UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

Pegasus Equine Guardian Association

Plaintiff,

v.

U.S. Army and Brigadier General Gary M. Brito, in his official capacity as Commanding General, JRTC and Fort Polk, Louisiana

Defendants.

Division: Lake Charles

Case No. 2:17-CV-00980

Judge: Unassigned

Magistrate Judge: Kathleen Kay

Ref. 137-002.2

Memorandum in Support of Plaintiff's Motion to Submit Extra-Record Evidence

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Plaintiff, Pegasus Equine Guardian Association ("Pegasus"), files this Memorandum in Support of its Motion to Submit Extra-Record Evidence. Pegasus respectfully moves this Court to supplement the Administrative Record with extra-record evidence to include: (1) the Declaration of Dr. Bruce Nock; (2) exhibits attached to the Plaintiff's Motion for Preliminary Injunction (except for Exhibits A, B, M and N); and (3) the testimony and evidence entered into the record at the January 30, 2018 hearing on the Plaintiff's Motion for Preliminary Injunction, to the extent they are relevant to the merits of this case. These documents and testimony are relevant to this action and necessary for effective judicial review, because they document significant facts, issues, and scientific or technical analyses that the Government failed to consider before proceeding with its horse-elimination plan and are not included within the administrative record.

Introduction

Pegasus supports the U.S. Army and its ongoing high-quality training for U.S. troops at Fort Polk. But the Army has chosen a plan that will completely eliminate the wild and free-roaming horses living in and around Fort Polk, without considering critical environmental and cultural factors as required by law. Nor does the plan accommodate the history and culture of both local residents and the larger citizenry.

The Fifth Circuit Court of Appeals has "held that a district court may review evidence in addition to the administrative record to determine whether an agency adequately considered the environmental impact under [the National Historic Preservation Act (NEPA)] of a particular project." *Sierra Club v. Peterson*, 185 F.3d 349, 370 (5th Cir. 1999), on *reh'g*, 228 F.3d 559 (5th Cir. 2000) (citing *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 678 (5th Cir. 1992) ("A reviewing court is to review the administrative records as well as other evidence to

determine whether the agenc[y] adequately considered the values set forth in NEPA and the potential environmental effects of the project…"). The reason for this is that a court often must look outside the agency's compiled record to see whether the agency missed important facts, technical data, or other important issues related to the environmental impacts:

> This occurs because NEPA imposes a duty on federal agencies to compile a comprehensive analysis of the potential environmental impacts of its proposed action, and review of whether the agency's analysis has satisfied this duty often requires a court to look at evidence outside the administrative record. To limit the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of NEPA. The omission of technical scientific information is often not obvious from the record itself, and a court may therefore need a plaintiff's aid in calling such omissions to its attention. Thus, we have held that the consideration of extra-record evidence may be appropriate in the NEPA context to enable a reviewing court to determine that the information available to the decision maker included a complete discussion of environmental effects and alternatives.

Peterson, 185 F.3d at 370 (citations omitted).

NEPA and the National Historic Preservation Act are similar procedural laws, requiring a "hard look" at project effects (environmental for NEPA, historical and cultural for the National Historic Preservation Act), alternative courses of action, and mitigation options. *See Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 241–42 (5th Cir. 2006); *see also Vieux Carre Prop. Owners, Residents & Assocs., Inc. v. Brown*, 875 F.2d 453, 459–60 (5th Cir. 1989). Therefore, the same exceptions to the "record rule" under NEPA apply under the National Historic Preservation Act.

Because the extra-record evidence here demonstrates the omission of technical and scientific information and pertinent facts not obvious from the record itself, this evidence is necessary to enable this Court to determine whether the information the Army considered when deciding on its Fort Polk horse-elimination plan did not include a complete discussion of

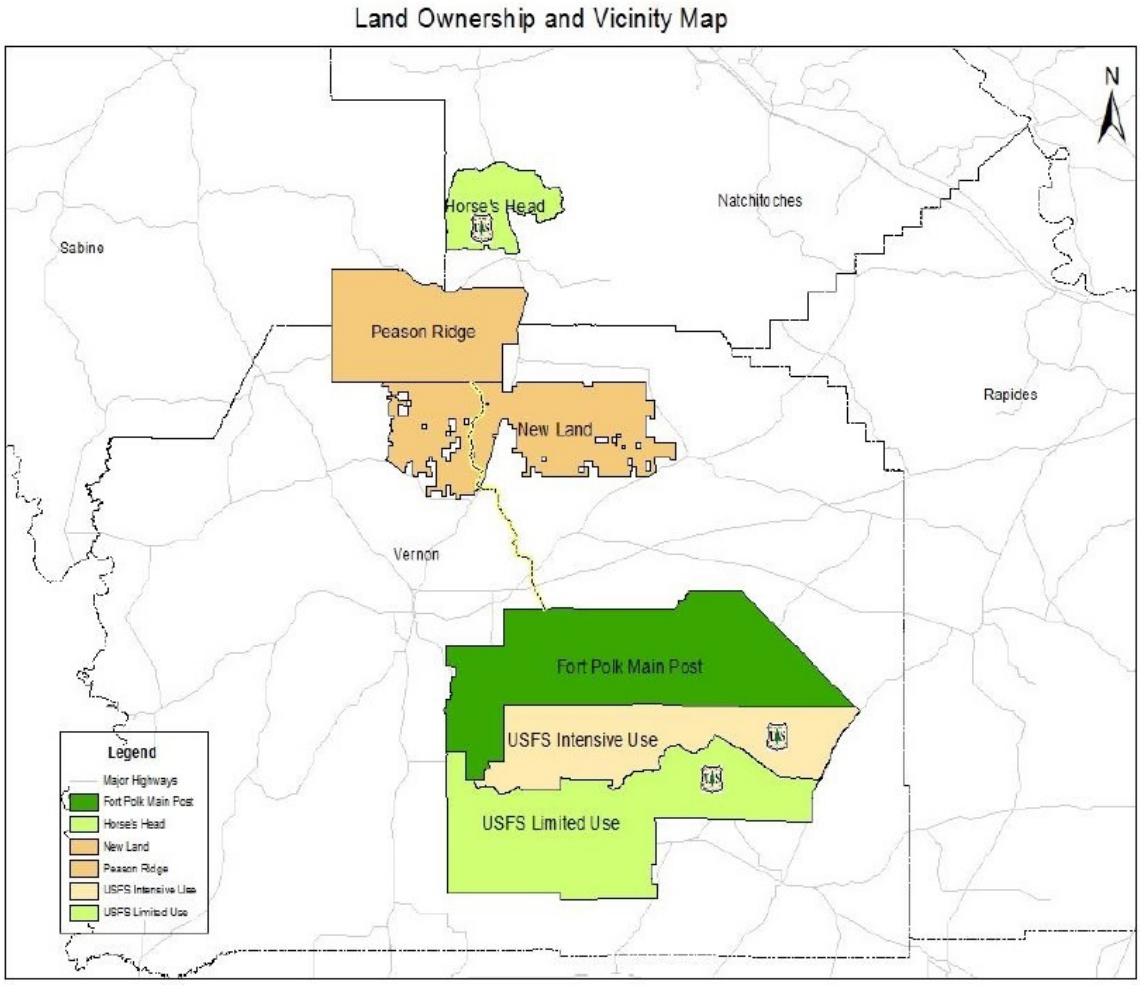
environmental, historical, and cultural effects and alternatives. Therefore, this Court should enter the extra-record evidence into the record for consideration on the merits.

Procedural Background

The Army issued a public notice entitled "Notice of Intent to Conduct an Environmental Assessment for Proposed Action to Eliminate Trespass Horses at Fort Polk, LA" on August 2, 2015. Ex. A, ECF No. 43-1.[1] The Army received more than 700 public comments. Jeff Matthews, *Army closer to decision on Fort Polk horses*, THE TOWN TALK (Sept. 23, 2015), Ex. B; EA, App. D – Comments, ECF Nos. 17-6 – 17-12; EA, App. G – Public Comments, ECF No. 17-15.

On May 4, 2016, the Army made its EA and Draft Finding of No Significant Impact available for public review with a thirty-day comment period. The Army extended the comment period's deadline to June 17, 2016. The Army received 180 comments in response to the plan. On August 8, 2016, the Army published a Finding of No Significant Impact. The Brigadier General concluded that none of the Army's primary or proposed alternative "Courses of Action" (or "COA") would have a significant impact on the environment. Therefore, he concluded that the Army did not need to prepare an Environmental Impact Statement ("EIS"). EA, FONSI, ECF No. 17-1.

[1] The entirety of Exhibit B (ECF Nos. 17-2 – 17-15) to Plaintiff's Opposition to Defendants' Motion to Transfer Venue (ECF No. 17) is the Army's full Environmental Assessment from the Army's Website. However, this Environmental Assessment document actually comprises both the FONSI and the EA (ECF No. 17-2), as well as a number of Appendices. Therefore, in citations, Pegasus will cite to the Finding of No Significant Impact as "EA, FONSI" and to the actual Environmental Assessment portion of the larger document as the "EA, Envtl. Assmnt." to clarify the specific sub-documents of ECF No. 17-2.



Land Ownership and Vicinity Map, EA, Envtl. Assmnt. 2-3, ECF No. 17-2 at 18-19.

The Army intends to eliminate all horses from Fort Polk. EA, FONSI 1, ECF No. 17-1 at 3. The Fort Polk Army Installation totals more than 260,000 acres, 139,468 acres of Army-owned land and 113,621 acres of U.S. Forest Service land the Army has contracted to use. EA, Envtl. Assmnt. 2-3, ECF No. 17-2 at 18-19. Fort Polk includes: (1) the Fort Polk Main Post (65,363 acres, where the most intensive training occurs); (2) the United States Forest Service land the Army uses for training just south of the Main Post (a 40,267-acre parcel of "intensive use" land and another 60,567-acre parcel of "limited use" land); (3) Peason Ridge (an area of about 74,105 acres of land about 30 miles north of the Main Post); (4) the newly acquired land just south of Peason Ridge ("To date, approximately 40,660 acres of new training lands have

been purchased"); and (5) Horse's Head (12,787 acres of Forest Service land where the Army may conduct low-impact training under a "Special Use" permit). *Id.*

In the Finding of No Significant Impact, Brigadier General Brito announced that the Army would implement alternative Course of Action 7, as described in the EA (and modified by the Finding of No Significant Impact). EA, FONSI 1-6, ECF No. 17-1 at 3-8. Under this plan, Fort Polk personnel will initiate the capture of horses in groups of ten to thirty. *Id.* As capture becomes more difficult, contract personnel will capture remaining horses. The Army will create a list of nonprofit animal welfare organizations and a list of members of the public who could potentially take the horses. The Army will first contact the organizations on the list, then those organizations will have three working days to notify Fort Polk that it will take the horses and eight days to pick them up. If an organization fails to respond within three days, declines to take all available horses, or fails to pick up horses within the eight-day deadline, that organization may be permanently removed from the adopter list. If no such organizations on the list can pick up the horses, the Army will then offer horses to people or entities on a "giveaway" list. They will have forty-eight hours to notify Fort Polk that they will take the horse(s), and five days to pick them up. If they fail to pick up the horse(s), they will be permanently removed from the giveaway list. All remaining horses will either be transported to a livestock sale facility or will be combined to the next lot of captured horses to cycle through the process again. The process will then continue until all horses are eliminated from Fort Polk. Additionally, Fort Polk may relocate the horses to a private landowner or other government entity. *Id.*

The Army filed the Administrative Record with this Court on November 17, 2017. ECF No. 37.

Factual Background

I. Horses have roamed the Fort Polk area since before settlers arrived.

Wild and free-roaming horses have lived at Fort Polk at least as long as the homesteaders, who settled the land in the early 1800's. STEVEN D. SMITH, A GOOD HOME FOR A POOR MAN: FORT POLK AND VERNON PARISH, 1800-1940 50 (Univ. of S.C. Scholar Commons 1999) ("The first Anglo-American settlers often found wild horses and cattle in the woods, lost by the Spanish or other settlers pushing west."); *see also* p. 62 (describing how Gustav Dresel chronicled his journey through the area in August 1839 when a grazing horse wandered into the camp) (*available at* https://scholarcommons.sc.edu/ anth_facpub/50/), Ex. G, ECF No. 43-7. Some of the ancestors of Pegasus members were included among these early settlers. They were subsistence farmers, and they set aside a large parcel of land exclusively for grazing for their horses and other animals. *See* EA, Envtl. Assmnt. 34-35, ECF No. 17-1 at 50-51 of 104. Horses have remained on that property ever since. *Id.*

II. For the more than seventy years Fort Polk has operated as a military training facility, horses were born on Fort Polk and coexisted there.

During World War II, the Army used eminent domain to take possession of the property and homes owned by Peason residents to create what is now known as the Fort Polk Military Installation. MG Daniel P. Bolger, Installation Commander, JRTC & Fort Polk, *Preface*, *Remembering Fort Polk's Heritage: A Tribute to the Displaced Families of Camp Polk and Peason Ridge* at p. i ("More than 200 families were displaced from their homesteads when the War Department exerted emergency powers under eminent domain to take land and create Camp Polk.") and p. 4 ("Through the Federal court system, the land was condemned and a judgment was rendered declaring eminent domain. After this, the local Parish Clerk's Office carried out the eviction of the residents from the property.") (U.S. Army 2007), Ex. K, ECF No. 43-11,

available at The Fort Port Heritage Project, https://tinyurl.com/fort-polk-heritage. The Army refers to the families whose property was taken, and their living descendants, as the Heritage Families. *See id.* at 6. Nearly all vestiges of the community have been lost or destroyed. Robertson Decl. 3 ¶ 11, ECF No. 1-1. The horses and certain cemeteries are the last remnants of the Heritage Families' old homes and way of life. *Id.*

Originally termed Camp Polk and Peason Ridge Training Center, the installation continued to grow, and has since been used for more than seventy years to train thousands of troops.

III. Different types of horses live on the Fort Polk Military Installation.

The horses on Fort Polk include primarily indigenous horses that were born on Fort Polk and have lived their lives without significant human contact for generations as well as a minority of horses that are comfortable with human presence. EA, Envtl. Assmnt. 35, ECF No. 17-1 at 51 of 104; 2d Robertson Decl. at ¶ 7-12, Ex. F, ECF No. 43-6. Horses at Peason Ridge generally "are undomesticated, and have never been tamed. When you come into contact with them, the first thing they are going to do is break and run away from you. You cannot walk up to them. You cannot pet them. They are very skittish. They are wild horses," and they have "never worn a bridle, halter, or saddle." 2d Robertson Decl. at ¶ 7 & 9, Ex. F, ECF No. 43-6. Whereas on Fort Polk Main Post, some of the horses are "different colors than the horses in Peason Ridge," are not "skittish, and did not break and run when they came into contact with humans," and "[s]ome of them still have a halter on them." 2d Robertson Decl. at ¶ 8-9, Ex. F, ECF No. 43-6. The Army's horse-elimination plan does not recognize these distinctions.

Legal Standard

Because this case presents exceptions under NEPA and the National Historic Preservation Act to the "record rule," extra-record evidence should be admitted. Extra-record evidence is evidence "outside of or in addition to the administrative record that was not necessarily considered by the agency." *Calloway v. Harvey*, 590 F. Supp. 2d 29, 38 (D.D.C. 2008).

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

Generally, the Administrative Procedure Act (APA) requires courts reviewing agency action to review the "whole record or those parts of it cited by a party." 5 U.S.C. § 706; *see also Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010). Thus, it is common for courts to decide federal agency cases by the general "record rule," i.e. based solely on the agency's designated administrative record. *Tagg Bros. v. United States*, 280 U.S. 420, 443 (1930); *Peterson*, 185 F.3d at 369. The Fifth Circuit recognizes three circumstances "justifying a departure" from the record rule: 1. The agency deliberately or negligently excluded documents that may have been adverse to its decision; 2. The district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors; or 3. The agency failed to explain administrative action so as to frustrate judicial review. *Medina Cnty.*, 602 F.3d at 706. The Fifth Circuit has articulated eight situations in which courts have "considered extra-record evidence":

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

7. In preliminary injunction cases; and
8. When an agency acts in bad faith.

La Union del Pueblo Entero v. Fed. Emergency Mgmt. Agency, 141 F. Supp. 3d 681, 694 (S.D. Tex. Sept. 30, 2015) (citing *Davis Mountains Trans-Pecos Heritage Ass'n v. U.S. Air Force*, 249 F. Supp. 2d 763, 776 (N.D. Tex. 2003), *vacated on other grounds sub nom. Davis Mountains Trans-Pecos Heritage Ass'n v. Fed. Aviation Admin.*, 116 F. App'x 3, 16 (5th Cir. 2004) (confirming that "the district court correctly stated the law regarding extra-record evidence in NEPA cases")); *Independent Turtles Farmers of La. v. U.S.*, 703 F. Supp. 2d 604, 612 (W.D. La. 2010) (applying the factors to allow the admission of extra-record evidence under factors 1, 2, and 3).

"Supplementing" the record is different from "introducing extra-record evidence." Once an agency presents the administrative record to the court, the court presumes that the record is properly designated. *Recent Past Pres. Network v. Latschar*, 701 F. Supp. 2d 49, 54 (D.D.C. 2010) (citations omitted). To "supplement" the record, the moving party must show that the documents to be included were before the agency decisionmaker, but the agency failed to include them in the record. *Id.* Consideration of extra-record information, however, is appropriate when the movant shows that simply reviewing the administrative record is not enough to resolve the case. *Id.* One example is where a court requires additional information to evaluate an agency's NEPA analysis. *Id.*

II. Courts commonly consider extra-record evidence in NEPA cases.

The Fifth Circuit has held that district courts may review extra-record evidence to determine whether an agency adequately considered the environmental impact under NEPA. *Sabine River*, 951 F.2d at 678. In *Sierra Club v. Peterson*, the Fifth Circuit observed that "deviation from the 'record rule' occurs with more frequency in the review of agency [NEPA]

decisions than in the review of other agency decisions." 185 F.3d at 370. NEPA imposes a duty to compile a comprehensive analysis of the potential environmental impacts of a proposed action, and review of whether the agency's analysis has satisfied this duty often requires extra-record evidence to prevent judicial review, and NEPA itself, from becoming meaningless. 185 F.3d at 370. Since the duty imposed by NEPA is to develop a comprehensive environmental analysis, extra-record evidence is often necessary to compare with the administrative record and determine whether the agency has "adequately considered the environmental impact under NEPA of a particular project." 185 F.3d at 370; *Sabine River*, 951 F.2d at 678; *Coliseum Square*, 465 F.3d at 247; *La. Crawfish Producers Ass'n-W. v. Mallard Basin, Inc.*, No. 10-CV-1085, 2014 WL 4207607, at *4 (W.D. La. Aug. 25, 2014).

NEPA does not command the agency to favor a particular environmentally preferable course of action, only that it make its decision to proceed after taking a "hard look at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21 (1976)). NEPA "simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences." *Sabine River*, 951 F.2d at 676; *see also Save Our Wetlands, Inc. v. Conner*, No. Civ. A. 98–3625, 1999 WL 508365, at *1–2 (E.D. La. July 15, 1999). While other statutes may impose substantive environmental obligations on federal agencies, NEPA prohibits "uninformed—rather than unwise—agency action." *Sabine River*, 951 F.2d at 676 (quoting *Methow Valley*, 490 U.S. 351). NEPA requires, among other things, the preparation of a comprehensive environmental impact statement (EIS) whenever proposals for legislation or other major Federal actions significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502. This includes exploration and objective evaluation of all

reasonable alternatives to the proposed action. The Court's evaluation of the adequacy of an EIS includes: "(1) whether the agency in good faith objectively has taken a hard look at the environmental consequences of a proposed action and alternatives; (2) whether the EIS provides detail sufficient to allow those who did not participate in its preparation to understand and consider the pertinent environmental influences involved; and (3) whether the EIS explanation of alternatives is sufficient to permit a reasoned choice among different courses of action." *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174-75 (5th Cir. 2000).

III. Courts may consider extra-record evidence in National Historic Preservation Act cases.

The Fifth Circuit has applied this same logic to similar statutes, where extra-record evidence was relevant to whether the agency failed to consider significant scientific or other considerations. *Peterson*, 185 F.3d at 369. NEPA and the National Historic Preservation Act are similar procedural laws that require agencies to consider project effects (environmental for NEPA, historical and cultural for the National Historic Preservation Act), alternative courses of action, and mitigation options. *See Coliseum Square*, 465 F.3d at 241–42; *Vieux Carre*, 875 F.2d at 459–60. Similar to NEPA, the National Historic Preservation Act imposes a duty on federal agencies to conduct consultation and an analysis of potential historic and cultural impacts. 36 C.F.R. § 800.1 ("Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties . . . The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties."). Therefore, the same logic for exceptions to the "record rule" for NEPA cases applies to National Historic Preservation Act cases.

The NHPA requires that "[t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking . . . prior to the approval of the expenditure of any Federal funds . . . shall take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. The agency must "apply the criteria of adverse effect to historic properties within the area of potential effects" by considering how the proposed action "would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(A), (A)(1). The Army's horse-elimination program is an "undertaking" under the NHPA, where "undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency." 36 C.F.R. § 800.16(Y).

IV. Courts may consider technical and scientific information omitted from the record.

Significantly, the omission of technical scientific information is often not obvious from the record; therefore, a court may need extra-record evidence brought to its attention in order to determine whether the information available to the decision-maker included a complete discussion of effects and alternatives. *Peterson*, 185 F.3d at 370; s*ee also Davis Mountains*, 116 F. App'x at 12 ("This court has recognized an exception to the general rule, however, where examination of extra-record materials is necessary to determine whether an agency has adequately considered environmental impacts under NEPA. In the present case we find it necessary to look at the *Dwinnell* text to determine whether the Air Force's use of the equation therein was sound. Because we lack technical expertise in aerodynamics, we also consider extra-record materials to aid our understanding of the science involved."). When the Administrative Record contains *outdated* scientific studies or fails to include critical environmental and cultural factors, courts may need to consider extra-record evidence. *See Peterson*, 185 F.3d 349, 369–70

(5th Cir.1999); *Coliseum Square*, 465 F.3d at 247 ("Extra-record evidence may be admitted if necessary to determine whether an agency has adequately considered adverse environmental impacts"). *Id.*

Argument

Pegasus seeks to introduce extra-record evidence to prove that the Army's horse-elimination program is "a type of activity that has the potential to cause effects on historic properties," including the Peason Ridge landscape, under 36 C.F.R. § 800.3. Further, the Fort Polk horses may be independently eligible for inclusion in the National Register of Historic Places. *See* 36 C.F.R. § 800.16(L)(1); *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008). If the Army had held a public hearing, sought comments, or complied with the consultation requirements under the National Historic Preservation Act, there would be evidence in the administrative record. 36 C.F.R. § 800.16(f). The Army never even considered whether the Fort Polk horses contributed to a historic landscape or are eligible for inclusion on the National Register of Historic Place. Due to this failure, there is no evidence or expert opinion in the administrative record for this Court to rely on to determine whether the horse-elimination plan "has the potential to cause effects on historic properties." 36 C.F.R. § 800.3

I. The Army's Environmental Assessment omits significant facts and analyses in violation of NEPA.

In numerous ways, the Army's Environmental Assessment is legally inadequate, and violates NEPA. First, the Army *failed to consider the effect of its plan on the horses themselves*. The Army did not evaluate the current market for wild and free-roaming horses in the United States and neighboring countries, thereby failing to evaluate the likelihood that the horses would be sold to "kill buyers" who ship horses to Mexico for slaughter, or sold for other inhumane purposes such as laboratory use or bucking stock rather than adopted and treated humanely.

The Army failed to include any mechanism to ensure that the horses are treated humanely once they are rounded up and in the possession of the Army or its contractors. The Army also failed to include safeguards to ensure that the horses would be treated humanely during transport or after the horses are acquired by third parties. The Army failed to distinguish between the wild and free-roaming horses born at Fort Polk and the small minority of horses that may be partially domesticated, or between historically significant horses and other horses. The Army also failed to distinguish the differences in where the different kinds of horses live or their roaming patterns.

The Army also did not consider a meaningful range of alternatives, including herd-management programs that would preserve some of the horses. Rather, the Army's alternatives consist of a "no action" alternative and six alternatives that each completely eliminate the horses. EA, FONSI 1-2, ECF No. 17-1 at 3-4 of 104; EA, Envtl. Assmnt. 23-33, ECF No. 17-1 at 39-49 of 104.

This missing information and lack of alternatives affect, among other things: (1) the planning needed to minimize the risk of injury and death, and also the long-term detrimental impact of the associated traumas; (2) different risks the different horses at different locations pose to the Army's operations; (3) likely success of different round-up and removal measures; (4) likelihood the horses will be adopted into a humane situation; (5) risks to and effects on the horses themselves of being removed; (6) how the wild horses will be desensitized to contact with and handling by humans; (7) how the horses will be held in captivity to avoid social chaos that can physically and psychologically damage them; (8) what precautions and training will be needed to assure safe transport; (9) historical and cultural impacts; and (10) possible mitigation measures.

II. The Army failed to consult, gather facts, or conduct necessary analysis under the National Historic Preservation Act.

The Army failed to consider the effects on historical and cultural resources as required by the National Historic Preservation Act, particularly including historic landscapes that may be eligible for listing on the National Register of Historic Places. King Decl., Ex. C, ECF No. 43-3 ("Peason Ridge, together with all or part of Fort Polk itself, constitutes a cultural landscape . . . [that] may be eligible for inclusion in the National Register of Historic Places. . . . "). There is no evidence in the EA that the Army conducted a consultation with stakeholders, including the Native American tribes that have an interest in this area, regarding the harm the horse-elimination plan poses to historical and cultural resources. Pegasus can find no record that the Army issued any report under the National Historic Preservation Act regarding the Fort Polk horse-elimination project or consulted with the Advisory Council on Historic Preservation.

Despite these and other problems with the Army's horse-elimination plan, the Army has already begun the process of eliminating the horses, and "will continue until all horses are eliminated from Army-owned land." EA, Envtl. Assmnt. 32, ECF No. 17-2 at 48.

III. This Court should consider extra-record evidence related to Pegasus's NEPA claims.

A main purpose of NEPA is for agencies "to compile a comprehensive analysis of the potential environmental impacts of its proposed action" and to limit "the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of NEPA." *Peterson*, 185 F.3d at 370. This case presents one of those circumstances.

Here, Pegasus seeks to enter the following documents in support of its NEPA claims:

A. Ex. H: Beranger Letter and Ex. I: Sponenberg Letter

Jeanette Beranger's letter and Phillip Sponenberg's letter fulfill three factors under the Fifth Circuit's extra-record test, because it demonstrates "2. Whether [or not] the agency considered all relevant factors; 3. When a record is incomplete . . . 4. When a case is so complex that a court needs more evidence to enable it to understand the issues . . . [and] 6. In certain NEPA cases" Ex. H, ECF No. 43-8; *Pueblo Entero*, 141 F. Supp. 3d at 694. Beranger states "initial visual assessments point to the possibility of the horses being a remnant population of a Colonial Spanish strain of horses known as the Choctaw horse. Ex. H, ECF No. 43-8. Colonial Spanish horses and Choctaw horses may be of genetic, cultural, and historical importance to the region. Since the Fort Polk horses have been, and are currently being rounded up, resulting in damages to the horses' welfare will lead to permanent effects, or even loss of life, that can never be reversed. Thus, it is necessary for this evidence to be admitted because it shows that the Army did not consider this in their EA.

Similarly, Phillip Sponenberg's letter demonstrates his findings showing evidence of the Fort Polk horses' unique physical, and possibly genetic, traits. Particularly of note is found in the last paragraph: "if the horses are of Colonial Spanish type, then the location and the origin indicate that they should be included within the Choctaw horse conservation effort. Strains such as this, long isolated from others, are *disproportionately valuable for conservation efforts* because of the genetic diversity they provide to the population." Ex. I, ECF No. 43-9. Thus, including this letter is essential for creating a complete administrative record because there is no mention of the Fort Polk horses' unique characteristics in the administrative record – a factor the Army failed to consider.

B. Ex. E: Jeff Dorson Declaration

Jeff Dorson's Declaration, Ex. E, ECF No. 43-5, should be included under factors "2. When looking to determine whether the agency considered all relevant factors; . . . 5. When evidence arising after the agency action shows whether the decision was correct or not; [and] 6. In certain NEPA cases." *Pueblo Entero*, 141 F. Supp. 3d at 694. Jeff Dorson, Director of the Humane Society of Louisiana, states that his organization has "received complaints from witnesses in January 2018 that the "horses being rounded up and stored at Fort Polk are not being treated humanely." Dorson Decl., Ex. E, ECF No. 43-5. This demonstrates that the Army's failure to include even basic considerations, methods, or safeguards for humane treatment was an incorrect decision.

C. Ex. O: FOIA Responses

The US Department of Agriculture (USDA) and Army FOIA Responses, Ex. O, ECF No. 43-15, should be included under factors "1. when agency action is not adequately explained in the record before the court, 2. When looking to determine whether the agency considered all relevant factors; 3. When a record is incomplete . . . 4. When a case is so complex that a court needs more evidence to enable it to understand the issues [and] 6. In certain NEPA cases." *Pueblo Entero*, 141 F. Supp. 3d at 694. The FOIA responses indicate that Army from "1/1/2012 to 9/29/2017" the USDA Natural Resources Conservation Service "to investigate and/or provide information about the natural resources within and adjacent to the United States Army Fort Polk installation" or to make any site visits to Fort Polk. Ex. O, ECF No. 43-15. This means that any USDA Natural Resources Conservation Service data that the Army relied on is older than 2012, and may be outdated. It also shows that the Army did not make an effort to acquire this kind of data when deciding to eliminate the horses.

The Army FOIA response indicates that the Army has no documents responsive to requests for "all data on the origin and roaming patterns of the horses" or "all information on the status of the horses that [had] been removed" by the time of the request. *Id.* This indicates that the Army failed to consider baseline data necessary to understand the horses' nature, history, and environment, and that they had no documents showing what happened to horses that had already been removed from Fort Polk during the early stages of the horse-elimination plan (or under the Army's previous policy of allowing people to come onto the base and remove horses themselves under a permitting program).

D. Ex. P. Bruce Nock Declaration

Bruce Nock's Declaration, Ex. P, should be included under factors "1. When agency action is not adequately explained in the record before the court; 2. When looking to determine whether the agency considered all relevant factors; 3. When a record is incomplete; 4. When a case is so complex that a court needs more evidence to enable it to understand the issues; [and] 6. In certain NEPA cases." *Pueblo Entero*, 141 F. Supp. 3d at 694. Nock studies stress physiology and has experience with the "negative impact of stress on captive and free roaming horses." Nock Decl. 1 ¶ 2, Ex. P. He finds that the Army's plan "does not include the most basic, and necessary, baseline information that is crucial for putting together a responsible horse management or horse removal plan, including a basic survey of the herds, their migration patterns, their family relationships, their encounters with humans, and basic descriptions of the types of horses living at Fort Polk." Nock Decl. 2 ¶ 7, Ex. P. His declaration exposes that there is:

> [N]o evidence provided [by the Army] that indicates that these process[es] will be carried out by qualified individuals in a humane manner. These omissions from the plan suggest a lack of appreciation/understanding of how stressors with associated captivity can negatively impact the health and welfare of wild horses, i.e., horses that have never been trained and have always roamed freely, and horses indigenous

> to Fort Polk who were born there, lived there their whole lives, and have never lived anywhere else.

Nock Decl. 4 ¶ 13, Ex. P. He describes many negative impacts of the plan that the Army never considered, including but not limited to:

> Furthermore, horse slaughterhouses are generally not allowed in the United States under a variety of state, local and federal laws and licensing programs. So horses sold to "kill buyers" are shipped to Mexico or Canada for slaughter in traumatizing and often inhumane conditions. This would be an inhumane way for the indigenous Fort Polk horses to be euthanized because, as discussed below, these horses would spend their last days in panic and trauma.

Nock Decl. 3 ¶ 12, Ex. P;

> Confinement in unfamiliar places, by penning or roping, also goes against the inherent proclivity of horses that have always roamed freely to avoid situations where the potential to flee is compromised. Then, the stressful effects of confinement are potentially compounded by social disruptions, i.e., confinement in close quarters with unfamiliar horses and the absence of life-long herd mates. Social disruption is a known, surprisingly severe stressor. And, in this case, the social disruption is likely to continue for as long as the horses live since there is no plan to release them back into their native environment, i.e., Fort Polk.

Nock Decl. 4 ¶ 15, Ex. P; and

> Maternal separation appears to be a particularly severe stressor which has effects that last a lifetime and, importantly, are known to persist across generations. That means what we do to the horses of today may affect the welfare of generations to come. The Fort Polk COA 7 does not include any information about how the Army will prevent maternal separation or keep horse families together. This failure could have negative consequences for the health and welfare of the Fort Polk horses and their descendants.

Nock Decl. 10 ¶ 32, Ex. P.

IV. This Court should consider extra-record evidence related to Pegasus's National Historic Preservation Act claims.

Under the National Historic Preservation Act, an agency must "apply the criteria of adverse effect to historic properties within the area of potential effects" by considering how the proposed action "would diminish the integrity of the property's location, design, setting,

materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(A), (A)(1). Just like for NEPA, to limit "the judicial inquiry regarding the completeness of the agency record to that record would, in some circumstances, make judicial review meaningless and eviscerate the very purposes of [the Act]." *Peterson*, 185 F.3d at 370. This case presents one of those circumstances.

Here, Pegasus seeks to enter the following documents in support of its National Historic Preservation Act claim:

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

The Declaration of Thomas F. King fulfills three extra-record evidence factors: "2. When looking to determine whether the agency considered all relevant factors; 3. When a record is incomplete; [and] 4. When a case is so complex that a court needs more evidence to enable it to understand the issues." Ex. C, ECF No. 43-3; *Pueblo Entero*, 141 F. Supp. 3d at 694. In his declaration, King states that "Peason Ridge, together with all or part of Fort Polk itself, constitutes a cultural landscape or landscapes as defined by the National Park Service (NPS) in Preservation Brief 36 (https://www.nps.gov/tps/how-to-preserve/briefs/36-cultural-landscapes.htm)." *Id.* 1 ¶ 2 (a). "The wild horses of Peason Ridge and Fort Polk contribute importantly to the character of the landscape(s) as perceived by the Heritage Families of Peason Ridge and Fort Polk (Heritage Families), and perhaps by other interested parties." *Id.* Further, "the horses themselves, as individual organisms, are may be eligible for the National Register of Historic Places." *Id.* See 36 C.F.R. § 800.16(L)(1); *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008).

This declaration demonstrates that the Army's horse-removal program is "a type of activity that has the potential to cause effects on historic properties," including the Peason Ridge landscape, under 36 C.F.R. § 800.3. King's declaration indicates that "[t]he U.S. Army (Army),

in its efforts to comply with the National Environmental Policy Act (NEPA) and National Historic Preservation Act (NHPA), appears to have failed to consider the possible existence of a cultural landscape or landscapes eligible for the NRHP." King Decl. 4 ¶ 6, Ex. C, ECF 43-3. "Instead of the process of consultation spelled out in the NHPA Section 106 regulations at 36 C.F.R. § 800.16(f) ('seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process'), the Army appears simply to have announced its intentions, as part of its environmental assessment process, given concerned parties some opportunity to comment, and done little or nothing in response to the comments regarding the historical and cultural impacts of its decision." *Id.* Further, "[i]f the Army would have held a public meeting or otherwise sought comments on the historic and cultural value of the horses at Fort Polk, [Thomas F. King] would have made the same kinds of comments as those stated [in this declaration]." *Id.*

B. Ex. H: Beranger Letter and Ex. I: Sponenberg Letter

The Letter by Jeanette Beranger, Senior Programs Manager of the Livestock Conservancy, and the Letter from Dr. Phillip Sponenberg should be included under factors "2. When looking to determine whether the agency considered all relevant factors; 3. When a record is incomplete; [and] 4. When a case is so complex that a court needs more evidence to enable it to understand the issues." Ex. H, ECF No. 43-8; Ex. I, ECF No. 43-9; *Pueblo Entero*, 141 F. Supp. 3d at 694.

Had the Army analyzed whether the horses qualify as historic property under the National Historic Preservation Act, the information contained in these letter would have been important, and it would have been readily available. "The Livestock Conservancy has a long history of nearly forty years of collaboration with the U.S. government and wildlife conservation

agencies to assess feral populations on public land." Ex. H, ECF 43-8. The Letter from the Livestock Conservancy was written in "support of beginning an investigation into the genetic documentation of the feral horses found on the Fort Polk," because "visual assessments point to the possibility of the horses being a remnant population of a Colonial Spanish strain of horses known as the Choctaw horse." *Id*. The Letter from Dr. Phillip Sponenberg, describes the history of these Choctaw horses, conservation efforts, and recent findings that some horses in the region where found to have the bloodlines of those horses acquired by the Choctaw nation from the Spanish during the time of colonization in the 1500s. Ex. I, ECF 43-9. The Letter explains why, should genetic testing come back positive, the horses at Folk Polk, "long isolated from others, are disproportionately valuable for conservation efforts because of the genetic diversity they provide to the population." *Id*.

C. Robertson Decl. ECF No. 1-1, Ex. F: Robertson Declarations, Ex. J: Robertson Article, Ex. K: Tribute to the Families, Ex. L: Heritage Project Brochure, and Ex. G: Good Home Exerpt

Finally, Pegasus seeks to introduce documents regarding to the area's history and the Heritage Families. These include the Declarations of Rickey Robertson, an article written by Mr. Robertson describing the history of the Town of Peason, the Army's article "Remembering Fort Polk's Heritage: A Tribute to the Displaced Families of Camp Polk and Peason Ridge", the Fort Polk Heritage Project brochure, and an excerpt from a book about the area's history funded by the Department of Defense titled A GOOD HOME FOR A POOR MAN: FORT POLK AND VERNON PARISH, 1800-1940. Robertson Decl. ECF No. 1-1; 2d Robertson Decl., Ex. F, ECF No. 43-6; Robertson Article, Ex. J, ECF No. 43-10; Tribute to Families article, Ex. K, ECF No. 43-11; Heritage Project Brochure, Ex. L, ECF No. 43-12; Good Home book, Ex. G, ECF No. 43-7. These documents should be included under factors "1. When agency action is not adequately

explained in the record before the court; 2. When looking to determine whether the agency considered all relevant factors; 3. When a record is incomplete; [and] 4. When a case is so complex that a court needs more evidence to enable it to understand the issues." Ex. H, ECF No. 43-8; Ex. I, ECF No. 43-9; *Pueblo Entero*, 141 F. Supp. 3d at 694.

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

V. This Court should consider extra-record evidence from the hearing on the Plaintiff's Motion for Partial Preliminary Injunction related to Pegasus's NEPA and National Historic Preservation Act claims.

Pegasus intends to introduce additional testimony and evidence related to its NEPA and National Historic Preservation Act claims at the January 30, 2018 hearing on its Motion for Partial Preliminary Injunction. Pegasus also expects the Defendants to introduce evidence that may be relevant to these claims. This evidence should be admitted to the record and considered by this Court to the extent the evidence is (1) relevant to the merits of this case, and (2) meets at least one of the eight exceptions to the record rule.

Conclusion

For the foregoing reasons, Pegasus's Motion to Supplement the Administrative Record and Consider Extra-Record Evidence should be granted.

Respectfully submitted on January 17, 2018

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Certificate of Service

I hereby certify that on January 17, 2018, this pleading was filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

s/ Machelle Lee Hall
Machelle R. L. Hall