

**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

**Plaintiff's Reply to Defendants' Opposition to
Objections to Magistrate Judge's Report and Recommendations**

I. Introduction

Plaintiffs must file written objections to any conclusions or factual statements contained in a Report and Recommendation or they are barred from "attacking either the factual findings or the legal conclusion accepted by the District Court." ECF No. 67. Pegasus objected to correct the legal standard and clarify imprecise factual statements. It is important to Pegasus that any judgment in this case be accurate. In response to Pegasus's objections and clarifications, the Government Defendants replied with unclear arguments and some misrepresentations of what is actually contained in its own administrative record.

II. The Report and Recommendation mistakenly applied the wrong legal standard for irreparable harm.

The Court's mistaken reliance on standing law in footnote 6 caused the Court to apply this incorrect standard. Neither the Supreme Court of the United States nor the United States Court of Appeals for the Fifth Circuit have stated that an organization suffers irreparable harm only if its *members* suffer irreparable harm. Such injuries can be *one* form of harm. But an

organization may also have other legally cognizable interests. Here, Pegasus has an interest in “protecting wild and free roaming equines at the Fort Polk Military Installation, and Kisatchie National Forest.” As part of that mission, Pegasus also has an interest in ensuring that the government makes well-informed decisions impacting the horses and their environment by enforcing compliance with both the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). Because the Court applied the wrong standard, it did not consider these interests or any harm to these interests.

The Defendants argue that plaintiffs are not entitled to a “presumption of harm simply because a claim involves an environmental statute.” Opp. 3, ECF No. 71. Pegasus in fact made a similar, though more nuanced, argument in its Objections. Mem. Objections 2-9, ECF No. 68-1. However, as Pegasus pointed out, “recognizing [] the nature of NEPA means recognizing harm in the context of the statute’s purpose – to prevent harmful uninformed government decision making – in order to prevent plaintiffs from being stopped at the threshold when seeking to enjoin actions in violation of NEPA.” Mem. Objections 5-6, ECF No. 68-1. The same logic applies to Pegasus’ National Historic Preservation Act claims.

III. Pegasus proved irreparable harm.

Under the correct legal standard, Pegasus has demonstrated irreparable harm. Defendants state that “Plaintiff’s argument about the smaller subset of” historic and Choctaw horses “is mere speculation.” Opp. 5, ECF No.71. But this is wrong for two reasons. First, Pegasus presented evidence that historic and Choctaw horses are likely to be present and this issue is important (see, e.g., ECF Nos. 43-8 and 43-9), and the Army has presented no evidence that any procedures are in place to prevent them from being eliminated. Second, the standard is that the applicant is “likely” to suffer harm, not “certain” to suffer harm, *Winter v. NRDC*, 555 U.S. 7, 21-22 (2008).

The evidence supports a finding that the Army's uninformed decisionmaking has led to a program where the Army and its contractors are now taking actions *likely* to harm these small historic horse groups. The Army has not done any baseline analysis, and could easily sweep up an entire family group with rare historic blood lines and lose this limited public resource.

Defendants also claim that, "Plaintiff also failed to prove harm to the horses. There is no legal basis for the horses to remain at Fort Polk." Opp. 5, ECF No.71. First, the record is replete with evidence of harm to the Fort Polk horses. Second, the Defendants phrase their statement in such a way that it sounds like the horses, themselves, have to prove they have a right to stay. In fact, the horses have been on that land longer than the Army base itself, and if the Army were to conduct a proper NEPA and NHPA analysis, it should evaluate whether there are good environmental, historic, and cultural reasons to keep horses at Fort Polk.¹

IV. There is no evidence that there is over-grazing or lack of forage at Fort Polk.

Here, Plaintiff seeks to clarify that unsupported statements made by the Army cannot be taken as fact. The Army did not have any experts make a site-specific determination of whether there is over-grazing or lack of forage. The Defendants argue that Pegasus relies on a logical fallacy: "*some* of the horses inherently does not apply to *all* of the horses." Opp. 6, ECF No.71. But to make this argument, the Defendants simultaneously rely on a false dichotomy that because *some* of the horses are malnourished, *at least* some of those *must* be malnourished *due to* inadequate forage. *Id.* Plaintiff is simply pointing out that there is no evidence in the record,

¹ Furthermore, the Defendants' claim that "Plaintiff just disagrees with the results," is not only trivializing and dismissive, but also unsupported by both the evidence presented to this Court and the Defendants' own administrative record. Plaintiff demonstrated major failures in the Army's NEPA process and its failure to do the NHPA Section 106 process. Defendants offer no evidence for their erroneous claim that the government met the NEPA requirements "to assure that when Government officials consider taking action that may affect the environment, they do so fully aware of the relevant environmental considerations." Opp. 6, ECF No.71 (citation omitted). Therefore, Pegasus reasserts that it proved irreparable harm.

outside of one unsupported assumption in the Army's EA, that any horses are malnourished *because of inadequate forage.*²

V. There is no evidence that any free-roaming horses carry infectious diseases.

Defendants erroneously claim that Pegasus failed to “look [] 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 disease.” Opp. 7, ECF No. 71. Conveniently, this argument ignores another statement in the Army's EA that “Horse health is not the primary basis of our stated need...” JRTC-G-000067. Pegasus read both of these statements in the EA, and also looked at the related source documents in the administrative record and cited to them in the pleadings, including in the objections. Mem. Objections 12-13, ECF No. 68-1. Pegasus wants to make sure the record of decision is as accurate as possible. The Army's capture methods *may* have caused the spread of infectious diseases: the only evidence of disease coming from any horses associated with Fort Polk was found in horses *after* they experienced prolonged exposure to the Army's contractors care or other domestic situations. There is strong evidence indicating that a disease, possibly strangles, came from the Army's contractor while in the Army's custody. Veterinary expert Dr. Batt testified that “Strangles is a bacterial infection. It's usually most commonly occurring in my practice in horses that come from kill pens, from rescues, horses that face a lot of stress and crowding...” Transcript 88, ECF No. 62. Here, fact and expert evidence indicates that it is highly likely that the horses in 2017-18

² Defendants further try to support this “argument” by referencing photographs of malnourished horses in the administrative record (while discounting Plaintiff's photos). However, some of the photographed horses are injured, which is a possible cause of malnourishment. Additionally, it is uncontested that *some* horses are dumped illegally by their owners on Fort Polk. The malnourished horses could have been recently dumped, another possible reason for malnourishment. The fact of the matter is, there is no evidence in the record of how or why any particular free-roaming horses were malnourished. Therefore, there is no basis to determine that any free-roaming horses on Fort Polk are malnourished because of inadequate forage. And Pegasus argued in ECF 64 that horses *that had been in the Army's care for some weeks* were emaciated. This is plainly a different issue than lack of forage.

caught any contagion while in the Army's contractor's custody. In the meantime, there is no evidence that any Fort Polk horse was infected with any contagious disease at the time it was initially captured. Pegasus had hoped the evidence brought to light in the Partial Preliminary Injunction Hearing would improve the Army's practices and the horses' conditions.

Nevertheless, Pegasus reasserts that, unless the Army changes its procedures, the Army's round-ups are likely to spread infectious diseases to the horses.

VI. Due to inconsistencies in the record it is inappropriate to accept the Army's estimate of 700 horses.

Here, Plaintiff is simply calling attention to how the EA gives conflicting estimates of the number of horses. Based on Army tables 3.1 and 3.2 (change and growth of horse population) in the EA, the Army's estimates show the population has been stable since 2009; therefore, it is reasonable to conclude that a reduction in herd size will not be offset by reproduction. JRTC-B-000085. Furthermore, in 2015, the Army did a fly-over which resulted in "238 horses counted on main post and 149 on Peason Ridge [totaling 387 horses]." JRTC-C-000052. Additionally, in the Defense's own footnote, the Army's own Aerial count produced 402 horses. ECF No. 71 at 8. That is an increase of fifteen horses in one year. Should we be expected to believe that an additional 298 horses were either unaccounted for or born or dumped between the fly-over and the time the EA was published? And that horses have continued to replenish at the exact same rate that the Army has been removing them? The Army has no support for this exaggerated number. Therefore, because of so many conflicting reports in the administrative record, Plaintiff reasserts it is improper to accept as fact a current horse count totals 700.

VII. Pegasus wants the record to be clear about its concession on the scope of the Army's program.

Pegasus wants the record to be accurate about what it has conceded. Pegasus does not represent or control the Army, cannot concede anything on behalf of the Army, and cannot read the Army's mind or predict the future. Pegasus conceded that *the Army says* that it will limit its program to only Army-owned land. *See* Objections 17, ECF No. 68-1. In its motion in opposition, the Defendants stated that "Plaintiff, in fact, conceded that the Army's project would be carried out only on Army-owned land. ECF No. 71 at 9. This is not only inaccurate, but it demonstrates the Defendants' insistence on inaccuracy. Pegasus certainly hopes the Army will stick to its word and limit the program to Army-owned land, but it is simply outside of Pegasus's power to control the Army on this issue.

VIII. Conclusion

For these reasons, this Court should correct the legal standards, conclusions, and facts described in the Plaintiff's Objections to Magistrate Judge's Report and Recommendations, ECF No. 68.

Respectfully submitted on May 3, 2018

s/ Machel R. Lee Hall

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Certificate of Service

I hereby certify that on May 4, 2018, this pleading was filed and transmitted to all counsel of record via the Court's CM/ECF electronic filing system.

s/ Machellee R. Lee Hall

Machellee R. Lee Hall