

**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 Post-Hearing Brief in Support of its
Motion for Partial Preliminary Injunction**

Pending before this Court is Plaintiff's Motion for Partial Preliminary Injunction to enjoin the Army from continuing its Fort Polk horse-elimination plan until the merits of this case can be decided.

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On the merits, Pegasus is asking the Court to determine that the Army: (1) failed to comply with Section 106 of the National Historic Preservation Act, especially its consultation requirements, and therefore, this Court should set aside and remand the Army's decision to implement its horse-elimination plan until the Army completes its obligations under the National Historic Preservation Act; (2) failed to complete a sufficient EA (Environmental Assessment) and, therefore, this Court should set aside and remand the Army's decision until the Army completes a sufficient EA; and (3) failed to complete an EIS (Environmental Impact Statement), and thus, this Court should set aside and remand the Army's decision until the Army completes an EIS. Pegasus is not asking the Court to tell the Army what to do on the substance of its decision. Rather, Pegasus is asking the Court to order the Army to properly complete these three legal requirements.

On Plaintiff's Motion for Partial Preliminary Injunction (ECF No. 48), Pegasus is not asking the Court to tell the Army how to manage its land. Pegasus is asking the Court to enjoin the Army from continuing their horse elimination program until the merits can be decided. In the meantime, if the Army has a specific need to eliminate horses, the Court can approve or disapprove of the Army's requests for limited horse-removal activity while ensuring transparency and accountability.

Supplemental Facts

Witnesses testified to a few topics at the Preliminary Injunction Hearing on January 30, 2018. Pegasus highlights two of these as particularly relevant to the decision before this Court.

I. The Fort Polk horses became emaciated and infected with strangles while in the Army's care.

Pegasus's witnesses, Jennifer Pfaff and Dr. Brendan Batt, testified about the strangles disease in the Fort Polk horses. Jennifer testified that her recently adopted Fort Polk horses "are

in terrible condition. They have a body scale of about two right now, which is emaciated. We are currently dealing with an outbreak of what is believed to be strangles. . . I have pregnant mares on my property who have now been exposed to this disease.” PI Hr’g Tr. 67-68, Jan. 30, 2018. The Army chose not to cross examine on the issue.

Dr. Batt testified that strangles is a bacterial infection. “It’s usually most commonly occurring in my practice in horses that come from kill pens, from rescues, horses that face a lot of stress and crowding.” PI Hr’g Tr. 88. Dr. Batt also explained that Louisiana State Law requires one of three identifying marks, a microchip, a brand or tattoo, before a horse can be identified, documented, and tested for infectious diseases. PI Hr’g Tr. 82. Because the Army places the burden of marking the horses on the adopter organizations, there is no baseline veterinary care or information available when adopters pick up the horses. Env’tl. Assessment (“EA”), ECF No. 17-2 at 31; PI Hr’g Tr. 82, 92-95.

The Defendant chose not to rebut: (1) the Army took no reasonable steps to prevent disease outbreaks from their round-up equipment or pens; (2) that the Thompson subcontractor was not taking the proper steps to provide veterinary care or prevent the spread of communicable diseases in horses with unknown baseline vaccination and medical histories; (3) that one of Ms. Pfaff’s adopted Fort Polk horses contracted an equine disease while in the Army’s care; and (4) the Army was not conducting baseline testing that is commonly accepted in the equine veterinary community as the minimum in these circumstances.

The Army failed to consider this readily-apparent risk of its horse-elimination plan. The administrative record is silent on considerations of disease and hygiene in regard to COA 7, the Army’s chosen horse elimination plan, or the other total-elimination COAs. When conducting an

undertaking that involves a moving hundreds of horses in only a few years, this is a significant baseline consideration that the Army neglected to even consider.

An eyewitness account by Jennifer Pfaff, who adopted three of the Fort Polk horses and checked on the pens frequently through the non-profit that took the Fort Polk horses in 2017 and 2018, testified to the consequences of the Army's choice to leave these things to chance and the Thompson subcontractor. Ms. Pfaff testified that while at the pens, she observed that "the hay was not anything that I would ever give to my horses. You could smell the mold and mildew on it. [The bales are]...on the ground and not covered by anything, open to the elements." PI Hr'g Tr. at 69. And the Humane Society of Louisiana received reports that the Fort Polk Horses are not being treated humanely while in the Army's subcontractor's care. ECF No. 43-5.

COA 7 provides that "small lots of horses... would be placed temporarily into a holding pen stocked with sufficient water and forage." JRTC-B-000081. The Defendant's declaration of Milton Fariss also states that initially, in 2016, he "personally ensured that the horses had sufficient water and hay on a daily basis." Fariss Decl. ¶ 11, ECF No. 51-2. But then in 2017, Fariss turned these responsibilities over to the Thompson subcontractors. Fariss Decl. ¶ 12, ECF No. 51-2. He testified that "[a]t no point have I seen the horses without access to food and water..." But there is nothing in his testimony, COA 7, or the administrative record to explain or ensure how often or how carefully Army personnel monitor the horses when they are held in their contractors' care.¹

¹ The decision to sub-contract with the Thompsons is especially troublesome considering the Thompson subcontractor's evident conflict of interest: in addition to being the Army's subcontractor to round up and care for the horses, the Thompson subcontractors are kill-buyers who also want to acquire the horses themselves. Numerous members of the public informed the Army that the "Thompson Kill Pen", aka "Double S Kill Pen," aka Thompson's Horse Lot & Co. wants to acquire Fort Polk Horses. *See, e.g.*, public comments at JRTC-B-000951 ("Thompson's Kill Pen is a feed lot that provides horses to Mexican slaughter houses. It is 25 miles from Fort Polk and it is my understanding that one of its owners, Jacob Thompson, has already expressed interest in rounding up the herds at Fort Polk."), JRTC-B-000759, JRTC-H-000304. In 2014, Dale Thompson illegally built a corral on Fort Polk at the Geronimo Drop Zone, and the Army received a report that he was illicitly gathering horses at night to and selling

Further, the Army has failed to follow basic veterinary practice, externalizing these costs onto members of non-profits and adopters, such as Ms. Pfaff, who must “bring out the vets to have them microchipped out of [their] own pockets.” PI Hr’g Tr. at 67.

II. Stacey Alleman-McKnight testified that 200-300 Fort Polk horses had already been removed by January 30, 2018.

The Army admits that at least 116 Fort Polk horses have already been removed under COA 7. Fariss Decl. ¶ 11, ECF No. 51-2. However, the Army was already eliminating horses through a Public Capture Program before it started its horse-elimination program. *See, e.g.*, JRTC-B-000073 (“The Army would continue to permit...the public to remove [horses under] the existing Public Capture Program.”). It is also possible that horses have been removed illicitly. JRTC-G-000042. Further, there is nothing in place to prevent the Army’s subcontractors from removing horses in addition to those that they are rounding up as part of COA 7.

On January 30, 2018, Stacey Alleman testified that “they’ve already gotten rid of 200 or 300 [horses].” PI Hr’g Tr. at 55. The Army did not object to this testimony, dispute this number, or provide contrary evidence. Regardless of the exact number, the horse population has already been significantly reduced. Based on the Army’s broad estimate of 500-700 horses, if 116-300 have already been eliminated, this is a substantial reduction in the population.

Argument

I. Pegasus members will suffer irreparable harm if the preliminary injunction is not granted.

Pegasus founding member, Rickey Robertson, testified about the harm the Army’s horse elimination program will cause him. These harms are permanent and irreparable:

After the Army came in after the 1941 . . . [they] destroyed all the houses, all the corn cribs, the barns and everything else. There is nothing for us to go back and see. There is

them to a slaughterhouse. JRTC-G-000042. And “Various Kill Buyers” were included on the Army’s contact list to receive “give-away” horses under COA 7. JRTC-G-000072; JRTC-G-000086.

one thing of my history and my culture and my heritage that's left and that's them horses right there. I can relate to them. I relate to the land that my ancestors, they worked. I've got a special feeling for the land and I've got a special feeling for them horses right there. They're free. They're part of Louisiana history, American history, and they're my heritage.

PI Hr'g Tr. 38. Prior to this testimony, Mr. Robertson repeatedly testified as to this irreparable harm. *See* Complaint ECF No. 1 (“members who are part of the “Heritage Families” whose ancestors owned land where Fort Polk is currently located, will permanently lose a critical part of the landscape that they rely on to retain and celebrate their cultural and historical heritage”; ECF No. 1-1 (“The horses on Peason Ridge have always been a part of my family’s heritage. My ancestors depended on the land, and their livestock, to survive. We always had livestock, and the horses ranged free at Peason Ridge for decades upon decades, long before Camp Polk existed.”)).

Id.

In addition to destroying a critical part of Pegasus members’ cultural heritage, the Army’s horse elimination plan degrades Pegasus’s use and enjoyment of the landscape at Fort Polk.

Rickey Robertson has enjoyed watching the horses at Peason Ridge his entire life:

I have been associated with the horses all my life. I’ll be sixty-one years old in January, and I remember interacting with the horses since I was four or five years old. I was raised in the Peason Community in southeastern Sabine Parish as a farm boy. Farming, cattle, and horses have always been my way of life. I still live right next to the range. 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.”

Robertson Decl. 2 ¶ 10, ECF No. 1-1. Mr. Robertson testified in his video declaration that when people go on tours of Fort Polk, they all want to see the horses. ECF No. 43-6, Exhibit F.

Given the Pegasus members’ personal connection to the horses, they are also harmed by watching as the Fort Polk horses suffer unnecessarily from emaciation, disease, and the threat of being turned into “giveaway” horses or being crowded into trailers and spending days being

shipped to their deaths in Mexican slaughter houses. PI Hr’g Tr. at 38, 52-53, 60-61, 80-81, 84-85.

If the injunction is not granted, Pegasus members will be denied the congressionally mandated informed decision-making and consultation processes that directly impact their lives. If more horses are eliminated, requiring the Section 106 process of consultation, avoidance, and mitigation may become moot. 54 U.S.C. § 306108, 300320; 36 C.F.R. § 800.4, 800.6. These requirements are designed to limit the irreparable loss of historic places. Ensuring the Army complies with Section 106 is the only protection Pegasus has against this irreparable harm. As Mr. Robertson testified “[t]here is one thing of my history and my culture and my heritage that’s left and that’s them horses right there.” PI Hr’g Tr. at 16-17. Further, requiring a proper EA and EIS may also become moot. The Army must take a “hard look” at the harm to an important aspect of the Fort Polk environment – the Fort Polk horses – before eliminating them; considering that harm *after* destroying this integral part of the environment is pointless.

The Army’s attempt to dismiss the Pegasus members’ irreparable harm by calling it “overstated” lacks foundation, is condescending and belittling, and does not justify the Government’s attempt to circumvent the procedural requirements of NEPA and the National Historic Preservation Act. Def.’s Opp. 23, ECF No. 51. In contrast, Dr. Thomas F. King, who has extensive experience in identifying historic properties and working with communities and government agencies through the consultation process required by Section 106, explains why the loss of historic properties results in irreparable harm. PI Hr’g Tr. at 31. In his testimony, Dr. King explained that “. . .when people lose big chunks of the things that they view as sustaining their cultural identity, that is damaging to them; and there’s a lot of literature on the kind of psychological damage that that causes.” *Id.* He also testified about historic and cultural

landscapes, a type of cultural and historical resource, that many people may not realize have such a deep impact on them:

Well, landscapes are often the kinds of areas that people are most concerned about. The National Historic Preservation Act was substantially enacted in order to reduce the tendency of government agencies to run roughshod over the interests of local parties. And often landscapes are the things that people relate to most heavily, most seriously. I think you have an example of that here where you have the heritage families organized around their relationship to the landscape that they and their ancestors have valued and treasured that they no longer can occupy but they still interact with in meaningful ways. So landscapes are regularly found eligible for the National Register, usually as districts.

PI Hr'g Tr. at 21. He further testified that Peason Ridge may be a historic landscape, and the horses appear to contribute to that landscape. PI Hr'g Tr. at 21-22. And in his original declaration, Mr. Robertson testified to the effect of the Army's decision-making process:

11. The Army is doing away with our heritage and our culture when it removes the horses from Fort Polk and Kisatchie National Forest. For generations the horses have been part of the landscape, and a part of nature. 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.

12. I would have liked to be more involved in the decision making process, and have more opportunity for input. I have called and mailed comments to Fort Polk, and also briefly spoke to General Brito. I want to share information about the history of the Heritage Families, and explain how eliminating the horses is tearing a piece of my culture out of my life. I do not feel like the Army acknowledged the historical and cultural significance of these horses before deciding to eliminate them from Fort Polk or Kisatchie National Forest.

Robertson Decl. 3, ECF No. 1-1. These injuries to Pegasus members are actual, concrete, and irreparable. They cannot be redressed by monetary damages. Therefore, this Court should find that Pegasus will suffer irreparable harm unless the partial preliminary injunction is granted.

II. Pegasus is likely to succeed on the merits

Pegasus is likely to succeed on the merits, because the Army's failure to comply with the procedural requirements of NEPA and National Historic Preservation Act violates the

Administrative Procedure Act (APA). The APA authorizes courts 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 [or] . . . without observance of procedure required by law.” 5 U.S.C. § 706(2).

Dr. King and Mr. Robertson’s testimony, as well as the documentary evidence and administrative record, prove that the Army failed to follow the requirements of National Historic Preservation Act. Specifically, the Army failed to engage in the analysis and consultation set out in Section 106 to determine whether and how historic properties would be impacted. Rather, the Army relied primarily on generalized reports that do not contemplate this particular undertaking. Further, the administrative record shows that government actors blatantly disregarded or summarily dismissed information offered by the local citizens about the horses’ potential contribution to their history and to the historic landscapes of Fort Polk.

Rickey Robertson, Stacey Alleman-McKnight, Jennifer Pfaff, and Dr. Brendan Batt’s testimony, as well as the documentary evidence and administrative record, prove that the Army failed comply with NEPA because the Army failed, *inter alia*, to collect and consider relevant baseline information, failed to consider alternatives to total elimination, failed to consider harm to the horses as part of the environment, and unreasonably issued a finding of no significance impacts, instead of taking a “hard look” at the environmental impacts.

Pegasus does not have to succeed on every one of these elements to succeed on the merits. Rather, if the Army failed to comply with Section 106 of the National Historic Preservation Act, or with one of the regulations for completing an EA, or with one of the regulations mandating and EIS, the decision to undertake horse-elimination COA 7 must be set aside and remanded for further consideration in compliance with the law.

A. *The Army failed to observe the consultation and analysis procedure required by the National Historic Preservation Act.*

The National 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. Accordingly, 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). Then, “[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).

1. *The administrative record shows that the Army disregarded information offered by the public that its undertaking would impact historic property.*

When Mr. Robertson spoke with the Director of the Folk Polk museum, Frederick R. Adolphus, about the historic nature of the horses, this information was condescendingly disregarded. JRTC-E-003206. Despite the fact that “[t]he head of each Federal agency shall assume responsibility for the preservation of historic property that is owned or controlled by the agency,” 54 U.S.C.A. § 306101, the Army neither asked for citations or other support from Mr. Robertson to understand where he learned this information nor engaged in independent research, even into its own records—including those that Pegasus attached as evidence to this motion. PI Hr’g Tr. at 40-41, ECF Nos. 43-7, 43-11 & 43-12. On cross-examination, the Government asked whether Mr. Robertson had told the Army about the historic nature of the horses and their connection to his heritage and even met with the Commander. PI Hr’g Tr. at 43. Still, the Army never followed up on the potential for its horse elimination plan to adversely affect historic properties. In light of being provided with this information, it was unreasonable for the Army to

determine the horse elimination plan had no potential to impact historic properties, instead of genuinely consulting with affected stakeholders.

2. *The Army failed to undergo the analysis and consultation set out in Section 106 to determine whether historic properties would be impacted.*

Dr. King testified that “[i]t appears that the Army short-circuited the Section 106 process in a couple of ways. One was that it decided unilaterally without much discussion with anybody that the removal of the horses would -- had no potential to affect historic properties.” PI Hr’g Tr. at 27. The regulations make clear “[t]he agency official *shall* involve the consulting parties described in paragraph (c) of this section in findings and determinations made during the section 106 process.” 36 C.F.R. § 800.2.²

Instead of seeking consultation from the parties listed in the regulations, the Army simply relies on its 1999 JRTC and Fort Polk Historic Preservation Plan, Cultural Resources Action Plan/ Planning Manual and the 2012 Cultural Resource Material - Integrated Cultural Resources Management Plan FY 2013-FY. 2017 JRTC-E-000001; JRTC-E-002021. However, these generalized documents that have nothing to do with the undertaking at issue here and fail to recognize the scope of historic properties that may be eligible for listing on the National Register of Historic Places. As pointed out by Dr. King in his testimony, “the other thing they did was to treat . . . what they call cultural resources pretty much solely as archaeological sites.” PI Hr’g Tr. at 27. “Now, the National Historic Preservation Act is about historic properties, all kinds of

² “The following parties have consultative roles in the section 106 process . . . (1) State historic preservation officer . . . (2) Indian tribes and Native Hawaiian organizations . . . (3) Representatives of local governments . . . (4) Applicants for Federal assistance, permits, licenses, and other approvals . . . (5) Additional consulting parties. Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking’s effects on historic properties.” 36 C.F.R. § 800.2(c).

historic properties, including but not limited to archaeological sites.” *Id.* Based on his review of the record, Dr. King found that the Army “left out any consideration of cultural landscapes.” *Id.*

While the Adolphus memorandum addresses the Fort Polk horses, it summarily dismisses any inconvenient information without analysis, and focuses on whether the horses descended from U.S. cavalry horses, but makes no mention of the National Historic Preservation Act or historic properties. JRTC-E-003206. Further, Dr. King testified that “if I were reviewing this as the Army, as the Army’s consultant, let’s say, I would certainly have a lot of questions about the conclusions.” PI Hr’g Tr. at 29. There is no evidence in the record that Adolphus has any qualifications, as there are no standard qualifications to be a museum director. PI Hr’g Tr. at 30.

When asked if all of these documents considered together were sufficient to meet the requirements of Section 106 analysis, Dr. King replied “Well, documents cannot comply with Section 106 because Section 106 is not about documents. It’s about people consulting and trying to reach agreement, and that’s what we don’t see here.” *Id.* at 30. He went on to say that it “is not something that I would accept if I were supervising a case like this for the advisory council, or as a consultant for the Army for that matter. It’s not something that I would accept as authoritative.” *Id.* Dr. King testified that the purpose of Section 106 is to require consultation with interested stakeholders:

It is true that the National Historic Preservation Act does not say thou shalt not destroy historic horses or historic houses or historic landscapes or anything else; but it does say that you’ve got to go through a rational, non-arbitrary, non-capricious process of consultation to decide what is important and what affects you will have and what can be done about them. And that’s what the whole . . . Section 106 process is about.

PI Hr’g Tr. at 25. The Fifth Circuit has similarly found that “[S]ection 106 upholds the NHPA’s objections ‘neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal

undertaking might have on them.” *Coliseum Square Ass’n v. Jackson*, 465 F.3d 215, 225 (5th Cir. 2006). (citing *United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981)).

The Army failed to follow the procedure set out in Section 106 of the National Historic Preservation Act. Based on the evidence, this Court should find that Pegasus is likely to succeed on the merits of its claim that the Army failed to comply with the requirements of the National Historic Preservation Act.

B. The Army failed to observe the procedures required by NEPA.

NEPA requires federal administrative agencies to factor environmental considerations into their discretionary decision-making. 42 U.S.C. §§ 4321-4370. It directs federal agencies to implement, “to the fullest extent possible,” methods and procedures designed to accord environmental factors appropriate consideration. 42 U.S.C. §§ 4332. NEPA requires procedural steps, such as the preparation of an EA and/or EIS, which, once satisfied, do not dictate any particular substantive decision. Thus, the key to compliance with NEPA is satisfaction of its procedural mandates.

Because the Army’s EA is deficient, this led to an illegal FONSI (Finding of No Significant Impact) rather than the necessary EIS. On August 8, 2016, the Brigadier General published a FONSI, which concluded that none of the proposed alternative Courses of Action (COA) would have a significant impact on the environment. This finding defies logic; the very proposed outcome – to remove 700 horses in three years from a landscape that has hosted horses for at least 200 years – is *itself* a significant environmental impact. The Army committed to COA 7 without assessing the harm to the Fort Pork horses, ignored what the impact of the missing horses would be on the grassland environment that had hosted horses for at least 200 years, neglected to gather the most basic baseline data in the analysis, and dismissed any input about

the adverse effects on historical and cultural resources. Further, the Army had made its final decision not only before it began removing horses from Fort Polk under its horse-elimination plan, but before it even proposed its only two courses of action – eliminate all Fort Polk horses or change nothing. JRTC-G-00001-16.

1. The Army failed to comply with NEPA when creating its EA.

Under NEPA, an agency may perform an EA to “[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1). Some of the regulations with which the Army did not comply in completing its EA are listed in the Complaint at pages 8-9. ECF No. 1. Under 32 C.F.R. § 651.34, the Army must include in its EA “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.” The Army failed to do this. Instead, the Army decided to eliminate the horses, then tried to find COAs as necessary only to get through the NEPA process, not to genuinely consider that there might be a better solution than either total elimination or no action. JRTC-G-000001-16.

The Army also must “include any relevant general baseline conditions focusing on specific aspects of the environment that may be impacted by the alternatives.” 32 C.F.R. § 651.34. But as demonstrated in Pegasus’s memoranda, the Army failed to do so. Further, Stacey Alleman-McKnight testified that national animal groups would [“want to know how long have these horses been on the property, what was their herd they were with, who were they migrating with, whenever they pulled the horses were they taking the whole family unit or was that family unit

being busted up,” but this information is not in the EA or the Administrative Record. PI Hr’g Tr. 52. She would also need basic baseline information including “Are there any documentation over truly how many horses anyone is looking at? Is there any documentation as to herd groups, where they're at, where they migrate, how many's in a herd, how many comingle, any coloring, any age, any foaling pattern? Is there anything that we could look to assess the true situation?” PI Hr’g Tr. 54. Again, the Army has not collected any of this information, even though “It shouldn't be overly hard” to do so. PI Hr’g Tr. 54. And Dr. Batt testified that “I would say to get a baseline of the whole herd, their ages. Even, after hearing the proceedings, I think that basic DNA testing could resolve a lot of these issues on where these horses came from or whether they're wild type horses or domesticated. A saliva swab is sufficient enough to determine some of that information.” PI Hr’g Tr. 80. On the merits, this Court should set aside the Army’s decision and remand the Fort Polk horses decision to the Army to first gather type of baseline information before making a final decision.

Finally, because the EA is so insufficient, the Army reached the logic-defying conclusion that removing 700 horses in three years would have no significant impact on the environment. The EA also “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.” But the horses are part of the Fort Polk environment. The EA never assesses either the impact of the horse-removal plan on the horses themselves or the impact on the plants, other animals, or ecosystem, of removing 700 horses from an environment that has included horses for at least 200 years. *See* PI Hr’g Tr. 60. In the EA’s section entitled “Horse

Welfare,” the Army considers the possible harm to the horses of the *no-action alternative only*, and states that “in order to eliminate the risk of injury or death to the horses, Fort Polk needs to eliminate their presence on Fort Polk lands.” JRTC-B-000057-58; *see also* JRTC-B-000086-87, JRTC-B-000165. Although possible harm or death to the horses is one of the Army’s primary rationales for not choosing the no-action alternative, this concern seems to evaporate once the horses come under the Army’s care and control in the horse-elimination alternatives. It does not make sense that the Army did not contemplate a basic plan to prevent the spread of equine diseases or even consider any other forms of unnecessary harm to the Fort Polk horses that are likely to be caused by its horse-elimination plan. Further, because the EA ignores these impacts, it also ignores any possible mitigation.

Therefore, the EA is not in accordance with the law under NEPA because it failed to 1. consider reasonable alternatives, 2. include necessary baseline information, 3. describe significant impacts, 4. “clearly state that an EIS will be prepared,” and 5. clearly present or identify mitigation measures, as required by law. 32 C.F.R. § 651.3.

2. *Army failed comply with NEPA when it did not complete an EIS before reaching a final decision.*

Further, the Army is obligated to prepare an EIS when its proposed action, COA 7, has the potential to:

- (1) significantly affect historic (listed or eligible for listing in the National Register of Historic Places, maintained by the National Forest 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; (2) result in significant or uncertain environmental effects, or unique or unknown environmental risks; (3) either establish a precedent for future action or represent a decision in principle about a future consideration with significant environmental effects; (4) be highly controversial from an environmental standpoint; or (5) cause loss or destruction of significant scientific, cultural, or historical resources. 32 C.F.R. § 651.41.

Some of the regulations with which the Army did not comply in completing a FONSI rather than an EIS are listed in the Complaint at page 9. There is an abundance of evidence that demonstrates that the Army's decision to not make an EIS violated NEPA. Pegasus addressed many of these in prior briefing, and will not repeat all of these now.

Under NEPA, "the appropriate role of the court is to ensure that [the agency] has taken a 'hard look' at the environmental consequences which are likely to result from [its action], to be attuned to whether the [agency] has considered the relevant areas of environmental concern, and to assess whether the agency has convincingly documented its determination of 'no significant impact.'" *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 35 (2d Cir. 1983). The United States District Court for the District of Columbia recently granted a preliminary injunction after considering this standard and enjoined the State of Maryland from killing 525 mute swans pursuant to a depredation permit issued by the Department of the Interior. *Fund for Animals v. Norton*, 281 F. Supp.2d 209, 234 (D.D.C. 2003) (rejecting state's argument that killing of mute swans would not cause adverse environmental impacts because the species is non-native and confers no positive effects on the environment). The court set aside the FONSI in light of the state's failure to identify the precise locations at which the swans would be killed, the number of birds that would be killed at particular individual sites, or the environmental impacts of those killings on local communities. The Army failed in a similar way here. The Army did not gather basic information about the horses, did not even attempt to determine how its plan will affect the horses, has no firm count on how many horses live on Fort Polk let alone how many different kinds of horses live there, and did not comprehensively examine the environmental impacts of these removals on the local community.

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

The threatened injury to Pegasus members outweighs the corresponding inconvenience the Army may face in limiting the scope of its horse-elimination program as a result of a partial preliminary injunction. If the injunction is granted, the Army can continue normal operations and can even remove more horses as needed. If the injunction is not granted, Pegasus will suffer irreparable harm before the merits of the case can be heard.

Pegasus fully supports the mission of the Army and does not attempt to down play the importance of maintaining a safe environment for our troops. This is why Pegasus asks for a partial preliminary injunction, not a total ban on eliminating horses. Continuing the Army's operations and training program does not require that every horse be immediately eliminated. Still, should the need to remove more horses arise, the Army will be able to do so subject to conditions to ensure the process is temporarily limited in scope and transparent.

While the Army has provided no documentation of the number of horses that have already been eliminated, it is estimated that number ranges between 200 and 300. PI Hr'g Tr. at 55. This is a substantial reduction in the population of 500 to 700 horses estimated by the Army, and will surely alleviate many of the issues the Army seeks to address with round-ups. Fariss Decl. ¶ 11, ECF No. 51-2.³

Another reason the threatened injury to Pegasus outweighs the harm to the Army is that Pegasus' injury is irreparable, while the Army has other options for ensuring the horses stay out of sensitive areas. In his testimony, Dr. Batt explained that, because horses are prey animals,

³ Further, about 140,000 acres of Fort Polk and Peason Ridge is a Wildlife Management Area. *See Wildlife and Fisheries*, http://www.jrtc--polk.army.mil/environmental_compliance/Wildlife_and_Fisheries.html; <http://www.wlf.louisiana.gov/wma/2766>. A now reduced horse population should be able to coexist temporarily with Army training in those areas just as do the deer, bobcats, and snakes living there.

when use of hot wires or electric fencing that can easily be turned off during training exercises, rubber bullets, loud noises, whips, and even shoeing are employed, the horses learn quickly to avoid sensitive areas. PI Hr'g Tr. at 87.

As described above, if the injunction is not granted, Pegasus will suffer irreparable harm. It is possible that all or most of the horses will be eliminated before this case can be decided on the merits, or that all the historically significant horses will be removed. And the ongoing program harms Pegasus members' use and enjoyment of the area, and subjects Pegasus members to actively witnessing the inhumane treatment of the horses they feel so connected to while this litigation is pending. Once horses are eliminated from Fort Polk, there is no going back.

IV. The injunction will not harm the public interest.

The public interest weighs heavily in favor of requiring the Army to take a hard look at the environmental, historical and cultural impacts of its decision before permanently eliminating all of the Fort Polk Horses under its current plan. Ms. Pfaff's testimony indicates that the horses are not receiving adequate treatment while in the Army's possession and that this negligent treatment has led to the spread of disease. These problems with the plan arise from the Army's failure to comply with the legal requirements of the National Historic Preservation Act and NEPA, as these laws are meant to ensure careful planning and consideration of consequences before taking action. As it stands, COA 7 lacks transparency and places an unreasonable burden on adoption organizations and members of the public who have taken the horses. And as stated in Pegasus's Memorandum in Support (ECF No. 48) and Reply (ECF No. 54), the proposed partial Preliminary Injunction does not disserve the public interest under the law.

- A. ***There is strong evidence that the horses are being treated inhumanely while in the Army's possession and this treatment has caused an outbreak of disease among the horses.***

Ms. Pfaff's testimony described the moldy hay in the holding pens where the horses were being kept after round-up, and their state of health:

Horses suffer from depression just as a human does. When a horse is suffering from depression you can tell. They just kind of stand in one place, their heads low, they don't eat, they don't drink. And that's exactly what I observed.

Q. Have you noticed any horses in particular that are not faring well or that have medical issues that needed to be treated?

A. We've had several of them. We had -- out of the group of December, we had a horse come in whose jawbone was exposed. We've had a vet come out, out of, again, our funding, and had that horse taken care of and is now healed. I have a horse on my property right now that came to me with a large laceration over her eye. Her eye was swollen shut."

PI Hr'g Tr. at 69-70. Ms. Pfaff testified that she saw a principle of the Army's subcontractor, Jacob Thompson, with a partially loaded trailer and a dart gun, rounding up Fort Polk horses. PI Hr'g Tr. at 72. Both Ms. Pfaff and Dr. Batt's testimony showed that using a dart gun to round up free-roaming horses is not common practice. PI Hr'g Tr. at 73, 84.

This testimony serves as strong evidence that the horses are not being treated humanely while in the Army's possession. Further, it is possible that the Army and/or its contractor is violating Louisiana's criminal statute §§ 14:102-102.27, on animal cruelty. It is animal cruelty in Louisiana to "Impound[] or confine[] or cause[] to be impounded or confined in a pound or other place, a living animal and fail[] to supply it during such confinement with proper food, proper drink, and proper shelter." La. Rev. Stat. § 14:102.1. This potential criminal violation is bolstered by the fact that the Thompson subcontractors the Army is using to round up and care for the horses includes someone with a criminal record for livestock offenses and is a kill buyer that is apparently seeking to get the horses themselves, as discussed *supra* and in prior briefing.

A new concern for Pegasus and the Public at large is that the horses appear to have contracted a disease while in the Army subcontractor's care. Because the Army does not test for these diseases or have protective measures in place, if the Army continues as-is this disease could spread to other horses across the region. This risk was support by Dr. Batt's response about whether the Army not performing blood tests was bad practice; "[i]t could potentially -- especially through trying to adopt these horses out, you could potentially spread disease into unaffected horses that are domesticated in rural communities throughout the state." PI Hr'g Tr. at 94. Ms. Pfaff stated that, after taking the horses, she brings them to the fairgrounds to be sorted, before paying for vets to microchip and test the horses for diseases. PI Hr'g Tr. at 67, 75.

The Army argued in the EA that it was concerned that one Fort Polk horse in 2004 was potentially found to have EIA, or Equine Infectious Anemia, a disease Dr. Batt testified is now almost eradicated. JRTC-B-000088; PI Hr'g Tr. at 92. However, in the Army's report on this 13-year old incident, the horse in question was not tested directly after being found at Fort Polk. JRTC-F-000001-3. Rather, the horse had first spent time on a local landowner's property, where it took "7 months to be able to move the horses into a catch pen from his pasture in order to load them in a trailer and bring them to the Red River Auction." JRTC-F-000003. Then the horse was purchased at auction by a Mr. Thompson, who transported the horse to a third party in Texas. *Id.* Five days later, the third party "tried to load the horses for shipment to slaughter...but he could not load the positive mare along with one of the negative horses purchased from Red River." But it does not make sense that the horse would have had EIA before the Red River Auction house sold her, because under Louisiana law all horses must be tested for EIA before or at auction, and cannot be transported out of state if the test is positive. La. Admin. Code tit. 7, part XXI, § 913. Therefore, either the horse must have contracted EIA after sale at auction and before the Texas

third party tried to send her to slaughter, or these various parties colluded to sell an untested sick horse and transport it across state lines. Either way, there is no evidence that any of the horses removed under either COA 7 or the Public Capture Program tested positive for EIA⁴ or any other diseases, except for the strangles outbreak contracted by the most recent round-up group. There is no evidence that there is any real threat of EIA in horses at Fort Polk.

B. The Army's failure to comply with NHPA and NEPA leaves the government unaccountable to the public and places an unnecessary burden on the public.

The testimony of Dr. King illustrates how failing to comply with the National Historic Preservation Act is against the public interest. When describing the Army's administrative record, Dr. King testified that "[i]t appears that the Army short-circuited the Section 106 process...it decided unilaterally without much discussion with anybody...it is, I think, a questionable one in the face of all the public concern." PI Hr'g Tr. 27. The very purpose of the Section 106 process of consultation, avoidance, and mitigation, helps to limit harm to the public. After describing the harm people endure when they lose their cultural identity, Dr. King summed up by saying "that's the basic reason that there is a public interest in the preservation of historic places." PI Hr'g Tr. 31. Because the Army short-circuited the procedural requirements, its undertaking cannot serve the public interest.

The Army's failure to comply with the procedural requirements of NEPA is not only contrary to the public interest, but has placed an unnecessary burden on the public. Gathering baseline information about the characteristic of the horses would have allowed the Army to develop better alternative courses of action. For example, alternatives might have implemented procedures to keep family units together, or at the very least, mothers and nursing foals. Alternatives might have involved providing food and a holding facility that was more akin to the

⁴ EIA is one of only two diseases every Fort Polk horse must be tested for. PI Hr'g Tr. 92.

horse's natural diet and habitat, so they would not starve while in the Army's possession. The alternatives might have considered the potential for diseases to spread amongst the horses while in the holding pens. The overarching issue before this Court is that the Army lacked the background information, specificity, and willingness to consider alternatives needed to make an informed decision. This hasty decision-making has created an unnecessary burden on the public.

The Army's EA makes clear that it intended to place most costs, responsibility, and liability on the adoption organizations and the public:

The adopter organization will be responsible for compliance with all applicable laws, including but not limited to, disease testing, branding, tattooing or microchipping, ascertaining and resolving any ownership issues for horses with existing brands, tattoos or microchipping, transporting from Fort Polk and all other requirements pertaining to either adoption and/or horse ownership from the time loaded into the organization's trailer at Fort Polk. Env'tl. Assessment ("EA"), ECF No. 17-2 at 31.

All the Courses of Action considered by the Army contain this identical language, whether an adopter organization or person/entity is taking the horses. While it is understandable that the Army wants to cut costs associated with its horse elimination plan, the discussion above shows that its plan externalizes an unjustifiable and unnecessary burden on adoption organizations and the public.

The Fort Polk round-ups are moving fast, with no mechanisms in place to prevent spread of disease or ensure that the horses are rounded up in a fashion that approved 501(c)(3)'s and other non-profits and animal experts can support. Non-profits rely on volunteer support and they simply cannot keep up with the round-ups, which means that the likelihood of horses going to kill-buyers is extremely likely. The problems in this area were the focus of Ms. Alleman-McKnight's testimony (PI Hr'g Tr. 45-65), and she testified in particular that "There's no way they can be treated humanely. There's never been determined how they would actually catch

them, herd them, migrate them and move them.” PI Hr’g Tr. 53. She also testified that national humane organizations might be able to help the Army, but the Army has not made it easy, through both its process and lack of baseline information, for these groups to be involved. As Ms. Pfaff testified: “we . . . [pick] them up. We move them. We sort them into what is left over of their family units. I help transport them to our fosters . . . we’re the ones who bring out the vets to have them microchipped out of our own pockets.” PI Hr’g Tr. 67. When one considers that domesticating a wild horse takes “hundreds of man hours by a trained expert,” it is hard to ignore the fact that Army either overlooked or did not consider the fact that these horses would not likely be adopted, and instead would likely end up with kill buyers or overburdened non-profits. PI Hr’g Tr. 81.

The Army does not provide a comprehensive description of how the round-ups are being completed, there does not appear to be any documentation on the condition of the horses before and after they are placed in the holding pen, and the Army has no records of what has happened to the horses that have been removed up to this point. ECF No. 43-15. The Army’s horse elimination plan lacks transparency and, the Army has externalized its own costs and accountability by moving the burden onto the public. For these reasons, issuing the partial preliminary injunction is in the public interest.

Conclusion

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

Respectfully submitted on February 13, 2018

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Certificate of Service

I hereby certify that on February 13, 2018, this pleading was filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

s/ Machele Lee Hall

Machele R. L. Hall