UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA

PEGASUS EQUINE GUARDIAN ASSOCIATION,

Plaintiff

v.

U.S. ARMY and BRIGADIER GENERAL PATRICK D. FRANK, in his official capacity as Commanding General, JRTC and Fort Polk, Louisiana,

Defendants.

Division: Lake Charles

Case No.: 2:17-CV-00980

Judge: Robert R. Summerhays

Magistrate Judge: Kathleen Kay

FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff here challenges a decision of Federal Defendants, the United States Army and the Commanding General of Fort Polk and the Joint Readiness Training Center ("JRTC"), concerning how to remove the hundreds of trespass horses on the Army's property. According to Plaintiff, Federal Defendants have not complied with two procedural statutes: the National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"). Much of Plaintiff's brief, however, focuses on the wrong subject. This case is not about the origin of the trespass horses. Nor is it about the Wild Free-Roaming Horses and Burros Act ("Wild Horses Act"). Rather, the Court should reject Plaintiff's claims because the administrative record establishes that the Federal Defendants complied with the relevant procedural requirements of NEPA and the NHPA.

Fort Polk and the JRTC's mission is to train the U.S. military's most tactically skilled units to "deploy, fight, and win." JRTC-B-000051. In addition to hosting thousands of rotational personnel present for training, Fort Polk is also the home-station for other units, dependent families, and civilian personnel. JRTC-B-000051-52. As documented in the Army's 2016 environmental assessment ("EA"), the large trespass horse population at Fort Polk impedes JRTC's training mission and endangers the safety of Fort Polk's residents. The horses themselves also face dangers unique to active military operations. JRTC-B-000054-57, 000157-191, JRTC-B-000057, JRTC-B-000825-846. Based on these concerns, Fort Polk elected to remove these trespass horses – primarily through adoption by 501(c)(3) organizations – in a 2016 decision. JRTC-A-000001-000006, JRTC-B-000084-129.

The Army properly engaged the public, considered environmental effects, and examined a host of alternatives throughout this process. Although Plaintiff disagrees with the substantive

decision to remove the trespass horses, Fort Polk followed the procedural commands of NEPA and the NHPA during its decision-making, and the resulting choices are rationally-based on evidence contained in the administrative record. Because the Army's actions were not arbitrary, capricious, or an abuse of discretion, Federal Defendants are entitled to summary judgment as a matter of law.

STATUTORY BACKGROUND

I. The National Environmental Policy Act

The purpose of NEPA, 42 U.S.C. §§ 4321-4370m-12 is to focus the attention of the government and the public on the likely environmental consequences of a proposed action before that action is implemented. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). This process ensures that agencies take a "hard look" at potential environmental consequences before approving any major federal action. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). It is well-settled, however, that NEPA is essentially a procedural statute and does not impose substantive requirements. *Marsh*, 490 U.S. at 371 (stating that "NEPA does not work by mandating that agencies achieve particular substantive environmental results"). *See also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228 (1980); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F. 3d. 754, 758 (9th Cir. 1996).

Under NEPA, regulations promulgated by the Council on Environmental Quality (CEQ), 40 C.F.R. §§ 1500-1508, provide guidance on the Act's implementation and are entitled to substantial deference. *Robertson*, 490 U.S. at 333-34. The CEQ regulations further provide that agencies adopt procedures to supplement the CEQ's guidance. 40 C.F.R. § 1507.3. The Army's supplementation is found at 32 C.F.R. part 651. Within this regulatory framework, one of the threshold determinations an agency must make is whether to prepare an environmental impact

statement (EIS). 40 C.F.R. § 1501.4. If the environmental effects of an action are uncertain, regulations allow an agency to prepare an EA. 40 C.F.R. § 1501.4(b). In contrast to an EIS, an EA is a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether" the action will have a "significant" effect on the environment. 40 C.F.R. § 1508.9. If an agency determines that the effects of an action will not be environmentally significant, it may issue a finding of no significant impact ("FONSI") in lieu of preparing an EIS. 40 C.F.R. § 1508.13. Further, "[a]n agency's decision not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 763 (2004) (quoting 5 U.S.C. § 706(2)(A)).

II. The National Historic Preservation Act

In the same vein as NEPA, the National Historic Preservation Act ("NHPA") also imposes procedural – not substantive – requirements on agencies. *Coliseum Square Ass'n v. Jackson*, 465 F.3d. 215, 225 (5th Cir. 2006). "[S]ection 106 upholds the NHPA's objections 'neither by forbidding the destruction of historic sites nor by commanding their preservation, but instead by ordering the government to take into account the effect any federal undertaking might have on them'." *Id*. (citing *United States v. 162.20 Acres of Land*, 639 F.2d. 299, 302 (5th Cir. 1981)).

Prior to approving an undertaking – that is, "a project" "requiring a Federal permit, license or approval," 54 U.S.C. § 300320, 36 C.F.R. § 800.16(y) – the NHPA requires an agency to identify historic properties that are eligible for National Register listing, assess the undertaking's effects on those properties, and avoid or mitigate adverse effects. 54 U.S.C. §§ 306108, 300320; 36 C.F.R. §§ 800.4, 800.6. The regulations may require an agency to

consult with the state historic preservation officer, tribes, interested parties, and the Advisory Council on Historic Preservation. 54 U.S.C. § 306108; 36 C.F.R. §§ 800.2, 800.6(a). This process, described in 36 C.F.R. § 800.3-6, is colloquially referred to as a "Section 106" consultation.

STANDARD OF REVIEW

Plaintiff challenges the Army's actions under the NEPA and NHPA pursuant to the Administrative Procedure Act (the "APA"), 5 U.S.C. §§ 701-706, which governs judicial review of final agency actions. The Army's challenged decision to remove trespass horses from Fort Polk and JRTC training areas is a final agency action reviewable under the APA. The APA confines the scope of this review to the administrative record and materials considered by the agency at the time the decision was made. Thus, the court's 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). Rather, the reviewing court must affirm an informal agency action unless that action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). *See, e.g.*, *Marsh*, 490 U.S. at 376; *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 413 (1971) *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Sierra Club v. Glickman*, 67 F.3d. 90, 96 (5th Cir. 1995).

The arbitrary and capricious standard is also an "exceedingly deferential" standard of review. *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 541 (11th Cir. 1996). Thus, the relevant question for the court is simply whether the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 981 (9th Cir. 1985) (quoting, *Balt. Gas & Elec.*

Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 105 (1983)). Because "an agency decision is entitled to some presumption of regularity," *Preston v. Heckler*, 734 F.2d 1359, 1372 (9th Cir. 1984) (citing *Overton Park*, 401 U.S. at 415-17), especially when the challenged decision implicates substantial agency expertise, *Marsh*, 490 U.S. at 378, the court's role is to determine whether there is a "rational connection between the facts found and the choice made." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 981 (9th Cir. 1985), quoting, *Balt. Gas & Elec. Co.*, 462 U.S. at 105. A court is not to engage in substantive review of the action and an agency's decision "need only be reasonable, not the best or most reasonable decision." *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989).

FACTUAL BACKGROUND

I. Prior Litigation

In 2000, the Coalition of Louisiana Animal Advocates ("COLAA") filed suit in the Eastern District of Louisiana to challenge the Army Corps of Engineers' September 1999 final report, "Protection of Restored Lands (Capture and Removal of Trespass Horses)." JRTC-B-000142-143, JRTC-E-002980-3139. The report discussed problems at Fort Polk with horses trespassing on training grounds and options for dealing with these problems. JRTC-B-000143. Based on that report and additional information from the U.S. Forest Service, the Army completed a record of environmental consideration ("REC") concerning trespass horse removal. JRTC-E-003524-3560. After summary judgment briefing, the district court found that the horses were "trespass horses that have roamed from adjacent ranches and farm areas onto military and Forest Service lands." JRTC-B-000148. The court also held that there was no evidence supporting that the horses were "wild horses" within the meaning of the Wild Horse Act, 16 U.S.C. §§ 1331-1340, or that the decision to remove these trespass horses was arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with the law.[1] JRTC-B-000148-149. Although a separate settlement was reached with COLAA, the Fifth Circuit affirmed the decision that the Wild Horse Act did not apply to these horses. JRTC-B-000156.

II. The Most Recent NEPA Process

On August 8, 2016, Major General Gary Brito, commanding general of Fort Polk, LA and JRTC, signed a FONSI concerning the removal of trespass horses on Fort Polk, LA. JRTC-A-00007. The FONSI followed a draft EA published in April 2016, titled "Final Environmental Assessment for the Elimination of Trespass Horses on Fort Polk, Louisiana." JRTC-B-000038. The purpose of that EA was to analyze the "proposed action to eliminate the trespass horses" as a means to "reduce the safety risks, training impacts, and threats to the health of the horses posed by their presence on Fort Polk, Louisiana." JRTC-B-000054.

As stated in the EA, Fort Polk's primary mission is to support home-stationed units and operate the JRTC. JRTC-B-000051. The JRTC, as one of the U.S. Army's Combat Training Centers, supports 10-12 annual training events for the U.S. Army's light infantry, airborne, and air assault forces. *Id*. With the goal of simulating conditions for low and medium intensity conflicts, the JRTC also supports the U.S. Navy, U.S. Air Force, and U.S. Marine Corps in preparation for joint operations. *Id*. Key components in many training events include airborne (parachutist) operations and flight operations. JRTC-B-000100. To enable these events, the training areas on Fort Polk include drop zones and airstrips. JRTC-B-000054.

[1] The district court in *COLAA v. USDA* also determined that the extra-record material submitted by COLAA was not properly before the court as it was outside of the administrative record. JRTC-B-000148-149. In doing so, the court noted that "even if the Declarants indicated personal knowledge or expertise sufficient to demonstrate that the subject horses are 'wild horses' under the Wild Horses Act . . . Plaintiff would still not meet its burden under the APA to show that Defendants' contrary conclusion was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." JRTC-B-000150.

Training at Fort Polk is conducted primarily on the Main Post and Peason Ridge. JRTC-B-000052. In order to improve the training experience to meet the Army's needs, the purchase of new lands was initiated in 2012, which has increased the size of Peason Ridge. JRTC-B-000052, JRTC-E-003906. Additionally, the JRTC also uses lands owned by the U.S. Forest Service under a separate permit. JRTC-B-000052. Although the Army uses such lands in the Kisatchie National Forest, the EA and the challenged decision specifically apply only to Army-owned lands. JRTC-B-000054.

An increasing number of "trespass horses" populate this training area. JRTC-B-000085, -146, JRTC-E-00298, -3140-3205. Prior to the late 1980s, Louisiana had open-stock laws, which meant that livestock was allowed to run in open range. JRTC-B-000084. In 1966, the Army began attempting to remove livestock from Fort Polk, and by the mid-1908s, it had succeeded in removing all cattle. JRTC-B-000085. By 1993, the Army had removed all but approximately 39 horses and returned them to local ranchers, who claimed ownership. *Id*. Since 1993, the population of these horses on Fort Polk lands has increased to several hundred. JRTC-E-003140–3199. The efforts to capture and remove the livestock ceased with the filing of the *COLAA* litigation; since then, the population of trespass horses has increased substantially. JRTC-B-000139-156, JRTC-E-003140-3205. Fort Polk is also aware of owners abandoning horses in the training areas through admissions on social media and brands observed on trespass horses photographed on the installation. JRTC-B-000847-850, JRTC-H-000013.

By their presence, these horses have impeded training events. JRTC-B-000055, -181-191, JRTC-F-000082, -98-259. Often congregating on the drop zones, they pose a danger to troops conducting airborne operations. JRTC-B-000055, JRTC-F-000082. On one occasion, flight operations were cancelled because of manure littering the airstrip and preventing aircraft

from being able to land safely. JRTC-B-000181-191. Additionally, their presence on local roadways has caused numerous accidents for motorists on Fort Polk property and on surrounding, state-maintained roadways. JRTC-F-000004-72, -98-259. Further, these horses also migrate into the Fort Polk cantonment area during cooler months and can be found on roadways, in office parking lots, near child care facilities, and throughout housing areas, which include children's play areas. JRTC-B-000038, -56, -157-180, JRTC-F-000098-259. In addition to potential safety concerns posed by their presence, horse manure can often be found in these same areas. JRTC-B-000059, JRTC-F-000098-259.

In addition to health and safety concerns to humans, Fort Polk's training area is also inhospitable to horses. JRTC-F-000073-259. Due to the presence of concertina wire, trenches, and other man-made obstacles, horses are severely injured or killed as a result of the training area's features. JRTC-B-000086. Live fire and nighttime operations with heavy equipment further endanger their safety. JRTC-B-000847, JRTC-H-000001–226. Additionally, the relatively poor amount of forage available for these animals has left many malnourished. JRTC-B-000112.

Due to these concerns, Fort Polk attempted to address the problem through several measures. In addition to the REC at issue in *COLAA*, Fort Polk conducted a 2010 EA, issued a FONSI, and elected sterilization as a method to reduce and eliminate the trespass horse population. JRTC-E-003561-3895. Further, Fort Polk completed a separate 2010 REC that created a public capture program. JRTC-E-003896-3899. Acknowledging that Fort Polk does not own the trespass horse population that migrates across its lands, this method allowed the public to capture up to two horses per month, which could include abandoned or escaped livestock. *Id*. Ultimately, neither the sterilization efforts nor the public capture program

succeeded in reducing the horse population on Fort Polk lands. JRTC-E-003140-3205. As a result, Fort Polk began preparing the challenged EA in 2015. JRTC-G-000001-17.

For the current EA, Fort Polk actively solicited public participation. For the initial scoping phase, Fort Polk published a "Notice of Intent to Conduct and Environmental Assessment for Proposed Action to Eliminate Trespass Horses at Fort, Polk, LA," in various newspapers across the State of Louisiana and on its website. JRTC-B-000234-824, JRTC-C-000041-43. Additionally, Fort Polk also held a public forum concerning the proposed project on August 13, 2015. JRTC-B-000062, JRTC-C-000044. Based on its public engagement, Fort Polk received and considered over 700 comments during the scoping period running from August 2, 2015, to September 5, 2015. JRTC-B-000062, -234-824. The comments were briefed to the commanding general during staff meetings. JRTC-G-000030-51.

Although some comments did not provide input concerning horse removal, all suggestions offered by the public were considered. JRTC-B-000063, -234-824. These suggestions included (1) adoption, (2) fencing, (3) sterilization, (4) relocation, (5) sale (6) give away, (7) use as service or therapy animals, (8) euthanization, (9) training and exhibition, and (10) use in prison rehabilitation programs. *Id*. These suggestions were considered against the following criteria: (1) training impact, (2) safety, (3) environmental impact, (4) public perception, (5) cost, and (6) time. JRTC-B-000064. After applying these criteria, use as service animals, train and exhibition, prison rehabilitation programs, and additional fencing were not carried forward for detailed analysis in the EA. JRTC-B-000066-72. Additionally, sterilization was not carried forward for detailed analysis because it was the subject of the 2010 EA. *Id*. Of particular note, studies for a fencing solution indicated initial costs in excess of $23 million with additional annual maintenance costs. JRTC-B-000069 and JRTC-E-003339-3426.

Of the remaining suggestions, each was studied and analyzed as an alternative, referred to as course of action or "COA" in the EA. JRTC-B-000072–83. COA 1 was the "no-action" alternative and included continuation of the existing sterilization and public capture methods. JRTC-B-000073. The remaining COAs all incorporated adoption, relocation, sale, give away, or euthanization in their approaches. JRTC-B-000072-83. Most of these approaches focused on tiered or cyclic processes designed to encourage adoption, relocation, or sale, with euthanization as a last resort occurring months after initial capture. *Id*.

Following a review by Brigadier General Timothy McGuire, then commander of Fort Polk and JRTC, Fort Polk released the draft FONSI and EA for public comment on 4 May 2016. JRTC-A-000003. As with the Notice of Intent, the draft finding was advertised in various newspapers across the State of Louisiana and on Fort Polk's website. The documents themselves were made available at local libraries. JRTC-B-000001-138. Further, the public comment period was extended to ensure all public comments were received from persons encountering difficulties submitting emails. The public comment period ultimately lasted from May 4, 2016, to June 17, 2016. JRTC-A-000003 and JRTC-C-000039-40.

During this period, Fort Polk received over 180 public comments for review. JRTC-B-001044-1340. Some commenters, including those representing 501(c)(3) rescue organizations, expressed a willingness to adopt horses and were contacted by Fort Polk. *Id*. Additional commenters noted that the horses may descend from Army cavalry horses, a claim previously evaluated by an Army historian. *Id*.; JRTC-E-003206-3209. Other commenters inquired about the application of the Wild Horse Act, the issue previously decided in *COLAA*. JRTC-B-000148, -1044-1340. Additional commenters focused on the adoption process and expressed concern for the timeline. JRTC-B-001044-1340 and JRTC-A-000003.

In response to these comments, Fort Polk extended the adoption timeline to better accommodate 501(c)(3) organizations. JRTC-A-000004-5. With these revisions, trespass horses were to be captured in small lots and first offered to 501(c)(3) organizations. *Id*. Based on public comments, all 501(c)(3) organizations would be notified when a capture occurred and given three working days to respond to the notification. *Id*. Previously, Fort Polk planned to notify the first 501(c)(3) on a list and proceed sequentially with a 48-hour deadline for each response. *Id*. Additionally, Fort Polk also modified the EA to prevent automatic removal from the adopter list for failure to meet a deadline. *Id*. Under the modified EA, Fort Polk retained discretion to remove adoptive organizations if necessary. *Id*. Fort Polk additionally provided instructions and information on its website for interested rescue organizations. JRTC-A-000023, JRTC-E-04595. Likewise, Fort Polk maintains a list of members of the general public ("give away" list), who asked to be given horses that are not taken by the 501(c)(3) organizations, along with instructions on how to be placed on the list. JRTC-A-000023, JRTC-E-04597.

Following these modifications, Fort Polk selected COA 7 as its chosen alternative on August 8, 2016. JRTC-A-000006. As stated above, this COA creates a cyclical process centered on small lot capture and initial offer to 501(c)(3) organizations. JRTC-A-000002-6. Under this COA, if trespass horses are not taken by a 501(c)(3) organization, they are then offered to the members of the general public on the "give away" list. *Id*. Any remaining trespass horses would then be transported to a livestock facility for sale or combined with the next capture to cycle through the process again. *Id*. COA 7 also stated the Army's willingness to move the entire population if an entity expressed willingness. *Id*. In making the choice, Major General Brito noted that COA 7 offered the best opportunity for the horses to be adopted by rescue organizations while efficiently reducing the safety risk to troops and horses in the

training areas. JRTC-A-000006. The signed FONSI with COA selection was then published and made available to the public. JRTC-A-000001-51.

ARGUMENT

I. The Army Complied With The National Historic Preservation Act.

A plain reading of the NHPA and its implementing regulations supports the Army's position that it appropriately applied the statute here. When considering the full administrative record at issue, Plaintiff does not – and cannot - demonstrate that the Army's "[n]o potential to cause effects" determination under 36 C.F.R. § 800.3(a)(1) was arbitrary or capricious. Plaintiff's other arguments fail because they are built entirely on a strained interpretation of the distinguishable case, *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082 (N.D. Cal. 2008), and completely ignore the prior decision of the Eastern District of Louisiana concerning the status of these horses. JRTC-B-000139-156. The Army reasonably relied on that district court's holding – and the Fifth Circuit's affirmation – that these animals are "trespass horses that have roamed from adjacent ranches and farm areas" onto Fort Polk lands. JRTC-B-000148. Viewed against this backdrop, Plaintiff's statement that the Army lacks any "valid basis for its decision" under the NHPA cannot stand. ECF No. 97-1 at 26.

As referenced above, an "undertaking" under 36 C.F.R. § 800.16(y) leads to the initiation of the Section 106 process. 36 C.F.R. part 800. Section 106 may require an agency to identify historic properties, to assess potential impacts, and/or to consult with various listed groups. *Id*. As a threshold matter, however, the regulations provide that "if the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such historic properties were present, the agency has no further obligations under section 106 or this part." 36 C.F.R. § 800.3(a)(1). As the Army determined that this project was such an activity, further procedural steps in the Section 106 process were unnecessary. The Army clearly

articulated this determination during the public comment phase of the NEPA process. JRTC-B-000855. Although not specifically citing the NHPA, the Army also directly conveyed to the public its reliance on the origin of the trespass horses, which was determined in the *COLAA* litigation. JRTC-B-000242-263.

Plaintiff argues that the Army acted improperly under the NHPA and that additional consideration is required because (1) the administrative record contains "scant" references to historic properties, and (2) this determination allows an agency to "circumvent any NHPA obligation." ECF No. 97-1, 21-26. A review of the administrative record, however, fails to support either of Plaintiff's contentions. The administrative record contains Fort Polk's existing procedures to conduct cultural resource surveys and their identification of historic properties potentially covered by the NHPA. JRTC-E-000001-2979. Given these documents – particularly the 2012 Integrated Cultural Resources Management Plan and the 1999 Historic Preservation Plan – the Army was well informed about historic and cultural properties on the installation. Considering the breadth of this documentation, the Army's decision cannot casually be dismissed as "turning a blind eye." ECF No. 97-1, 26.

Plaintiff's real contention, however, is not the Army's treatment of identified and catalogued historic properties, but that the Army did not consider the trespass horses as historic property. In support, one of Plaintiff's primary arguments is that "[a]nimals can be protected under the NHPA." ECF No. 97-1, 16. However, Plaintiff's argument is not supported by law, regulation, or prior decisions.

Under 36 C.F.R. § 800.16(l)(1), an historic property is defined as "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior." *Id*. The

criteria for the National Register is further established by the Secretary of the Interior and is found at 36 C.F.R. § 60.4, which states:

> 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 to prehistory or history.

Based on a plain reading, there is nothing on the face of these criteria that applies to a transient, living animal, especially when any historic significance has been rebutted.

Plaintiff's novel argument for considering Fort Polk as a cultural landscape, that includes the horses as "wildlife or domestic animals therein," is misplaced. *Id*. at 11-12. As referenced in the administrative record and *COLAA* litigation, there was no evidence that the population of these animals is a historic fixture of this area. Although domesticated animals once roamed under Louisiana open range laws, the U.S. Forest Service stated that the area was "trespass horse free" in the 1980s. JRTC-E-003549-50. As documented in the EA, their presence now is due to the end of open grazing, the cessation of capture efforts with the *COLAA* litigation, further abandonment, and unrestrained breeding. JRTC-B-000084-85. Plaintiff provides no evidence that hundreds of trespass horses are a historic component of this area. Neither does Plaintiff cite any case law supporting this assertion that animals can constitute a part of a cultural landscape that is protected under the NHPA.

Plaintiff's argument is also based on a selective reading of *Okinawa Dugong v. Gates*. The facts and holding in *Gates*, however, and the related litigation of *Okinawa Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106 (N.D. Cal. Mar. 2, 2005), are readily distinguishable from this litigation. In those cases, the NHPA's applicability turned on international treaty obligations and the Japanese government's determination that the dugong was a "national monument" under the "Japanese Register of Cultural Properties." *Rumsfeld*, 2005 WL 522106, at *6-7. On the "narrow issue" of the dugong's status, the Northern District of California thus held that the NHPA applied to a Department of Defense's undertaking *because* the dugong was protected under "Japan's equivalent of a National Register." *Gates*, 543 F. Supp. 2d at 1086. That court necessarily did not reach the issue of whether a domestic, living animal could qualify as a historic object under the NHPA. And Plaintiff cites no case where a court has done so.

The *COLAA* decision does bear on this matter, though Plaintiff fails to mention it. As previously discussed, Fort Polk considered trespass horse removal under a 1999 REC. JRTC-E-003524-3560. That REC relied, in part, on an Army Corps of Engineers report that concluded the horse population on Kisatchie National Forest and Fort Polk lands was not covered by the Wild Horse Act and was a potential repository for equine disease.[2] JRTC-E-002980-3139. In response to COLAA's challenge, the district court ruled that the administrative record "supports

[2] Under 36 C.F.R. § 222.61(a)(3), the U.S. Forest Service is charged with establishing wild horse territories "where it is determined that horses and/or burros will be recognized as part of the natural system." 36 C.F.R. § 222.61(a)(3). In the administrative record, a letter from Department of Agriculture is included detailing the Forest Service's position on these horses. It states that there is "no record of any horses, other than trespass horses" on the Kisatchie National Forest. It further states that "Louisiana has a history of open range" and that "[r]ecords indicate in the early 1980s the forest was considered trespass horse free." JRTC-E-003549-50. As stated in the EA, the trespass horses are also present on nearby USFS land. JRTC-B-000073.

the agencies' determination that the subject horses are trespass horses that have roamed from adjacent ranches and farm areas onto military and Forest Service lands." JRTC-B-000148. The district court further stated that "[t]here is no competent, credible evidence that the horses are or were ever 'wild horses' within the meaning of the Wild Free Roaming Horses and Burros Act, or that the Defendant's decision to remove these horses, as trespass horses, was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." JRTC-B-000148-149. In addition to this decision, the challenged study and REC are both included in the administrative record for the instant action. JRTC-E-002980-3139, 3524-3560.

Although the *COLAA* decision directly concerned the Wild Horse Act, the consequences of the holding bear on the current case. The very purpose of the Wild Horse Act is to protect "living symbols of the historic and pioneer spirit." 16 U.S.C. § 1331. Under the Wild Horse Act, a "wild horse" is then defined as follows:

> Wild free-roaming horses and burros mean all unbranded and unclaimed horses and burros and their progeny that have used lands of the National Forest System on or after December 15, 1971, or do hereafter use these lands as all or part of their habitat, but does not include any horse or burro introduced onto the National Forest System on or after December 15, 1971, by accident, negligence, or willful disregard of private ownership. Unbranded, claimed horses and burros for which the claim is found to be erroneous, are also considered as wild and free-roaming if they meet the criteria above.

36 C.F.R. § 222.60(b)(13). Given these regulations and the decisions of the district court and Fifth Circuit, the issue of the origin of these horses should be precluded from further review.

In the *COLAA* litigation, the plaintiff necessarily challenged the Army's conclusion that these animals were introduced by "accident, negligence, or willful disregard of private ownership" under the Wild Horse Act. Now, Plaintiff makes the argument that the Army's decision will impact an "important historic resource," and that the Army failed to consider that these horses may "descend from Spanish Conquistadores, Los Adeas colony, pre-settlement

Indians, early 19th century settlers, Civil War military, and WW2 US Cavalry." ECF No. 97-1, 22. Plaintiff also labels these horses as "wild and free roaming" in its motion before the Court. ECF No. 97-1, 42. Not only did the Army consider the horses' origin again during the most current EA and found no basis to classify these horses as historic, but the Army also relied on the district court and Fifth Circuit decisions on this issue. *See, e.g.*, JRTC-E-003206-3229, JRTC-B-000851-1043.

The appropriateness of such reliance is supported by the related doctrines of collateral estoppel and *stare decisis*. Regarding *collateral estoppel*, our courts "ha[ve] long recognized that 'the determination of a question directly involved in one action is conclusive as to that question in a second suit.'" *B&B Hardware, Inc. v. Hargis Indus., Inc*., 135 S. Ct. 1293, 1301 (2015) (citing *Cromwell v. Cty. of Sac*, 94 U.S. 351, 354 (1877)). Further, issue preclusion "does not require complete identity of the parties," and "federal courts will bind a nonparty whose interests were represented adequately by a party in the original suit." *Meadows v. Chevron*, 782 F. Supp. 1189, 1193 (E.D. Tex. 1991) (citing *Willis v. Fournier*, 418 F. Supp. 265, 266 (M.D. Ga. 1976), *aff'd*, 537 F.2d 1142 (5th Cir. 1976)). In the *COLAA* litigation, the Army defended its action against animal advocates where the factual matter of the horses' origin was at stake. The issue was then fully litigated and necessary for the court to render a decision. *See e.g.*, *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 572 (5th Cir. 2005) (stating the elements of collateral estoppel). As that court necessarily found that these horses were introduced to Fort Polk by "accident, negligence, or willful disregard of private ownership," the Army justifiably relied on the resolution of that factual matter when evaluating the current project under the NHPA and NEPA. Although the factual conclusion may be "perhaps disputable," the agency's reliance on the court's decision cannot be "arbitrary or capricious." *Marsh*, 490 U.S. at 385.

Relatedly, the principle of *stare decisis* should further guide the Court concerning this issue. Broader than collateral estoppel, *Meadows*, 782 F. Supp. at 1192, this principle "promotes the evenhanded, predictable, and consistent development of legal principles." *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Further, it also saves a party the risk of endless relitigation of issues. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). Critical to the functioning of any agency, the Army must be able to rely on a court's prior decision under this doctrine. Given that the *COLAA* litigation settled the matter of the horses' origin, even if the court were inclined to find a procedural violation of the NHPA, there has been no prejudicial error because the trespass horses are not historic property. *See Sisseton-Wahpeton Oyate v. U.S. Corps of Eng'rs*, No. 3:11-CV-03026-RAL, 2016 WL 5478428, at *8 (D.S.D. Sept. 29, 2016).

II. The Army Complied With The National Environmental Policy Act.

As demonstrated in the administrative record, the Army also fully complied with the purpose and intent of NEPA. *Marsh*, 490 U.S. at 371 (stating that the purpose of NEPA is to focus the attention of the government and public on environmental consequences of a proposed action). In doing so, the Army necessarily considered a number of factors related to the project's purpose and the agency's need, solicited public involvement, and made a decision supported by the record. Plaintiff's sole focus, however, remains the trespass horses. Thus, Plaintiff's allegations not only concern matters settled by prior litigation, but also concern "a classic example of a factual dispute the resolution of which implicates substantial agency expertise." *Id.* at 377. Because the Army followed the purpose and intent of NEPA throughout this process, and can articulate a "rational connection between the facts found and the choice made," Plaintiff's

claims lack merit. *Nat. Res. Def. Council v. EPA*, 966 F.2d 1292, 1297 (9th Cir. 1992) (quoting *Sierra Pac. Indus. v. Lyng*, 866 F.2d 1099, 1105 (9th Cir. 1989)).

A. An EIS was not required.

Plaintiff's first assertion is that the Army violated NEPA by failing to prepare an EIS. As an initial matter, it bears repeating that an EIS is not the sole means for an agency to fulfill its obligations under NEPA. 40 C.F.R. § 1501.3. Rather, an agency may choose to proceed by conducting an EA to determine if an EIS is required. 40 C.F.R. §§ 1501.3-1501.4. At the conclusion of an EA, an agency then makes the determination of whether a proposed action will have significant environmental impacts. 40 C.F.R. § 1501.4. On this basis, it either proceeds further with an EIS or issues a FONSI. *Id*. The agency's decision "not to prepare an EIS can be set aside only upon a showing that it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Pub. Citizen*, 541 U.S. at 763 (quoting 5 U.S.C. § 706(2)(A)). Against such a standard, a plaintiff must submit detailed and conclusive evidence, not speculation. *Kleppe v. Sierra Club*, 427 U.S. 390, 412-14 (1976).

Here, Plaintiff relies on speculation and fails to demonstrate any abuse of discretion. Citing the Army's NEPA implementing regulation at 32 C.F.R. § 651.41, Plaintiff cites several factors for EIS preparation that carry no weight here. First, Plaintiff argues that 32 C.F.R. § 651.41(f) is applicable as there is risk that a "round-up" could occur at other installations. However, Plaintiff ignores that this EA applies only to Fort Polk and provides no evidence that other Army installations face similar challenges with trespass horses. *See, e.g.*, *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1140 (9th Cir. 2011).

Second, Plaintiff references 32 C.F.R. § 651.41(i) and states that the "highly controversial" nature of the project warrants EIS scrutiny. This regulation identifies a number of

factors for the agency to consider when deciding if an EIS is necessary. As Plaintiff's standard would render any EA null, courts have interpreted this regulation narrowly and found that Plaintiff's view would result in an EIS for all projects as "public outcry and emotion, 'not the reasoned analysis' in an EA" would govern. *Don't Ruin Our Park v. Stone*, 802 F. Supp. 1239, 1257 (M.D. Pa. 1992) (citing *North Carolina v. FAA*, 957 F.2d 1125, 1133-34 (4th Cir. 1992)). Instead, "controversial" means "more than some public opposition to a particular use—rather it requires 'a substantial dispute . . . as to the size, nature, or effect of the major federal action.'" *Coliseum Square*, 465 F.3d at 234 (quoting *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 202 F. Supp. 2d 594, 567-58 (W.D. Tex. 2002).

Third, Plaintiff cites 32 C.F.R. § 651.41(b) and (j), relying on the trespass horses' status as justification. As briefed previously, the Army considered the horses' origin during its decision-making process and concluded that the horses were trespass livestock, a decision Plaintiff simply dislikes. Regardless of the district court and Fifth Circuit decisions in the *COLAA* litigation, the record also shows that this issue was evaluated by multiple federal agencies over the span of nearly two decades. Plaintiff cannot show that the Army's factual conclusion regarding the trespass horses was arbitrary or capricious under the APA. Thus, this Court should find that the Army was not required to prepare an EIS for this matter to comply with NEPA.

B. The Army's EA satisfied NEPA's requirements.

Plaintiff's remaining arguments under 32 C.F.R. § 651.41(a) and (d) essentially second-guess the adequacy of the Army's EA and FONSI. The Army's EA is appropriately documented and contains the required components listed at 32 C.F.R. § 651.34. Plaintiff's real contention with the Army's FONSI stems from its disagreement with the purpose and need of the project.

But, it is not the prerogative of a plaintiff or the courts to determine an agency's discretionary needs or what is sufficient to accomplish them. Rather, the court's role is to decide whether the agency took a "hard look" at the impacts of its decision under the arbitrary and capricious standard.

First, the Army's EA reflects a "hard look" because it examines the impacts of the proposed action and adequately considers all reasonable alternatives. 32 C.F.R. § 651.34(d). Based on research and public comments, the Army considered in detail seven alternatives. JRTC-B-000072-83. Plaintiff implausibly cries foul at these alternatives, suggesting that the Army should have also considered other methods that would not meet the project's purpose. ECF No. 97-1, 36. However, the guide for what alternatives to consider depends on the purpose and need as defined for the project. *Concerned Citizens Coal. v. Fed. Highway Admin.*, 330 F. Supp. 2d 787, 796–97 (W.D. La. 2004), *aff'd per curiam*, 134 F. App'x 760 (5th Cir. 2005). Further, an EA does not need to examine as broad a range of alternatives as an EIS might because the necessary range of alternatives diminishes as the expected impacts diminish. *Sierra Club v. Espy*, 38 F.3d 792, 796, 802 (5th Cir. 1994). In light of this legal standard and purpose of the project, the Army's consideration of alternatives was appropriate.

Second, the Army considered the affected environment and relevant baseline conditions. JRTC-B-000084-130. This consideration included not only the horse population and their welfare, but also natural resources and other elements of the affected landscape. *Id*. Plaintiff's focus is again solely the trespass horses, alleging that the Army failed to identify data, such as trespass horse "roaming patterns." ECF No. 97-1, 36. This claim is without merit. The EA states:

> The horses, due to their natural instincts, move to the large openings in early spring. On these DZs, which appear to be a vast pasture to them, they give birth

> and begin raising their young. As Fall begins, they disperse throughout the training areas and adjacent lands. Figure 3.19 provides a graphic of this annual cycle.

JRTC-B-000100. Further, the EA contains additional baseline information concerning these horses. It notes Louisiana's history of open range, previous capture efforts by game enforcement officers, and the increasing population of trespass horses on Fort Polk over time. JRTC-B-000084-85, JRTC-E-003140-3205. It also notes the dangers present on a training range and instances of injury or death to the horses. JRTC-B-000057-61, -86, JRTC-F-000082-258. The EA contains photographs documenting emaciated and injured horses found on Fort Polk and estimates of available forage along with the dangers of overgrazing. JRTC-B-112, 825-846, F-000073-81. Plaintiff's claim that the Army was required to do more has no basis under NEPA.

Third, the Army also considered the environmental consequences of the proposed alternatives, with discussion of direct, indirect, and cumulative impacts. JRTC-B-000101-131. For each alternative, these impacts were considered against a list of valued environmental components and socioeconomic concerns, to include soil, ground water, aquatic life, and public safety. *Id*. Although the purpose of the project is to eliminate the horses from Fort Polk-owned lands, the Army also considered the impact on the horses themselves. In addition to noting current dangers to horse welfare under the no-action alternative, the Army discussed the importance of providing sufficient water and forage post-capture, the responsibility of adoption organizations for disease testing and other care, and annual monitoring by Fort Polk if the horses were relocated to a private entity. JRTC-B-000073-82. The treatment of horses by adoptive groups and other entities, post-capture, is also governed by applicable state laws. *See, e.g.*, LA. ADMIN CODE tit. 7, pt. XXI, § 2103 (2018).

Plaintiff also argues that the Army's use of a "decision matrix" was arbitrary and capricious. ECF No. 97-1, 34-37. But these so-called matrices were parts of briefings that were updated during the planning process and presented to different commanding generals over a fourteen-month span. JRTC-G-000001-000470, JRTC-A-000001-7. These documents are evidence of the Army's deliberation, not its final determination. Specifically, two of Plaintiff's specific issues in these documents concern non-determinative cost estimates and the Army's determination that a non-euthanization option would have a better "public perception" than alternatives incorporating euthanasia. JRTC-G-000481. Regarding Plaintiff's third issue, their analysis misreads the tables included at JRTC-B-000131-132 and draws an illogical conclusion with respect to the environmental impacts of the alternatives. While Table 5.1 indicates the impact of each alternative on a valued environmental component, it contains no direct qualitative assessment relative to another alternative. JRTC-B-000131. And Table 5.2 only compares each alternative against the "no action" alternative, but – again – does not otherwise qualitatively compare COAs. JRTC-B-000132. Thus, Plaintiff cannot draw the conclusion that there is no environmental impact difference between COAs 1, 2, and 7. ECF No. 97-1, 40. The only qualitative ranking that can be deduced is from Table 5.2, and that conclusion rationally supports favoring other COAs, based on environmental impact, over COA 1. JRTC-B-000101-132. So these documents are not in and of themselves arbitrary or capricious.

Ultimately, it is clear that other COAs would have met the purpose and need of the project. However, the Army selected an alternative excluding euthanasia that would satisfy the purpose and need of the project within a reasonable time period. JRTC-A-000006. The selected alternative also indicates a preference for adoption by 501(c)(3) organizations based on the rational conclusion that it would benefit the trespass horses, especially over maintaining the

status quo. *Id*. The Army modified its plan to extend the timeline for 501(c)(3) organizations to respond, to allow mass notification of all organizations, and to eliminate removing 501(c)(3) organizations from the adoption list. JRTC-A-000001-6. These modifications were also intended to better accommodate and ensure the continued involvement of the 501(c)(3) organizations. *Id*. While Plaintiff speculates as to the selected action's feasibility, there is no evidence to show a failure in implementation. Rather, the record shows that the Army was in contact with 501(c)(3) organizations throughout the planning process, and all captured horses have been adopted by such organizations through 2017. JRTC-E-004595-6; JRTC-H-000227-487; *see also* ECF No. 51-2, Decl. of Milton W. Fariss ¶ 14.

III. The Extra-Record Evidence Offered By Plaintiff Is Improper.

The Army renews its previous objections to the extra-record evidence offered by Plaintiff. Under 5 U.S.C. § 706, the court's proper focus for review is the administrative record. *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). And, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). Given that this case is a review of agency action, records created months after the challenged decision are especially improper as they could not be considered by the agency in its decision-making. Further, "a court may not 'substitute [its] own judgment for that of the agency by considering expert testimony that was not made part of the administrative record." *Aquifer Guardians in Urban Areas v. Fed. Highway Admin*., 779 F. Supp. 2d 542, 565 (W.D. Tex. 2001) (internal citations omitted).

In its brief, Plaintiff specifically cited the extra-record materials provided by Rickey Robertson, Thomas King, Bruce Nock, Stacey Alleman-McKnight, and Jennifer Pfaff in an

attempt to second-guess the Army's decision. Of these, multiple sources cited by Plaintiff questioned the adequacy of the Army's administrative record, while admitting that they did not review the record in its entirety. In addition, multiple sources provided legal conclusions – which is the purview of this Court. With regards to Ms. McKnight, the basis of her testimony concerns horse management in a parish without a large military presence and is irrelevant. Further, Ms. Pfaff's and Mr. Robertson's testimony specifically concerns post-decisional materials. Out of the individuals Plaintiff offered, Mr. Robertson is the only one who availed himself of the public comment period under NEPA, and the record reflects his comments were considered. JRTC-B-000280, -892. As any "unusual circumstances" justifying their inclusion are absent, these extra-record materials should not be considered by the Court. *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 755 (E.D. La. 2014); *see also Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010).

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that this Court grant their cross-motion for summary judgment and deny Plaintiff's motion for summary judgment and request for relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 15, 2018, a copy of the foregoing *Federal Defendants' Cross-Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment* 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 Walker
Davené D. Walker, Trial Attorney
U.S. Department of Justice

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

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

FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF UNCONTESTED FACTS

The National Environmental Policy Act ("NEPA") and the National Historic Preservation Act ("NHPA"), the two statutes underlying Plaintiff's claims, do not provide for a private right of action against the United States; therefore, Plaintiff's challenges under those statutes are reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Summary judgment motions are an appropriate means for resolving challenges to agency action under the APA because the court is not acting as the initial factfinder. *Save Our Springs Alliance v. Cooke*, No. A-01-CA-855-SS, 2002 WL 31757473, *4 (W.D. Tex. Nov. 12, 2002) (quoting *Sabine River Auth. v. United States Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992)).

Judicial review of federal agency actions under the APA, even in the context of a summary judgment motion, does not call for this Court to make factual findings on the merits of the challenged agency decisions or to determine the existence of genuine issues of disputed material facts. Rather, the Court's task is to review the administrative record that was before the

federal agency at the time they made the challenged decision to determine whether, as a matter of law, the administrative record supports the agency's decision or whether the agency's decision was arbitrary, capricious or otherwise contrary to law. 5 U.S.C. § 706; *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985).

Because the Court's role is to determine whether the Federal Defendants' decision is supported by the administrative record, the Court need not, and should not, "find" the facts. All facts necessary for resolution of this case on the pending cross-motions for summary judgment are the facts set forth in the administrative records before the Court. Federal Defendants submit this filing solely to comply with Local Rules 56.1 and 56.2. The Court's review of Plaintiff's statement of facts and this submission should be limited to the parties' summary of materials in the administrative record that supports their legal arguments under the APA standard of review.

Federal Defendants hereby respond to Plaintiff's Statement of Uncontested Facts, ECF No. 96-1, as follows:

1. On August 2, 2015, the Army issued a public notice entitled "Notice of Intent to Conduct an Environmental Assessment for Proposed Action to Eliminate Trespass Horses at Fort Polk, LA." JRTC-B-00242.

Response: Federal Defendants concur with this statement of fact, except that this notice was published in various publications between August 2, 2015 and August 6, 2015. JRTC-B-000242-263

2. The Army solicited public comments to help it determine the appropriate scope of the EA and appropriate alternative actions. JRTC-G-000166.

Response: Federal Defendants concur with this statement, except that the exhibit referenced does not discuss the intent of the solicitation of public comments. Instead, Federal Defendants refer the Court to JRTC-B-000242 and JRTC-G-000034.

3. The notice was published in several newspapers and online. JRTC-B-000001-138.

Response: Federal Defendants concur that the Notice of Intent to Conduct an Environmental Assessment for the Proposed Action to Eliminate Trespass Horses at Fort Polk, LA was published in several newspapers and online. *See* JRTC-B-000242-263 and JRTC-C-000041.

4. The Army received more than 700 public comments. JRTC-G-000035.

Response: Federal Defendants concur with this statement.

5. Pegasus members commented during that scoping phase. JRTC-H-000404-05; JRTC-G-000437.

Response: Federal Defendants object to the statement as, to the best of their knowledge, Pegasus did not exist as an organization at that time and that the documents cited in the statement do not support the statement. Federal Defendants state that comments were submitted by persons who would later become part of Pegasus.

6. On May 4, 2016, the Army made the Environmental Assessment and Draft Finding of No Significant Impact ("FONSI") available for public review with a thirty-day comment period. JRTC-A-000003.

Response: Federal Defendants concur with this statement.

7. The deadline was extended until June 17, 2016. The Army received 180 comments in response to the plan. JRTC-C-000039-40.

Response: Federal Defendants concur with this statement, except that 182 comments were received during the comment period. *See* JRTC-B-000851-1043.

8. Pegasus commented on these documents. JRTC-B-0008920.

Response: Federal Defendants concur with this statement to the extent that "documents" refer to the Environmental Assessment and Draft Finding of No Significant Impact published in May 2016. Federal Defendants refer the Court to JRTC-B-001238 for this statement.

9. On August 8, 2016, the Army published a FONSI. JRTC-A-00007.

Response: Federal Defendants concur with this statement.

10. The Brigadier General concluded that none of the proposed alternative Courses of Action (COA) would have a significant impact on the environment. Therefore, he concluded that the Army does not need to prepare an Environmental Impact Statement. JRTC-A-000005. ECF No. 51. P. 14, "The Army complied with these regulations governing the NEPA process. It prepared an EA that considered all of the impacts from its proposed action and determined that there were no significant environmental impacts. As such, it issued its FONSI and determined preparation of an EIS was not required."

Response: Federal Defendants concur with this statement.

11. In the FONSI, Brigadier General Brito announced that the Army would implement alternative COA 7 as described in the EA, and modified by the FONSI. JRTC-A-000006.

Response: Federal Defendants concur with this statement.

12. As capture becomes more difficult, contract personnel would manage capturing remaining horses. "Now, given the additional time it took for the Army to secure a contractor to handle the capture and removal process and the ongoing necessity of scheduling capture efforts in between training exercises." ECF No. 51. p. 21.

Response: Federal Defendants object to this statement as both sentences are incomplete quotes of the relevant language. Federal Defendants concur that contract personnel have been and will be used to capture horses under the oversight of Army personnel. *See* JRTC-B-000081.

13. The Army will create a list of charitable nonprofit (26 U.S.C. § 501(c)(3)) animal welfare organizations and a list of members of the public that could potentially adopt the horses. JRTC-B-000081.

Response: Federal Defendants object to this statement as written as it does not accurately reflect the statements in the referenced documents. Federal Defendants concur that "[a] list of potential adopter organizations (adopter list) would be created, with only tax-exempt animal welfare organizations approved under 26 U.S.C. §501c3 (501c3 organization) eligible to be placed on the list" and "[a] list (give away list) of members of the public interested in acquiring the horses would be created, with any person or entity eligible to be placed on the list." JRTC-B-000081-82.

14. The Army will first contact adopter organizations on the list, and the organization will have three working days to notify Fort Polk that it will take the horses, and eight days to pick them up. If an adopter organization fails to respond within three days, declines to take all available horses, or fails to pick up horses within the eight-day deadline, that organization will be permanently removed from the adopter list and not be permitted on future lists absent a showing of good cause. JRTC-B-00083.

Response: Federal Defendants concur with this statement, except to clarify that when a lot or group of horses are captured, Fort Polk will notify all organizations on the adopter list and the first organization on the list will have three working days to notify Fort Polk it will take the horses and eight days to pick them up. *See* JRTC-A-000005.

15. If no adopter organizations are on the list or pick up the horses, the Army will then offer horses to people or entities in the give-away list. They will have forty-eight hours to notify Fort Polk that they will adopt the horse(s), and five days to pick them up. If they fail to pick up the horse(s), they will be permanently removed from the giveaway list. JRTC-A-000023, JRTC-E-04597. "Likewise, Fort Polk maintains a list of members of the general public ("give-away list"), who asked to be given horses that are not taken by the 501(c)(3) organizations, along with instructions on how to be placed on the list." ECF No. 51 at 11-12.

Response: Federal Defendants concur with this statement, except to clarify that if no adopter organizations are on the adopter list or if any of the horses are not picked up by an adopter organization within the eight day time period, the Army will then offer horses to persons and entities on the give-away list. Also, only those persons/entities who notified Fort Polk that they would pick up a horses will be removed from the list if the horses are not picked up within 5 days after notification from Fort Polk that they are permitted to pick up the horses. *See* JRTC-B-000081-82.

16. All remaining horses with either be transported to a livestock sale facility or will be combined to the next lot of captured horses to cycle through the process again. The process will then continue until all horses are eliminated from Fort Polk. JRTC-A-000002-6.

Response: Federal Defendants concur with this statement, except to clarify that the "process" referred to in this statement is the entire process in COA 7 and not just the component of the process discussed in this statement. *See* JRTC-B-000082.

17. "Any remaining trespass horses would then be transported to a livestock facility for sale or combined with the next capture to cycle through the process again." ECF No. 51. p. 12

Response: Federal Defendants concur with this statement. *See* JRTC-B-000082.

18. Additionally, Fort Polk may relocate the horses to a private landowner or other government entity. JRTC-A-000002-6.

Response: Federal Defendants concur with this statement. See JRTC-B-000082 and JRTC-B-000076.

19. The Army has made its final decision and has already begun removing horses from Fort Polk. "Operating under the chosen COA, Fort Polk captured 50 horses in October 2016 and 15 in December 2016." ECF No. 51. p. 12.

Response: Federal Defendants concur with this statement.

20. The Army did not issue an Environmental Impact Statement (EIS) regarding the Fort Polk horse-removal project. JRTC-A-000005.

Response: Federal Defendants concur with this statement.

21. The Army did not issue any report under NHPA Section 106 regarding the Fort Polk horse-elimination plan. According to its brief, "the Army determined that based on the 1999 Historic Preservation Plan, which summarized work conducted on Army properties to establish the guidelines for determining the significance of cultural resources at Fort Polk, and the Integrated Cultural Resources Management Plan, 2012 that there would not be any impact on a known archeological site or effect on a site under the authority of the ICRMP. JRTC-B-000108. Thus, the Army did not conduct further analysis. *Id.*; *see also* JRTC-B-000855 (response to comment regarding NHPA section 106 compliance)." ECF No. 51. p. 17.

Response: Federal Defendants concur that no report was issued under NHPA Section 106 but otherwise objects to this statement. Pursuant to 36 C.F.R. §800.3(a)(1), the Army, assuming that properties subject to the NHPA were present, determined that the proposed actions would not

have the potential to cause effect to historic properties and, thus, was not required to issue a report. *See* JRTC-B-000855.

22. Cultural resources at JRTC and Fort Polk can be dated as far as the Paleo-Indian Period. JRTC-B-000108.

Response: Federal Defendants concur with this statement.

23. The Army recommended not to acknowledge person from the Tulane Law Clinic's request for a tour. JRTC-G-000151.

Response: Federal Defendants concur with this statement. *See* JRTC-G-000157.

24. The "Army determined that the type of activity…did not require it to consult under the NHPA." ECF No. 51. p. 1-2.

Response: Federal Defendants concur with this statement. *See* JRTC-B-000855.

25. The Army refers to these families who lost their property, and their living descendants, as the Heritage Families. JRTC-G-000313; JRTC-G-000442.

Response: Federal Defendants object to the characterization that the families "lost their property," as the land was purchased by the United States through eminent domain. Federal Defendants concur that the term "Heritage Families" refers to those families, and their descendants, that were displaced during the 1940s for the creation of then Camp Polk.

26. The Army's horse-removal program is an "undertaking" under the NHPA, where "Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency…" 36 C.F.R. § 800.16; JRTC-A-000024; JRTC-G-000009.

Response: Federal Defendants object to this statement as it is a statement of law, not a statement of fact.

27. The Army considered this to be more of a public relations issue than an environmental one. "This is a public relations issue much more than an environmental issue[.]" JRTC-G-000010.

Response: Federal Defendants object to the characterization of the opinion of one staff member advising the Fort Polk Commander as the opinion of the Army but concurs that the Commander was advised that the scope of this effort went far beyond the typical environmental assessment and would be a significant public relations issue. *See* JRTC-G-000010.

28. The Army believed a sterilization plan would reduce the size of the herd to less than 100 horses by 2035. *See* slide "Herd Size (under sterilization)" found in the administrative record page. JRTC-G-000014.

Response: Federal Defendants concur with this statement but clarify that this projection was based on assumptions and information known at the time of the brief in June 2015.

29. There is no evidence in the administrative record that the Army ever tried a sterilization plan.

Response: Federal Defendants deny this statement. There are multiple statements in the record regarding the ongoing sterilization plan. For example, on June 20, 2015, a Statement of Intent for a cooperative agreement for the sterilization program was released for bid. JRTC-G-000059; JRTC-G-000175. On July 7, 2015, a Statement of Intent was received, and from September 2-28, 2015, the Statement of Intent was under legal review and was signed by the Grants Officer. *Id*. On September 30, 2015, the Cooperative Agreement was signed, and on October 15, 2015, herd monitoring started. *Id*. *See also* JRTC-G-000247; JRTC-G-000258; JRTC-G-000171; JRTC-G-000174; JRTC-G-00043-45.

30. Under any alternative, if horses are not adopted, there is a substantial likelihood they will be killed. According to an Army internal brief, given on November 10, 2015, the Army knew regardless of which COA was chosen the, "Horses could end up in slaughter in most cases." JRTC-G-000069.

Response: Federal Defendants object to the characterization that there is a substantial likelihood that horses that are not adopted will be killed. Federal Defendants concur that in an Army internal brief at the very early stages of the analysis, it was noted that horses "could", i.e. that it was possible, end up in slaughter. JRTC-G-000069.

31. In an internal army brief, given on November 20, 2015, when considering the "give-a-way" option the Army assumed, "There may be some animals that are not adoptable ---will not be a stand alone COA." JRTC-G-000086.

Response: Federal Defendants deny this statement. The statement quoted is found at JRTC-G-000074 and regards adoption, not the give-away action. Further, the statement was listed as a potential CON of that course of action and not an assumption.

32. According to a brief given on January 11, 2016 the Army was in "Phase I" of its "Four Phases of Elimination." JRTC-G-000116.

Response: Federal Defendants concur with this statement.

33. "Phase I" is described by the Army as," NEPA, COA Development, Draft Decision Vocalization." JRTC-G-000116.

Response: Federal Defendants concur with this statement.

34. During this same brief the Army stated, "The Senior Commander has determined the need to eliminate trespass horses on the training area." JRTC-G-000115.

Response: Federal Defendants concur with this statement.

35. Horses lived at Fort Polk at least as long as the homesteaders who settled the land in the early 1800's. STEVEN D. SMITH, A GOOD HOME FOR A POOR MAN: FORT POLK AND VERNON PARISH, 1800-1940 50 (Univ. of S.C. Scholar Commons 1999) ("The first Anglo-American settlers often found wild horses and cattle in the woods, lost by the Spanish or other settlers pushing west."); *see also* p. 62 (describing how Gustav Dresel chronicled his journey through the area in August 1839 when a grazing horse wandered into the camp) (available at https://scholarcommons.sc.edu/ anth_facpub/50/), Ex. G, ECF No. 43-7.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court. Federal Defendants deny that horses have continuously lived at Fort Polk since the early 1800s. JRTC-B-000139, -157.

36. Based on descriptions and photographs of the horses at Fort Polk, at least two experts regarding Spanish Colonial horses believe they may be "Spanish Colonial horses" or possibly "Choctaw horses." Letter from Jeannette Beringer, Senior Programs Manager, The Livestock Conservancy (Feb. 12, 2017), Ex. H. ECF No. 49-1.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and, therefore, deny it.

37. Choctaw horses in particular would be "disproportionately valuable for conservation efforts because of the genetic diversity they provide to the population." Letter from D. Phillip Sponenberg, DVM, PhD, Professor, Pathology and Genetics, Virginia Tech, Ex. I. ECF No. 49.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and, therefore, deny it.

38. In the early 1800s, settlers and homesteaders, including Pegasus members' ancestors, began to settle Peason Ridge. STEVEN D. SMITH, A GOOD HOME FOR A POOR MAN:

FORT POLK AND VERNON PARISH, 1800-1940 50 (Univ. of S.C. Scholar Commons 1999 (*available at* https://scholarcommons.sc.edu/ anth_facpub/50/), Ex. G, ECF No. 43-7. The area's population boomed with the arrival of the railroad and the lumber industry, birthing the town of Peason in 1917.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and, therefore, deny it.

39. They brought more horses with them. STEVEN D. SMITH, A GOOD HOME FOR A POOR MAN: FORT POLK AND VERNON PARISH, 1800-1940 50 (Univ. of S.C. Scholar Commons 1999 (*available at* https://scholarcommons.sc.edu/ anth_facpub/50/), Ex. G, ECF No. 43-7. The area's population boomed with the arrival of the railroad and the lumber industry, birthing the town of Peason in 1917.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and, therefore, deny it.

40. The local subsistence farmers set aside a large parcel of land exclusively for grazing for their horses and other animals. *See* EA, Envtl. Assmnt. 34-35, ECF No. 17-1 at 50-51 of 104.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and, therefore, deny it.

41. Horses have lived at Fort Polk ever since. *Id.*

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and, therefore, deny it. Federal Defendants further state that the origin of the current population of horses was determined to be trespass livestock in prior litigation, JRTC-B-000139, -157, and there is no evidence in the record to

establish unbroken lineage between any horse that may have lived in the area in the 1800s to the current population.

42. During World War II, the Army used eminent domain to take possession of the property and homes owned by Peason residents to create what is now known as the Fort Polk Military Installation. MG Daniel P. Bolger, Installation Commander, JRTC & Fort Polk, Preface, Remembering Fort Polk's Heritage: A Tribute to the Displaced Families of Camp Polk and Peason Ridge at p. i ("More than 200 families were displaced from their homesteads when the War Department exerted emergency powers under eminent domain to take land and create Camp Polk.") and p. 4 ("Through the Federal court system, the land was condemned and a judgment was rendered declaring eminent domain. After this, the local Parish Clerk's Office carried out the eviction of the residents from the property.") (U.S. Army 2007), Ex. K.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court but will concur with this statement.

43. The Army refers to the families whose property was taken, and their living descendants, as the Heritage Families. *See Id.* at 6.

Response: Federal Defendants concur that the term "Heritage Families" refers to those families, and their descendants, that were displaced during the 1940s for the creation of then Camp Polk.

44. Nearly all vestiges of the Peason community have been lost or destroyed. Robertson Decl. 3 ¶ 11, ECF No. 1-1.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

45. The horses and certain cemeteries are some of the last remnants of the Heritage Families' old homes and way of life. *Id.*

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

46. The Army has stated that it is committed to "ensur[ing] that our cultural history remains relevant and sustainable for future generations," so that they "will not forget [their] Heritage Families for they are unsung heroes who surrendered their homes and way of life for the sake of this nation." JRTC & Fort Polk, The Fort Polk Heritage Family Project, http://www.polkhistory.org/publications/publications/Heritage%20Project%20Brochure.pdf (last visited Jan. 8, 2018), Ex. L.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court but state that the cited document actually provides, "[t]his Heritage Project is an important link between the Army and the surrounding community that focuses on our common history. Only through awareness and education can we ensure that our cultural history remains relevant and sustainable for future generations."

47. Many horses at Peason Ridge "are undomesticated, and have never been tamed," and they have "never worn a bridle, halter, or saddle." 2d Robertson Decl. at ¶ 7 & 9, Ex. F.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

48. Ricky Robertson is sixty-one years old, and remembers interacting with the horses at Peason since he was four or five years old. Robertson Decl. ¶ 10-11, ECF No. 1-1.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

49. Ricky Robertson believes that the horses that roam Fort Polk are likely the descendants of his "kinfolk's livestock." He feel closely connected to the land and these horses. Robertson Decl. ¶ 10-11, ECF No. 1-1.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

50. Ricky Robertson feels that the horses are his history. Robertson Decl. ¶ 10-11, ECF No. 1-1.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

51. "Peason Ridge, together with all or part of Fort Polk itself, constitutes a cultural landscape . . . [that] may be eligible for inclusion in the National Register of Historic Places as a traditional cultural property or as multiple such properties." King Decl., Ex. C, ECF No. ??; PI Hr'g Tr. 21-22, ECF No. 62.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

52. "[L]andscapes are often the kinds of areas that people are most concerned about. …And often landscapes are the things that people relate to most heavily, most seriously." PI Hr'g Tr. 21, ECF No. 62.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

53. "Basic DNA testing could resolve a lot of these issues on where these horses came from or whether they're wild type horses or domesticated. A saliva swab is sufficient enough to determine some of that information." PI Hr'g Tr. 80, ECF No. 62.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

54. The administrative record does not include a basic survey of the herds, their migration patterns, their family relationships, their encounters with humans, and basic descriptions of the types of horses living at Fort Polk. Nock Decl. 2, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it. *See also* discussions of migration and interaction with humans in the EA at JRTC-B-00054-60, -100, -157; annual horse censuses at JRTC-E-003140-3205; interaction with humans at JRTC-F-000001-258; and discussions in various briefs regarding the encounters with humans at JRTC-G-000108-109, -154, -163-164, -201-202, -227-228, -232-233, -248-250, -375-376.

55. Horses sold to "kill buyers" are shipped to Mexico or Canada for slaughter in traumatizing and often inhumane conditions. Nock Decl. 3, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

56. Such horses would spend their last days in panic and trauma. Nock Decl. 3, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

57. There is no evidence in the administrative record that there are systems in place to ensure that the horse-elimination process will be carried out by qualified individuals in a humane manner. Nock Decl. 4, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

58. There are no good methods to capture wild horses. Even the best of the bad options will cause fear in the horses that will drive the horses indigenous to Fort Polk to resist capture. Nock Decl. 4, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

59. There is serious risk of physical injury to the Fort Polk horses as part of the Army's horse-elimination process. Nock Decl. 4, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it. Further, Federal Defendants state that there is serious risk of physical injury to the trespass horses remaining at Fort Polk. *See* JRTC-B-0000086, -847; JRTC-H-000001-226.

60. In addition, there is potential for significant psychological harm. Nock Decl. 4, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

61. The plan fails to include a description of the capture method that allows the public to ascertain the level of injury risk for the horses or how traumatic/stressful the process is likely to be. Nock Decl. 4, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it. *See* JRTC-B-000073 (stating "Fort Polk intends to capture horses in the least stressful manner to the horses, provided that capture method is sufficiently efficient and successful. The preferred and intended primary method to be utilized for capture is the baiting of capture pens so that horses move into the capture pens without external pressure. The secondary method of capture which will likely be utilized is the employment of personnel to

physically round up and capture the horses. Fort Polk will not use or permit the use of aircraft to drive the horses over a long distance in a swift manner for purposes of roundup and capture.").

62. The stressful effects on the horses of capture and confinement are potentially compounded by social disruptions, i.e., confinement in close quarters with unfamiliar horses and the absence of life-long herd mates. Nock Decl. 4, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

63. Social disruption is a known, surprisingly severe stressor for horses. Nock Decl. 4, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

64. The social disruption is likely to continue for as long as the horses live since there is no plan to release them back into their native environment, Fort Polk. Nock Decl. 4, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

65. The deleterious consequences of such stress are not acknowledged or discussed in the administrative record. Nock Decl. 5, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

66. Maternal separation appears to be a particularly severe stressor in horses, which has effects that last a lifetime and, importantly, are known to persist across generations. Nock Decl. 10, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

67. The Fort Polk COA 7 does not include any information about how the Army will prevent maternal separation or keep horse families together. Nock Decl. 10, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court but concur with this statement.

68. This failure could have negative consequences for the health and welfare of the Fort Polk horses and their descendants. Nock Decl. 10, Ex. P, ECF No. 49-2.

Response: Federal Defendants object to this statement as it is not part of the administrative record properly before this Court and as an inadmissible statement of opinion, and, therefore, Federal Defendants deny it.

Respectfully submitted, this 15th day of November, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of November, 2018, a copy of the foregoing *Federal Defendants' Response to Plaintiff's Statement of Uncontested Facts* 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 Walker
DAVENÉ D. WALKER
U.S. Department of Justice