

**UNITED STATES DISTRICT COURT  
FOR THE 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

**ORDER**

IT IS ORDERED BY THE COURT that the Motion of Dr. Phillip Sponenberg for Leave to File Amicus Curiae Brief of Dr. Phillip Sponenberg in Support of Plaintiffs, filed on April 16, 2018 be **GRANTED**.

SO ORDERED.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2018

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**THE HONORABLE KATHLEEN KAY  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF LOUISIANA**

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**MOTION TO FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF  
DR. PHILLIP SPONENBERG IN SUPPORT OF PLAINTIFF**

Amicus Curiae Dr. Phillip Sponenberg and undersigned counsel, respectfully moves for leave to file Amicus Curiae Brief of Dr. Phillip Sponenberg in Support of Plaintiff and supporting Declaration of Dr. Phillip Sponenberg pursuant to LR 7.8 and LR 7.4.

This brief provides the Court with background information that is intended to enrich the Court's understanding of the genetic and cultural implications of the Army's horse removal operation in the instant case. Amicus presents here an entirely new facet of the Plaintiff's case, namely, the Army's failure to consider the environmental and historical impacts that the horse removal operation will have on the Choctaw Horse strain and overall impact on worldwide horse genetic diversity. As described in the accompanying Memorandum in Support, impacts on genetic diversity of horse populations are regularly included in National Environmental Policy Act ("NEPA") analyses and inform agency management plans and alternatives analyses of wild and feral horses. Further, the Army also failed to consider that Choctaw Horses are themselves historic objects and are eligible for inclusion in the National Register of Historic Place ("NRHP") under the National Historic Preservation Act ("NHPA").

Amicus urges this Court to find that the Army failed to consider the cultural and genetic impacts that removal will have on the future of Spanish Colonial Horses and Choctaw Horses.

Counsel for Amicus Curie has reached out to counsel for the Defendants. Counsel for the Defendants indicated that it opposes this motion.

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CM/EFC system, which will send a Notice of Electronic Filing to all counsel of record who have registered to receive electronic service, on the 16th of April, 2018.

*/s/ Andrew Jacoby*

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Respectfully submitted,

*/s/ Andrew Jacoby*

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*Defendants.*

Division: Lake Charles

Case No. 2:17-CV-00980

Judge: Unassigned

Magistrate Judge: Kathleen Kay

**MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS  
CURIAE BRIEF OF DR. PHILLIP SPONENBERG IN SUPPORT OF PLAINTIFF**

Consideration of this brief is warranted because it provides background information that is intended to enrich the Court's understanding of the genetic and cultural implications of the Army's horse removal operation in the instant case. This information would not otherwise be presented to the court. Amicus urges this Court to find that the Army failed to consider the cultural and genetic impacts that removal will have on the future of Spanish Colonial Horses and Choctaw Horses.

**1. Interest of Amicus**

Dr. Sponenberg has an interest in the conservation of culturally and genetically significant livestock, including Choctaw Horses. Dr. Sponenberg has spent over 45 years researching rare livestock strains and working to assure their preservation.

**2. Legal standard for admitting amicus curiae briefs.**

District Courts in the Fifth Circuit readily admit amicus briefs when the brief offers "another viewpoint not represented by the parties in this case."<sup>1</sup> The Eastern District of

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<sup>1</sup> *City of Dallas, Tex. v. Hall*, No. CIV.A. 3:07CV0060-P, 2008 WL 262.

Louisiana held and the Fifth Circuit affirmed “[t]here are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful to or otherwise desirable by the court.”<sup>2</sup> “Generally, courts have exercised great liberality in permitting an amicus curiae to file a brief in a pending case, and, with further permission of the court, to argue the case and introduce evidence.”<sup>3</sup>

Amicus curiae briefs are particularly valuable in the context of National Environmental Policy Act (“NEPA”) and National Historic Preservation Act (“NHPA”) cases, where the completeness of a federal agency’s analysis is at issue. Since the duties imposed by NEPA and the NHPA are to study and consider impacts, factual information not found in the administrative record 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.”<sup>4</sup> 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.<sup>5</sup>

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<sup>2</sup> *United States v. State of La.*, 751 F. Supp. 608, 620 (E.D. La. 1990)

<sup>3</sup> *Id.*

<sup>4</sup> *Sierra Club v. Peterson* 185 F.3d 349, 370 (5th Cir. 1999); *see also 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).

<sup>5</sup> *See id.* at 370. *See 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.”).

**3. The Amicus Curiae Brief includes a distinct viewpoint on the Army's impacts analysis under NEPA, a viewpoint that will aid the Court in making a ruling.**

This Amicus Curiae Brief and associated declaration will provide the Court with information necessary to determine if the Army complied with NEPA and NHPA in considering impacts on Choctaw Horses that are likely present at Fort Polk.

Amicus submits this brief and declaration to the Court to provide the finder of fact with information not meaningfully raised by either party before the Court, and not found in the administrative record. Plaintiff only briefly mentioned that Choctaw Horses could be present at Fort Polk, and the Army's administrative record is devoid of any information on the historical and biological significance of Choctaw Horses. However, as the attached Amicus Curie Brief describes, a Choctaw Horse expert (Dr. Phillip Sponenberg) with 45 years of experience studying Choctaw Horses believes that some of the horses at Fork Polk are indeed of the Choctaw strain and Colonial Spanish type.

The likely presence of the Choctaw Horse strain is important because it is a genetically rare and important strain of horses that is vulnerable to extinction. Its extinction threatens to not only destroy a culturally significant organism, but also to reduce the genetic diversity of horse populations worldwide. Once a strain dies off, the genetically unique characteristics associated with that strain and related phenotypes are gone forever as well.

The Plaintiff has already briefed the Army's failure to gather general baseline data on the horse population at Fort Polk for their EA under 32 C.F.R. § 651.34.<sup>6</sup> (Pl.'s Mem. Prelim. Inj., ECF No. 44-1). Proper baseline data would have confirmed the presence of Choctaw Horses at

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<sup>6</sup> In preparing an EA, an agency must consider: "[A]ny relevant general baseline conditions focusing on specific aspects of the environment that may be impacted by the alternatives." An EA "must state and assess the effects (direct, indirect, and cumulative) of the proposed action and its alternatives on the environment, and what practical mitigation is available to minimize these impacts."

Fort Polk and would have triggered an EIS under 32 C.F.R. § 651.41.<sup>7</sup> Had the Army properly consulted with experts, like Dr. Sponenberg, the Army would have considered the biological impacts and proper management strategies in the alternatives analysis. Impacts on genetic diversity of horse populations are regularly included in NEPA analyses and often inform agency management plans and alternatives analyses of wild and feral horses.<sup>8</sup> For example, in *Friends of Animals v. Sparks*, a federal district court found that the Bureau of Land Management [“BLM”] adequately studied and considered the impacts on genetic diversity in an EA for a proposed horse management plan by consulting with Pryor Mountain Wild Mustang Center and Dr. Gus Cothran. *See* 200 F. Supp. 3d 1114, 1127 (D. Mont. 2016).

Unlike in *Friends of Animals v. Sparks*, in this case the Army did not gather baseline data on the genetic health of the horses at Fort Polk. Nor did the Army consult with experts in the field of equine genetics. In fact, the administrative record shows that the Army chose not to take blood samples, asserting that it would “serve no purpose”. Bates No. JRTC-G-00006. Had the Army taken the proper steps under NEPA, they would have considered the grave genetic impacts horse removal would have on Colonial Spanish Horses. The Army could also have then

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<sup>7</sup> An EIS is required when a proponent, preparer, or approving authority determines that the proposed action has the potential to: (a) Significantly affect environmental quality, or public health or safety. (b) Significantly affect historic (listed or eligible for listing in the National Register of Historic Places, maintained by the National Park Service, Department of Interior), or cultural, archaeological, or scientific resources, public parks and recreation areas, wildlife refuge or wilderness areas, wild and scenic rivers, or aquifers. ... (d) Result in significant or uncertain environmental effects, or unique or unknown environmental risks. ... (i) Be highly controversial from an environmental standpoint. (j) Cause loss or destruction of significant scientific, cultural, or historical resources.

<sup>8</sup>*See Am. Wild Horse Pres. Campaign v. Zinke*, 2017 WL 4349012, at \*11 (D. Idaho Sept. 29, 2017), *appeal dismissed sub nom.*, *Am. Wild Horse Pres. Campaign v. Jewell*, 2017 WL 7796295 (9th Cir. Dec. 13, 2017) (finding that BLM properly relied on genetic impacts and “evidence and studies” to determine that the horses “lack of Spanish genetic descent”.); *Am. Wild Horse Pres. Campaign v. Vilsack*, 133 F. Supp. 3d 200, 231 (D.D.C. 2015), *rev'd on other grounds in part sub nom.*, *Am. Wild Horse Pres. Campaign v. Perdue*, 865 F.3d 691 (D.C. Cir. 2017), *withdrawn from bound volume, amended and superseded on reh'g*, 873 F.3d 914 (D.C. Cir. 2017), *and rev'd in part, vacated in part sub nom. Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914 (D.C. Cir. 2017) (Finding the Forest Service’s EA properly considered genetic diversity because “[t]he 2013 EA states that ‘[b]aseline genetic diversity would be determined by sampling a portion of the herd during the first gather cycle,’ and ‘[f]urther samples would be taken at a minimum of every other gather (e.g., 8–10 years) to detect any change in genetic diversity from the baseline.’”).

considered a proper management plan to protect the genetic diversity of such horses.

**4. The Amicus Curiae Brief includes a distinct viewpoint on the Army's failure to consider the eligibility of the Choctaw Horse under the NHPA, a viewpoint that will aid the Court in making a ruling.**

As described in the accompanying brief, the Choctaw Horses that are likely present at Fort Polk are likely eligible for inclusion in the National Register of Historic Places ("NRHP") under the NHPA. The Army also failed to consider that Choctaw Horses are themselves historic objects and are eligible for inclusion in the NRHP under the NHPA. *See Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005 (9th Cir. 2013). The Army failed to properly consider the historical and cultural significance of Choctaw Horses or their eligibility for inclusion in the NRHP. It is clear that the Choctaw Horses at Fort Polk are eligible for inclusion in the NRHP and the Army's failure to even consider the horses' eligibility amounts to a violation of the NHPA and the APA.

**5. Conclusion**

The Court should accept this Amicus Curiae Brief because it serves to examine the issue of impacts on Choctaw Horses at Fort Polk and provide the Court with the historical and technical information needed to rule on the merits of the case, including information that the Court would not otherwise consider. The historical and biological information presented in this brief seeks to aid in the Court in determining whether the Army considered all relevant factors in the NEPA and NHPA analyses. The additional information in this brief is properly before the Court as it falls within one of the eight extra-record evidence exceptions recognized by the Fifth Circuit.<sup>9</sup>

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<sup>9</sup> *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"))).

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CM/EFC system, which will send a Notice of Electronic Filing to all counsel of record who have registered to receive electronic service, on the 16th of April, 2018.

*/s/ Andrew Jacoby*

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Respectfully submitted,

*/s/ Andrew Jacoby*

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**AMICUS CURIAE BRIEF OF DR. PHILLIP SPONENBERG  
IN SUPPORT OF PLAINTIFF**

Dr. Phillip Sponenberg respectfully submits this amicus curiae brief in support of the Plaintiff, Pegasus Equine Guardian Association.<sup>1</sup> Dr. Sponenberg supports the Plaintiff's efforts to compel the Defendant, the Army, to study the impacts of Choctaw Horses being removed from Fort Polk. This amicus brief and accompanying Declaration of Dr. Phillip Sponenberg (Dec'l) support the Plaintiff's argument that the Army failed to properly perform an impact study on Choctaw Horses under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA).

**I. Identity of the Amicus Curiae**

Dr. Phillip Sponenberg is a professor of pathology and genetics at Virginia-Maryland College of Veterinary Medicine at Virginia Tech. Dr. Sponenberg's relevant research interests include genetics of domesticated animals and conservation of rare breeds of livestock.

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<sup>1</sup> Statement of Counsel: Amicus Curiae, Dr. Phillip Sponenberg, states that no party or parties' counsel authored any part of this brief or paid any costs associated with its preparation, and no person other than amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

## II. Status of the Case

On August 2, 2015, the Army issued a “Notice of Intent to Conduct an Environmental Assessment for Proposed Action to Eliminate Trespass Horses at Fort Polk, La.” A year later, the Army published a Finding of No Significant Impact (the “FONSI”). On December 14, 2016, the Plaintiff filed a Complaint, alleging that the U.S. Army and Brigadier General Gary M. Brito, in his official capacity failed to properly assess the harm that the horse removal operation would have on the horses at Fort Polk. This amicus brief points out the additional failure of the Army to assess impacts associated with destroying a genetically unique horse population (the Choctaw Horse) in a way that threatens the strain with extinction, while undermining the genetic diversity of horse populations worldwide.

## III. Argument

### 1. **The Choctaw Horse is a genetically rare and important strain that is vulnerable to extinction.**

Extinction does not threaten only the sort of wild and exotic species featured in documentary films. There are also specific, genetically rare and important strains within otherwise larger populations of creatures. Some of these strains, such as certain domesticated or feral horse strains, are vulnerable to extinction.<sup>2</sup> Dec’1 at ¶3(a). The Choctaw Horse strain is one such genetically rare and important strain, and it is threatened with extinction. In this case, extinction threatens to not only destroy a culturally significant organism, but also to reduce the genetic diversity of horse populations worldwide.

The need to conserve domesticated and feral animals is often overlooked by scientists and policymakers alike despite these creatures being equally as endangered as wild species. To

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<sup>2</sup> “Strain” is a taxonomic description to describe a subtype or variant within a species. In this instance, the Choctaw Horse is a strain of the Colonial Spanish Horse.

truly preserve biodiversity on a global scale, domesticated and feral animals such as the Choctaw Horse must be included in the effort. Dec'1 at ¶3(a).

The direness of the ongoing loss of genetic diversity in domesticated and feral horses cannot be understated. The last of the true wild horses went extinct in what is now modern Poland in 1627. Dec'1 at ¶3(c). Thus, the need to conserve the remaining unique genetic characteristics among domesticated and feral horse populations is essential. Once a strain dies off, the genetically unique characteristics associated with that strain and related phenotypes are gone forever as well.

**2. The Army failed to consider the cultural and genetic impacts on Choctaw Horses in their NEPA and NHPA analyses.**

Congress enacted NEPA and NHPA to provide a procedural safeguard for when federal action threatens vulnerable populations like the Choctaw Horses at Fort Polk. The Plaintiff has already briefed the NEPA and NHPA issues in its Complaint (Compl., ECF No. 1) and the Plaintiff's Memorandum in Support of its Motion for Partial Preliminary Injunction (Pl.'s Mem. Prelim. Inj., ECF No. 44-1), and amicus supports the Plaintiff's arguments. Amicus presents here an entirely new facet of the Plaintiff's case: the Army's failure to consider the environmental and historical impacts that the horse removal operation will have on the Choctaw Horse strain and overall impact on worldwide horse genetic diversity.

**a. Under NEPA, the Army failed to prepare a proper Environmental Assessment and Environmental Impact Statement that considered the impacts on the Choctaw Horses and global horse genetic diversity in formulating the horse removal and management plan.**

In their Environmental Assessment (EA), the Army failed to consider (1) the impact horse removal would have on the genetic diversity of the Choctaw Horse population at Fort Polk (2) the impact on genetic diversity among the remaining Spanish Colonial Horse type worldwide

and (3) proper management to assure conservation of the type and strain. The Plaintiff has already briefed the Army's failure to gather general baseline data on the horse population at Fort Polk for their EA under 32 C.F.R. § 651.34.<sup>3</sup> (Pl.'s Mem. Prelim. Inj., ECF No. 44-1). Proper baseline data would have confirmed the presence of Choctaw Horses at Fort Polk and would have triggered an EIS under 32 C.F.R. § 651.41.<sup>4</sup> Had the Army properly consulted with experts, like Dr. Sponenberg, the Army would have considered the biological impacts and proper management strategies in the alternatives analysis.

Impacts on genetic diversity of horse populations are regularly included in NEPA analyses and often inform agency management plans and alternatives analyses of wild and feral horses.<sup>5</sup> For example, in *Friends of Animals v. Sparks*, a federal district court found that the Bureau of Land Management ["BLM"] adequately studied and considered the impacts on genetic diversity in an EA for a proposed horse management plan by consulting with Pryor Mountain Wild Mustang Center and Dr. Gus Cothran. *See* 200 F. Supp. 3d 1114, 1127 (D. Mont. 2016).

Unlike in *Friends of Animals v. Sparks*, in this case the Army did not gather baseline data

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<sup>3</sup> In preparing an EA, an agency must consider: "[A]ny relevant general baseline conditions focusing on specific aspects of the environment that may be impacted by the alternatives." An EA "must state and assess the effects (direct, indirect, and cumulative) of the proposed action and its alternatives on the environment, and what practical mitigation is available to minimize these impacts."

<sup>4</sup> An EIS is required when a proponent, preparer, or approving authority determines that the proposed action has the potential to: (a) Significantly affect environmental quality, or public health or safety. (b) Significantly affect historic (listed or eligible for listing in the National Register of Historic Places, maintained by the National Park Service, Department of Interior), or cultural, archaeological, or scientific resources, public parks and recreation areas, wildlife refuge or wilderness areas, wild and scenic rivers, or aquifers. ... (d) Result in significant or uncertain environmental effects, or unique or unknown environmental risks. ... (i) Be highly controversial from an environmental standpoint. (j) Cause loss or destruction of significant scientific, cultural, or historical resources.

<sup>5</sup> *See Am. Wild Horse Pres. Campaign v. Zinke*, 2017 WL 4349012, at \*11 (D. Idaho Sept. 29, 2017), *appeal dismissed sub nom.*, *Am. Wild Horse Pres. Campaign v. Jewell*, 2017 WL 7796295 (9th Cir. Dec. 13, 2017) (finding that BLM properly relied on genetic impacts and "evidence and studies" to determine that the horses "lack of Spanish genetic descent"); *Am. Wild Horse Pres. Campaign v. Vilsack*, 133 F. Supp. 3d 200, 231 (D.D.C. 2015), *rev'd on other grounds in part sub nom.*, *Am. Wild Horse Pres. Campaign v. Perdue*, 865 F.3d 691 (D.C. Cir. 2017), *withdrawn from bound volume, amended and superseded on reh'g*, 873 F.3d 914 (D.C. Cir. 2017), *and rev'd in part, vacated in part sub nom. Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914 (D.C. Cir. 2017) (Finding the Forest Service's EA properly considered genetic diversity because "[t]he 2013 EA states that '[b]aseline genetic diversity would be determined by sampling a portion of the herd during the first gather cycle,' and '[f]urther samples would be taken at a minimum of every other gather (e.g., 8–10 years) to detect any change in genetic diversity from the baseline.'").

on the genetic health of the horses at Fort Polk. Nor did the Army consult with experts in the field of equine genetics. In fact, the administrative record shows that the Army chose not to take blood samples, asserting that it would “serve no purpose”. Bates No. JRTC-G-00006. Had the Army taken the proper steps under NEPA, they would have considered the grave genetic impacts horse removal would have on Colonial Spanish Horses.

**i. Preservation of the Choctaw Horse population through a proper management plan is necessary to preserve and protect the genetic diversity of horses generally and Spanish Colonial Horses particularly.**

Spanish Colonial Horses have become increasingly rare due to the preference of Thoroughbred and Arabian horses among breeders. Initially, the Spanish, Thoroughbred, and Arabian were the most common horse breeds and were largely responsible for the erosion of genetic variability in horse breeds worldwide. Dec’1 at ¶3(n). Over time, the Spanish type became increasingly rare and is now in need of conservation. Colonial Spanish Horses in North America are distinct from modern horses in Spain, due to “centuries of divergent selection.” Dec’1 at ¶3(d). “The result is that the New World remnants are very important to overall conservation because some of the New World varieties are closer in type to the historic horse of the Golden Age of Spain than are the current horses in Iberia.” Dec’1 at ¶3(d).

The Colonial Spanish Horse is found throughout the Americas, and all are descendants from the Iberian horses brought over to the New World by conquistadors five centuries ago. Dec’1 at ¶3(h). However, the Colonial Spanish Horses found in North America “have a distinct enough history of early foundation followed by isolation that they can currently be considered to be different enough from Central American and South American horses to warrant separate conservation efforts. Dec’1 at ¶3(r). Similarly, different strains, like the Choctaw Horse, have been isolated from other strains for multiple centuries. Dec’1 at ¶3(u).

Since their arrival in the New World some five centuries ago, the Colonial Spanish Horse

type has come to include several distinct strains including the Choctaw Horse. Throughout much of the 20th century the Choctaw Horse strain was well preserved through careful breeding by a small number of families. By 1988, less than fifty pure Choctaw Horses remained, due to the dispersal of many of the large Choctaw Horse herds. Recently, pockets of Choctaw Horses and potential candidates of Choctaw Horses have appeared in Mississippi and Louisiana, including the population at Fort Polk. The discovery of these new populations could provide great potential to reestablish the genetic strength of the Choctaw Horse. Dec'1 at ¶3(x).

Generally a horse population that is much fewer than 100 breeding individuals is unlikely to be successfully conserved in isolation and would need to be grouped with other strains. The Choctaw Horse population may be large enough to survive in isolation. The Choctaw Horse has benefited from some degree of isolation, but it has also contributed broadly to the more composite breeds. Thus, the Choctaw Horse is one of the few strains of the Colonial Spanish Horse that is a strong candidate for successful conservation in isolation. Dec'1 at ¶3(t). In the case of Fort Polk, to preserve the specific local strain in situ, at least fifty individuals belonging to the Choctaw strain would need to remain on site. Dec'1 at ¶3(v).

The Fort Polk horses, evaluated by Dr. Sponenberg through photographs, have an appearance—or type—consistent with the Colonial Spanish type. Dec'1 at ¶4(a). Based solely on the photographs it appears that the population at Fort Polk contains Choctaw Horses. Dec'1 at ¶4(a)(b). They show physical traits typical of the old Colonial Spanish type, which is rare among other horses in the United States. The head and rear end conformation (physical characteristics) are fairly distinctive in Choctaw Horses. In the case of Choctaw Horses, the appearance of the horse is an excellent indication of the genetic strain. Dec'1 ¶4(b). Based on the appearance of the horses in the photographs, further study is warranted to confirm that the strain is indeed Choctaw

Horse. Further examination of the conformation and DNA of the herd are necessary to confirm the type and strain. Dec’l at ¶4(a). The results of these two types of evidence taken together have consistently proven accurate for including candidate populations of conservation merit. Dec’l at ¶4(c). If confirmed, this population would be a high priority for conservation as a genetic resource that is otherwise rare in North America. Dec’l at ¶4(d).

If the Choctaw Horses at Fort Polk could not be maintained in situ, communication and cooperation among recipients of individual Choctaw Horses must be a priority. Dec’l at ¶4(e). Once the horses are removed and sold to buyers around the country, it is incumbent upon the recipients of the Choctaw Horses to make a concerted effort to facilitate breeding with other Choctaw Horses. Absent this communication and cooperation, the likelihood of survival of the Choctaw Horse strain diminishes drastically. Dec’l at ¶4(e). This is precisely why the Army must consider a proper management plan. Had the Army studied the issue, it likely would have recognized the problem associated with Choctaw Horse removal and possible destruction, and likely would have taken steps to mitigate the problem by implementing a proper management plan.

**b. The Army failed to consider the historical significance of the Choctaw Horses under the NHPA.**

There is no question that the Colonial Spanish horse is of great historic importance in the New World and worldwide. If the horses at Fort Polk are confirmed to be of the Choctaw Horse strain (and all present indications are that they are such a strain), the horses themselves would be found to be eligible for inclusion in the National Register of Historic Places (“NRHP”). The Plaintiff has already briefed the procedural deficits in the Army’s determination that no cultural landscapes would be impacted by the horse removal operation. (Pl.’s Mem. Prelim. Inj., ECF No. 44-1 at 24). The Army also failed to consider that Choctaw Horses are themselves historic

objects and are eligible for inclusion in the NRHP under the NHPA.

“Under NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b); determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4; assess the effects of the undertaking on any eligible historic properties found, 36 C.F.R. §§ 800.4(c), 800.5, 800.9(a); determine whether the effect will be adverse, 36 C.F.R. §§ 800.5(c), 800.9(b); and avoid or mitigate any adverse effects, 36 C.F.R. §§ 800.8(e), 800.9(c).” Id.

*Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005 (9th Cir. 2013)

It may seem odd that wildlife would fit within a law expressly dedicated to preserving historic “places” and “properties,” but federal courts hold that the NHPA does indeed protect wildlife like the Choctaw Horse as statutory “historic properties.” For example, in *Okinawa Dugong v. Gates*, the District Court found that Okinawa dugong<sup>6</sup> is protected property under the NHPA. 543 F. Supp. 2d 1082, 1100 (N.D. Cal. 2008). In a related action, the Ninth Circuit adopted the interpretation in *Okinawa Dugong*, finding that “property” under the NHPA includes wild animals. *See Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803, 817 (9th Cir. 2017). After an agency identifies the historic properties that could be impacted, they are then directed to determine if the properties are eligible for inclusion on the NRHP. 36 C.F.R. § 60.4 expressly directs federal agencies to apply the following criteria to make this determination:

“The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and

- (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or
- (b) that are associated with the lives of persons significant in our past; or
- (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- (d) that have yielded, or may be likely to yield, information important in prehistory or history.”

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<sup>6</sup> A dugong is a marine mammal that is related and similar in appearance to the manatee.

One need only briefly consider the history of the Choctaw Horse to find that the criteria in 36 C.F.R. § 60 are met. The modern Colonial Spanish Horses of North America are descendants from horses introduced during the period of Spanish conquest of the New World 500 years ago. They likely originated in what is now Spain with and possible influences from North Africa. Dec'1 at ¶3(i).

In the centuries since they arrived in the New World, the Colonial Spanish Horse type has become split into several different breeds and strains, including a number of North American strains. The individuals that remain in North America provide a clear view in to the past. “These horses are a direct remnant of the horses of the Golden Age of Spain, which are now mostly or wholly extinct in Spain. The Colonial Spanish Horses are therefore a treasure chest of genetic wealth from a time long gone.” Dec'1 at ¶3(i).

The Spanish Colonial Horses were “instrumental in the ability of the Spanish Conquistadors to conquer the native civilizations” of the New World. Dec'1 at ¶3(i). By 1700 Spanish Colonial Horses were common throughout the Southeastern U.S. The horses then expanded throughout the West and the Great Plains. At one time the Colonial Spanish Horse was the most common of all the horses throughout the continent and were the preferred horse of the native tribes and European colonists. Dec'1 at ¶3(o). The popularity of the Colonial Spanish Horse would decline slowly over the next two centuries, as described by Dr. Sponenberg:

The Colonial Spanish horse came to be generally considered as too small for cavalry use by the Anglo-Americans, and was slowly supplanted by taller and heavier types from the northeast as an integral part of Anglo expansion in North America. In the final stages this process was fairly rapid, and was made even more so by the extermination of the horse herds of the Native Americans during the final stages of their subjection in the late 1800's. The close association of the Spanish Horse with both Native American and Mexican cultures also caused the popularity of these horses to diminish in contrast to the more highly favored larger horses of the

dominant Anglo—derived culture, whose horses tended to have breeding predominantly of Northern European types. The decline of the Colonial Spanish horse resulted in only a handful of animals left of the once vast herds.

Dec’l at ¶3(p).

Some of the remaining Colonial Spanish Horses were preserved as distinct tribal strains, including the Choctaw Horse. The Choctaw tribe acquired the horses from early Spanish missions that dotted the South. The Choctaw tribe was instrumental in facilitating meetings between the U.S. government and tribes from further West, and it is believed the exchange of Choctaw Horses occurred during these meetings. The Choctaw tribe has a well-documented horse breeding history, and the tribe continued to breed Choctaw Horses even after their removal to Oklahoma in the late 1800s. Most of the remaining Choctaw Horses of Oklahoma are descendants of horses that were brought west via the Trail of Tears. Dec’l at ¶3(w).

The Army failed to properly consider the historical and cultural significance of Choctaw Horses or their eligibility for inclusion in the NRHP. It is clear that the Choctaw Horses at Fort Polk are eligible for inclusion in the NRHP and the Army’s failure to even consider the horses’ eligibility amounts to a violation of the NHPA and the APA.

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing document with the Clerk of Court using the CM/EFC system, which will send a Notice of Electronic Filing to all counsel of record who have registered to receive electronic service, on the 16th of April, 2018.

*/s/ Andrew Jacoby*

Respectfully submitted,

*/s/ Andrew Jacoby*

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**UNITED STATES DISTRICT COURT  
FOR THE 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

**28 U.S.C. § 1746 DECLARATION OF DR. PHILLIP SPONENBERG IN SUPPORT OF  
AMICUS CURIAE OF DR. PHILLIP SPONENBERG**

I, Phillip Sponenberg, pursuant to 28 U.S.C. § 1746, declare as follows:

1. I am the age of majority and am competent to make this declaration. This declaration is based on my personal knowledge and observations.
2. I have reviewed photographs of the horses at Fort Polk. Based on these photographs, I believe some of the horses at Fort Polk are of the Choctaw strain and Colonial Spanish type.
3. I am a professor of pathology and genetics at Virginia-Maryland College of Veterinary Medicine at Virginia Tech, and I have studied Choctaw Horses for over 45 years.
  - a. Domesticated and feral horses are equally vulnerable to extinction and should be included in the same conservation efforts as wild animals.
  - b. The Choctaw Horse is threatened with extinction.
  - c. Wild horses went extinct in Poland in 1627.
  - d. The Spanish type is rare and is now itself in need of conservation. The horse currently in Spain is distinct, through centuries of divergent selection, from the Colonial Spanish Horse. The result is that the New World remnants are very important to overall conservation because

some of the New World varieties are closer in type to the historic horse of the Golden Age of Spain than are the current horses in Iberia.

- e. Some individual families were important in preserving the tribal horses. The major families that preserved the Choctaw horses until recently were the Brame, Crisp, Locke, Self, Helms, Thurman, and Carter families. Horses were run on the open range in areas where other types of horses were not kept. These families had hundreds of horses of consistent Spanish type and widely varying colors including the "Spanish roan" sabino type, leopard and blanketed, and others such as overo paints.
- f. Colonial Spanish Horses are of great historic importance in the New World, and are one of only a very few genetically unique horse breeds worldwide. They have both local and global importance for genetic conservation. The combination of great beauty, athletic ability, and historic importance makes this breed a very significant part of the historic heritage of North America.
- g. The Colonial Spanish Horses have an elegant beauty as well as a temperament that allows them to be good, close partners with people. They are alert to their environment, and have great endurance. The more generic crossbred feral horses rarely have all of these qualities.
- h. The important part of the background of the Colonial Spanish Horses is that they are indeed Spanish. These are descendants of the horses that were brought to the New World by the Conquistadors, and include some feral, some rancher, some mission, and some Native American strains. Colonial Spanish type is very rare among modern feral mustangs.
- i. Colonial Spanish Horses descend from horses introduced during the period of the conquest of the New World. They came from southern Spain, northern Spain, and possibly North Africa. In the New World this colonial resource has become differentiated into a number of breeds,

and the North American representatives are only one of many such breeds throughout the Americas. These horses are a direct remnant of the horses of the Golden Age of Spain, which type is now mostly or wholly extinct in Spain. The Colonial Spanish horses are therefore a treasure chest of genetic wealth from a time long gone. In addition, they are capable and durable mounts for a wide variety of equine pursuits in North America. These are beautiful and capable horses from a genetic pool that heavily influenced horse breeding throughout the world five centuries ago, yet today they have become quite rare.

- j. The Spanish Colonial Horse is the remnant of the once vast population of horses in the USA. The ancestors of these horses were instrumental in the ability of the Spanish Conquistadors to conquer the native civilizations. The source of the original horses was Spain, at a time when the Spanish horse was being widely used for improvement of horse breeding throughout Europe. The Spanish horse of the time of the conquest had a major impact on most European light horse types (this was before breeds were developed, so type is a more accurate word). Types of horses in Spain at the time of the founding of the American populations did vary in color and conformation, and included gaited as well as trotting horses. In general, smaller horses of unique type hailed from Northern Spain, gaited types from Central and Eastern Spain, and trotting military horses from Southern Spain. All three types were included in the colonization of the New World.
- k. The types, though variable, tended to converge over a relatively narrow range when compared to other major types of horses. This tendency has been validated by recent genetic work showing the Iberian Peninsula as a major ancient center of horse genetic diversity and influence. The Iberian Peninsula was a reservoir of wild horses following domestication of a separate reservoir in Eastern Europe. This diversity was incorporated into domestic herds

once the domesticated horse reached the Iberian Peninsula, and as a result Iberian horses ended up being an important source of genetic diversity among horse breeds.

- l. The origin of Iberian horses has been shrouded in myth and speculation. Opinions have varied over time, with one extreme holding that these are a unique subspecies of horse, to the other extreme that they are a more recent amalgamation of Northern European types with oriental horses. Somewhere in between is the view that these are predominantly of North African Barb breeding, while an alternate view is that the Barb is of Iberian origin. The most likely modern interpretation is that local wild horses persisted in Iberia, and contributed greatly to domesticated stocks once the domesticated horses were introduced from further north and east.
- m. It is undeniable that the resulting Spanish Colonial horse is distinct from most other horse types, which is increasingly important as most other horse breeds become homogenized around a very few types dominated by the Arabian, Thoroughbred, and Warmbloods. Modern results point to Iberia as a direct source of unique horse types and genetic influences.
- n. This historically important Spanish horse has become increasingly rare, and was supplanted as the commonly used improver of indigenous types by the Thoroughbred and Arabian. These three (Spanish, Thoroughbred, and Arabian) are responsible for the general worldwide erosion of genetic variability in horse breeds. The Spanish type subsequently became rare and is now itself in need of conservation.
- o. At one time (about 1700) the purely Spanish horse occurred in an arc from the Carolinas to Florida, west through Tennessee, and then throughout all of the western mountains and Great Plains. In the northeast and central east the colonists were from northwest Europe, and horses from those areas were more common than the Colonial Spanish type. Even in these non-

Spanish areas the Colonial Spanish Horse was highly valued and did contribute to the overall mix of American horses. Due to their wide geographic distribution as pure populations as well as their contribution to other crossbred types, the Colonial Spanish Horses were the most common of all horses throughout North America at that time, and were widely used for riding as well as light draft. These were the common mounts of the native tribes (some of whom measured wealth by the number of horses owned) as well as of the European colonists.

- p. The Colonial Spanish horse came to be generally considered as too small for cavalry use by the Anglo-Americans, and was slowly supplanted by taller and heavier types from the northeast as an integral part of Anglo expansion in North America. In the final stages this process was fairly rapid, and was made even more so by the extermination of the horse herds of the native Americans during the final stages of their subjection in the late 1800's. The close association of the Spanish Horse with both native American and Mexican cultures also caused the popularity of these horses to diminish in contrast to the more highly favored larger horses of the dominant Anglo—derived culture, whose horses tended to have breeding predominantly of Northern European types. The decline of the Colonial Spanish horse resulted in only a handful of animals left of the once vast herds.
- q. The relatively small handful of Colonial Spanish horses that persisted through the lean years has founded the present breed. These remnants are the horses of interest when considering the history of the breed today. The foundation that persisted through the period of low numbers will forever stamp the resulting breed in more important ways than will the millions of these horses that once roamed the continent but failed to survive the bottleneck of low numbers that occurred between the days of numerous Spanish Colonial horses and today.
- r. Colonial Spanish Horses occur throughout the Americas, and ultimately all of these have a

common origin in Iberian horses from centuries ago. The North American horses have a distinct enough history of early foundation followed by isolation that they can currently be considered to be different enough from Central American and South American horses to warrant separate conservation efforts.

- s. This line of logic could also extend to the different strains still available in North America, because some of them have been isolated from one another for multiple centuries. It is important to remember that any fine splitting of the resource into different strains (or breeds) does need to serve the very practical end of conserving the genetic resource in good enough shape to survive and serve future generations.
- t. Any population that is much fewer than 100 individual breeding animals is unlikely to be able to make it as an isolated genetic pool, and this has implications for whether to group strains together, or save them in strict isolation as distinct breeds. A few of the groups may well be large enough to survive isolation including the Choctaw/Cherokee/Huasteca. Others will likely need to be grouped locally in order to survive.
- u. The Choctaw maintains some degree of isolation, but also has contributed broadly to the more composite breed.
- v. For the Choctaw Horses at Fort Polk to be conserved in situ as an isolated substrain, at least 50 breeding individuals would need to be present.
- w. A few tribal types have continued to be bred as distinct strains. The Choctaw and Cherokee horses are among these. Both of these tribes, in addition to the Chickasaw and Creek, were avid horse breeders in their original homes in the southeast. The excellence of their horses is specifically mentioned in various travel journals from the late 1700s and early 1800s. Following removal of these tribes to what is now Oklahoma they continued to breed horses.

The basis for these Oklahoma herds was horses brought from the southeast on the Trail of Tears, but no doubt some western horses were added as well. The original horses were Spanish, obtained at first from the chain of missions across the Deep South in early Spanish colonial days. Some of these horses have unique Iberian blood types, which provides evidence of the accuracy of the oral history of isolation surrounding these herds. These tribes became important as mediators between several of the more western tribes and the US government, and it is likely that exchange of horses between tribes occurred during the many meetings that were held.

- x. From the hundreds of Choctaw and Cherokee horses that were available as recently as 1975 there are now very few. This is due to the dispersal of many large herds following the deaths of some of the elderly breeders. Probably only 50 pure Choctaw and Cherokee horses could be assembled in 1988, but some few breeders are trying to assure that this type continues to the future as a part of the overall breeding of Spanish horses, and numbers are now much higher (approaching 300). Many horses in the various registries are of partial Choctaw breeding, so the Choctaw strain has made a wide impact on the general Colonial Spanish horse breed of today.
- y. A recent find in south Mississippi gives hope that not all of the original Choctaw horses in the southeast became extinct following the removal of Native Americans in the early 1800s. A small remnant of local ranch horses was discovered on the Brown family farm in Poplarville in 2005, and included a stallion and two of his sons out of the same mare. These are gaited, and have a pronounced Colonial Spanish type. DNA work by Gus Cothran shows them to be closest to the Oklahoma Choctaw horses, which is logical by history, geography, and external type. These horses have great potential for boosting the genetic strength of the

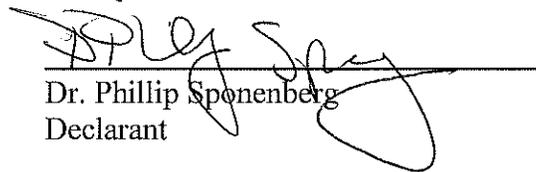
Choctaw horse.

- z. Other candidates of Colonial Spanish horses in Mississippi, Louisiana, and Alabama do surface from time to time, but not all leads have been adequately investigated. These include horses in private herds, but also a feral group on Fort Polk that descends from long-term local herds owned by families displaced by the establishment of the fort.
4. I have evaluated photographs of the horses at Fort Polk. The photographs lead me to the following conclusions:
- a. The Fort Polk horses, evaluated by photographs, have a type consistent with the Colonial Spanish type. Ideally this would be investigated further. The further steps would be more detailed examination of physical characteristics, and this should be coupled with DNA evaluation.
  - b. The head and rear end confirmation of Choctaw Horses is very distinctive and is a strong indicator of the strain.
  - c. Blood typing and DNA typing are both critically valuable and important adjuncts to conservation programs, but must be used wisely with consideration of the sort of information they provide. They are not a panacea for the difficult and subjective challenges that face conservationists interested in Colonial Spanish Horses. Neither of these techniques is powerful enough to direct conservation programs without attention to overall conformation and breed type as well as historical data.
  - d. If the population at Fort Polk is confirmed to be Choctaw, the population would be a high conservation priority.

- e. If the Choctaw Horse population cannot remain in situ, communication and cooperation would be key to assure recipients of the Choctaw Horses would take active steps to conserve the strain. Otherwise the survival of the strain would become compromised.

I declare under the penalty of perjury that the forgoing is true and correct.

Executed on 13 of April 2018 in Bledsoy, Virginia.

  
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Dr. Phillip Sponenberg  
Declarant