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' BRIEF IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

INTRODUCTION

Plaintiff moved for a preliminary injunction to prevent the Army from rounding up or removing any trespass horses at Fort Polk until this case is resolved. Federal Defendants opposed Plaintiff's motion, arguing that Plaintiff was not likely to succeed on the merits of its claims and could not establish irreparable harm or show a balance of the equities or public interest in favor of the preliminary injunction. Without addressing all of the potential grounds supporting her decision, Magistrate Judge Kathleen Kay properly denied Plaintiff's motion for partial preliminary injunction. Report and Recommendation, ECF No. 67 ("Report"). Plaintiff now objects, but Judge Kay did not err in denying Plaintiff's motion. The record before the Court supports a determination that Plaintiff failed to prove irreparable harm and that Judge Kay applied the appropriate legal standard for irreparable harm. Additionally, Plaintiff's other objections lack merit and concern tangential facts not directly relevant to the denial of injunctive relief. Thus, this Court should adopt the Report and deny Plaintiff's objections.

STANDARD OF REVIEW

When a party objects to any portion of a magistrate judge's report and recommendation, the district court must make a *de novo* determination of the portions of the proposed findings or recommendations to which objection is made. 28 U.S.C. § 636(b)(1); *accord* Fed. R. Civ. P. 72(b)(3). A court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). For those portions to which no party objected, the Magistrates Act does not prescribe any standard of review. However, the Advisory Committee on the Federal Rules of Civil Procedure recommends reviewing those parts of the report and recommendation for "clear error on the face of the record." Fed. R. Civ. P. 72, Advisory Committee's Notes, 1983 Addition, Subdiv. (b) (citation omitted).

"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) (citations omitted). 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 Am. 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).

ARGUMENT

1. Judge Kay applied the proper legal standard for irreparable harm.

The first objection that Plaintiff makes is that Judge Kay applied the incorrect legal standard to determine whether Plaintiff established irreparable harm. Not so. The Report clearly stated the basis for the decision: "Pegasus has not shown a substantial likelihood of irreparable injury." Report 7. That conclusion follows from the correct identification of the necessary elements for a preliminary injunction, including "a substantial threat that failure to grant the order will result in irreparable harm." *Id*. at 5. In making this determination, the Report discussed Plaintiff's proffered testimony at the hearing and explains why this testimony fails to address irreparable harm. *Id*. at 5-7. There is no place in the Report that conflates the standard for standing with irreparable harm. Plaintiff places great emphasis on a footnote stating that Plaintiff only has standing as to its members' interests, not on behalf of the herd or individual horses. Pl.'s Mem. in Supp. Of Obj. to Report 2, ECF No. 68-1 ("Pl.'s Mem."). This footnote was not the reason that Judge Kay denied the preliminary injunction.

Additionally, the First Circuit cases cited by Plaintiff are not binding in this Court. Pl.'s Mem. 5-7. There is no presumption of harm simply because a claim involves an environmental statute. *Amoco*, 480 U.S. at 542. So, the standard for irreparable harm is not changed because this case involves alleged violations of NEPA, especially where there has been no finding that Plaintiff is likely to succeed on the merits of its claims. The standard for irreparable harm was properly applied in the Report.

2. Judge Kay correctly found that Plaintiff failed to establish irreparable harm to support emergency injunctive relief.

As its second objection, Plaintiff circuitously argues that as an organization dedicated to protecting Fort Polk horses, any harm to those horses would harm its members. Pl.'s Mem. 3. However, as cited by Judge Kay, Plaintiff's motion stated injunctive relief was necessary to avoid an irrevocable change to the environment and potential harm to the horses, as well as Plaintiff's argument that its members will be harmed if *all* of the horses are removed. Report 5. Finding that all of the horses would not be removed before this case was decided on the merits and that the horses would remain on the Kisatchie Forest, Judge Kay determined that Plaintiff failed to establish irreparable harm. *Id*. at 7.

In its objection memorandum, Plaintiff now argues that Judge Kay wrongly considered whether all of the horses would be removed before the merits of the case were decided. Pl.'s Mem. 10-11. Yet, Plaintiff made this exact argument to try to show irreparable harm in its motion—"[w]ithout this injunction, the Army may eliminate all of the horses at Fort Polk before this Court can rule on the merits." ECF No. 48 at 16. Further, Plaintiff asserted that "[t]he horse-elimination plan irreparably harms the Pegasus members by impairing their ability to enjoy and recreate in the Fort Polk and Kisatchie region[.]" *Id*. at 17. In response, Federal Defendants provided evidence from the record that the trespass horses would not be removed from the Kisatchie Forest. ECF No. 51 at 21. And, while Plaintiff provided the testimony of one member who visited the Fort Polk and Kisatchie area to view horses, they did not provide any testimony or evidence showing how any of its interests were irreparably impaired by the removal of only some of the horses from Fort Polk. In fact, Plaintiff proposed a partial preliminary injunction that would allow for the continued removal of some trespass horses during the pendency of this case. ECF No. 48 at 1-3 (detailing a multi-step process for Federal Defendants to obtain

permission from the Court and give notice to Plaintiff). Plaintiff does not have an interest or right to a particular horse or herd of horses or to view horses on the private property of Fort Polk. The applicable standard for the extraordinary remedy of a preliminary injunction is not showing any harm, but showing irreparable harm. In the context of injunctive relief, Plaintiff simply cannot establish that the removal of some of the horses from Fort Polk causes it irreparable, *i.e.*, permanent or of long duration, harm. *See Amoco*, 480 U.S. at 545.

Further, Plaintiff's argument about the smaller subset of the trespass horses "with specific historic, genetic and cultural value" is mere speculation. Pl.'s Mem. 11. Even Plaintiff's only identified member, Rickey Robertson, provides conflicting information as to the origin of the trespass horses, stating the horses at "Fort Polk are likely the descendants of my kinfolk's livestock." Robertson Decl. ¶ 10, ECF No. 1-1. The standard for irreparable harm was correctly applied, and Judge Kay properly determined that Plaintiff failed to establish it.

Arguing that it met the alleged "erroneous standard" for irreparable harm, Pl.'s Mem. 2, Plaintiff also failed to prove harm to the horses. There is no legal basis for the horses to remain at Fort Polk. In fact, in 2001, the Eastern District of Louisiana found the horses were trespass livestock that had "roamed from adjacent ranches and farm areas[.]" JRTC-B-000148. In 2003, the Fifth Circuit affirmed the Eastern District's determination that the Wild Free-Roaming Horse and Burro Act did not apply to these trespass horses. JRTC-B-000156. Absent the Wild Horses Act, there is no restriction on the Army's substantive decision to remove the horses. And Plaintiff's arguments that the horses would suffer mental or emotional harm from being removed from Fort Polk are purely speculative. Pl.'s Mem. 13. There was no testimony as to the condition of a specific horse prior to its capture or evaluation of the cause of the condition of any horse after its capture. The rest of the testimony provided by Plaintiff was conjecture.

Moreover, no NEPA violations occurred in this case to support irreparable harm under Plaintiff's alleged standard. Thus, there was no procedural harm to support injunctive relief. The purpose of NEPA as identified in *Winter*—"to assure that when Government officials consider taking action that may affect the environment, they do so fully aware of the relevant environmental considerations"—was met here. 555 U.S. at 35. Plaintiff just disagrees with the results of the Army's environmental review, and such disagreement is not a basis for a preliminary injunction.

3. There is no basis to reject the Report's finding that some horses are malnourished due to inadequate forage.

In its third objection, Plaintiff asserts that it was wrong for Judge Kay to state that some of the trespass horses were malnourished due to inadequate forage. Pl.'s Mem. 13-14. Plaintiff is the one that asserted that some of the horses were malnourished or emaciated. ECF No. 64 at 1-2. Federal Defendants simply identified one reason for the condition of some of the horses. When discussing the environmental consequences of the proposed action, the Environmental Assessment described the amount of forage needed to support the population of horses. JRTC-B-000112. The Army concluded, even with conservative estimates of herd size and forage consumption, there was insufficient forage to maintain the total population without severe overgrazing. *Id*. Plaintiff asserts that pictures showing some of the trespass horses are healthy proves that none of the horses are malnourished due to inadequate forage, but this logic does not follow. The condition of *some* of the horses inherently does not apply to *all* of the horses. In addition, the record does contain photographic evidence of horses that appear malnourished. JRTC-B-000826, -843-45. Ultimately, there is no basis to reject the Report's finding that some horses are malnourished due to inadequate forage. Nor does it change the ultimate outcome of the denial of Plaintiff's motion.

4. There is also no basis to reject the Report's finding that some horses may spread infectious diseases.

In its fourth objection, Plaintiff disputes the Report's finding that some of the trespass horses "may spread infectious diseases" with a reference to the Environmental Assessment. ECF No. 67 at 2. Judge Kay did not reach a finding that the trespass horses definitively spread infectious diseases. Nor did the Army take this position. Instead, looking at the source document, the Environmental Assessment identifies one of the needs for the proposed action as the possible threat from equine infectious anemia and other equine infectious diseases. JRTC-B-000054. This potential threat is based on the fact that it is unknown when or whether the trespass horses have been tested for any infectious diseases. JRTC-B-000061. Without such testing, there is the potential for these large horse herds to act as a reservoir for disease from which other horses may become infected. *Id*. The Army did not base its decision on a belief that the trespass horses were infected with Equine Infectious Anemia or any other diseases.

Plaintiff actually raised the issue of infectious diseases affecting the horses at Fort Polk with testimony from Jennifer Pfaff that she had received a horse from Fort Polk that had "what is believed to be strangles[,]" a bacterial infection. ECF No. 64 at 1-2. Then, Plaintiff tried to assert that the horse only could have been affected with strangles once captured by the Army based on speculative testimony from Dr. Brendan Batt. *Id*. Yet, there was no testimony as to the particular horse's history or explanation of when such infectious disease occurred. Reporter's Official Tr. of Hr'g on Mot. for Partial Prelim. Inj. Held before the Honorable Kathleen Kay, U.S. Magistrate Judge, ECF No. 62 ("Hr'g Tr."). So, there is no basis to reject the Report's finding on this issue either.

5. It was reasonable for Judge Kay to accept the Army's estimate as to the number of trespass horses at Fort Polk.

In its fifth objection, Plaintiff disputes the Army's estimate as to the number of trespass horses at Fort Polk. Pl.'s Mem. 16-17. Plaintiff alleges that the removal of 104 horses would have a different impact if there are fewer horses. *Id*. Despite the otherwise undisputed affidavit from Milton W. Fariss that there were 500-700 horses as of January 2018, Plaintiff contends that there was no basis given for this number by the Army. Pl.'s Mem. 17. However, Plaintiff provided no credible evidence to contradict this number. Instead, a witness who had never even been to Fort Polk testified that she had heard 200-300 horses had already been removed. Hr'g Tr. 55:13-14. This speculative statement, based on inadmissible hearsay, does not refute the Army's estimate.

Plaintiff mistakenly treats the number of horses at Fort Polk as a static number that will never increase if some trespass horses are removed. Any reduction in the herd size by the Army's removal efforts would be offset by reproduction of the remaining horses and new horses being dumped or escaping from local owners. These changing circumstances mitigate against the notion that calculating the current size of the herd is as simple as taking the number of horses from an August 2016 aerial count and subtracting the horses the Army has removed to date.[1]

Based on the record, it is clear the exact number of the trespass horses is not known. *See* JRTC-E-003199 (stating that not all of the horses could be counted due to the forested areas and other areas of cover). However, the Army was clear that only 104 horses have been removed as of January 2018 and an estimated 90-120 horses would be captured over the next six to nine

[1] Even if the Court were to accept the August 2016 aerial horse count of 402 horses at Fort Polk, JRTC-E-003201, the Army would have only removed approximately half of the total trespass horses by the time this case is likely to be resolved.

months. Decl. of Milton W. Fariss ¶ 16, ECF No. 51-2. Thus, it was reasonable for Judge Kay to accept the Army's estimate of 500-700 horses at Fort Polk.

6. Plaintiff, in fact, conceded that the Army's project would be carried out only on Army-owned land.

Lastly, Plaintiff objects to Judge Kay reciting what Plaintiff put in its own reply brief—"As the Army pointed out, the horse-elimination program will be carried out on Army-owned land only." ECF No. 54 at 7. Plaintiff began this lawsuit alleging that the Army would remove the trespass horses from both Army land and the Kisatchie Forest. Compl. ¶ 1. However, the Army has always stated that it would only remove the trespass horses from its own land. The Finding of No Significant Impact stated that the proposed action was to "eliminate trespass horses from Fort Polk" and that the "action does not include the part of Fort Polk used under a special use permit from the Kisatchie National Forest." JRTC-A-000001. Now Plaintiff asserts that it "cannot know for certain what the Army will or will not do and whether the Army will change its mind." Pl.'s Mem. 17. Such arguments should hold no sway with this Court. The Army is entitled to the presumption of regularity that it will act according to its stated project. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) (citation omitted), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Thus, there is no basis to reject the Report's finding that Plaintiff conceded this issue.

CONCLUSION

For the reasons outlined herein, Federal Defendants request that the Court adopt the Report and deny Plaintiff's objections.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 6, 2018, a copy of the foregoing *Federal Defendants' Brief in Opposition to Plaintiff's Objections to Magistrate Judge's Report and Recommendation* was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system. I also certify that according to the Court's Mailing Information, there are no manual recipients.

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