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' POST-HEARING BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL PRELIMINARY INJUNCTION

Pursuant to the Court's Order, Federal Defendants provide the following post-hearing brief in opposition to Plaintiff's Motion for Partial Preliminary Injunction and in response to Plaintiff's Post-Hearing Brief in support of its motion, ECF No. 64 ("Pl.'s Supp. Br.").

INTRODUCTION

As Plaintiff states in the first paragraph of its complaint, "this case is about the horses at Fort Polk." That is the primary mission of its organization and its entire focus in this litigation. However, that is not the appropriate focus for this Court. Plaintiff is attempting to use this NEPA and NHPA litigation to make a substantive challenge to the Army's decision to remove horses, but courts may not use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency. *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 717 (5th Cir. 2009). In this case, there is no legal requirement for the Army to maintain the horses at Fort Polk. In fact, in 2001, the Eastern District of Louisiana found the horses were trespass livestock that had "roamed from adjacent ranches and farm areas[.]" JRTC-B-000148. In 2002, the Fifth Circuit affirmed the Eastern District's

determination that the Wild Free-Roaming Horse and Burro Act did not apply to these trespass horses. Absent the Wild Horses Act, there is no restriction on the Army's substantive decision to remove the horses, and this Court should not countenance such arguments from Plaintiff.

NEPA and the NHPA are procedural statutes. It is well settled that NEPA itself does not mandate particular substantive results, but simply prescribes the necessary process. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228 (1980). Nor does the NHPA. *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 225 (5th Cir. 2006). The relevant agency decision here concerns how to remove the trespass horses. Thus, Plaintiff's challenge should focus on the actual claims of violations of NEPA and the NHPA, not previously-decided issues.

Turning to Plaintiff's motion for a partial preliminary injunction, such relief is an extraordinary and drastic remedy, and Federal Defendants have shown that no injunction should issue in this case because Plaintiff has failed to carry this clear and heavy burden. Federal Defendants are likely to prevail on the merits in this case, and Plaintiff has not shown harm that is actual, concrete, or irreparable. Nor does the balance of equities or public interest favor issuance of an injunction here. Plaintiff does not seek transparency with its motion but oversight of the Army's removal process. Since Plaintiff fails to meet any of the four requirements for a preliminary injunction, its motion should be denied.

ARGUMENT

Having already briefed the admissibility of Plaintiff's extra-record evidence multiple times, Federal Defendants briefly respond to Plaintiff's alleged supplemental facts. Pl.'s Supp. Br. 1. Plaintiff's alleged supplemental facts are simply not relevant and should not be considered by the Court on this motion. First, Plaintiff alleges that the testimony shows that the "horses became emaciated and infected with strangles while in the Army's care." *Id*. However, there was no testimony to support this conclusion. Instead, Plaintiff attempts to extrapolate this

allegation from testimony that its witness acquired horses that she alleges are now "emaciated" and that may potentially have "strangles." There was no testimony as to the conditions of these horses prior to being gathered by the Army's subcontractor. Further, part of the reason that the Army has provided for the removal of the horses is the threat to the horses' health while roaming on or around Fort Polk without any care or sufficient places to forage. JRTC-B-000054, 112. Thus, there is no evidence that the horses' condition is a result of the Army's care or lack thereof.

Second, Plaintiff alleges that 200-300 horses had already been removed based on inadmissible hearsay and a speculative estimate from Stacey Alleman-McKnight, Reporter's Official Tr. of Hr'g on Mot. for Partial Prelim. Inj. Held before the Honorable Kathleen Kay, U.S. Magistrate Judge 55:13-14, ECF No. 62 ("Hr'g Tr."), who testified that she had never been to Fort Polk. *Id*. at 63:5-6. The Army provided the exact number of horses that have been removed via this project—104. Decl. of Milton W. Farris, ECF No. 51-2 ("Farris Decl."). So, there is no reason to speculate as to how many horses may have been publicly captured in previous years because the total number of trespass horses at Fort Polk is based on the Army's estimate as of the 2016 EA. JRTC-B-000070.

Lastly, Plaintiff repeatedly emphasizes that Federal Defendants did not cross-examine witnesses on certain issues. However, the failure to cross-examine a witness does not mean that the testimony given is valid, unrefuted, or properly considered. Instead of looking to irrelevant testimony, to which Federal Defendants objected, the Court should look to the requirements for injunctive relief.

A. Federal Defendants Are Likely to Succeed on the Merits.

The Court should deny injunctive relief because Plaintiff is not likely to succeed on the merits of its claims. Based on the evidence before the Court in the Administrative Record,

Federal Defendants are likely to prevail on the NEPA and NHPA claims in this case.

1. The Army fully complied with NEPA by completing an EA instead of an EIS and by considering a reasonable range of alternatives.

The purpose of NEPA is to ensure that agencies do not make uninformed decisions that affect the environment by requiring the agencies to take a hard look at the environmental consequences of their actions and providing for broad dissemination of relevant environmental information, especially through public engagement. The purpose of NEPA was fulfilled here. Plaintiff's members as well as the rest of the public had ample opportunity to participate and did actually provide input during the review process, allowing the Army to take a "hard look" at potential environmental impacts from its proposed action in a detailed environmental assessment.

Plaintiff asserts that the Army failed to consider a sufficient range of alternatives. Yet, Federal Defendants have shown that this claim lacks merit. In addition to the no-action alternative, the Army considered six alternatives with various components that were all aimed at achieving the purpose of the project—to remove the trespass horses. *Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force*, 249 F. Supp. 2d 763, 794 (N.D. Tex. 2003), *vacated sub nom. Davis Mountains Trans-Pecos Heritage Ass'n. v. Fed. Aviation Admin.*, 116 F. App'x 3 (5th Cir. 2004). Given that the alternatives considered would accomplish the purpose of the project, they were all reasonable. Plaintiff has not suggested any reasonable alternative that the Army failed to consider. Instead, Plaintiff's real issue is not with the alternatives considered but with the purpose of the project, which Plaintiff has no basis to challenge directly.

Plaintiff asserts that the Army's EA is deficient because it does not include certain baseline information, such as herd or migration habits and DNA testing. Pl.'s Supp. Br. 14. However, such information is not relevant to the action taken by the Army. The horses have already been deemed to be trespass livestock, so the Army reasonably acted within its agency discretion to remove the horses. Plaintiff also attempts to argue that the EA is insufficient

because the Army did not assess the impact of the project on the horses.[1] *Id*. Again, Plaintiff's reasoning is blinded by its sole focus on the horses. The project considered by the EA was removing the horses. The EA does in fact assess the effects of the proposed action on the environment after the horses are removed. JRTC-B-000110-129. Furthermore, the Army did consider that Fort Polk is not a safe environment for these horses and provided a description of the risks and examples of injuries, including death, sustained by the horses. JRTC-B-000057-58, 84-88, 157.

As previously briefed, the Army was not required to complete an EIS for this project because the Army determined that there would not be any significant impacts to the quality of the human environment. 42 U.S.C. § 4332(2)(C). Plaintiff has not identified any such significant impacts. Instead, Plaintiff cites to another case where an injunction was issued to assert that the injunction should issue here. Pl.'s Supp. Br. 16. But that case is distinguished from the facts here. In *Fund for Animals v. Norton*, there were statements in the record and other evidence that suggested that the agency's action would have a significant effect, but the agency did not prepare an EIS. 281 F. Supp. 2d 209, 232-33 (D.D.C. 2003). There is no such evidence here, nor are the facts identical to those here to argue that the Army should have considered the same kind of information that was considered in *Fund for Animals*. Therefore, this Court should find that the Army complied with NEPA.

2. The Army also complied with the NHPA and was not required to engage in Section 106 consultation.

The Army followed the procedural requirements of the NHPA. Plaintiff continues to confuse the requirements for this statute. To be clear, the Army determined that it was not

[1] Federal Defendants also note that Plaintiff alleges here that the horses have been in this environment for at least 200 years, but none of its inadmissible extra-record evidence established this time period. Instead, the weight of the evidence and even Plaintiff's inadmissible extra-record evidence is contrary to this allegation.

required to conduct Section 106 consultation for this action. JRTC-B-000855. The basis for that determination was 36 CFR § 800.3(a)(1). Under that regulation, if the agency determines that the proposed action would not have the potential to cause effects to historic properties, assuming such properties are present, the agency official has no further obligations under section 106 or that regulation. That determination is made before Section 106 consultation. The Army assumed that such properties were present and decided that removing the trespass horses was not the type of activity that would potentially cause effects to such properties, thus following the procedure laid out in the NHPA.

Plaintiff now asserts that the Army should have done more, but that is not the proper standard to prove a violation. Instead, an alleged violation must be reviewed under the APA to determine if the agency's action was arbitrary or capricious. This standard means that the agency's action should be upheld if the agency examined the relevant data and articulated a satisfactory explanation for its action with a rational connection between the facts found and the choice made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Plaintiff's own expert testified that the Army's determination was understandable. Hr'g Tr. 27:6-10. Based on the record before this Court, the Army's decision should be upheld.

Plaintiff alleges that the Army "blatantly disregarded [and] summarily dismissed information" about the historic character of the horses or disregarded information. Pl.'s Supp. Br. 8-9. Not so. The character of the horses issue has been considered by the Army since the 1990s, and the Army, as well as the Forest Service, has found nothing to support the alleged historic character of the horses. JRTC-E-003549. Furthermore, this issue has already been litigated and decided. Thus, it is not arbitrary or capricious for the Army to dismiss these conclusory assertions that were presented during the public comment period.

As Federal Defendants are likely to prevail on the merits, the court can stop its review of Plaintiff's request for injunctive relief at this point. However, Plaintiff also fails to prove that its members will suffer irreparable injury or that the balance of equities and public interest are in its favor.

B. Plaintiff Will Not Suffer Irreparable Injury if its Preliminary Injunction is Denied.

Federal Defendants have shown several reasons why Plaintiff not suffer irreparable injury in this case. Here, it highlights three primary reasons. First, there is no risk that the Army's actions will prohibit this Court from rendering a meaningful decision by removing all of the horses prior to the conclusion of this case. Since August 2016 when this decision was made, only 104 horses have been removed from Fort Polk. Farris Decl. ¶¶ 6-7. Without providing any competent evidence, Plaintiff speculates that this number is closer to 200 and 300. Pl.'s Supp. Br. 17. Yet, as the Army explicitly stated in the EA, there are several hundred trespass horses remaining at Fort Polk. JRTC-B-000070. Additionally, the Army offered in the declaration of Milton Farris a clear explanation of the current process of removing horses to refute the misinformation asserted by Plaintiff. *See* ECF No. 51-2. Mr. Farris confirmed that it will take approximately three years to capture all of the trespass horses at Fort Polk and that a maximum of 120 horses could possibly be removed over the next nine months. *Id.* ¶ 16. Thus, there is little chance that all of the horses would be removed during the pendency of this litigation. Further, Plaintiff has not shown that the removal of some horses would cause irreparable harm, but it has focused on the harm from removing all of the horses. Plaintiff also incorrectly asserted that the horses will be removed from the Kisatchie National Forest, which is directly contradicted by the FONSI. JRTC-A-000001. Thus, Plaintiff's members will still be able to observe the horses that will remain in this area on Forest Service lands.

Second, Plaintiff's delay in bringing this motion does not show irreparable injury. The Army made the challenged decision on August 8, 2016. Plaintiff waited four months before filing its complaint, and at the time Plaintiff filed the action, it acknowledged that the Army had begun rounding up and removing horses. However, Plaintiff waited more than one year after the decision was made, and three roundups of horses were completed before they moved to enjoin. Additional captures of these trespass horses will not cause irreparable injury to Plaintiff. Furthermore, Plaintiff's argument that a partial preliminary injunction should be granted cuts against its argument that the removal of even one more horse would be irreparable injury.

Third, Plaintiff's members have fully participated in the environmental review process and expressed concerns on the alleged historical significance of this area and the horses. After duly considering these comments and other information, the Army reached a different conclusion. Contrary to Plaintiff's assertions in its brief, there has been no circumvention of procedural requirements under NEPA or the NHPA. Pl.'s Supp. Br. 6. Further, the testimony of Dr. King cited by Plaintiff is speculative and not concrete as to the potential for harm when people lose parts of cultural identity. Additionally, Dr. King did not review all of the records before the agency but criticized the agency's decision-making and compliance with the NHPA. *See* Hr'g Tr. 32:5-17. His opinions should be discarded. Therefore, Plaintiff's motion should be denied because it has not shown irreparable harm.

C. The Balance of Harm and Public Interest Weigh in Favor of Denying Plaintiff's Motion.

Lastly, Plaintiff has failed to show that the balance of harms or public interest favor an injunction. The same reasons that supported the decision to remove the trespass horses support the balance of equities and public interest. Delay in the removal of the horses would lead to a continued growth of their population, which would exacerbate their impact on Fort Polk and the JRTC. Plaintiff asserts that the Army can simply continue dealing with this hardship in the way

that it has previously but fails to take into account that the numbers of the trespass horses at Fort Polk are not the same today as in years past. Nor has the reduction of the 104 trespass horses removed since the decision was implemented solved this growing problem. As the number of horses increases, the safety concerns for the soldiers, their families, and civilians at Fort Polk, as well as the horses, continue to exist. Plaintiff also alleges that the Army has "other options for ensuring the horses stay out of sensitive areas." Pl.'s Supp. Br. 17. However, many of these other options have already been considered and rejected as unviable in the EA. JRTC-B-000068-72. While stressing that the Army should use "humane treatment," Plaintiff suggests options to control the horses like hot wires, electric fencing, rubber bullets and whips. In contrast, the Army's decision allows for 501(c)(3) charitable organizations to adopt these horses, sparing them from both Plaintiff's suggestions and the dangers of live fire exercises, training obstacles, and heavy tactical vehicles.

Further, the horses also cause damage to nearby private property. Over the years, Fort Polk has received complaints from local landowners regarding property damage, such as destroyed septic tanks, porches, and commercial chicken facilities. JRTC-B-000060. Some of these same local landowners have expressed support for the Army's decision as well as those concerned about traffic safety. JRTC-G-000114.

Plaintiff argues that there is an unreasonable burden on the adoption organizations or members of the public to adopt these horses that may have various issues. Pl.'s Supp. Br. 18. Yet, the Army is not the owner of these horses. This argument fails to recognize that this burden should not rest with the Army and the greater public just because the horses trespassed on the Army's land. It makes more sense that the maintenance and care of these horses would be taken on by those organizations and individuals interested in adopting these animals. Additionally, these entities freely accept the benefits from adopting these horses. To date, there have been a

number of organizations willing to adopt these horses, and the cyclic process approved by the Army has not gone beyond the adoption stage. Farris Decl. ¶ 14; *see* JRTC-B-000083. Thus, the injunction would halt this process and is contrary to the public interest.

The Army should not have to wait until a catastrophic event occurs because of the trespass horses before it acts. The balance of harms to the Army and the horses and the benefit to the public interest by allowing the Army to carry out its properly approved decision outweigh any alleged harm presented by Plaintiff. Therefore, this request for injunctive relief must be denied.

CONCLUSION

Plaintiff has challenged the procedures that the Army followed in reaching its decision but is unable to prove any defect under NEPA or the NHPA. Plaintiff simply disagrees with the substance of the proposed action. But the mere existence of differing opinions does not make the agency's decision erroneous. *Louisiana v. Lee*, 758 F.2d 1081, 1085 (5th Cir. 1985). For all of the presented in their briefing and thorough administrative record, Federal Defendants request that the court deny plaintiff's motion for preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 20, 2018, a copy of the foregoing *Federal Defendants' Post-Hearing Brief in Opposition to Plaintiff's Motion for Partial Preliminary Injunction* 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.

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