UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

PEGASUS EQUINE GUARDIAN ASSOCIATION, *Plaintiff,* v. U.S. ARMY and BRIGADIER GENERAL GARY M. BRITO, in his official capacity as Commanding General, JRTC and Fort Polk, Louisiana, *Defendants.*	Division: Lake Charles Case No.: 2:17-CV-00980 Judge: Unassigned Magistrate Judge: Kathleen Kay

FEDERAL DEFENDANTS' MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF DR. PHILLIP SPONENBERG

INTRODUCTION

Dr. Phillip Sponenberg ("Petitioner") moves this Court for leave to appear and file a brief in support of Plaintiff as an amicus curiae. ECF No. 72. Primarily, Dr. Sponenberg allegedly seeks to provide information concerning the "genetic and cultural implications" of the Army removing horses that could impact the "Choctaw Horse strain" and worldwide horse genetic diversity. ECF No. 72-1 at 1. There are a number of deficiencies with this request. First, Petitioner's interest and information is inapplicable because the horses at Fort Polk are trespass horses, not wild horses. Second, the information in this amicus brief is not relevant to the facts or useful in this case. Third, Petitioner does not raise any new issues that Plaintiff has not already raised, including a statement from Dr. Sponenberg expressing the exact same concerns that Plaintiff has already submitted for this Court's consideration. *See* ECF No. 43-9. Thus, there is no basis or need for Dr. Sponenberg to file an amicus curiae brief, and his motion should be denied.

The timing of this request is also curious as it was filed after the briefing and hearing for the preliminary injunction and before the merits briefing. Under the Federal Rules of Appellate Procedure, Rule 29(a)(6) requires the filing of an amicus curiae brief "no later than 7 days after the principal brief of the party being supported." This timing is intended to allow the amicus to avoid duplicating arguments of the party it supports but to also give the responding party time to address the issues raised by the amicus. *See* Subdivision (e), FED. R. APP. P. 29 advisory committee's note to 1998 amendment. The same considerations apply in matters before this Court. Plaintiff moved for a partial preliminary injunction on January 8, 2018, and has yet to file its principal merits brief. Thus, Petitioner's motion should also be dismissed as untimely.

STANDARD OF REVIEW

While courts have broad discretion in allowing an amicus curiae brief, there are guidelines that can inform the Court's decision. The individual seeking to appear as an amicus must make a showing that his participation is useful to or otherwise desirable by the court. *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990). It inherently follows that in order to be useful or desirable by the court, the brief should be relevant to the issues the court has to decide. Further, a motion for leave to file an amicus brief should be denied where the issue the movant seeks to address has been adequately briefed by the parties. *Ysleta Del Sur Pueblo v. El Paso Cty. Water Improvement Dist. No. 1*, 222 F.3d 208, 209 (5th Cir. 2000); *see also City of Dallas v. Hall*, Nos. 3:07-CV-0060-P and 3:07-CV-0213-P, 2008 WL 2622809, *3, *16 (N.D. Tex. June 30, 2008) (citation omitted) (granting leave to file amicus where the brief "will bring to this case another perspective, one not shared by the parties to this case").

Also, since Plaintiff's claims under the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA") are brought pursuant to the

Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, it is important to remember that "the scope of review under the [APA] is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This court's review of the Army's compliance with NEPA and the NHPA is conducted under the APA's "arbitrary and capricious" standard and is based on a certified administrative record. *Coliseum Square Ass'n v. Jackson*, 465 F.3d 215, 241 (5th Cir. 2006) (citing *Vieux Carre Prop. Owners, Residents, & Assocs. v. Brown*, 875 F.2d 453, 456 (5th Cir. 1989)). Under the "arbitrary and capricious" standard, administrative action is upheld if the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation and quotation marks omitted).

ARGUMENT

I. The Horses At Fort Polk Are Trespass Horses, Not Wild Horses.

Petitioner sets forth his interest in filing an amicus as "interest in the conservation of culturally and genetically significant livestock, including Choctaw horses." ECF No. 72-1 at 1. Essentially, Plaintiff is attempting to continue, through Dr. Sponenberg, its argument that the horses should not be removed because they are historic. However, there is no basis on which to dispute the nature of the horses. Significantly, the issue of whether the horses are historic was decided over 15 years ago. 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 ("Wild Horse Act") did not apply to these trespass horses. JRTC-

B-000156. Absent the Wild Horse Act, there is no restriction on the Army's substantive decision to remove the horses.

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

Additionally, Petitioner's interest in Choctaw horses is not affected by the Army's decision to remove the horses from Fort Polk. The Army is not destroying the horses; it is simply relocating them. If Petitioner or anyone else is interested in conserving particular horses, he or she has the ability to adopt those horses. Further, assuming that Choctaw horses were present, leaving the horses to roam freely about Fort Polk would not satisfy Petitioner's interest. As Plaintiff has acknowledged, trespass livestock are at Fort Polk. JRTC-B-00870; JRTC-B-00875; 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 at 35-36, 40, 42. Petitioner also seems to acknowledge that only some of the horses might be Choctaw or Colonial Spanish. ECF No. 72-3 ¶ 2. Without intervention, the alleged Choctaw horses could breed with the trespass livestock, so, relocation of these horses would better serve the interests of preservation and research.

II. Petitioner's Brief Is Not Relevant Or Useful To The Court.

Judicial review of an APA case is generally limited to the administrative record in existence at the time of the agency's decision. *Camp v. Pitts*, 411 U.S. 138, 142 (1973). "Supplementation of the administrative record is not allowed unless the moving party demonstrates 'unusual circumstances justifying a departure' from the general presumption that review is limited to the record compiled by the agency." *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (quoting *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)). Plaintiff has already attempted to demonstrate whether extra-record submissions may be properly considered in this case, and Judge Kay has reserved ruling on that issue for merits briefing. Thus, Plaintiff should not be allowed to add additional documentation through an "amicus curiae." The time for the Petitioner to submit his opinion as to the Army's actions and for the Army to consider that opinion was during the NEPA analysis, which included public scoping comments and a public comment period on the Environmental Assessment and draft Finding of No Significant Impact.

Petitioner failed to participate in either process. He should not be allowed to participate now by providing extra-record evidence. A plaintiff is not allowed to use extra-record evidence "to determine the correctness or wisdom of the agency's decision." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014) (quotation omitted); *see also Sierra Club v. Sigler*, 695 F.2d 957, 977 (5th Cir. 1983) (citation omitted). Likewise, an amicus should not be able to engage in inappropriate, post hoc second-guessing of the agency's compliance with NEPA and the NHPA.

Without any supporting case law, Petitioner alleges that "[a]micus curiae briefs are particularly valuable . . . where the completeness of a federal agency's analysis is at issue." ECF

No. 72-1 at 2. However, the issue raised by Petitioner is one that was already considered by the Army, and Petitioner fails to show that the Army's analysis was incomplete. Without having visited Fort Polk or personally examined any of the trespass horses, Sponenberg speculates that based on some photographs he was shown "some of the horses at Fort Polk are indeed of the Choctaw strain and Colonial Spanish type." ECF No. 72-1 at 3; ECF No. 72-3 ¶ 2. But, even assuming that this allegation was credible, the Army considered the origins of the horses in its analysis. In identical public comments, several individuals refer to the horses being "smaller Spanish type," and one commenter specifically stated that the "horses date back to the Spanish, Native Americans and Cavalry Horses." JRTC-B-000890, -896, -898, -901, -937, -940. The Army directly responded that "[t]here is no reputable evidence that the horses present on Fort Polk today are part of a non-livestock herd that has been wild and free roaming since the times referenced in this comment." JRTC-B-000940. Based on the arbitrary and capricious standard of review for an APA case, there is no basis to find that the Army reached the wrong decision or that Petitioner's brief would aid the Court in deciding the issues in this case.

Petitioner also cites cases concerning the Bureau of Land Management's horse management decisions under the Wild Horse Act to argue that he will provide information that the Army should have considered. ECF No. 72-1 at 4. However, those cases are inapplicable here. As already discussed, these horses are not wild horses. As such, the Army is not required to manage and maintain these trespass horses at Fort Polk.

III. Petitioner Is Not Providing New Information.

Lastly, Petitioner's brief should be rejected because he raises the same issues that have already been raised by Plaintiff. Petitioner alleges that he "presents . . . an entirely new facet of the Plaintiff's case." ECF No. 72 at 1. Not so. Petitioner argues that the Army failed to comply

with NEPA because it did not consider the impact on a type of horse and failed to comply with the NHPA because it did not consider the horses as historic objects. These are nearly identical to the arguments already advanced by Plaintiff and that Plaintiff will likely continue to make. Plaintiff even provided a statement from Petitioner in support of its motion for preliminary injunction. *See* ECF No. 43-9. This statement set forth the same contention about the possible origin of some of the horses and the concern for preserving this strain. *Id*.

In *United States v. Gotti*, the district court found that the petitioner did not seek to come as "a friend of the court" providing the court with "an objective, dispassionate, neutral discussion of the issues" but "as an advocate for one side." 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991) (denying leave to file an amicus brief). "In doing so, it does the court, itself and fundamental notions of fairness a disservice." *Id*. Dr. Sponenberg is not providing an objective discussion but is repeating the arguments Plaintiff has already made. Likewise, his request for leave should be denied.

CONCLUSION

Petitioner's interest and assertions in his brief are speculative and focus on a key factual issue that has already been determined by the Fifth Circuit, making his brief irrelevant and not likely to be useful to this Court. Even more, Petitioner is merely duplicating the Plaintiff's arguments, which is contrary to the purpose of an amicus. For these reasons, Petitioner's request for leave to file an amicus brief should be denied.

Respectfully submitted, this 4th day of May, 2018,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division

s/ Davené D. Walker
Davené D. Walker, Trial Attorney

U.S. Department of Justice
Natural Resources Section
P. O. Box 7611
Washington, DC 20044-7611
Telephone: (202) 353-9213
Facsimile: (202) 305-0506
Email: davene.walker@usdoj.gov

ALEXANDER C. VAN HOOK
ACTING UNITED STATES ATTORNEY

s/ Desiree Williams-Auzenne
DESIREE WILLIAMS-AUZENNE (#30978)
Assistant United States Attorney
800 Lafayette Street, Suite 2200
Lafayette, Louisiana 70501
Telephone: (337) 262-6618
Facsimile: (337) 262-6693
Email: desiree.williams@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, a copy of the foregoing *Federal Defendants' Memorandum in Opposition to Motion for Leave to File Amicus Curiae* was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system. I also certify that according to the Court's Mailing Information, there are no manual recipients.

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