage.

Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force, 249 F. Supp. 2d 763, 776 (N.D. Tex. 2003), (quoting *ITT Fed. Servs. Corp. v. United States*, 45 Fed. Cl. 174, 185 (1999)), *vacated sub nom. Davis Mountains Trans-Pecos Heritage Ass'n. v. FAA*, 116 F. App'x 3 (5th Cir. 2004).

Plaintiff bears the burden of demonstrating that the record is inadequate and that proposed extra-record submissions may properly be considered. *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 755 (E.D. La. 2014) (finding the plaintiff fell "short of demonstrating 'unusual circumstances justifying a departure' from the rule that judicial review is limited to the administrative record" (citation omitted)), *aff'd,* 827 F.3d 452 (5th Cir. 2016), *reh'g en banc denied,* 848 F.3d 635 (5th Cir. 2017), *cert granted sub nom. Weyerhaeuser Co. v. Fish & Wildlife Serv.,* No. 17-71, 2018 WL 491540 (U.S. Jan. 22, 2018).

IV. ARGUMENT

A. The Administrative Record Is Sufficient for Review, and Plaintiff Has Not Met Its Burden to Show that Extra-Record Evidence Is Appropriate.

Here, the agency prepared an administrative record wholly sufficient to support review of the challenged decision in this case. The record consists of the documents considered by the decision-maker in the course of developing the selected course of action and in analyzing the

numerous public comments. It comprises over 7,600 pages covering the span of more than twenty years. *See* Index of the Admin. R., ECF No. 37-2. The record includes voluminous materials related to the decision-making process, including the NEPA documents, public comments, prior litigation, extra-agency communications, prior environmental review documents, and specialist reports. *See id*. The agency has declared to this Court that this record contains all of the documents that were directly or indirectly before the decision-maker for the challenged decision. Admin. R. Certification ¶ 2.

Plaintiff requests that this Court consider additional materials, but it fails to show that the record as it currently exists is inadequate. In fact, much of the "technical and scientific information and pertinent facts" referred to by Plaintiff are actually included in the Administrative Record. Pl.'s Mem. 2. For example, Plaintiff argues that the Army did not consider whether the Fort Polk horses contributed to a historic landscape or were eligible for inclusion on the National Register of Historic Places. *Id*. at 13. However, the character of the horses was previously decided by the prior litigation and affirmed by the Fifth Circuit. JRTC-B-000139, -156. Also, the United States Department of Agriculture issued a letter in 1998 determining that the horses "on the Kisatchie National Forest lands [were] trespass horses in their progeny." JRTC-E-003549. Further, the Army considered numerous comments by the public regarding the potential historic character of the horses and the area. JRTC-A-000003-4; JRTC-B-000108, -234-824, -851-1043. Therefore, Plaintiff failed to show that "simply reviewing the administrative record is not enough to resolve the case." *Recent Past Pres. Network v. Latschar*, 701 F. Supp. 2d 49, 54 (D.D.C. 2010) (citing *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989)); *see also Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988) (declining to look at evidence outside the record when the record contained adequate

information to respond to the allegations), *opinion amended,* 867 F.2d 1244 (9th Cir. 1989). . Moreover, Plaintiff presented no evidence that was actually relevant to the Court's review of whether the Army properly found this project to be the "type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present . . . ." 36 C.F.R. § 800.3(a)(1). For these reasons, Plaintiff's motion should be denied.

B. Plaintiff Has Failed to Show that Any Exception to the Record Review Rule Applies to the Materials It Seeks to Include in the Record.

Plaintiff asserts that limiting judicial review to the Administrative Record here would "make judicial review meaningless and eviscerate the very purposes of NEPA." Pl.'s Mem. 15 (internal citation omitted). However, its motion seeks to do just that. Judicial review of a NEPA challenge is not intended to be an opportunity for the court to review the agency's decision and see if it would reach the same result. It also is not intended as an opportunity for Plaintiff to present expert opinions that differ from the record that was before the agency. *Krichbaum v. U. S. Forest Serv.*, 973 F. Supp. 585, 589-90 (W.D. Va. 1997) ("Supplementation of the administrative record 'to determine the correctness or wisdom of the agency's decision' is specifically prohibited." (internal citation omitted)), *aff'd,* 139 F.3d 890 (4th Cir. 1998) (per curiam). After reviewing each item of extra-record evidence presented by Plaintiff, this Court should find that Plaintiff fails to meet its burden as to any of the materials at issue and deny Plaintiff's motion.

Federal Defendants provide the following specific responses to Plaintiff's extra-record evidence.

1. Exhibit H—Beranger Letter and Exhibit I—Sponenberg Letter

Despite the prior determination that the horses are trespass horses, Plaintiff's exhibits address potential claims about the character of the horses. However, both of these documents are

speculative and do not provide competent evidence that should be considered by this Court. Beranger states that "[i]nitial visual assessments point to the possibility" of the horses being Colonial Spanish or Choctaw. ECF No. 43-8 at 1. Sponenberg similarly speculates when using the language "if the horses are of Colonial Spanish type . . . ." ECF No. 43-9. Plaintiff states that the Army did not consider this in the EA. Pl.'s Mem. 16. But, even assuming that this evidence was credible, the origins of the horses were already considered by the Army. In identical public comments, several individuals refer to the horses being "smaller Spanish type," and one commenter specifically stated that the "horses date back to the Spanish, Native Americans and Cavalry Horses." JRTC-B-000890, -896, -898, -901, -937, -940. The Army directly responded that "[t]here is no reputable evidence that the horses present on Fort Polk today are part of a non-livestock herd that has been wild and free roaming since the times referenced in this comment." JRTC-B-000940. The time has long passed for Plaintiff to attempt to find and present such evidence.

Plaintiff asserts that this information will show whether the agency considered all relevant factors, that the record was incomplete, enable the Court to understand a complex case, and provide an explanation as to the rationality of the agency's action in this NEPA case. Pl.'s Mem. 16. Yet, then it only relies on this information to attempt to show that the Army failed to consider this evidence. *Id*. These documents were never submitted to the Army for consideration and appear to only have been prepared in connection with this litigation. Further, as discussed above, the substance of Plaintiff's claim was considered in the Army's NEPA process. Plaintiff also attempts to use these documents to show that the Army failed to analyze whether the horses qualify as historic property under the NHPA. *Id*. at 21-22. However, there is no legal basis in United States' law for the Army to have found that the horses meet such a

qualification. And given the Army's reliance on the character of the horses from the 2002 Fifth Circuit decision, it was not rational for the Army to have analyzed whether the trespass horses were historic property. Therefore, these documents should be excluded from the Court's consideration.

2. Exhibit E—Dorson Declaration

Plaintiff seeks to include the declaration of Jeff Dorson, ECF No. 43-5, but this testimony is not competent evidence as it lacks a proper foundation. Mr. Dorson claims to have received complaints from unidentified witnesses that the horses were "not being treated humanely." *Id.* ¶ 3. No other information is provided by this declaration to support the testimony or further inform the Court. Further, the Army is not required to include all considerations, methods for removal or various safeguards in its decision as alleged by Plaintiff. Louisiana law provides guidance on the treatment of the trespass livestock when it has been captured, so additional guidelines or safeguards for how to treat and care for the horses were not necessary. *See* LA. ADMIN. CODE, tit. 7, pt. XXI, § 2103. Thus, this declaration does not show a failure to include certain considerations in the Army's decision or proof of an incorrect decision by the Army.

3. Exhibit O—FOIA Responses

The United States Department of Agriculture and Army FOIA responses, ECF No. 43-15, are also not relevant to this action and should not be considered. Plaintiff alleges that these documents show a failure of the Army to consider certain information. Pl.'s Mem. 17. Not so. There is no support that data related to natural resources that was older than 2012 would have necessarily been outdated. Nor does Plaintiff establish that such data was actually important or relevant to the Army's decision or that the Army did not obtain comparable information from another source. Therefore, the exceptions that Plaintiff identified do not support this Court's

consideration of these documents.

4. Exhibit P—Bruce Nock Declaration

Plaintiff offered the declaration of Bruce Nock, ECF No. 49-2 ("Nock Decl."), to provide expert testimony on stress physiology of the horses. First, such expert testimony is not permissible. It is well-settled, however, that "a court may not 'substitute [its] own judgment for that of the agency by considering expert testimony that was not made a part of the administrative record.'" *Aquifer Guardians in Urban Areas v. Fed. Highway Admin.*, 779 F. Supp. 2d 542, 565 (W.D. Tex. 2011) (alteration in original) (quoting *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1190 (8th Cir. 2001) ("upholding [categorical exemption ("CE")] and refusing to consider extra-record 'citizen letters and expert testimony'")). Second, the subject matter of the expert's testimony is not relevant to a review of the agency's decision under NEPA and the NHPA. Ultimately, Plaintiff is advocating for the horses to be allowed to remain at Fort Polk, which the Army considered and rejected as a viable course of action. See JRTC-B-000998 (responding to comments "[p]ermitting the horses to remain on Fort Polk does not eliminate the safety risk and training impacts created by their presence"). Third, the same concerns about stress on the horses and utilizing low-stress techniques to handle the horses were raised and considered by the Army during the public comment period. *See* JRTC-B-000851. Therefore, the declaration of Mr. Nock does not provide additional information needed for this Court's review and should be excluded.

5. Exhibit C—Thomas King Declaration

The declaration of Thomas King, ECF No. 43-3, is offered to provide expert testimony on the historic nature of Peason Ridge and the horses. However, this declaration is speculative

as to the eligibility of the horses on the National Register of Historic Places.[2] In addition, as discussed above, such expert testimony is not permitted in APA cases. Further, even if the Court were to consider the agency's decision through the lens of Dr. King's opinions, it would not be an accurate assessment as Dr. King did not consider all of the evidence that the Army considered when offering his opinion in this declaration. For example, the organization for the "Heritage Families" was contacted as part of the Army's decision-making process. JRTC-G-000071. Thus, this declaration does not show an incomplete record or that the agency failed to consider any factors in making its decision.

6. Exhibit F—Robertson Declarations, Exhibit J—Robertson Article, Exhibit K—Tribute to the Families, Exhibit L—Heritage Project Brochure, and Exhibit G—*Good Home* Excerpt

The declarations, video statement, and article of Rickey Robertson as well as the brochures and book excerpt, ECF Nos. 1-1, 43-6, 43-10, 43-11, 43-12 and 43-7, are not relevant or competent evidence for this Court to consider. These documents contain speculative assertions that have not been substantiated. There is no proof that the horses were historic or connected to World War II cavalry horses or the "Heritage Families" that previously lived in the area of Fort Polk. Moreover, all of this information was substantively considered by the agency during the NEPA review process. NHPA consultation was not required by the NHPA or in order for these issues to have been considered. The Army held a public meeting as part of its compliance with NEPA. JRTC-B-000062. Plus, Mr. Robertson specifically submitted public scoping comments and comments on the final EA, and he made the same comments both times.

[2] When Dr. King testified at the hearing, he stated that no animal has ever been included on the National Register of Historic Places and that the National Park Service does not consider animals to be eligible for inclusion. Thus, it is reasonable that the Army did not decide to consider the horses that were already deemed trespass livestock as eligible for such inclusion.

See JRTC-B-000280, -892. Thus, no exception applies and these documents should be excluded from the Court's review.

7. Exhibit D—Meeting Agenda

Plaintiff attached to its motion for preliminary injunction an agenda from the Louisiana Department of Agriculture & Forestry for a January 5, 2018 meeting, ECF No. 43-4, but it does not specifically mention this document in its motion to submit. This document should not be considered by this Court as it is not relevant or determinative of any specific fact. Plaintiff offers no explanation as to how this document meets any exception for admissible extra-record evidence. Thus, it should be excluded.

8. Preliminary Injunction Hearing Testimony

Plaintiff broadly asserts that the evidence from the preliminary injunction hearing is relevant to the merits and meets at least one of the exceptions to the record rule. Pl.'s Mem. 23. However, after hearing all of the testimony from Plaintiff's witness, this Court should find that the testimony was not relevant or admissible for consideration under an applicable exception.

Plaintiff offered five witnesses at the hearing on January 30, 2018, including Dr. Thomas King, Rickey Robertson, Stacey Alleman-McKnight, Jennifer Pfaff, and Dr. Timothy Brendan Batt. Dr. King was offered as an expert on the NHPA and testified that the agency's determination that there was no potential to effect historic properties was an "understandable position" but that he would have reached a different determination. Mr. Robertson testified consistently with his declarations and video previously submitted by Plaintiff, but on cross examination, he admitted that he was fully able to participate in the NEPA process and expressed the exact same concerns about the historic character of the horses. He also admitted that he had an additional in-person meeting with his wife, the decision-maker Major General Brito, and an

Army attorney to discuss the proposed action and his same concerns about the horses. Ms. Alleman-McKnight testified as to her expertise working with and placing horses for adoption and the likelihood of potential successful adoptions for the trespass horses from Fort Polk. She admitted on cross-examination that she did not actually have any experience with the Fort Polk or the trespass horses there. Ms. Pfaff offered testimony as to her experience working with a 501(c)(3) organization that received some of the trespass horses from Fort Polk. Lastly, Dr. Batt was offered as an expert to adopt the opinions in the Nock Declaration, ECF No. 49-2, and to testify as to the potential for stress in some of the horses.

Most of this testimony was not relevant to the issues that will be addressed during the merits briefing of this case, namely whether the Army complied with NEPA and the NHPA in making its 2016 decision. Nor is any of this testimony relevant to expose any defects in the Administrative Record. Instead, Plaintiff has presented this evidence as a way to allege that the Army made the wrong call, which is not permitted in an APA case, especially as to expert testimony. It is well-settled that "a court may not 'substitute [its] own judgment for that of the agency by considering expert testimony that was not made a part of the administrative record.'" *Aquifer Guardians*, 779 F. Supp. 2d at 565 (alteration in original) (citation omitted). Indeed, permitting expert testimony to second-guess the substantive decision of the agency would subvert the entire administrative review process, transforming a discretionary review of the administrative record into a *de novo* proceeding. NEPA does not "permit a court to substitute its judgment for that of the agency on the wisdom of the action taken by the agency." *Sierra Club v. Sigler*, 695 F.2d 957, 977 (5th Cir. 1983) (citation omitted). There is no basis for this Court to review expert or lay opinions stating that the Army should have taken a different course of action.

Plaintiff has not made a viable argument as to why any of this testimony should be considered by this Court on the merits of this case. Therefore, this testimony should be excluded as inadmissible extra-record evidence.

V. CONCLUSION

The Administrative Record is sufficient for this Court's review of the challenged decision in this case. Plaintiff does not make the necessary showing to explain why the requested documents should be considered by the Court as extra-record evidence. Accordingly, Plaintiff's motion should be denied.

Respectfully submitted, this 7th day of February, 2018,

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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2018, a copy of the foregoing *Federal Defendants' Memorandum in Opposition to Plaintiff's Motion to Submit Extra-record Evidence* was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system. I also certify that according to the Court's Mailing Information, there are no manual recipients.

s/ Davené D. Walker
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U.S. Department of Justice