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 Objections to
Magistrate Judge's Report and Recommendation

I. Introduction

Pursuant to 28 U.S.C. § 636(b)(1)(C) and WDLA Local Rule 74.1(B), Plaintiff, Pegasus Equine Guardian Association (Pegasus), respectfully objects to certain portions of the Magistrate Judge's Report and Recommendation, issued on March 9, 2018. ECF No. 67. The rule requires "a written objection which specifically identifies the portion or portions of the proposed findings, recommendations or report to which objection is made, the basis for such objection and a written memorandum in support thereof." WDLA Local Rule 74.1(B). Plaintiff thus submits this memorandum in support of its objections to preserve matters for this Court's review as well as for subsequent review. The reviewing court must make a de novo determination of the Plaintiff's objections to the Report and Recommendation. *Id.*; *see also* 28 U.S.C. § 636(b)(1)(C).

II. Explanation of Objections

Pegasus respectfully objects to the following findings:

1. Objection #1: The legal standard described in Magistrate Kay's Report and Recommendation in Footnote 6 applies to standing, not preliminary injunctions. The Court should apply the correct legal standard.

The Report & Recommendation applied the wrong legal standard on irreparable harm and erroneously found that Pegasus did not demonstrate that it met the irreparable harm standard. However, Pegasus meets both the correct and the erroneous standard.

The Report & Recommendation found: "Pegasus fails to satisfy the necessary second element because it has not offered sufficient evidence that its members will suffer irreparable harm if the injunction is not granted.[6]" In Footnote Six, the Magistrate Judge stated:

> Pegasus has standing only to the extent of its members' interests. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149. It does not have standing on behalf of the herd, much less individual horses, because it 'has not differentiated its concern [about the treatment of the horses] from the generalized abhorrence other members of the public may feel at the prospect of cruelty to animals.' *Animal Lovers Volunteer Ass'n Inc. (A.L.V.A.) v. Weinberger*, 765 F.2d 937, 939 (9th Cir. 1985).

But the rule in Footnote Six is a rule for standing, not for the irreparable harm prong of the preliminary injunction test.

This Court should instead apply the legal standard for a preliminary injunction: Pegasus proves irreparable harm if the Government's action is *likely* to irreparably harm a *legally cognizable interest* of *the plaintiff*. *Winter*, 555 U.S. at 21-22. The Plaintiff in this case is the Pegasus organization. Complaint, ECF No. 1.

A. Pegasus has proven irreparable harm, which is not the same as standing.

Federal courts have the power to grant whatever sort of equitable remedy is required by the facts of any particular case. *Hecht Co. v. Bowles,* 321 U.S. 321, 329 (1944). In order to achieve the appropriate result, the court must engage in a "balancing of the equities." *Yakus v. U.S.*, 321 U.S. 414, 440 (1944). Essentially, this is a balancing of the benefits and harms to each

party of the litigation. In doing this balancing, federal courts engage in the established four-pronged test to determine whether preliminary injunctive relief is appropriate.

Unlike "injury in fact" for standing, "irreparable harm" for preliminary injunction purposes is not tied or limited to standing "*injuries in fact*" to an organizational plaintiff's *members*. And while, under the leading Supreme Court case *Winter v. Natural Resources Defense Council*, a plaintiff does not *automatically* satisfy the irreparable harm requirement based *solely* on a NEPA violation, a plaintiff can show irreparable harm where a NEPA violation rises to the level of, or is *likely* to cause, irreparable harm to a *legally cognizable interest* of *the plaintiff*, which in this case is the Pegasus organization. 555 U.S. 7, 21-22 (2008).

Here, "Pegasus is a regional conservation organization dedicated to protecting wild and free roaming equines at the Fort Polk Military Installation, and Kisatchie National Forest." Complaint 4 ¶ 9, ECF No. 1 (internal parentheticals omitted). Harm to the Fort Polk horses harms Pegasus's interests in many ways, including harm to its members, but also including other harms including Pegasus' interests in preserving and protecting the horses, enforcing laws protecting the horses and their environment (including NEPA the National Historic Preservation Act), and in preventing unnecessary and unmitigated harm to the Fort Polk horses, their environment, and their relationship to the community as contributing elements to historic and cultural properties. Any of these irreparable injuries can support a preliminary injunction.

a. Supreme Court jurisprudence prior to Winter indicates environmental harm should be viewed in light of the purpose of the particular statute at issue.

Applying the principles of injunctive relief to environmental cases, the Supreme Court has generally taken a relatively conservative approach on the question of what qualifies as irreparable harm. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), the Supreme Court addressed whether a violation of the Clean Water Act's permit provisions amounted to

irreparable harm on its face. Similar to *Winter*, for many years, the Navy had used an island off the coast of Puerto Rico for weapons training. Upset by the potential harm to their environment from air-to-water bombings, the residents of Puerto Rico sought an injunction, alleging violations of the Clean Water Act by failing to acquire a permit to discharge pollutants into Waters of the U.S. *Id.* at 308. The Court concluded that under the CWA, "[a]n injunction is not the only means of ensuring compliance. The [CWA] itself, for example, provides for fines and criminal penalties." *Id.* at 314 (citing 33 U.S.C. §1319(c) and (d)). Given these other means of enforcement, as well as the fact that the purpose of the statute is to protect the nation's waters, "not the permit process," no injunction was required where there were other legal remedies. However, the Court qualified that finding somewhat by noting that "should it become clear that no permit will be issued and that compliance with the [CWA] will not be forthcoming, the statutory scheme and purpose would require the court to reconsider." *Id.* ("As Congress explained, the objective of the [CWA] is to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters'" (quoting 33 U.S.C. § 1251(a)). Since it was likely that the Navy would eventually get a permit, the Court found the harm was not irreparable.

A second major Supreme Court case on the subject of irreparable harm for environmental violations was *Amoco v. Village of Gambell*, 480 U.S. 531, (1987). The case involved granting offshore oil leases in violation of ANILCA, which protects natural resources used for subsistence by native Alaskan people. *Id.* at 534. ANILCA has two main components, a procedural requirement of an evaluation, and a substantive requirement of notice, hearings, and certain determinations. 16 U.S.C. § 3120(a). ANILCA establishes a procedural scheme much like NEPA, in which government agencies must prepare environmental impact statements detailing the potential environmental impacts of proposed projects. Yet ANILCA is not purely procedural.

It also requires regulated agencies to take "reasonable steps . . . to minimize adverse impacts upon subsistence uses and resources." In reversing the grant of a preliminary injunction, the Supreme Court found that the lower courts "erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect—preservation of subsistence resources," and under the facts of that case, "injury to the subsistence resources…was not at all probable." *Village of Gambell*, 480 U.S. at 545.

b. Justice Breyer's pre-Winter decisions have focused on how irreparable harm should be approached in NEPA cases, indicating that a failure to follow NEPA could, under certain facts, constitute an irreparable harm in and of itself.

While serving on the First Circuit, then-Judge Breyer clarified how the irreparable harm prong should be viewed in NEPA cases. First, in *Massachusetts v. Watt*, Judge Breyer decided whether a preliminary injunction was appropriate to prevent auctioning rights to drill for oil in a fishing area off the coast of New England. 716 F .2d 946, 947 (1st Cir. 1983). Upholding the preliminary injunction, Judge Breyer found that NEPA requires a supplement to an EIS before auctioning oil leases if there are "significant new circumstances or information." *Id.* at 948. The Government argued that regardless of the NEPA violation, there was no irreparable injury. Then-Judge Breyer made this key finding:

> The government's argument, however, ignores an important feature of NEPA. NEPA is not designed to prevent all possible harm to the environment; it foresees that decisionmakers may choose to inflict such harm, for perfectly good reasons. Rather, NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered.

Id. Distinguishing NEPA from the CWA, Judge Breyer found that NEPA focuses on the permit process itself. *Id.* As such, "it is appropriate for the courts to recognize this type of injury in a NEPA case." *Id.* As Judge Breyer pointed out, every NEPA violation does not, by itself, require

an injunction; in order to prevail, a traditional balancing of the equities must take place. But recognizing that the nature of NEPA means recognizing harm in the context of the statute's purpose – to prevent harmful uninformed government decisionmaking – in order to prevent plaintiffs from being "stopped at the threshold" when seeking to enjoin actions in violation of NEPA. *Id.*

Several years later, in *Sierra Club v. Marsh*, Judge Breyer harmonized his own prior decisions as well as the Supreme Court decisions on irreparable harm under environmental statutes. 872 F .2d 497, 498 (1st Cir. 1989). In *Marsh*, although the Government had prepared an EIS, the plaintiff sought an injunction, arguing that the final EIS "did not adequately evaluate the environmental effects…, nor did it adequately explore other alternatives…less harmful to the environment." *Id.* At trial, the district court had held that *Village of Gambell* "appear[ed] to preclude preliminary injunctive relief predicated on a likely NEPA violation unaccompanied by a showing of irreparable environmental injury." *Sierra Club v. Marsh*, 701 F. Supp. 886, 897 (D. Me. 1988). In addition, the lower court held that "irreparable environmental injury" meant physical harm to the environment that one could not repair later. *Id.* at 898. The First Circuit rejected this view. In doing so, Judge Breyer added a few words of caution:

> We did not (and would not) characterize the harm described as a "procedural" harm, as if it were a harm to procedure (as the district court apparently considered it). Rather, the harm at stake is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment. NEPA's object is to minimize that risk.

Sierra Club, 872 F .2d at 500 (internal quotations omitted). Judge Breyer was also quick to point out that many other courts have found that the harm to good decisionmaking can itself be irreparable.[1]

Distinguishing *Village of Gambell*, Judge Breyer also distinguished NEPA from ANILCA. Unlike NEPA, which is a "purely procedural statute," ANILCA contains other substantive standards as well. *Sierra Club*, 872 F .2d at 502. In particular, a federal agency could not fulfill the procedural requirements under the statute, but then still undertake an action "in spite of its non-minimal adverse impacts on subsistence uses; yet the agency head could do an exactly comparable thing under NEPA." *Id.* As such, "a court, under ANILCA but not under NEPA, may require the decisionmaker to choose a new action; and this fact may make the ANILCA failure 'reparable harm.'" *Id.* at 503. In conclusion, Judge Breyer held that "the harm at stake in a NEPA violation *is* a harm to the environment, not merely to a legalistic 'procedure,' nor, for that matter, merely to psychological well-being." *Id.* at 504 (emphasis added). Likewise, Judge Breyer admonished the District Court which "refer[red] to 'harm to the NEPA process' and 'harm to the environment' as though they were separate categories; but they are not." *Id.* at 505.

c. The Supreme Court in Winter neither overruled Justice Breyer's jurisprudence nor conflated the standing requirement with the irreparable harm requirement.

Then in *Winter*, the majority of the Court did not decide whether violations of NEPA can be sufficient alone to establish irreparable harm. Although the Supreme Court ruled for the Navy, the holding was narrow and limited to two rulings: first, a "likelihood" of irreparable harm was

[1] *See N. Cheyenne Tribe v. Hodel*, 851 F .2d 1152, 1156-58 (9th Cir . 1988); *Wisconsin v. Weinberger*, 745 F .2d 412, 426-27, 14 ELR 20744 (7th Cir . 1984); *id.* at 432-33 (Cudahy, J., concurring in part and dissenting in part); *City of Davis v . Coleman*, 521 F .2d 661, 671 (9th Cir. 1975); *Friends of the Earth v. Hall*, 693 F. Supp. 904, 913.

required rather than a mere "possibility," and second, the balancing of equities favored the interests of the Navy given the lack of evidence of any correlation between naval action and actual significant injuries to marine mammals over the 40-year span of past training exercises. *Winter*, 555 U.S. at 21-22. The *Winter* Court stated that "We do not discount the importance of plaintiffs' ecological, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy's need to conduct realistic training exercises to ensure that it is able to neutralize the threat posed by enemy submarines." *Id.* at 33.

But Justice Breyer raised the particular issue of what constitutes irreparable injury under NEPA in his concurring opinion (which Justice Stevens joined). Justice Breyer explained that the "very point of NEPA's insistence upon the writing of an EIS is to force an agency 'carefully' to 'consider…detailed information concerning significant environmental impacts,' while 'giv[ing] the public the assurance that the agency 'has indeed considered environmental concerns in its decision-making process.'" *Winter*, 555 U.S. at 35. (Breyer, J., concurring) (citing *Robertson v. Methow Valley Citizens Counci*l, 490 U.S. 332, 349 (1989)). The purpose of NEPA is "to assure that when Government officials consider taking action that may affect the environment, they do so fully aware of the relevant environmental considerations." *Winter*, 555 U.S. at 35. This is a purpose that is echoed throughout *Massachusetts*, *Sierra Club*, and NEPA itself. As such, Justice Breyer points to the requirement of an EIS—a requirement "not [to] force them to make any particular decision, but it does lead them to take environmental considerations into account when they decide whether, or how, to act." *Winter*, 555 U.S. at 35. And so, if a decision is made without the federal agency fulfilling its EIS obligations, "much of the harm that NEPA seeks to prevent has already taken place." *Winter*, 555 U.S. at 35.

In conclusion, the Magistrate Judge misapplied the standing legal standard for "injury in fact" instead of the correct preliminary injunction standard for "irreparable harm." The correct standard is: Pegasus can prove irreparable harm if the Government's action is *likely* to irreparably harm a *legally cognizable interest* of *the plaintiff*, which in this case is the Pegasus organization. *Winter*, 555 U.S. at 21-22. This Court should correct this error.

A. Pegasus' member Rickey Robertson meets the legal test for standing.

Although the standard is different, standing is a threshold subject matter jurisdiction issue. And Pegasus has proven that it has standing to bring this case. The U.S. Supreme Court has established a three-part test for standing. The "irreducible constitutional minimum of standing" requires the plaintiff to establish:

> First . . . an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent," not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Pegasus demonstrated that member Rickey Robertson meets all three elements. First, Pegasus must show that at least one member has either been injured or is likely to be injured "in fact." Members' "injuries in fact" can be physical, mental/emotional, financial, or an injury to one of their civil rights, as long as it is a specific injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000); *see also Summers v. Earth Island Institute*, 555U.S. 488, 494 (2009) ("While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice" to establish the injury in fact requirement). Here, Pegasus demonstrated that its members will suffer injury because the Government's actions will

harm (1) its members' cultural heritage and way of life, and (2) its members' enjoyment of watching and interacting with the horses. *See* Plaintiff's Post-Hearing Brief in Support of its Motion for Partial Preliminary Injunction 4-7, ECF No. 64.

Second, Pegasus has proven there is a connection between its injury and Defendant's actions or planned actions. The Army plans to eliminate all of the horses at Fort Polk. JRTC-G-000006. "Before the Army commits an irreversible and significant change to the landscape of west-central Louisiana, it must complete further analysis on the impacts of the removal, the alternatives available, and actions the Army can take to mitigate harm." Complaint ¶ 5, ECF No. 1.

Finally, Pegasus has proven redressability by asking for relief that this Court can provide: that the Government's decision be vacated and remanded, and its horse-removal action enjoined, until the Army can remedy the situation by doing what was procedurally required of it from the beginning: create a legally sufficient EA, perform an EIS, and conduct a proper Section 106 analysis and consultation under the National Historic Preservation Act. Complaint, ECF No. 1. Pegasus further asked that this Court temporarily halt the Government's actions until it can reach a decision on the merits. Mot. for Prelim. Inj., ECF No. 43. All of this relief is within this Court's power.

2. **Objection #2: Because the magistrate court erroneously applied the wrong standard, it did not give proper weight to the evidence of harm and erroneously found that Pegasus had not proven irreparable harm.**

The correct preliminary injunction standard does not require Pegasus to prove that *all* of the horses be *completely eliminated* on the entirety of *both* the Army-owned land and the Kisatchie National Forest before there is any irreparable harm to Pegasus. Rather, Pegasus has proven that the Army's plans to eliminate horses is likely to harm *its interests*, which include

protecting all of the wild and free roaming horses at Fort Polk: "Pegasus is a regional conservation organization dedicated to protecting wild and free roaming equines at the Fort Polk Military Installation, and Kisatchie National Forest." Complaint 4 ¶ 9, ECF No. 1 (internal parentheticals omitted). Pegasus also has an interest in protecting any interest of its members that is related to its organizational purposes. Pegasus members regularly observe and interact with the Fort Polk horses, and care about what happens to them. For example, Mr. Robertson testified that.

> I have been associated with the horses all my life. I'll be sixty-one years old in January, and I remember interacting with the horses since I was four or five years old. I was raised in the Peason Community in southeastern Sabine Parish as a farm boy. Farming, cattle, and horses have always been my way of life. I still live right next to the range. The horses that roam Fort Polk are likely the descendants of my kinfolk's livestock. I feel closely connected to the land, and these horses."

Robertson Decl. 2 ¶ 10, ECF No. 1-1. Mr. Robertson testified in his video declaration that when people go on tours of Fort Polk, they all want to see the horses. ECF No. 43-6, Exhibit F. And he also testified about the harm to the local heritage families' history and culture:

> After the Army came in after the 1941 . . . [they] destroyed all the houses, all the corn cribs, the barns and everything else. There is nothing for us to go back and see. There is one thing of my history and my culture and my heritage that's left and that's them horses right there. I can relate to them. I relate to the land that my ancestors, they worked. I've got a special feeling for the land and I've got a special feeling for them horses right there. They're free. They're part of Louisiana history, American history, and they're my heritage.

PI Hr'g Tr. 38. Furthermore, there is a smaller subset of horses on Fort Polk with specific historic, genetic and cultural value, and there is no guarantee that this smaller subset of horses will not be completely eliminated. Dr. Sponenberger's report states that "the Fort Polk horses from the isolated areas are of special interest for further evaluation before they are removed or lost." It is unclear how many horses are needed to maintain this unique and vulnerable subspecies of historically and genetically important horses. ECF No. 43-9. This report is further

bolstered by Beranger's letter, which states that "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. If this is the case it would mean that the horses could be of genetic, cultural, and historical importance to the region." ECF No. 43-8. And Dr. King testified as to the possible historic importance of the particular horses associated with cultural landscapes at Fort Polk. PI Hr'g Tr. 17-31.

Unlike *Winter*, this is a new Government activity with where the full environmental impacts are unknown and, because the Army failed to consider and analyze them, the alternatives and mitigating measures are also unknown. In *Winter*, the Supreme Court partially discounted the irreparable harm because the program at issue had already been going on for 40 years without strong evidence that marine mammals were being significantly injured:

> We also find it pertinent that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment. When the Government conducts an activity, "NEPA itself does not mandate particular results." Instead, NEPA imposes only procedural requirements to "ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures. Here, in contrast, the plaintiffs are seeking to enjoin—or substantially restrict—training exercises that have been taking place in SOCAL for the last 40 years.

Winter, 555 U.S. at 23. Also unlike *Winter*, nothing in Pegasus's proposed preliminary injunction would prevent the Army from continuing its training.

On the other hand, the horse-elimination program is currently irreparably harming Pegasus's interests in (1) preserving and protecting the Fort Polk horses, (2) having the Government make informed and careful horse-management decisions at Fort Polk, and (3) understanding the impacts of the Government's decisions on the Fort Polk horses, Pegasus

members, historic properties, and the local community. For example, Ms. Pfaff's testimony described the moldy hay in the holding pens where the horses were being keep after round-up, and their state of health:

> Horses suffer from depression just as a human does. When a horse is suffering from depression you can tell. They just kind of stand in one place, their heads low, they don't eat, they don't drink. And that's exactly what I observed.
>
> Q. Have you noticed any horses in particular that are not faring well or that have medical issues that needed to be treated?
>
> A. We've had several of them. We had -- out of the group of December, we had a horse come in whose jawbone was exposed. We've had a vet come out, out of, again, our funding, and had that horse taken care of and is now healed. I have a horse on my property right now that came to me with a large laceration over her eye. Her eye was swollen shut."

PI Hr'g Tr. at 69-70. *See also*, the testimony of S. Alleman McKnight, PI Hr'g Tr. at 45-62; J. Pfaff, PI Hr'g Tr. at 66-74; Dr. B. Batt, PI Hr'g Tr. at 7-95; and Dr. Nock, ECF No. 49-2. Thus, under the preliminary injunction standard, Pegasus has proven that there is strong *likelihood* for irreparable harm to *its interests* if the Army continues eliminating the Fort Polk horses without having completed the proper decision-making under NEPA and the National Historic Preservation Act. This Court should correct that error.

3. Objection #3: "Some [Fort Polk] horses are also malnourished due to inadequate forage . . ."

The Report and Recommendation makes this finding on page 2. ECF No. 67. In its opposition to the motion for injunction (ECF No. 51), the Army stated that "the relatively poor amount of forage available for these animals has left many malnourished" and cited to the Environmental Assessment (EA). However, nowhere in its EA did the Army state that the horses living on Fort Polk were malnourished or even mention malnourishment. Rather, the cited pages of the EA discuss whether there is sufficient forage to maintain the total population in those areas

without overgrazing *in the future*. JRTC B-000112. Based on this finding alone, it is a leap for the Court to conclude that horses are currently malnourished due to inadequate forage.

In contrast, the photographs submitted by the Plaintiffs, and Mr. Robertson's testimony that these horses are typical of the horses he sees on Peason Ridge, show healthy horses that are not at all malnourished. Ex. N: Photographs, ECF No. 43-14; PI Hr'g Tr. 34-36. And the Army's own photographs taken during aerial surveys also typically depict healthy, not malnourished horses. JRTC-E-003140-003146; -003147-003154; -003155-003162; -003163-003174; -003175-003184; -003199-003202. There is no evidence that the forage at Fort Polk is inadequate to feed the horses living there.

Therefore, Plaintiffs object to any finding that the horses living on Fort Polk are currently, or have been in the past, malnourished due to inadequate forage.

4. Objection #4: "[Some Fort Polk horses . . .] may spread infectious diseases."

The Report and Recommendation makes this finding on page 2. ECF No. 67. Pegasus objects to any such finding of fact.

In its EA, the Army stated concern about "equine infectious anemia threat and other equine infectious diseases." But the evidence introduced by the Plaintiffs unequivocally disproved this speculative concern. Plaintiff's expert witness, Dr. Batt, testified that "Equine infectious anemia [EIA] is largely eradicated. It was once a very prolific disease in Louisiana…no longer." PI Hr'g Tr. 92. Although some Fort Polk horses may have contracted Strangles after their capture, Dr. Batt testified that Strangles is common when horses are stressed and crowded, more likely found in kill pens and rescues. PI Hr'g Tr. 88. Therefore the horses are more likely to become diseased from the round-up process than they are from living free-roaming as they currently live.

Nor does the Army's Declaration of Milton Fariss regarding the Army's ongoing testing for Equine Infectious Anemia provide any evidence that this is a risk at Fort Polk which supports the horse elimination program. Fariss Decl. 4 ¶ 9, ECF No. 51-2. Significantly, Mr. Fariss did not testify that any Fort Polk horses have ever tested positive for EIA or any other disease. EIA is one of two diseases the Army tests the Fort Polk horses for. Fariss Decl. 4 ¶ 9, ECF No. 51-2; PI Hr'g Tr. 92. If the Government is concerned about the horses spreading any other infectious diseases, it could choose to test for them.

Finally, the Army argued that it was concerned that one horse that originally came from Fort Polk in 2004 was found to have EIA. JRTC-B-000088. But the Army's own report on this incident shows how this horse likely contracted the disease after contact with other off-site horses and horse equipment. In the Army's report on this single 13-year old incident in which a single horse tested positive, the horse was *not* tested directly after being found at Fort Polk. JRTC-F-000001-03. Rather, the horse had first spent *months* on a local landowner's property, where it took "7 months to be able to move the horses into a catch pen from his pasture in order to load them in a trailer and bring them to the Red River Auction." JRTC-F-000003. After spending time at the auction house in contact with other horses, and horse auction facilities and equipment, the horse was purchased at auction by a Mr. Thompson, who transported the horse to a third party in Texas. *Id*. Five days later, the third party "tried to load the horses for shipment to slaughter…but [one of the mares tested positive for EIA and] he could not load the positive mare along with one of the negative horses purchased from Red River."

But it does not make sense that the horse would have had EIA *before* the Red River Auction house sold her, because under Louisiana law all horses must be tested for EIA before or at auction, and cannot be transported out of state if the test is positive. La. Admin. Code tit. 7,

part XXI, § 913. Therefore, either (1) the horse contracted EIA after sale at auction and before the Texas third party tried to load her for slaughter, or (2) the auction house colluded to illegally sell an untested horse.

At any rate, there is no evidence that any horses living at Fort Polk have tested positive for EIA or any other disease upon capture, before being forced into contact with domesticated horses or contaminated equipment. There is no evidence that there is any realistic threat of infectious diseases *originating* with any horses at Fort Polk; while there is a threat that horses from Fort Polk will suffer from diseases for which they have no immunity when they are rounded up, put under stress, and put in contact with contaminated equipment or domesticated horses. For these reason, Pegasus objects to the Report and Recommendation's statement "[[s]ome horses . . .] may spread infectious diseases" being accepted as a finding of fact.

5. Objection #5: The estimate that "between five and seven hundred horses remained on the base and training grounds" is outdated as it was made before more than 100 Fort Polk horses were eliminated.

The Report and Recommendation states: "On January 19, 2018, it estimated that between five hundred and seven hundred horses remained on the base and training grounds. Doc. 51, att. 2, p. 7." This matters because the Court should not erroneously assume that the Army's ongoing horse-elimination program will not have a significant impact.

This "estimate" is based on the Declaration of Milton W. Fariss, where Fariss estimated the current population of horses at Fort Polk as 500-700. ECF No. 51-2. But according to the Army's administrative record, an aerial horse count conducted in August 2016 located 402 horses at Fort Polk: "On 2 August 2016, 234 total horses were counted on Fort Polk Main Post and 168 total horses on Peason Ridge…" JRTC-E-003201. The army has been using this survey to "estimate" a total number of between 500 and 700 horses at Fort Polk since August 2016,

although Pegasus has not yet found an explanation of how the Government calculated that estimate based on this survey.

Further, Fariss gives absolutely no basis for his estimate of the 500-700 of horses as of January 2018, after at least 104 horses were removed from Fort Polk, according to his own testimony. Farriss Decl. 2-3, ECF No. 51-2. Therefore Pegasus objects to a finding of fact.

6. Objection #6: "Pegasus, however, concedes that 'the horse-elimination program will be carried out on Army-owned land only.'"

The Report and Recommendation states: "Pegasus, however, concedes that 'the horse-elimination program will be carried out on Army-owned land only' [doc. 54, p. 7] and, therefore, horses will remain in the Kisatchie National Forest after all of the horses are removed from Fort Polk." Rep. and Recommendation 7, ECF No. 67. However, Pegasus actually conceded that "the Army pointed out" that the horse-elimination program will be carried out on Army owned land only. ECF No. 54. The Army made this assertion in response to Pegasus's pleadings, which pointed out that the Army's documents were inconsistent as to whether the program was limited to only Army-owned land or whether it extended to the surrounding forest. Pegasus cannot know for certain, and has no control over, what the Army or its contractors will or will not do and whether the Army will change its mind. And there is no mechanism to enforce this statement from the Army. Therefore Pegasus cannot make any "concessions" as to what the Army actually will or will not do.

III. Conclusion

For reasons outlined above, and as required by 28 U.S.C. § 636(b)(1)(C) and Rule 74.1(B) of the Rules of this Court, Plaintiffs object to these portions and aspects of the Magistrate Judge's Report & Recommendation.

Respectfully submitted on March 23, 2018.

s/ Allison Skopec
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Certificate of Service

I hereby certify that on March 23, 2018, this pleading was filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

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