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 SUPPORT OF THEIR MOTION TO STRIKE EXTRA-RECORD MATERIALS

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"), and seeking review under the Administrative Procedure Act ("APA"). On January 8, 2018, Plaintiff moved for a partial preliminary injunction. ECF No. 43. In addition to opposing the motion, Federal Defendants have moved to strike extra-record materials attached to and cited in Plaintiff's motion and supporting memorandum. Judicial review of this claim is limited to the Administrative Record, which was lodged with the Court on November 17, 2017. ECF No. 37. The Administrative Record contains all of the information relied on by the agency and its decision-maker and is the basis for the review of this claim. For the reasons set forth in this supporting memorandum, the Court should grant Federal Defendants' Motion to Strike Extra-record Materials.

LEGAL STANDARD

Judicial review under the Administrative Procedures Act ("APA") is generally limited to the administrative record. 5. U.S.C. § 706 ("In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party . . . ."); *Harris v. United States*, 19 F.3d 1090, 1096 (5th Cir. 1994). As the Supreme Court explained in *Camp v. Pitts*, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." 411 U.S. 138, 142 (1973). "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).

Judicial review of an APA case is generally limited to the administrative record in existence at the time of the agency's decision. *Camp v. Pitts*, 411 U.S. 138, 142 (1972). "Supplementation 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." *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (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. Plaintiffs bear the burden of demonstrating that proposed extra-record submissions may properly be considered. *Markle Interests, LLC v. U.S. Fish and Wildlife Services*, 49 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).

ARGUMENT

In its motion for preliminary injunction, Plaintiff seeks to rely on several documents and a video that were presented for the first time and were not before the Army at the time it made the subject decision.[1] Indeed, remarkably, even though the administrative record was lodged two months ago, Plaintiff does not cite to the record in its motion. Plaintiff has provided no facts or arguments in its motion or supporting memorandum that support the consideration of extra-record materials. Therefore, the Court should strike these materials and not consider them in support of Plaintiff's motion.

A. Plaintiff's Declarations Should Be Stricken

Plaintiff attached four declarations to its motion for injunctive relief, including the declaration of Thomas F. King, ECF No. 43-3; the declaration of Jeff Dorson, ECF No. 43-5; and the declarations of Rickey Robertson, ECF No. 43-6. One permissible purpose for the submission of extra-record declarations is to establish standing under Article III of the Constitution. *Permian Basin Petroleum Ass'n v. Department of the Interior*, No. MO-14-CV-50, 2015 WL 12910680, at *1 (W.D. Tex. Sep. 1, 2015). Instead of addressing Plaintiff's standing or even alleged harm, Plaintiff uses these declarations to provide the declarants' opinions as to

[1] Federal Defendants note that Plaintiff moved to submit extra-record evidence on January 17, 2018. ECF No. 49. However, as this motion was filed after Plaintiff's motion for partial preliminary injunction and will not likely be resolved before the preliminary injunction, Federal Defendants request that the Court strike these extra-record from consideration for the preliminary injunction.

the issues with the challenged decision or Federal Defendants' compliance with NEPA or the NHPA.

The declarations of Mr. King and Mr. Robertson specifically attempt to supplant the expert opinions relied on by Federal Defendants. 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. Federal Highway Admin.*, 779 F. Supp. 2d 542, 565 (quoting *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1190 (8 Cir. 2001) (upholding CE and refusing to consider extra-record "citizen letters and expert testimony")). 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. Thus, these declarations should be stricken as improper extra-record evidence.

Further, extra-record investigations to determine the correctness or wisdom of agency decisions are not allowed. *Harris*, 19 F.3d at 1096 n.7. Plaintiff also provides a letter from Jeanette Beranger, ECF No. 47-8, and a statement from D. Phillip Sponeberg, ECF No. 47-9, that should be stricken for the same reasons as these declarations.

B. All Extra-Record Evidence Relied on to Support the Merits of Their Claims Should be Stricken

Plaintiff submitted other documents and a video that were either not from a member of Plaintiff or were submitted in support of the merits of Plaintiff's claims. These documents include articles, a meeting agenda, maps, pictures, and a brochure. *See* ECF Nos. 43-2, 43-4, 43-7, 43-10, 43-11, 43-12, 43-13, 43-14, and 43-15. The video, ECF No. 43-16, contains the same kind of inappropriate statements that Mr. Robertson made in his declarations. Plaintiff provides no explanation of how these extra-record materials meet any possible exception that would allow

to the Court's consideration extra-record material. Nor does Plaintiff assert that the agency omitted these materials from the record. *See Louisiana Sportsmen Alliance, LLC v. Vilsack*, No. 12-cv-2929, 2013 WL 12182156 at *2 (W.D. La. 2013) (allowing for consideration of extra-record evidence when the agency considered evidence that was omitted from the administrative record). In fact, many of these documents were dated after the August 8, 2016 decision, which inherently means that they could not have been presented to or considered by the agency in making its decision. Further, these documents are not relevant to the challenged decision or the Court's review of that decision. Therefore, these materials should be stricken from the record.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that the Court grant their motion and strike the extra-record materials.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 19, 2018, a copy of the foregoing *Federal Defendants' Memorandum in Support of their Motion to Strike Extra-Record Materials* 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 Walker
Davené D. Walker, Trial Attorney
U.S. Department of Justice

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' MOTION TO STRIKE EXTRA-RECORD MATERIALS

For the reasons set forth in the accompanying memorandum in support, Federal Defendants respectfully move this Court to strike the following extra-record materials, which were attached to Plaintiff's Motion for Partial Preliminary Injunction and cited in Plaintiff's supporting memorandum:

(1) Article, entitled "Army closer to decision on Fort Polk horses", attached as Exhibit B, ECF No. 43-2;

(2) Declaration of Thomas F. King, attached as Exhibit C, ECF No. 43-3;

(3) Louisiana Board of Animal Health Agenda, attached as Exhibit D, ECF No. 43-4;

(4) Declaration of Jeff Dorson, attached as Exhibit E, ECF No. 43-5;

(5) Declarations of Rickey Robertson, attached as Exhibit F, ECF No. 43-6;

(6) Article excerpt, entitled "A Good Home for a Poor Man: Fort Polk and Vernon Parish, 1800-1940," attached as Exhibit G, ECF No. 43-7;

(7) Letter from Jeanette Beranger, attached as Exhibit H, ECF No. 47-8;

(8) Statement from D. Phillip Sponeberg, attached as Exhibit I, ECF No. 47-9;

(9) Article, entitled "The Sawmill Town of Peason, Louisiana," attached as Exhibit J, ECF No. 47-10;

(10) Document, entitled "Remembering Fort Polk's Heritage: A Tribute to the Displaced Families of Camp Polk and Peason Ridge," attached as Exhibit K, ECF No. 43-11;

(11) Document, entitled "The Fort Polk Heritage Project," attached as Exhibit L, ECF No. 43-12;

(12) Maps, attached as Exhibit M, ECF No. 43-13;

(13) Pictures, attached as Exhibit N, ECF No. 43-14;

(14) Letters from Patrick McLoughlin and Karen M. Perkins, attached as Exhibit O, ECF No. 43-15; and

(15) Video Statement of Rickey Robertson, manually filed, ECF No. 43-16.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 19, 2018, a copy of the foregoing *Federal Defendants' Motion to Strike Extra-Record Materials* 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 Walker
Davené D. Walker, Trial Attorney
U.S. Department of Justice

Exhibit A

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.	Civil Action No. 2:17-cv-00980 Judge: Unassigned Magistrate Judge Kay

DECLARATION OF MARK S. LESLIE

I, Mark Shannon Leslie, declare as follows:

1. I am employed by the United States Department of the Army at Fort Polk, Louisiana. I am the Chief of Plans and Operations and have held that position since August 2016. Prior to that, I was Lieutenant Colonel in U.S. Army with 30 years of active Army service. During my active duty career, I served at Fort Polk from 2014 to 2016 as an infantry battalion commander and as the installation Chief of Plans and Operations.

2. My duties in my current position include synchronization and mission command on behalf of the commander concerning installation activities and events. I am also responsible for identifying hazards to the mission and the garrison's population. In my role as the Chief of Plans and Operations, I am responsible for developing methods to mitigate these hazards and reduce risk. Additionally, I coordinate response efforts to training and safety events.

3. Although the trespass horse population has caused safety accidents and training

impacts prior to 2015, these incidents were not formally tracked. JRTC-F-000004-82. Since November 2015, Fort Polk has attempted to track all incidents with horses, although it remains likely that all such incidents are not reported. JRTC-F-000098-258. Since November 2015, 53 documented incidents and 174 reports to the installation department of emergency service have been reported. *See* diagram showing incidents and reports, attached hereto as Exhibit 1.

4. The Joint Readiness Training Center ("JRTC") trains brigade size units. JRTC-B-000051. In recent years, the Army has restructured its Brigade Combat Teams to increase their size from approximately 3,000 soldiers to approximately 5,000 soldiers. With the necessary support elements required by these units, this change has resulted in more soldiers on the installation. In addition, the focus of the training rotations has shifted in recent years from Iraq and Afghanistan-based counterinsurgency training to more complex training scenarios focused on a wide-range of real world scenarios. This shift means that the training is less focused on site-specific simulated villages, but on larger maneuver based training across the entire training landscape. As a result, a larger number of soldiers and a larger number of horses have been forced into the same size training area as the scope of training has evolved and encompassed a more intensive use of the training space.

5. The horses impact Fort Polk in two major ways, (1) training impediments and (2) safety risks. JRTC-B-000054. Due to the presence of horses, training events have been canceled and delayed. JRTC-B-000055, JRTC-F-000082, -98-2358. Frequently, training must be halted until trespass horses are cleared from a drop zone, firing range, or from an aircraft landing strip. JRTC-B-000055, JRTC-F-000082. Attempts to clear the horses from these areas are usually of limited success and the horses will move back into the area after clearing efforts cease.

6. Each delay causes a substantial loss of man hours and money to Fort Polk. For

example, when an aircraft has to be diverted from landing, substantial fuel costs are incurred. Likewise, personnel must be diverted from their normal tasks to clear the horses. JRTC-B-000181-191, JRTC-H-000001-226.

7. These impediments to training also result in degraded training to the soldiers. JRTC at Fort Polk is one of three Combat Training Centers in the Army. JRTC-B-000057. The training area at JRTC is engaged in training soldiers throughout the year. JRTC-B-000051. These soldiers, and their units, travel from other installations to train at JRTC. *Id.* Due to the limited availability of the training area and training time, if a unit's training is impeded by horses, the unit cannot simply come back at a later time and redo the training. Instead, each delay in training is a training opportunity permanently lost to those soldiers, who often then deploy into a theater of combat. JRTC-B-000057.

8. In addition to impeding critical training, the horses present an unacceptable risk of harm to soldiers, dependents, civilian employees, and members of the general public. JRTC-B-000055-56. The horses are present in significant numbers on critical training areas, such as the drop zones, and many have become conditioned to the training presence and do not react when confronted with military vehicles. JRTC-B-000162. Further, soldiers often parachute into the training area, sometimes at night. JRTC-B-000055. The presence of horses in the "drop zone" or landing area, creates a significant risk that a soldier will land in a group of horses and become injured by the horse striking them or by a parachute becoming caught on a horse that runs away. In addition, the horses may be startled by the parachuting soldiers and run away through the positions of soldiers already on the ground on the edge of the drop zones.

9. Additionally, military vehicles often operate under limited visibility conditions in the training area, as part of the training requires that vehicles operate under light restrictions. *Id.*

Trespass horses located on the dirt roads that these vehicles are operate creates a significant risk of harm to soldiers and horses during low-light conditions. *Id.*

10. The horses often intrude into the cantonment area, which is the non-training area of Fort Polk dedicated to housing, shopping, and office space. JRTC-F-000098-258. The horses walk across and on asphalt roadways, some of which have speed limits up to 50 miles per hour. As a result, there have been several motor vehicle accidents on Fort Polk involving horses. *Id.*

11. The horses also walk into and stand in parking lots, creating a situation in which employees must walk near the trespass horses to reach either their office or their vehicle. JRTC-F-000252. The horses walk into the driveways, yards, and children's playgrounds in the housing areas which creates an unreasonable risk of harm to the families of soldiers as they go about their daily lives. JRTC-F-000220.

12. The horses also leave Fort Polk land and enter adjacent public highways, which has resulted in motor vehicle accidents. JRTC-F-000240.

13. Any delay in the capture of the horses creates an unacceptable risk of harm to all persons of the Fort Polk community as the horses will continue to present the above noted risks on a daily basis. The risks posed can be mitigated by reducing the number of horses on Fort Polk during the pendency of the above captioned lawsuit.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of January, 2018, in Fort Polk, Louisiana.

Mark Shannon Leslie
Chief of Plans and Operations
Fort Polk, LA

Exhibit B

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.	Civil Action No. 2:17-cv-00980 Judge: Unassigned Magistrate Judge Kay

DECLARATION OF MILTON W. FARISS

I, Milton Wayne Fariss, declare as follows:

1. I am employed by the United States Department of the Army at Fort Polk, Louisiana. I am the ITAM Coordinator and have held that position since August 21, 2016.

2. My duties in this position include sustaining military training land to enable current and future training. In this capacity, I have served as the Fort Polk employee with the primary responsibility for daily oversight of the capture, maintenance, and transfer of trespass horses which have occurred from October of 2016 to present.

3. Course of Action ("COA") 7 as stated in the Environmental Analysis ("EA") and modified in the Finding of No Significant Impact provides for the establishment of a list of 501(c)(3) organizations ("501(c)(3) list") and a list of members of the general public ("give-away list") who wish to be receive horses from the trespass horse population at Fort Polk. I am one of the two Fort Polk employees responsible for maintaining the 501(c)(3) list and the give-away list.

4. All 501(c)(3) organizations which have provided the required documentation identified in the EA to Fort Polk have been placed on the 501(c)(3) list in the order received. One organization subsequently requested to be removed from the 501(c)(3) list and was removed. One organization requested to be moved to the bottom of the 501(c)(3) list and was so moved. No other organization on the list has been removed from the list or moved to a different location on the list.

5. Since the compiling of the initial 501(c)(3) list, Fort Polk has maintained close contact with the organizations on the list. Fort Polk hosted a kickoff meeting with the organizations to orient them to Fort Polk and its operations. Fort Polk has also forwarded names of persons interested in acquiring horses to the organizations to assist them with finding homes for the horses taken by the organizations.

6. The initial capture of 50 horses in October 2016 was completed by personnel from the Humane Society of North Texas ("HSNT") and Fort Polk personnel, including myself. Several bands of horses had intruded into the cantonment area and were seen roaming on a roadway and grazing in an area adjacent to an abandoned motor pool, which consisted of a fenced in grass and dirt area. HSNT and Fort Polk personnel formed a line and slowly walked toward the horses, causing the horses to gradually move away from the line of persons. Over a period of 30-45 minutes, the horses gradually walked approximately 1/10th of a mile until they reached the motor pool. A second line of personnel was formed just past the motor pool so that the horses turned as they approached the second line of persons and entered the motor pool. The gate to the motor pool was then closed, and the capture was complete. The following day, when I went to the pen with the representatives from the HSNT, two additional horses were noted to be standing near the motor pool. HSNT requested to take these horses, as well. The gate was

opened, and the additional horses entered the motor pool with no urging by any person. On the morning of the third day, which was the day scheduled to draw blood from the horses, an additional band of ten horses was outside the holding pen. Again, the HSNT representatives requested to also take these animals. The gate was opened, and the additional horses entered the motor pool with no urging by any person. The capture of 15 horses in December 2016 was accomplished in a similar manner to the initial October capture, although it involved only Fort Polk personnel and no other animals showed up after the initial capture day.

7. Fort Polk entered into a Cooperative Agreement with Texas State University ("TSU") on September 30, 2017. In November and December 2017, 18 and 21 horses respectively were captured in the training area pursuant to this agreement. The first of these captures were completed by placing a feed mixture in a pen near the Geronimo Drop Zone. The pen was left open and monitored by both TSU's subcontractor and Fort Polk personnel. When horses were seen in the pen, the gate was closed. The second of these captures was completed by using portable fence panels setup on the Geronimo Drop Zone with the feed mixture in the temporary pen. Once the pen was closed, TSU's subcontractor loaded the horses onto a trailer and transported them to the holding pen in the cantonment area to ensure there was readily-available access to the horses on a daily basis. The holding pen is the same converted motor pool used in 2016.

8. After each capture in 2016 and 2017, the following notification process was followed, except for the capture in October 2016 when the 501(c)(3) organization's representatives were involved in the capture. All 501(c)(3) organizations on the 501(c)(3) list were notified of the capture. The 501(c)(3) organization at the top of the list was informed of the date the State of Louisiana veterinarian would draw blood for tests and offered the opportunity to

have their veterinarian present to draw blood for tests on the same date. Once the blood test results were returned from the State veterinarian, the first 501(c)(3) was informed of the negative results and the availability of the horses for pick up.

9. After each of the 2016 captures, Dr. Daniel Myrick, a veterinarian with the Louisiana Department of Agriculture ("LDAF") was notified of the capture. Each time, LDAF veterinarian and support personnel traveled to Fort Polk, drew blood from each horse and sent the blood to a United States Department of Agriculture laboratory to test for Equine Infectious Anemia and Equine Piroplasmosis. In addition, the HSNT hired an independent veterinarian to draw blood for tests at the same time. HSNT personnel assisted with the blood draws on both occasions.

10. After each of the 2017 captures, Dr. Myrick was notified and performed the same testing procedure as in 2016. TSU's subcontractor assisted with the blood draws on both occasions. However, Mustang Adoption (Horses Lives Matter), the 501(c)(3) organization currently first on the 501(c)(3) list, opted not to send their veterinarian to test the horses at the same time before they moved the horses to an offsite location.

11. After each of the 2016 captures, I was personally responsible for the maintenance of the horses while in the holding pen. I personally ensured that the horses had sufficient water and hay on a daily basis. At no time were the horses in the holding pen without access to food or water. Additionally, the hay provided to these horses was of good quality and free of any mold.

12. After each of the 2017 captures, TSU's subcontractor was responsible for the actual feeding and watering of the horses on a daily basis. Erby Thompson is the only representative of the subcontractor who has fed, watered, and otherwise maintained the horses while in the holding pen. Jacob Thompson has had no involvement with the maintenance of the

horses in the holding pen. I personally monitored the horses while in the holding pen to ensure that they were being adequately fed and watered. At no point have I seen the horses without access to food and water while in the holding pen.

13. Dr. Myrick, a local veterinarian retained by HSNT, HSNT personnel, and representatives from Mustange Adoption have all observed the holding pen, the horses while in the holding pen, and the general conditions in which the horses are maintained. At no point have any of these individuals identified or voiced any concerns over the way the horses are being held or the adequacy of the feed and water being provided to the horses.

14. Other than the 2016 and 2017 captures discussed in this declaration, no other round ups of horses on Fort Polk owned land have been conducted by Fort Polk, on behalf of Fort Polk, or with the consent of Fort Polk. No horses captured during the 2016 and 2017 captures discussed herein have been given to any individual person, nor to any entity other than HSNT and Mustang Adoption.

15. While the horses at issue roam across not only Army-owned land at Fort Polk but also on private property and land owned by the United States Forest Service ("USFS"), all capture efforts have occurred only on Army-owned land, specifically Army-owned land on Fort Polk Main Post. All capture efforts under the process identified in the EA will occur on Army-owned land, specifically on Fort Polk Main Post, Peason Ridge, and the new law adjacent to Peason Ridge. No capture efforts will occur under the process identified in the EA on land owned by the USFS, including those areas used by the Army for training; namely "Horses Head," the Limited Use Area, ord the Intensive Use Area.

16. Capture efforts are limited in size by the EA to 1-3 bands (10-30 horses) and in time by the need to accomplish capture when an area is not being used for training. The typical

training rotation takes 21days and is typically followed by an 8-10 day window of no training. It is during that no training window that the majority of the captures in the training area must be completed. Thus, it is anticipated that only 7-10 successful captures will occur each year with approximately 15-20 horses in each capture, resulting in approximately 105 to 200 horses captured per year. Taking into account the estimated current population of 500-700 horses, the continued birth of foals into the herd and the continued release or abandonment of livestock to join the herd, it is estimated that it will take approximately 3 years to capture all horses at Fort Polk and that only 90-120 horses would be captured over the next six to nine months.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of January, 2018, in Fort Polk, Louisiana.

Milton Wayne Fariss
ITAM Coordinator

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' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL PRELIMINARY INJUNCTION

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INTRODUCTION

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2948, 129-30 (2d ed. 1995)). In the face of this clear and heavy burden, Plaintiff fails to provide sufficient support for injunctive relief.

Plaintiff, an organization advocating for equine animals, specifically those within Fort Polk, challenges the August 8, 2016 decision of Federal Defendants U.S. Army and Major General Gary M. Brito (the "Army") concerning the method of removal of trespass horses from Fort Polk. Plaintiff seeks a broad injunction to prevent the Army from rounding up or removing any more trespass horses at Fort Polk until this case is resolved. Pl.'s Mot. for Partial Prelim. Inj., ECF No. 43. Yet, Plaintiff fails to demonstrate that they are entitled to emergency relief in its supporting memorandum, ECF No. 48 ("Pl.'s Mem.").

Plaintiff is not likely to succeed on the merits of its claims. Since the mid-1990s, the Army has been trying to resolve the issue of these trespass horses and has involved the public at every step. JRTC-E-002984. Additionally, there has been prior litigation with a group similarly situated to Plaintiff here. JRTC-B-000146 (identifying the Coalition of Louisiana Animal Advocates as a statewide coalition of animal protection organizations and individuals). As a decision was already reached by the Eastern District of Louisiana allowing for the removal, the Army has now decided on a method for removal in accordance with the partial settlement agreement from that prior litigation. JRTC-B-000139-155. The Army's decision complied with the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"). The Army conducted an extensive public engagement process, solicited comments, and responded to those comments. Further, the Army determined that the type of activity did

not require it to consult under the NHPA. Neither NEPA nor the NHPA require more. Thus, Plaintiff is unlikely to succeed on the merits of its case.

Moreover, Plaintiff is unable to establish irreparable harm or show a balance of the equities or public interest to support a preliminary injunction. In addition to the delay in filing its motion, Plaintiff's claims are not based on facts supported by the administrative record. Furthermore, the status quo here is not static, as Plaintiff alleges. The safety risks from the trespass horses at Fort Polk which necessitated this decision is ever increasing, including both the numbers of soldiers and the numbers of horses forced to utilize the same amount of space. Declaration of Mark S. Leslie ¶ 4, attached hereto as Ex. A ("Leslie Decl.").

Plaintiff has failed to demonstrate they are entitled to the unusual and disfavored remedy of an emergency injunction. Accordingly, as explained below, the Army should not be enjoined from continuing to implement its decision and Plaintiff's motion should be denied.

STATUTORY BACKGROUND

I. National Environmental Policy Act

NEPA requires federal agencies proposing "major Federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C). The purpose of NEPA is to ensure that agencies take a "hard look" at potential environmental consequences before approving any major federal action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). It is well-settled, however, that NEPA is an "essentially procedural" statute. *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978); *Robertson*, 490 U.S. at 350. "NEPA does not work by mandating that agencies achieve particular substantive environmental results." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989).

Regulations promulgated by the Council on Environmental Quality ("CEQ"), 40 C.F.R. §§ 1500-1508, provide guidance on the implementation of NEPA and are entitled to substantial deference. *Robertson*, 490 U.S. at 355-56. CEQ's regulations allow an agency to comply with NEPA by preparing an environmental assessment ("EA"), *see* 40 C.F.R. §§ 1501.4(b), 1508.9, and based on the EA either determine that an EIS is necessary or issue a finding of no significant impact ("FONSI"). *See id*. §§ 1501.4(e), 1508.13. In contrast to the EIS, an EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether" the action will have a "significant" effect on the environment, the threshold for preparation of an EIS. *Id*. § 1508.9. If the agency determines that the effects will not be significant, it issues a FONSI. *Id*. § 1508.13.

II. National Historic Preservation Act

Like NEPA, the NHPA imposes procedural—not substantive—requirements on agencies. *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 225 (5th Cir. 2006). "[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.'" *Id*. (citing *United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981)).

First, prior to approving an undertaking—that is, "a project" "requiring a Federal permit, license or approval," 54 U.S.C. § 300320, 36 C.F.R. § 800.16(y)—the NHPA requires an agency to identify historic properties that are eligible for National Register listing, assess the undertaking's effects on those properties, and avoid or mitigate adverse effects. 54 U.S.C. §§ 306108, 300320; 36 C.F.R. §§ 800.4, 800.6. Second, the regulations require the agency to consult with the state historic preservation officer ("SHPO"), tribes, and interested parties, and sometimes the Advisory Council on Historic Preservation. 54 U.S.C. § 306108; 36 C.F.R.

§§ 800.2, 800.6(a). The process, described in 36 C.F.R. §§ 800.3-6, is colloquially referred to as a "Section 106" consultation.

STANDARD OF REVIEW

I. Emergency Injunctions Are Extraordinary Remedies

The Supreme Court has stressed that "a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek*, 520 U.S. at 972 (quoting 11A C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2948, 129-30 (2d ed. 1995)). The movant's "requirement for substantial proof is much higher" for a motion for a preliminary injunction than it is for a motion for summary judgment. *Id.*

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). If a plaintiff fails to meet its burden on any of these four requirements, its request must be denied. *See, e.g., id.* at 23-24 (denying injunctive relief on the public interest and balance of harms requirements alone, even assuming irreparable injury to endangered species and a violation of NEPA); *Holland America Ins. Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir. 1985) (finding injunctive relief should only be granted when a movant carries its burden of persuasion by a clear showing). It is therefore an abuse of discretion to grant an injunction without specifically finding that the movant is likely to succeed on the merits. *Munaf v. Geren*, 553 U.S. 674, 690-91 (2008). Further, no presumption exists that an injunction automatically follows the violation of an environmental statute. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

II. Review of Agency Action under the Administrative Procedure Act

Plaintiffs' claims under NEPA and the NHPA are brought pursuant to the Administrative Procedure Act ("APA"), which provides for judicial review of challenges to a federal agency's compliance with applicable law. 5 U.S.C. §§ 701 *et seq.* "[T]he scope of review under the [APA] is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

This court's review of the Army's compliance with the requirements of NEPA and the NHPA is conducted under the APA's "arbitrary and capricious" standard. *Coliseum Square*, 465 F.3d at 241 (citing *Vieux Carre Prop. Owners, Residents, & Assocs. v. Brown*, 875 F.2d 453, 456 (5th Cir. 1989)). Under the "arbitrary and capricious" standard, administrative action is upheld if the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation and quotation marks omitted). The court's role is solely to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

This standard is '"exceedingly deferential.'" *Tex. Comm. on Nat. Res. v. Van Winkle*, 197 F. Supp. 2d 586, 597 (N.D. Tex. 2002) (quoting *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). "While we may not supply a reasoned basis for the agency's action that the agency itself has not given, we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285-86 (1974) (citations omitted). "The [agency's] action . . . need be only a

reasonable, not the best or most reasonable, decision." *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).

FACTUAL BACKGROUND

I. Prior Litigation

In 2000, the Coalition of Louisiana Animal Advocates ("COLAA") filed suit in the Eastern District of Louisiana to challenge the Army's decision to remove the horses based on an Army Corps of Engineers final report titled, "Protection of Restored Lands (Capture and Removal of Trespass Horses)" from September 1999. JRTC-B-000142-143. The report discussed problems at Fort Polk with horses trespassing on training grounds and options for dealing with these problems. JRTC-B-000143. After summary judgment briefing was completed, the court found that the horses were "trespass horses that have roamed from adjacent ranches and farm areas onto military and Forest Service lands." JRTC-B-000148. The court also held that there was no evidence supporting a claim that the horses were "wild horses" within the meaning of the Wild Free-Roaming Horses and Burros Act or that the decision to remove these trespass horses was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.[1] JRTC-B-000148-149. The parties entered a partial settlement that resolved the plaintiff's NEPA challenge, and then the Fifth Circuit Court of Appeals partially affirmed as to the non-application of the Wild Horses Act. JRTC-B-000156, JRTC-D-000001.

II. Summary of NEPA Process

On August 8, 2016, Major General Gary Brito, commanding general of Fort Polk, LA and the Joint Readiness Training Center ("JRTC"), signed a FONSI concerning the removal of trespass horses on Fort Polk, LA. JRTC-A-00007. The FONSI followed a draft EA published

[1] The court in *COLAA* also determined that the extra-record material submitted by that plaintiff was not properly before the court as it was outside of the administrative record. *Id*. at 8. The same issue is present in this case, and the Army has contemporaneously moved to strike Plaintiff's extra-record citations and attachments to its motion for preliminary injunction.

in April 2016, titled "Final Environmental Assessment for the Elimination of Trespass Horses on Fort Polk, Louisiana." JRTC-B-000038. The purpose of that EA was to study the "proposed action to eliminate the trespass horses" and means to "reduce the safety risks, training impacts, and threats to the health of the horses posed by their presence on Fort Polk, Louisiana." JRTC-B-000054.

As stated in the EA, Fort Polk's primary mission is to support home stationed units and operate the JRTC. JRTC-B-000051. JRTC, as one of U.S. Army's Combat Training Centers, supports 10-12 annual training events for the U.S. Army's light infantry, airborne, and air assault forces as well as the U.S. Navy, U.S. Air Force, and U.S. Marine Corps in preparation for joint operations. *Id*. Key components to many training events include airborne (parachutist) operations and flight operations. JRTC-B-000100. To enable these events, the training areas on Fort Polk include drop zones and airstrips. JRTC-B-000054. Training at JRTC and Fort Polk is conducted primarily on the Main Post and Peason Ridge. JRTC-B-000052. In order to improve the training experience to meet the Army's needs, the purchase of new lands was initiated in 2012 in the Peason Ridge area. JRTC-B-000052, JRTC-E-003906. Additionally, JRTC also uses lands owned by the U.S. Forest Service under a separate permit. JRTC-B-000052.

An increasing number of trespass horses populate the training area. JRTC-B-000085, -146, JRTC-E-00298, -3140-3205. Since 1993, the population of these horses on Fort Polk lands has increased from approximately 39 to several hundred. JRTC-B-000085, JRTC-E-003140–3199. Prior to 1993, under Louisiana open-stock laws, horses and other livestock were run in open range around Fort Polk. JRTC-B-000084. Fort Polk engaged in efforts to remove that livestock by capturing and returning to local ranchers. JRTC-B-000085. The efforts to capture and remove the livestock ceased due to the prior COLAA lawsuit; since then, the

population of trespass horses has increased substantially. JRTC-B-000139-156, JRTC-E-003140-3205.

By their presence, these horses impede training events. JRTC-B-000055, -181-191, JRTC-F-000082, -98-259. Often congregating on the drop zones, they pose a danger to troops conducting airborne operations. JRTC-B-000055, JRTC-F-000082. On one occasion, flight operations were cancelled because of manure littering the airstrip and preventing aircraft from being able to land safely. JRTC-B-000181-191. Additionally, their presence on local roadways has caused numerous accidents for motorists on Fort Polk property and on surrounding, state-maintained roadways. JRTC-F-000004-72, -98-259. Further, these horses also migrate into the Fort Polk cantonment area during cooler months and can often be found on roadways, in office parking lots, near childcare facilities, and throughout the housing area, which includes children's play areas. JRTC-B-000038, -56, -157-180, JRTC-F-000098-259. In addition to potential safety concerns posed by their presence, horse manure can often be found in these same areas. JRTC-B-000059, JRTC-F-000098-259.

In addition to health and safety concerns to humans, Fort Polk's training area is also inhospitable to horses. JRTC-F-000073-259. Due to the presence of concertina wire, trenches, and other man-made obstacles, horses are frequently severely injured or killed as a result of the training area's features. JRTC-B-000086. The conducting of live fire and nighttime operations with heavy equipment further endangers their safety. JRTC-B-000847, JRTC-H-000001–226. Additionally, the relatively poor amount of forage available for these animals has left many malnourished. JRTC-B-000112.

Due to these concerns, Fort Polk has attempted to address the problem through several measures. In 1999, a Record of Environmental Consideration ("REC") was prepared to test the horse population for Equine Infectious Anemia and remove the horses from the training area. JRTC-E-003519-521. That REC was the subject of the prior lawsuit in the Eastern District of

Louisiana, which ruled that the horse population was not subject to the Wild Horses Act and appropriately classified as "trespass horses." JRTC-B-000139-156.

In addition to the 1999 REC, Fort Polk conducted an EA and issued a FONSI in 2010 electing sterilization as a method to reduce the trespass horse population. JRTC-E-003561-3895. Later, Fort Polk issued a 2010 REC creating a public capture program. JRTC-E-003896-3899. Acknowledging that Fort Polk does not own the trespass horse population that migrates across its lands, this method allowed the public to capture a limited number of horses for personal use. *Id*. Ultimately, neither the sterilization efforts nor the public capture program succeeded in reducing the horse population on Fort Polk lands. JRTC-E-003140-3205. Fort Polk began efforts on the current EA in 2015. JRTC-G-000001-17.

Concerning the current EA, Fort Polk actively solicited public participation in this project. During the initial scoping phase, Fort Polk published a "Notice of Intent to Conduct and Environmental Assessment for Proposed Action to Eliminate Trespass Horses at Fort, Polk, LA," in various newspapers across the State of Louisiana and on its website. JRTC-B-000234-824, JRTC-C-000041-43. Additionally, Fort Polk also held a public forum concerning the EA on 13 August 2015. JRTC-B-000062, JRTC-C-000044. Based on interactions with the public during this initial scoping period, Fort Polk considered over 700 comments received during the scoping period running from August 2, 2015, to September 5, 2015. JRTC-B-000062, -234-824. The comments received were regularly briefed to the commanding general, the decision-maker, during regular staff meetings. JRTC-G-000030-51.

Although some comments did not provide input concerning horse removal, all suggestions offered by the public were considered. JRTC-B-000063, -234-824. These suggestions included (1) adoption, (2) fencing, (3) sterilization, (4) relocation, (5) sale (6) give away, (7) use as service or therapy animals, (8) euthanization, (9) training and exhibition, and (10) use in prison rehabilitation programs. *Id*. These suggestions were considered against the

following criteria: (1) training impact, (2) safety, (3) environmental impact, (4) public perception, (5) cost, (6) and time. JRTC-B-000064. Given that criteria, use as service animals, train and exhibition, prison rehabilitation programs, and additional fencing were not carried forward for detailed analysis in the EA. JRTC-B-000066-72. Additionally, sterilization was not carried forward for detailed analysis because it was the subject of the 2010 EA. *Id.* Of particular note, initial studies for a fencing solution indicated an initial cost in excess of $23 million with additional annual maintenance costs. JRTC-B-000069 and JRTC-E-003339-3426.

Of the remaining suggestions, each was studied and incorporated into the remaining alternatives (referred to as courses of action) in the EA. JRTC-B-000072–83. Course of Action ("COA") 1 was the no-action alternative, and included continuation of the existing sterilization and public capture methods. JRTC-B-000073. The remaining COAs all incorporated adoption, relocation, sale, give away, or euthanization in their approaches. JRTC-B-000072-83. Most of these approaches focused on tiered or cyclic processes designed to encourage adoption, relocation, or sale with euthanization as a last resort following months after initial capture. *Id.*

Following a review by Brigadier General Timothy McGuire, then commander of Fort Polk and JRTC, Fort Polk released the draft FONSI and EA for public comment on May 4, 2016. JRTC-A-000003. As with the Notice of Intent, the draft finding was advertised in various newspapers across the State of Louisiana, on the Fort Polk's website, and made available at local libraries. JRTC-B-000001-138. Further, the public comment period was extended to ensure all public comments were received from persons encountering difficulties submitting emails and ultimately lasted from May 4, 2016, to June 17, 2016. JRTC-A-000003 and JRTC-C-000039-40.

During this period, Fort Polk received over 180 public comments for review. JRTC-B-001044-1340. Some commenters, including those representing 501(c)(3) rescue organizations,

expressed a willingness to adopt horses and were contacted by Fort Polk. *Id*. Additional commenters noted that the horses may be descended from Army cavalry horses, a claim previously evaluated by an Army historian. *Id*.; JRTC-E-003206-3209. Further, other commenters inquired about the application of the Wild and Free Roaming Burros Act of 1971, which was an issue previously decided by the Eastern District of Louisiana in 2001 stating that "there is no competent, credible evidence that the horses are or were ever 'wild horses' within the meaning" of the act. JRTC-B-000148, -1044-1340. Additional commenters focused on the adoption process and expressed concern for the timeline. JRTC-B-001044-1340 and JRTC-A-000003.

In response to these comments, Fort Polk elected to extend the adoption timeline to better accommodate rescue organizations. JRTC-A-000004-5. With these revisions, trespass horses were to be captured in small lots and first offered to 501(c)(3) organizations. *Id*. Based on public comments, all 501(c)(3) organizations would be notified when a capture occurred and given three working days to respond to the notification. *Id*. Previously, Fort Polk planned to notify the first 501(c)(3) on the list and proceed sequentially with a 48-hour deadline for response. *Id*. Additionally, Fort Polk also modified the EA to prevent automatic removal from the adopter list for failure to meet a deadline. *Id*. Under the modified EA, Fort Polk retained discretion to remove adoptive organizations if necessary. *Id*. Of note, no 501(c)(3) organizations have been removed by Fort Polk except one at the 501(c)(3) organization's request. Declaration of Milton W. Fariss ¶ 4, attached hereto as Ex. B ("Fariss Decl."). A second 501(c)(3) organization was moved to the bottom of the list at its request. *Id*. Fort Polk additionally provides instructions for organizations on its website for interested rescue organizations. JRTC-A-000023, JRTC-E-04595. Likewise, Fort Polk maintains a list of members of the general public ("give-away list"), who asked to be given horses that are not

taken by the 501(c)(3) organizations, along with instructions on how to be placed on the list. JRTC-A-000023, JRTC-E-04597.

Following these modifications, Fort Polk elected COA 7 as its chosen alternative on August 8, 2016. JRTC-A-000006. As stated above, this COA creates a cyclic process centered on small lot capture and initial offer to 501(c)(3) organizations. JRTC-A-000002-6. Under this COA, if trespass horses are not taken by a 501(c)(3) organization, they are then offered to the members of the general public on the give-away list. *Id*. Any remaining trespass horses would then be transported to a livestock facility for sale or combined with the next capture to cycle through the process again. *Id*. COA 7 also stated the Army's willingness to move the entire population if an entity expressed willingness. *Id*. In making this choice, MG Brito noted that COA 7 offered the best opportunity for the horses to be adopted by rescue organizations and reduce the safety risk to troops and horses in the training areas. JRTC-A-000006. The signed FONSI with COA selection was then published and made available for the public. JRTC-A-000001-51.

III. Summary of the Decision in Practice

Operating under the chosen COA, Fort Polk captured 50 horses in October 2016 and 15 in December 2016. Fariss Decl. ¶ 6. All of these horses were placed with the Humane Society of North Texas, which was the first 501(c)(3) on the list at that time. *Id*. Fort Polk signed a Cooperative Agreement with Texas State University on September 30, 2017. *Id*. ¶ 7. Under that agreement, Texas State University or its subcontractor is now responsible for the capture of the trespass horse population and the maintenance of the horses from the time captured until taken by 501(c)(3) organizations. *Id*. Through this agreement, 18 and 21 trespass horses were captured in December 2017 and January 2018, respectively. *Id*. As with all previous captures, these trespass horses were also placed with 501(c)(3) rescue organizations – most recently with Mustang Adoption. *Id*. ¶ 10. The horses are also breeding faster than previous removal efforts.

Based on continued small lot captures of 10-30 horses and the continued breeding of the horses, Fort Polk estimates that the complete removal of the would take approximately three years. Fariss Decl. ¶ 16. To address inaccurate allegations of Plaintiff, the Army has provided detailed information on recent captures in the Fariss Declaration. *See* Fariss Decl. ¶¶ 5-13.

ARGUMENT

I. PLAINTIFFS ARE NOT SUBSTANTIALLY LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. The Army Complied with NEPA

As discussed herein, the Army complied with NEPA, and as a result, Plaintiff's claims lack merit. The Army met the purpose and intent of NEPA by fully considering the environmental impacts of its proposed action, as well as fully engaging the public in the process. The Army considered a number of factors, while Plaintiff's sole focus has been the trespass horses.

1. The Army properly prepared an EA and FONSI.

The Army's EA was sufficient to comply with NEPA, and an EIS was not necessary here. NEPA requires federal agencies to consider the environmental impact of any major federal actions they undertake and to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). If an activity does not automatically require an EIS, the agency may conduct an EA to determine whether an EIS is necessary. 40 C.F.R. §§ 1501.3-1501.4. If, after a "hard look" at the proposed action, the agency concludes that there will not be any significant environmental impact, the agency may issue a FONSI and is not required to prepare an EIS. "An agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Dep't of Transp. v. Pub. Citizen*, 541 U.S.

752, 763 (2004) (quoting 5 U.S.C. § 706(2)(A)). In doing so, the plaintiff must submit detailed and conclusive evidence, not speculation. *Kleppe v. Sierra Club*, 427 U.S. 390, 412-14 (1976).

The Army complied with these regulations governing the NEPA process. It prepared an EA that considered all of the impacts from its proposed action and determined that there were no significant environmental impacts. As such, it issued its FONSI and determined preparation of an EIS was not required. JRTC-A-000005. Plaintiff now contests that decision without identifying any significant impacts that would have required an EIS. Pl.'s Mem. 20. Therefore, Plaintiff is not likely to prevail on this issue.

2. The Army fully considered and disclosed the impacts of the project under NEPA.

Plaintiff asserts that the EA failed to consider the consequences of the plan on the horses themselves, the important baseline information in the analysis of the different types of horses, all appropriate and reasonable alternatives, and any significant mitigation measures to minimize impacts. Pl.'s Mem. 21-22. The Army considered alternatives in line with the purpose and need of the proposed project. It is not Plaintiff's place or the Court's to determine what needs the agency has or what is sufficient to meet those needs. *Contra* Pl.'s Mem. 22. Instead, Plaintiff offers its input in the public comment phase of the environmental review, and the Court reviews the agency's decision under the arbitrary and capricious standard.

The Army's EA also contains discussion of direct, indirect, and cumulative impacts, including the existing conditions from the current population of trespass horses. The presence of the horses at Fort Polk, especially during the growing season, causes an impact to the soil due to the volume of forage removed and resulting erosion. JRTC-B-000112. Each horse forages between 9,360 to 11,700 pounds a year. *Id.* Additionally, the Army's EA discussed background information on the current population of trespass horses in order to establish a baseline for the effects of this project. JRTC-B-000084-88. Plaintiff alleges that the Army failed to consider the

effects of its project on the horses themselves. Pl.'s Mem. 7. This is not true. The Army considered the relevant effects of its project and concluded that the proposed action would not have significant environmental effects. Plaintiff cannot show that this level of analysis and disclosure was inadequate under NEPA.

Lastly, Plaintiff's unsupported allegations of inhumane treatment and assertions that the Army did not put procedures in place to ensure the horses are not primarily sold to "kill buyers" or in a transparent manner do not provide a basis for an injunction. Pl.'s Mem. 9, 24. The Army has repeatedly stated that its intent was to permit 501(c)(3) animal welfare organizations to have the first opportunity to acquire the horses so that those organizations would play the determinative role in the identification of the persons who would ultimately acquire the horses. JRTC-B-000851-1043. Fort Polk has not sold or given any horses to "kill buyers" since the decision was made. *See* Fariss Decl., Ex. B. Further, humane treatment of the horses during capture and transport is legally protected under state law. *See* LA. ADMIN. CODE, tit. 7, pt. XXI, § 2103.

Accordingly, the Army did not act arbitrarily, capriciously, or otherwise not in compliance with the law, and Plaintiff is not likely to succeed on the merits of this claim.

3. The Army considered a meaningful range of alternatives.

The Army took a hard look at the impacts of the proposed action and adequately considered reasonable alternatives. And because the Army found no significant impacts, the EA does not need to examine as broad a range of alternatives as an EIS might because the necessary range of alternatives diminishes as the expected impacts diminish. *Sierra Club v. Espy*, 38 F.3d 792, 796, 802 (5th Cir. 1994) (range of alternatives to be considered in EA "decreases as the environmental impact of the proposed action becomes less and less substantial" (internal

quotations omitted)). Additionally, it is not grounds for a NEPA violation that the EA did not consider an alternative preferred by Plaintiff.

Plaintiff nevertheless argues that the Army did not consider a meaningful range of alternatives. Pl.'s Mem. 8. Based on its research and public comment from the scoping process, the Army identified five methods of handling the trespass horses that were viable after preliminary analysis and considered in some combination for in-depth analysis. JRTC-B-000072. The Army's EA considered in detail seven alternatives: (1) no action; (2) adopt, give away, sell, euthanize, and relocate; (3) adoption/relocation, give away/sell, euthanize; (4) adoption, sell, euthanize; (5) relocation, sell, euthanize; (6) give away, sell, euthanize; and (7) adopt, give away, sell, and relocate. JRTC-B-000072-83. The Army also considered, but eliminated from detailed analysis, several alternatives, including sterilization, fencing, use as service animals or in prison rehabilitation programs, and training and exhibition. JRTC-B-000066-72. The Army fully considered the environmental impacts of these alternatives in Section 4.4 of the EA. JRTC-B-000110-129.

The Army ultimately selected the seventh alternative for this project. JRTC-A-000006. The first alternative was not selected because taking no action would not resolve the personnel safety and training impacts in the reasonably foreseeable future. *Id*. While the other alternatives would meet the purpose and need of the project, the selected alternative did not involve euthanization of any horses and will satisfy the purpose and need of the project within a reasonable time period. JRTC-A-000007.

The Army was not required under NEPA to do anything more. Nor has Plaintiff proven a likelihood of success on the merits of this claim.

B. The Project Comports With the NHPA

Fort Polk additionally considered the application of the NHPA. The Army, assuming such properties were present, determined that the proposed actions would not have the potential to cause effect to historic properties. JRTC-B-000855. Pursuant to 36 C.F.R. § 800.3(a)(1), which states "the agency official has no further obligations under section 106 or this part," the Army complied with the NHPA. Plaintiff here, like in *McGehee v. U.S. Army Corps of Engineers*, "confuse the 'no potential to cause effects' determination with a 'no effects' determination. A 'no effects' determination, like a delineation of the [area of potential effects] happens further along in the Section 106 Process." No. 3:11-CV-160-H, 2011 WL 3101773, at *4 (W.D. Ky. July 19, 2011) (citing 36 C.F.R. § 800.4).

The administrative record supports the Army's decision as it relates to the NHPA. Fort Polk has multiple plans in place under which it conducts cultural resource surveys and identifies culturally relevant sites, artifacts and structures, including those potentially covered under the Act. JRTC-E-000001-2979. The EA defined cultural resources as "[i]rretrievable or irreversible damage to a prehistoric or historic site that is listed or is eligible/potentially eligible for listing on the National Register of Historic Places." JRTC-B-000104. Then, the Army determined that based on the 1999 Historic Preservation Plan, which summarized work conducted on Army properties to establish the guidelines for determining the significance of cultural resources at Fort Polk, and the Integrated Cultural Resources Management Plan, 2012 that there would not be any impact on a known archeological site or effect on a site under the authority of the ICRMP. JRTC-B-000108. Thus, the Army did not conduct further analysis. *Id.*; *see also* JRTC-B-000855 (response to comment regarding NHPA section 106 compliance).

Plaintiff alleges that Peason Ridge and all or part of Fort Polk constitutes a cultural landscape and that the horses themselves could possibly be considered historic property. Pl.'s Mem. 25-26. Based on the previous finding by the Eastern District of Louisiana and the

affirmation of the 5th Circuit, the Army rationally concluded that the trespass horses were not historic property. While it is true that several comments were received that referred to "historic horses," no such determination was made by any party in the record that the existing horses at Fort Polk, Peason Ridge, or Fort Polk itself have any protected status or historic significance. In fact, the record shows that the Army had the Director of the Fort Polk Museum investigate and prepare a memorandum on the historical origins of the trespass horses at Peason Ridge and Fort Polk. JRTC-E-003206. This memorandum concluded that the trespass horses are not descendants of the U.S. Army cavalry stock or feral horses from previous periods but are more likely post-WWII unwanted or abandoned saddle horses from the local area. JRTC-E-003206, -3208. Further, this conclusion was consistent with the 2001 finding of the Eastern District of Louisiana that the trespass horses had roamed from adjacent ranches and farm areas.

The regulations define historic property as "any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places maintained by the Secretary of Interior." 36 C.F.R. § 800.16(l)(1). The criteria for the National Register is established by the Secretary of the Interior and found at 36 C.F.R. § 60.4. *Id*. at § 800.16(r). This criteria includes:

> The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects[2] that possess integrity of location, design, setting, materials, workmanship, feeling, and association and
>
> **(a)** that are associated with events that have made a significant contribution to the broad patterns of our history; or
>
> **(b)** that are associated with the lives of persons significant in our past; or
>
> **(c)** that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or

[2] "An object is a material thing of functional, aesthetic, cultural, historical, or scientific value that may be, by nature or design, movable yet related to a specific setting or environment." 36 C.F.R. § 60.3.

> **(d)** that have yielded, or may be likely to yield, information important in prehistory or history.

36 C.F.R. § 60.4. Nothing on the face of this criteria applies to a living animal, especially when its historic significance has not been established. Nor has a court found that animals within the United States are covered by the NHPA.

Plaintiff, relying on a distinguishable case concerning the Okinawa dugong, contends that the trespass horses should be considered eligible for inclusion on the National Register of Historic Places. Pl.'s Mem. at 26-27. However, the applicability of the NHPA to the Okinawa dugong turned on whether a Japanese law, which designated it for preservation, was Japan's equivalent to the National Register. *Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106, at *6 (N.D. Cal. Mar. 2, 2005). The court there found that the Japanese law and the National Register reflected similar motives, shared similar goals, and generally pertained to the same types of property, despite the Japanese law including both animate and inanimate things. *Id*. While that court found some support for the idea that living things could be protected as an object under the NHPA, no court has found that the NHPA protected a wild animal based on United States' law. *Id*. at *10 (citing *Hatmaker v. Ga. Dep't of Transp.*, 973 F. Supp. 1047 (M.D. Ga. 1995)).[3] Thus, even if the Court were inclined to find a violation of the procedural requirements of the NHPA, there has been no prejudicial error because no historic property is affected by this project. *See Sisseton-Wahpeton Oyate v. U.S. Corps of Eng'rs*, No. 3:11-CV-3026-RAL, 2016 WL 5478428, at *8 (D.S.D. Sep. 29, 2016).

[3] *Hatmaker* also is distinguished from the facts in this case as that case involved an oak tree, which the court found that the agency had not initially fully considered its potential eligibility to be placed on the National Register. 973 F. Supp. at 1056-57. The court itself did not provide any legal analysis on this issue but found the agency's analysis was flawed and issued an injunction. *Id*. Further, when the agency conducted this review and moved to dissolve the injunction, the court found the agency properly determined was not covered by the NHPA. *Hatmaker v. Ga. Dep't Transp.*, 973 F. Supp. 1058, 1069 (M.D. Ga. 1997).

The Army's decision must be reviewed to determine whether it was arbitrary and capricious, and Plaintiff cannot prove that it was, as Plaintiff failed to provide any evidence of flaws in the decision-making process and conclusion. *See Coliseum Square*, 465 F.3d at 244. Therefore, having found that plaintiffs cannot succeed on the merits, the Court need not give further analysis to Plaintiff's request for injunctive relief. Plaintiff's request for injunctive relief should be denied.

II. PLAINTIFF CANNOT DEMONSTRATE IRREPARABLE INJURY

Because Plaintiff's claims are not likely to succeed, the Court may end its inquiry here. *See, e.g.*, *Winter*, 555 U.S. at 22. But even if the Court considers the remaining *Winter* factors, Plaintiff cannot meet their heavy burden of demonstrating irreparable harm. There is no presumption of harm simply because a claim involves an environmental statute. *Amoco*, 480 U.S. at 544-45. Further, an injury must be permanent or of long duration to be considered irreparable. *Amoco*, 480 U.S. at 545.

Plaintiff's harm is not irreparable. Plaintiff alleges that the project harms its members by impairing their ability to enjoy and recreate in the Fort Polk and Kisatchie region and seeing the horses. Pl.'s Mem. 17. Plaintiff also asserts that this project will permanently prevent its members from "connecting to their cultural heritage." Pl.'s Mem. 18. However, Plaintiff's members will still have other ways to connect to their heritage. Moreover, the horses are only being removed from Fort Polk, so Plaintiff can continue to see the horses on the Kisatchie Forest. Farris Decl. ¶ 15. If Plaintiff were to prevail in this litigation, the population of horses could be reconstituted from the offspring of horses that have already been adopted or other feral herds in Louisiana. Additionally, the remaining horses would continue to breed, thereby increasing the population at Fort Polk.

First, there is no risk of the Army rounding up and removing all of the trespass horses from Fort Polk prior to this litigation being resolved. Pl.'s Mem. 15. Even in the EA, the Army estimated that it would take up to three years to remove all of the horses. JRTC-B-000129. Now, given the additional time it took for the Army to secure a contractor to handle the capture and removal process and the ongoing necessity of scheduling capture efforts in between training exercises, the Army estimates it will take approximately three years to complete the project. Fariss Decl. ¶ 16. Assuming this case is resolved within the next six to nine months, no more than 120 of the 500-700 horses would likely be removed from Fort Polk. *Id*.

Second, while horses are being removed from Fort Polk, they are not being removed from the Forest Service lands. JRTC-A-000001; Fariss Decl. ¶ 15. Nor are the horses being destroyed. Even where a NEPA violation occurs, to obtain an injunction, a petitioner must show actual or imminent irreparable harm to an environmentally-related concrete interest. *Winter*, 555 U.S. at 22; *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-58 (2010). Given that individuals can continue recreational activities with respect to viewing horses on the Kitsatchie Forest and at Fort Polk until the removal is completed in a few years, Plaintiff cannot establish that their asserted injury is "more than mere speculation." *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 583 (E.D. La. 2016) (citations omitted). Thus, Plaintiff's claim of irreparable harm should be rejected.

Further, Plaintiff's delay in bringing their emergency motion also undercuts any presumption of irreparable harm. *M-I LLC v. Argus Green LLC*, No. 2:10-CV-24-DF-CE, 2010 WL 11527419, at *4 (E.D. Tex. July 13, 2010). Plaintiff could have filed suit as early as August 2016 when the Army issued its decision. Instead, Plaintiff waited four months before filing its complaint. During that time, Plaintiff was certainly aware of the Army's ability to begin 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. Plaintiff has not explained its delay or how it would be harmed by additional captures of the trespass horses. Thus, Plaintiff's own delay in filing this case and in moving for a preliminary injunction militates against a finding of irreparable harm.

Moreover, even if the Court were to find that Plaintiffs had shown concrete, irreparable harm, the relief granted should be tailored to the proven harm. Plaintiff, along with members of the public, recognized that not all of the horses were "descendants of cavalry horses" or a "historical herd." JRTC-B-00870; JRTC-B-00875 (recognizing that "it is unknown which horses are descendants and which horses were abandoned"). Thus, Plaintiff's objections to removal of these horses should not stand. Plaintiff has not met its burden on this requirement. For this reason, standing alone, the Court can deny Plaintiff's motion.

III. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST FAVOR ALLOWING THE ARMY TO CONTINUE TO IMPLEMENT ITS 2016 DECISION.

Plaintiff must also demonstrate both "that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. "These factors merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). Plaintiff cites *Amoco*, 480 U.S. at 545, for the proposition that alleged environmental injuries favor the issuance of an injunction. Pl.'s Mem. 16. The Supreme Court in *Amoco*, however, noted that the balance of harms usually favors the issuance of an injunction only "*[i]f* such injury is sufficiently likely." 480 U.S. at 545 (emphasis added) (reversing injunction). Plaintiff has failed to make the requisite showing.

Here, the balance of harms supports allowing the Army to proceed, not an injunction, partial or otherwise. Delaying the removal of the trespass horses would allow the horses' population to expand, increasing the risks posed by this trespass livestock and leading to

substantial losses of man hours and money. Leslie Decl., ¶¶ 6, 13; *see Amoco*, 480 U.S. at 545 (financial harms are relevant considerations). Plaintiff argues that the Army can continue its training and other operations at Fort Polk as it has for more than seventy years. Pl.'s Mem. 15. However, Plaintiff fails to take into account that the numbers of the trespass horses at Fort Polk are not the same today as in years past. The Army should not have to wait until a catastrophic event is caused by these horses before it acts. The safety concerns for the soldiers, their families, and civilians at Fort Polk, as well as the horses, continue to exist. Leslie Decl. ¶¶ 5-12. These risks will only increase the longer that trespass horses remain at Fort Polk. For example, from November 2015 to January 2016, there were 17 reported and documented incidents related to the trespass horses, including dead or injured horses, cancelled training, horses in roads or built-up areas, and horse-caused damage. JRTC-G-000108.

Additionally, the balance of harms to the trespass horses supports the Army continuing with its plan. Left to roam freely at Fort Polk, the horses could be injured or accidentally killed or even face starvation from limited resources. In the past, some horses have been caught in concertina wire or live fire exercises. JRTC-B-000086-87. The Army's removal decision would ensure that the horses are placed with rescue organizations and adopted. Thus, the balance of equities favors denying Plaintiff's request for injunctive relief.

The alleged harm to Plaintiff their heritage and the environment is overstated. Pl.'s Mem. 15. Such heritage will be remembered and can be honored without horses roaming freely on Fort Polk. Even if all the horses were removed, the historical role of horses and other animals during war and conflict will not be forgotten. Additionally, Plaintiff's members are not prevented from adopting any of these horses and caring for them in an appropriate environment as a way to preserve their heritage.

Plaintiff alleges that the Army would not be harmed by its partial injunctive request beyond a "corresponding inconvenience." Pl.'s Mem. 29. However, Plaintiff's request adds at least 7 additional steps to the removal process. Pl.'s Mem. 1-3. These requests raise more concerns than a complete prohibition by creating a process that was not approved or considered by the public during the agency's NEPA review. It also places additional burdens on the Army in order to allocate additional employees, time, and financial resources to comply. For example, the length of time that the Army would hold the horses after capture would increase under Plaintiff's proposal, which also increases the cost of care for the horses to the Army and the staffing needed to care for the horses. Lastly, Plaintiff's request would take control of the capture and removal process away from the agency and its contractor, who have the knowledge and experience in operating Fort Polk and managing such livestock, and gives it to Plaintiff, who has no identified experience or special knowledge. Such an approach is not supported by the balance of equities and is problematic for a host of reasons.

Allowing the Army to proceed with this project favors the public interest. The harms from delaying the removal are well documented throughout the administrative record. *See* Leslie Decl. ¶¶ 5-13. Implementation of the project as approved by the Army far outweighs any perceived harm of not observing these trespass horses at Fort Polk, especially when they can still be observed on the Forest. Moreover, there is public support for this project. There are local land owners who have suffered property damage and others concerned about traffic safety that favor removing these horses from Fort Polk. JRTC-G-000114. In addition, there are many citizens who are neutral or not interested in this project. *Id*. The Army already complied fully with NEPA and the NHPA, so the public interest would be served by allowing this agency to act on its legally authorized decision. If every time an interest group disagreed with an agency's decision, it could obtain a preliminary injunction, government operations would grind to a halt.

Plaintiff argues that the injunction will "effectively preserve the status quo" until the merits of the case can be heard. Pl.'s Mem. 30. Removing some horses actually does a better job to maintain the status quo by not allowing the horse population to grow. Furthermore, "[t]here is always a status quo," but a preliminary injunction should not issue to protect it "unless the court's ability to render a meaningful decision on the merits would otherwise be in jeopardy." *Canal Auth. of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974).

Plaintiff requests that if the Court issues an injunction, the Court require no bond. Pl.'s Mem. 32. A successful applicant for a preliminary injunction must post a bond or other security "in such sum as the court deems proper" for the payment of costs that may be incurred by a wrongfully-enjoined party. Fed. R. Civ. P. 65(c). Such costs could be incidental and consequential costs, as well as losses the unjustly enjoined party will suffer during the period he is prohibited from engaging in certain activities. *Texans for Free Enter. v. Tex. Ethics Comm'n*, No. A-12-CA-0845-LY, 2012 WL 12874899, at *7 (W.D. Tex. Dec. 6, 2012) (citation omitted). Where a court determines that the risk of harm to the enjoined party is remote, then the court has the discretion to require only a nominal bond or no bond at all. *Id.* (citation omitted). Plaintiff's claim of remote risk to the Army is not sufficient to support no bond. Further, Plaintiff has offered no evidence to show that it is financially unable to post a bond or that requiring security would deny it access to judicial review.

CONCLUSION

Plaintiff has failed to meet its burden of proof on each of the four requirements for this Court to consider the extraordinary remedy of an emergency preliminary injunction. Therefore, Plaintiff's motion for a preliminary injunction should be denied, and the Army should be allowed to continue executing its duly-authorized decision to round up and remove these trespass horses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 19, 2018, a copy of the foregoing *Federal Defendants' 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.

s/ Davené Walker
Davené D. Walker, Trial Attorney
U.S. Department of Justice