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: Robert R Summerhays

Magistrate Judge: Kathleen Kay

Plaintiff's Response to Defendants' Cross Motion for Summary Judgment and Reply in Support of Plaintiff's Motion for Summary Judgment

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Introduction

The Government does not dispute that it did not engage in the Section 106 consultation process, which is mandated by the National Historic Preservation Act unless a government action "does not have the potential to cause effects on historic properties . . . ." 36 C.F.R. § 800.3(a)(1); *see also* Federal Defs.' Cross-Mot. Summ. J. 12, ECF No. 101 ("As the Army determined that this project was such an activity [one with no effect], further procedural steps in the Section 106 process were unnecessary."). Hence, unless the Government provided, *on the record*, a reasonable basis for its all-important statement that its horse removal program "does not have the potential to cause effect to historic properties," JRTC-B-000855, its failure to engage in the consultation process required under the NHPA renders its decision arbitrary and capricious and not in accordance with law. 5 U.S.C. § 706(2)(A). Under the APA, courts "***shall*** hold unlawful and set aside" such agency actions. *Id.* (emphasis added).

But the Government did not provide, on the record, ***any*** support for this statement. Indeed, its "no effect" statement is *not even a finding*, but appears instead as a response to a comment. JRTC-B-000855. Scouring the entire record for some support for this statement, as the Plaintiff did (though not legally required to do, as the agency must support its findings on the record), revealed nothing but a few references to the absence of "known archeological sites" in the area. *See* Mem. Supp. Pl.'s Mot. Summ. J. 16 (hereinafter "Pl.'s SJ Mem").

The Government does not dispute that this "no effect" statement constitutes the Army's sole basis on the record for not engaging in the otherwise mandatory Section 106 consultation process. Nor does it point to any attempt, support on the record, to provide a basis or explanation for this finding. Instead, its counsel engages in *post-hoc* rationalization to explain this unsupported finding, relying on a 2003 ruling that had nothing to do with the NHPA and two

lengthy general NHPA procedural/planning documents which the Army put in place at Ft. Polk some years ago. Opp. 12-13, ECF No. 101.

Here, the *COLAA* decisions appear in the administrative record prepared by agency counsel, and the Army mentions it in a response to a comment asking why the horses are called "trespass" horses. But nowhere in its decision does the Army even mention the *COLAA* decision as a basis for finding that its horse removal plan would have no effect on historic properties, much less that the decision led it to conclude that the horses are not a component of an historic landscape. And the *COLAA* administrative record is not included in *this* administrative record. Thus, under the law barring such *post-hoc* justifications, this Court "may not accept" the Government's new argument that it relied on a 15-year old court ruling to conclude that the plan would have no effect on NHPA properties. *Burlington Truck Lines, Inc., v. United States*, 371 U.S. 156, 168 (1962). Indeed, the Army has no basis on the record for its "no effect" conclusion.

As explained below, even if this Court chose to accept the Army's *post-hoc* rationalizations to support its "no effect" finding, the *COLAA* decision does not support that finding. And even had the agency actually relied on the decision to support its finding, that reliance would be arbitrary and capricious and contrary to law.

Argument

I. *Post-Hoc* Arguments of Counsel

Throughout its opposition memorandum, the Government relies on post-hoc arguments to support the Army's decisions on the NHPA and NEPA. Opp., ECF No. 101. While these arguments are discussed in greater detail below, they are improper and this Court should reject them outright.

Longstanding and consistent precedent forbids such after-the-fact justification by agency counsel in place of agency findings and reasoning on the record. In *Burlington*, 371 U.S. 156, in enjoining and setting aside an order of the Interstate Commerce Commission, the U.S. Supreme Court rejected justifications offered by agency counsel but not stated by the agency itself on the record. The Court explained: "The short answer to this attempted justification is that the Commission did not so find. The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; [*Securities & Exchange Comm'n v. Chenery Corp.*] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Id.* at 168-9 (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). The Court also explained the need for agencies to justify their discretion by providing bases for their decisions: "[F]or the courts to determine whether the agency has [properly exercised its discretion], [the agency] must disclose the basis of its order and . . . make findings that support its decision, and those findings must be supported by substantial evidence." *Id.* at 167-8 (internal quotations and citations omitted). *See also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("[C]ourts may not accept appellate counsel's *post hoc* rationalizations for agency action…It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." (citations omitted)).The Fifth Circuit has further explained that "it is a fundamental rule of administrative law that 'in dealing with a determination or judgment which an administrative agency alone is authorized to make, [a reviewing court] must judge the propriety of such action solely by the grounds invoked by the agency.'" *Guillory v. Berryhill*, 738 F. App'x 290, 291 (5th Cir. 2018) (citations omitted).

II. NHPA Response

A. The Army failed to follow the NHPA requirement to conduct a Section 106 analysis.

The Army uses scant evidence in the administrative record to try and prove it followed the NHPA. The Army tries to rely on two sources to justify its decision under the NHPA: the 1999 Historic Preservation Plan and the 2012 Cultural Resources Management Plan (ICRMP). JRTC-B- 000108. But neither of these documents show any hard look at the cultural landscapes at issue here.

The EA states that the Army stopped any sort of cultural analysis after looking at these two documents: "The proposed action and the associated courses of action would not impact a known *archeological* site or negate the authority of the ICRMP. Accordingly, this resource area was eliminated from further analysis." *Id*. The problem with its analysis is the Army clearly only looked for archeological sites.[1] The Army may have thereby followed its own guidance with regards to the Archaeological Resources Protection Act and Native American Graves and Repatriation Act. *See, e.g.*, JRTC-E-002062, 2063, 2072, 2110-11. But as Pegasus briefed previously, an agency cannot just ignore consultation and other kinds of historic properties besides cemeteries and archaeological sites under the NHPA's Section 106. P.'s Mem. In Supp. Summ. J. 16, ECF No. 99 at 21. Furthermore, in its EA the Army never mentions the NHPA, despite the fact that many members of the public tried to get the Army to look at the historic significance of the horses on Fort Polk. *See e.g.* JRTC-B-000281 (discussing the historic value of the Peavy-Wilson Corral Site on Peason Ridge); JRTC-B-000329 (Discussing the possibility that

[1] JRTC-E-000067 (describes the NHPA process *primarily* for the purpose of determining archeological site.) JRTC-E-000070 (again is detailing only how *archeological* sites fall into the registar). *See also*, JRTC-E-000773.

these horses are from U.S. Cavalry); JRTC-B-00124 (suggesting the Army undergo the Section 106 process).

In response the public concern, the Army generally ignores these comments or, in one instance, summarily dismisses the comments without any investigation. The Army writes, "36 C.F.R. §800.3(a)(1) states '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 official has no further obligations under section 106 or this part.' It is Fort Polk's determination that the actions proposed does not have the potential to cause effect to historic properties." JRTC-B-000855. The Army's attorneys are relying heavily on this *one response to comments* to explain the absence of any actual NHPA analysis in the record. But (1) this is a post-hoc rationalization not supported by the record, and (2) this quote ignores the rest of the process – the Army needed to consult with stakeholders and the Advisory Council on Historic Preservation: "Agencies begin section 106 review by defining the "area of potential effects" ("APE"), which is the area where federally-funded activity will take place. 36 C.F.R. § 800.4(a), 800.16(d)." *Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency*, 658 F.3d 460, 463 (5th Cir. 2011). Next, "If the agency finds that there will be 'no adverse effect,' *and the Advisory Council on Historic Preservation ('ACHP') concurs*, review ends. 36 C.F.R. § 800.5(d)." *Id*. (emphasis added). The administrative record shows no indication that the Army ever contacted the ACHP, let alone got its concurrence as required.

The Army vaguely cites to two long documents, together nearly three-thousand-pages, as justification for why it was not required to conduct a Section 106 analysis. Opp. 13, EFC No. 101 at 19. Even though the Army cites to an avalanche of pages in an attempt to provide

evidence, it fails to cite any specific instance where a document actually supports its argument. A close look at these documents does not help the Army's position.

The first document is primarily an archeological site inventory. In fact, it was created in 1999 by the division of archeology. JRTC-E-000001. It does not evaluate the proposed COAs in this case or any historic landscapes. It does state, however, that the Army "will prepare a report annually on its implementation…and provide this report the Louisiana SHPO, the US Forest Service, and the Council." JRTC-E-000131. Pegasus cannot find any record of these subsequent annual reports in the administrative record.

The Army also cites a 2012 Cultural Resource Study that begins at JRTC-E-002021. Again the Army cites the entire study, but no particular pages or provisions. But this 2012 document wouldn't suffice anyway; it is simply a planning document. It states the Army will "[c]omply with federal laws and regulations governing the treatment of cultural resources"—including the NHPA and NEPA. JRTC-E-002037. Additionally, the document clearly states,

> The Section 106-implementing regulations at 36 C.F.R. Part 800 were significantly revised in a series of rulemakings effective June 17, 1999, Jan. 11, 2001, and Aug. 5, 2004. The amended regulations call for greater federal agency responsibility and autonomy in considering the effects of their actions on historic properties, strengthen the role of Native American tribal organizations, emphasize the role of SHPOs. . ."

JRTC-E-002044. Furthermore, the document states that the Louisiana SHPO is a consulting partner of the JRTC and Fort Polk for cultural resources management and plays a key role in the Section 106 process. JRTC-E-002052. Yet the administrative record shows no contact with the Louisiana SHPO or any Native American tribal organizations in the area. Finally, the document requires the Army to coordinate closely with the U.S. Forest Service about cultural resources management within the Kisatchie National Forest lands used by the Army. *Id*. But the Army

made a conscious decision *not to involve* the U.S. Forest Service when conducting its evaluation. JRTC-G-000060.

Again, Pegasus is not asking this Court to determine whether Peason Ridge or any other potentially historic landscape may qualify for the National Register. Rather, Pegasus has plainly shown that the Army failed to even consider historic properties, sites or objects other than archaeological sites, or to otherwise comply with the NHPA Section 106's consultation requirements.

B. Neither collateral estoppel nor stare decisis excuse the Army's refusal to comply with the NHPA.

The Government uses *post-hoc* arguments, smoke and mirrors to draw the Court's attention away from the actual case at hand. Although the *COLAA* decisions are included in the record, and the Army was bound to comply with the settlement agreement by notifying COLAA about its NEPA actions in this case (Settlement (July 25, 2002), JRTC-D-000001-8), the Army does not *in the record* rely on the *COLAA* decision to reach its decisions in this matter. Further, this case is about the NHPA and NEPA; there are no claims based on or related to the Wild Free-Roaming Horses and Burros Act (Wild Horses Act). And the Army's word "trespass horse" has no actual legal, scientific, or other dispositive meaning. Furthermore, as stated above, the *COLAA* record is not included in this administrative record – only the decisions in that case.

1. The 2001 and 2002 court decisions in COLAA were about different issues and a different record.

The *COLAA* litigation was primarily about the Wild Free-Roaming Horses and Burros Act, and it was between COLAA and the U.S. Department of Agriculture, U.S. Forest Service, and U.S. Army. *COLAA v. U.S. Dept. of Agric.*, 64 F.App'x. 416 (5th Cir. 2003): Eastern District of Louisiana's (EDLa) Decision (Aug. 17, 2001), JRTC-B-000139-56; Settlement (July 25,

2002), JRTC-D-000001-8; Fifth Cir. Decision (Mar. 11, 2003), JRTC-B-000156. *COLAA* did not involve the National Historic Preservation Act at all. *Id. COLAA* initially involved a NEPA claim, but the NEPA issues were appealed, but settled before briefing before the Fifth Circuit. *Id.* The Fifth Circuit's terse ruling therefore adjudicated no NEPA claims, only Wild Horses Act claims. *Id.* Furthermore, in the settlement, the three federal defendants all agreed to *at least* perform an EA before rounding up, let alone eliminating, any horses at Fort Polk or Kisatchie Forest. JRTC-D-000001-8. Importantly, COLAA agreed to drop its appeal of the EDLa's decision on the NEPA issues, but explicitly retained its right to challenge any Appellee's "proposed action regarding the Kisatchie horses if it disagrees with their NEPA determination." *Id.*

Importantly, neither the EDLa nor the Fifth Circuit determined that the horses were not historic or culturally significant. Rather, in *COLAA*, the district court quoted the Government in stating that the "project was initiated *under the assumption* that the subject horses were trespass livestock, and that Fort Polk could take control actions…as long as the welfare of the horses was adequately addressed…" JRTC-B-000144 (emphasis added). The EDLa ruled in the defendant's favor because the Plaintiffs could not prove that this assumption was arbitrary and capricious. JRTC-B-000139-56. The court also never explained what effect the Government's choice of the word "trespass horse" was supposed to have other than to say that, at least as far as the horses on the U.S. Forest Service Defendant's land, *that* agency's regulations provided a mechanism to remove horses not protected under the Wild Horses and Burros Act. JRTC-B-000149. Despite the Government's many unsupported allusions to facts that are allegedly somewhere in the absent COLAA administrative record, the COLAA decision does not make any legal or factual determinations that are at issue in this case based on this administrative record.

2. Collateral estoppel does not apply.

Collateral estoppel does not apply here for two reasons: (1) this case is about different legal issues, and (2) it is between different parties. It is well-established that collateral estoppel only applies to (1) issues that were *actually litigated* between (2) the *same parties*. *Larsen v. Northland Trasnp.Co*., 292 U.S. 20, 25 (1934) (holding, "former cause is, an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'"); *Cromwell v. County of Sac*, 94 U.S. 351 (1876) ("There is nothing in this language…which gives support to the doctrine that, whenever in one action a party might have brought forward a particular ground of recovery or defense, and neglected to do so, he is, in a subsequent suit between the same parties upon a *different* cause of action, precluded of availing himself of such ground."); *see also* Restatement of Judgments § 68 (1942).

First, none the issues before this Court have been "actually litigated" as required for collateral estoppel. Second, Pegasus and COLAA are two different legal persons, and Pegasus was not a party to the *COLAA* litigation. Thus, collateral estoppel does not apply.

3. Stare Decisis also does not apply.

Stare Decisis is slightly different. While the *same parties* are not required, "[u]nder the doctrine of *stare decisis*, where a court has in one case *decided a question of law* it will in subsequent cases in which the *same question of law* arises ordinarily decide it in the same way." Restatement (First) of Judgments § 70 (1942) (emphasis added). Courts similarly defer to superior courts in the line of appellate authority above them, but courts of similar rank or in different circuits have only a persuasive authority, not *stare decisis*.

The holding in the *COLAA* case simply does not apply to this case under the *stare decisis* doctrine for four reasons. First, the Fifth Circuit specifically *did not designate its 2003 decision*

for reporting. JRTC-B-000156 (*also found at* 64 Fed.Appx. 416). Under Fifth Circuit Rule 47.5.4, "[u]npublished opinions issued on or after January 1, 1996, *are not precedent*, except under the doctrine of *res judicata*, collateral estoppel or law of the case…"(emphasis added), and under Rule 47.6, a "judgment or order may be affirmed or enforced without an opinion when the court determines that an opinion would have *no precedential value*…" (emphasis added). Thus, under the Fifth Circuit rules, the *COLAA* decision can have no *stare decisis* effect at all. Second, as described in detail above, this case involves the NHPA and NEPA, but in *COLAA* the Fifth Circuit considered only Wild Horses Act claims. Therefore the cases do not involve the *same questions of law* as required for *stare decisis* to apply. Third, the Wild Horses Act explicitly only applies to Bureau of Land Management land and Forest Service land. 16 U.S.C. § 1331-40.[2] It cannot apply to Army-owned land. But in this case, unlike the *COLAA* case, the Army is the only defendant, and it has specifically limited its horse-elimination program to *only* Army-owned land, and will not round up or eliminate horses on land it leases from the Forest Service. JRTC-A-000001; Fariss Decl. ¶ 15, ECF No. 51-2. Fourth, the two cases concern entirely different administrative records. The Army keeps trying to cite to the *COLAA* administrative record, but that (more than fifteen-year-old) administrative record involving a different decision and different federal agencies is not before this Court. Fifth, the *COLAA* Wild Horses Act decision has no discernable effect on any NHPA or NEPA analysis. The NHPA analysis does turn on any analysis or determination made under the Wild Horses Act.

[2] "The Secretary shall maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands." 16 U.S.C.A. § 1332. And "(a) 'Secretary' means the Secretary of the Interior when used in connection with public lands administered by him through the Bureau of Land Management and the Secretary of Agriculture in connection with public lands administered by him through the Forest Service; (e) 'public lands' means any lands administered by the Secretary of the Interior through the Bureau of Land Management or by the Secretary of Agriculture through the Forest Service." 16 U.S.C. § 1332.

4. The term "trespass horse" is not dispositive of anything.

The Army insists on using, and holds great stock in, the term "trespass horse." But this term, and any similar term, is irrelevant under the NHPA and NEPA. The use of "wild", "free-roaming", "domesticated", "tame", "lost", "indigenous", and "trespass", while perhaps of some public relations value, is legally, scientifically, and descriptively meaningless at best and misleading at worst. The term "trespass horse" has no discernable legal meaning at all under the Wild Horses Act, Louisiana state law, Army regulations, Forest Service regulations, Park Service regulations, NEPA, the NHPA, or any other applicable legal framework Pegasus is aware of. It is a term the Army likes to use, and the EDLa District Court used the term in its decision. JRTC-B-000139-56. Other than that, the Army has not shown that it actually has any meaning or effect under any law, or that the term has any meaningful or actually useful application in this case. Whether the horses were born at Fort Polk or are somehow "trespassing," they (1) are still part of the environment and (2) may still have historic and cultural implications.[3]

[3] Army's statement that all but 39 Fort Polk horses were relocated, primarily to neighboring farms, by the 1990s is completely unsupported in the record. Opp. 7, ECF No. 101 at 13; JRTC-B-000085. In fact, many of the public records include personal stories and other refutations of this assumption, and the Army's own publications recommended by commenters and cited by Pegasus refute this assumption. JRTC-B-000234-824, 851-1340. *See in particular, e.g.,*

- Comment of P. Flynn, JRTC-B-000234 ("I grew up in Peason, Louisiana and those horses were part of the landscape my entire life. The herd also has historical significance!");
- Comment of J. Merrick, JRTC-B-001163 ("These drastic and damaging measures ERASE & WIPE OUT part of early Kisatchie's history. Their numbers have already been drastically reduced over the past several months!!! The army has allowed anybody to take the wild horses into captivity and many of those were kill buyers who sent the horses to slaughter… Historically the army always referred to the horses as "wild" until the army decided to get rid of them and they declared them trespassers in order to strip them of any protection under the Federal Wild Horse and Burro Protection Act. While the federal government alleged that removal of the horses was necessary for the safety of its military training exercises, no records provided in a FOIA response, pursuant to the Freedom of Information Act, indicated a connection between horses and it's training accidents in the history of Fort Polk.") (citing STEVEN D. SMITH, A GOOD HOME FOR A POOR MAN: FORT POLK AND VERNON PARISH, 1800-1940 (Univ. of S.C. Scholar Commons 1999 (available at https://scholarcommons.sc.edu/ anth_facpub/50/), Ex. G, ECF No. 43-7).
- Comments of R. Robertson, JRTC-B-000280-282; M. Mansfield, JRTC-B-000740-41; Barbara M., JRTC-B-000424, Ramona B., JRTC-B-000432, and J. Butera, JRTC-B-000317.

Actually performing the consultation and analysis under NHPA Section 106 could put these assumptions to rest. Testimony of Dr. Batt, PI Hr'g Tr. 80, ECF No. 62 ("I would say to get a baseline of the whole herd, their ages. Even, after hearing the proceedings, I think that basic DNA testing could resolve a lot of these issues on where these

C. Considering animals as part of an NHPA Section 106 analysis is nothing new, and is well-supported by the law.

While the National Park Service's historic preservation policies have evolved over the years, the consideration of animals as part of the Section 106 process is neither new nor unique to this case. The National Park Service administers the National Register of Historic Places. Under 36 CFR § 60.4, "Criteria for Evaluation," the National Park Service provides the authoritative guidance on how to evaluate historic properties, which is provided in the "How To" guidance documents the Service publishes from time to time as well as the regulations:

> The criteria applied to evaluate properties …are worded in a manner to provide for a wide diversity of resources. …*Guidance in applying the criteria is further discussed in the "How To" publications, Standards & Guidelines sheets and Keeper's opinions of the National Register.* Such materials are available upon request.
>
> National Register criteria for evaluation. 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;…

36 C.F.R. § 60.4 (emphasis added).[4] The National Park Service in the 1980s and 1990s published multiple National Register Bulletins to and other guidance to inform agencies' execution of the

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horses came from or whether they're wild type horses or domesticated. A saliva swab is sufficient enough to determine some of that information.")

[4] The National Park Service has always maintained flexibility to allow experts to evaluate and recommend varied historic properties under this law. Though the NHPA has long provided that "properties of traditional religious and cultural importance to an indigenous group may be determined to be eligible for inclusion in the National Register." 16 U.S.C. § 470a(d)(6)(A), *see also* 36 C.F.R. § 800.1, during the early years of implementation, federal agencies viewed the NHPA as protecting only those properties impressive to academics and professionals. This gave rise to an elitist pattern of protection that often dismissed ordinary peoples' concerns. But these actions were fundamentally at odds with the NHPA's mandate "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." Pub.L. No. 89-665; *see also* Protection and Enhancement of the Cultural Environment, 36 FR 8921, Exec. Order No. 11593, 1971 WL 135022.

For this reason, the National Park Service and the Advisory Council on Historic Preservation became increasingly concerned in the 1980s and 1990s that landscapes, vernacular sites, and other places of traditional

NHPA. The National Park Service maintains some of this guidance on its website. https://www.nps.gov/nr/publications/; https://www.nps.gov/tps/how-to-preserve/briefs.htm.

One of the earlier guidance documents on Historic Landscapes, National Register Bulletin No. 18, *How to Evaluate and Nominate Designed Historic Landscapes,* (https://www.nps.gov/nr/publications/bulletins/nrb18/), has been relied upon for years for looking at historic landscapes. Bulletin No. 18 is about *designed* landscapes, such as parks or designed communities; nonetheless it includes the following instructions for landscapes that *should* include plants, streams, and animals when analyzing rural, agricultural, and other natural-resource-use landscapes, such at Fort Polk:

> Not all historic properties retain integrity. Within this concept of integrity…Historic location, design, setting, materials, workmanship, feeling, and association must be considered in determining whether a landscape retains enough of its important features to convey its historically significant appearance or associations. Landscapes have unique attributes that often complicate the evaluation of integrity, but the degree to which the overall landscape and its significant features are present today must be evaluated. In general, the researcher should ask the following questions when evaluating integrity:
>
> 1) To what degree does the landscape convey its historic character?
> 2) To what degree has the original fabric been retained?
> 3) Are changes to the landscape irrevocable or can they be corrected so that the property retains integrity?
>
> The specific features that a designed historic landscape must retain will differ for various landscape types. Such features may include but not necessarily be limited to spatial relationships, vegetation, original property boundary, topography/grading, site-furnishings, design intent, architectural features, and circulation system.

Bulletin No. 18 at 6.[5]

historic and cultural importance were being inappropriately regarded as ineligible for the National Register if they were not of historical interest to elite archeologists, historians, and architectural historians. To address this concern,

[5] It is unclear when Bulletin No. 18 was published, but it is logical that it was originally published before Bulletin 24, which was published originally in 1977 and revised in 1985. Bulletin No. 24, https://www.nps.gov/nr/publications/bulletins/nrb24/. This guidance is therefore neither new nor novel. Regardless, Bulletin 18 must have been published before Bulletins No. 30 and 38 published in 1989 and 1990, respectively.

Bulletin No. 30, *Guidelines for Evaluating and Documenting Rural Historic Landscapes*, published in 1989 and revised in 1999 (https://www.nps.gov/nr/publications/bulletins/nrb30/), recognizes the importance of activities involving the relationships between humans and animals at page 13, and advises flexibility and comprehensiveness in considering factors that may "reflect a variety of activities occurring at one time, or evolving functions in different periods of time, for example, orchards planted sequentially," or may "interrelate and…overlap, for example, cultural traditions may be evident in structures and buildings, spatial organization, vegetation, and clusters."[6]

Preservation Brief 36, "Protecting Cultural Landscapes: Planning, Treatment and Management of Historic Landscapes," was published it 24 years ago in 1994. Preservation Brief 36 at 20, https://www.nps.gov/tps/how-to-preserve/briefs/36-cultural-landscapes.htm. It explicitly includes animals as elements of historic landscapes on page one in paragraph two:

> A ***cultural landscape*** is defined as 'a geographic area, including both cultural and natural resources and the ***wildlife or domestic animals therein***, associated with a historic event, activity, or person exhibiting other cultural or aesthetic values.' There are four general types of cultural landscapes, not mutually exclusive: historic sites, historic designed landscapes, historic vernacular landscapes, and ethnographic landscapes. These are defined on the Table on page 2."

(Emphasis added.) The Table on page 2 explicitly discusses biological elements and living animals as contributing components of vernacular and ethnographic landscapes:

> ***Historic Vernacular Landscape*** – a landscape that evolved through use by people whose activities or occupancy shaped that landscape. …the landscape reflects the physical, biological, and cultural character of those everyday lives. Function plays a significant role in vernacular landscapes. They can be a single property such as a farm or a collection of properties such as a district of historic farms along a river valley. Examples include rural landscapes, industrial complexes, and agricultural landscapes.

[6] And Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties, published in 1990 (https://www.nps.gov/nr/publications/bulletins/nrb38/), clarifies that "*wholly natural places* can be found eligible for the National Register if they are ascribed cultural significance by living communities based on traditional beliefs" (emphasis added).

> …
> ***Ethnographic Landscape*** – a landscape containing a variety of natural and cultural resources that associated people define as heritage resources. Examples are contemporary settlements, religious sacred sites and massive geological structures. Small plant communities, animals, subsistence and ceremonial grounds are often components.

There is nothing new about any of this; historians and anthropologists have been looking at living animals as contributing elements of landscapes for decades, and the Park Service officially incorporated this fact into its Section 106 guidance years ago.

Again, Pegasus is not asking this Court to rule whether any particular landscape at Fort Polk is historically significant or eligible for the National Register. Rather, Pegasus is asking this Court to order the Army to follow the *longstanding* NHPA guidance to conduct analysis and consult with stakeholders as required under Section 106. The Army plainly has not done this, and, contrary to the Army's unsubstantiated arguments, the practice of considering animals when evaluating historic landscapes is well established under the legal guidance documents. Indeed, many properties that have been listed on the National Register of Historic Places include discussions of the presence of living animals as part of their description and evaluation, just as the National Park Service guidance recommends.[7]

[7] *E.g.*, Green River Drift Traditional Cultural Property, https://www.nps.gov/nr/feature/places/pdfs/12001224.pdf; Canoa Ranch Rural Historic District, https://www.nps.gov/nr/feature/places/pdfs/R_A_04001158.pdf; Duncan Grant Ranch Rural Historic Landscape, https://www.nps.gov/nr/feature/places/pdfs/13000047.pdf; Evergreen Corner Rural Historic Landscape, https://www.nps.gov/nr/feature/places/pdfs/13000960.pdf; Belle Plaine, https://www.nps.gov/nr/feature/places/pdfs/16000532.pdf; South Rockfish Valley Rural Historic District, https://www.nps.gov/nr/feature/places/pdfs/16000534.pdf; Treasure Hammock Ranch Farmstead, https://www.nps.gov/nr/feature/places/pdfs/13000900.pdf; Rouse Ranch, https://www.nps.gov/nr/feature/places/pdfs/13000674.pdf.
The National Register also includes three wildlife refuges: the Lower Klamath Wildlife Refuge (https://npgallery.nps.gov/GetAsset/4447e441-2aee-46c6-b9ab-c248e14a2099), the Lake Merritt Wild Duck Refuge, (https://npgallery.nps.gov/GetAsset/55492bfe-82ca-4797-8f2c-a43ff747f60c), and the Pelican Island Wildlife Refuge (https://npgallery.nps.gov/AssetDetail/NRIS/66000265). In addition, sites such as Devil's Tower in Montana (https://npgallery.nps.gov/NRHP/AssetDetail?assetID=7195b9ef-6267-4d9c-a138-1ad934bea4e7) and Massacre Canyon in Nebraska are listed based on cultural traditions and events associated with animals living at the site.

D. The Army misunderstands the Dugong *case.*

The *Dugong* case actually holds the opposite of what the Army argues. *See* Opp. 15, ECF No. 101 at 21. The Army argues that the reason the *Dugong* court found that the dugong may be protected under the NHPA turned on the fact that the dugong was protected under Japan's historic property laws. But the Court in *Dugong* actually found, in the 2008 *Gates* decision that the Army sites, that it was *not* deferring to the Japanese decision, but rather was applying the NHPA's requirements to the U.S. Department of Defense *independent* of what the Japanese were doing:

> …[T]he court's review is not directed at whether Japan has complied with Japanese law, but whether DOD has complied with its obligations under the NHPA. Section 402 of the NHPA is clear on its face—it assigns the obligation to take into account to "the head of a Federal agency having direct or indirect jurisdiction over such undertaking." … The obligation to take into account, therefore, lies with the DOD and the DOD alone. …The fact that Japan will conduct an environmental assessment pursuant to Japanese law does not relieve DOD of its independent obligation to take into account under the NHPA.

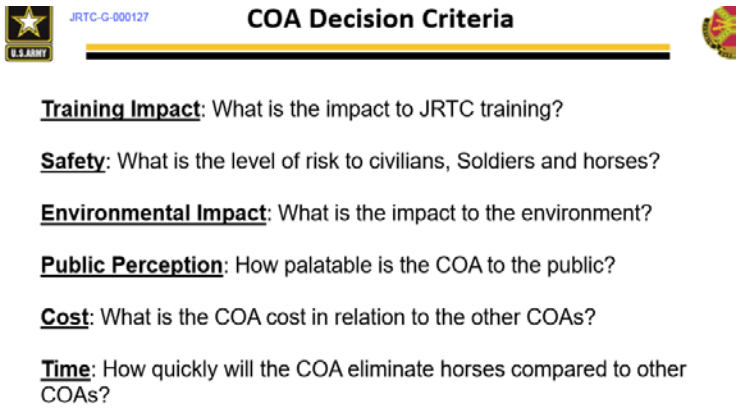
Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1107–08 (N.D. Cal. 2008). Further, everything in this 2008 decision assumes the correctness of, and builds upon, the 2005 decision, where the *Dugong* court found that the dugong was a wild animal that may be independently eligible for inclusion on the National Register of Historic Places *under the NHPA*. *Dugong v. Rumsfeld,* No. C 03-4350 MHP, 2005 WL 522106, at *9–10 (N.D. Cal. Mar. 2, 2005).

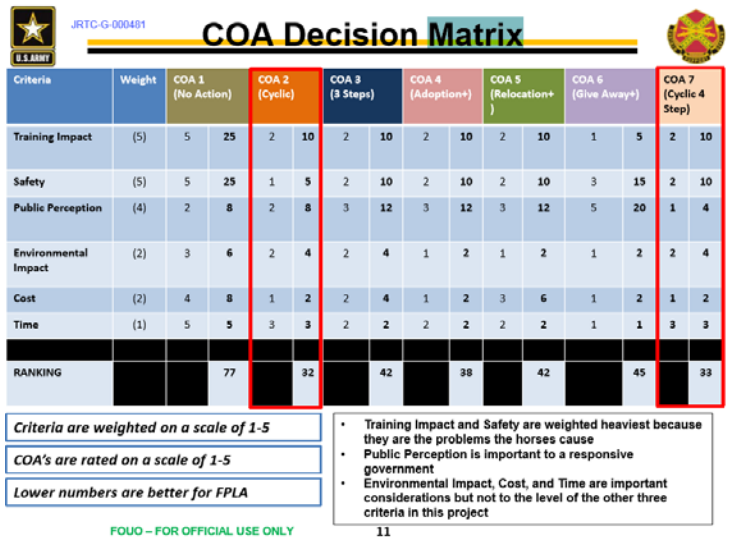
III. NEPA Response

A. The Army attempts to rely on post hoc rationalization to explain why it did not rely on the Decision Matrices when making its final decision.

The Government's argument/explanation of the decision matrixes is confusing, and frankly seems to support Pegasus's argument. The Army tries to denigrate the matrixes by

calling them "so called matrices", but Pegasus did not come up with this name – it's the Army's own title.





JRTC-G- 000481, JRTC-G000127; *see also* Opp. 23, ECF No. 101 at 29. In its opposition, the Army tries to downplay these faulty matrices by saying they were "parts of briefings that were updated during the planning process and presented to different commanding generals over a fourteen-month span." Opp. 23, ECF No. 101 at 29. The Army also argues that "These documents are evidence of the Army's deliberation, not its final determination." *Id.* If with these arguments the Army is admitting that the basis for its choice of alternatives was patchwork and inaccurate, it proves Plaintiff's point that the Army's reliance on these matrices to make its determination was arbitrary and capricious. "[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained. The administrative process will best be vindicated by clarity in its exercise." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (internal quotations omitted).

Furthermore, there is nothing in the administrative record which indicates that the Army used something other than the "Decision Matrix" to support its final decision. Rather, there is specific evidence that shows that command *did* rely these on these matrices in the end. For

example, Table 5. in the Army's EA at JRTC-B-000131 is the exact same Table the Army used in its decision matrix. *See* Mot. Summ. J. Ex. U 9, ECF No. 96-4 at 9 (Matrices comparison).

The Army also attempts to discredit Pegasus's arguments by stating that Table 5.2 only compares each COA to the "no action" alternative, "but does not otherwise qualitatively compare COAs." D.'s Opp. 23, ECF No. 101. First, if this is true, the Army did not do its job. The Army's own regulations state it is required to consider alternatives, "including appropriate consideration of the 'No Action' alternative, the 'Proposed Action,' and *all other appropriate and reasonable alternatives* that can be realistically accomplished." 32 C.F.R. § 651.34 (emphasis added). On the other hand it plainly, on its face, compares all the COAs against one another – to argue otherwise (1) makes no sense, and (2) is entirely *post-hoc*.

Furthermore, the Army's argument, that the matrix analysis is not sufficient to show that the Army credibly weighed all the reasonable alternatives, is *exactly* Pegasus's point. Table 5.2 compares all COAs to COA 1 (no action), and without justification the Army claims every other COA would have a higher-scored environmental impact. But the Army's own Table 5.1 shows the *opposite*. JRTC-B-000131. Pegasus is frankly unable to understand how the Government's *post-hoc* arguments even show that the Army made a decision based on any rational analysis and comparison. The Army's Cost and Public Perception rankings are arbitrary and capricious, the record and Exhibit U speak for themselves, and the Government is grasping at confusing *post-hoc* arguments to justify the Army's patently flawed decision-making process.

B. The Army's EA does not satisfy its obligations under NEPA.

The Army's explanation for how it took a "hard look" under NEPA is a classic example of a party trying to lower its burden. The Army is essentially claiming the "hard look" it was required to take is *lowered* because it chose only to conduct an EA. But there is no support for

the argument that the "hard look" requirement is *lowered* during an EA. An EA is more concise, but a genuine "hard look" is still required. *Dine Citizens Against Ruining Our Environment v. Kline*, 747 F. Supp. 2d 1234, 1254 (D. Colo. 2010) ("The obligation to consider alternatives to the proposed action is at the heart of the NEPA process, and is 'operative even if the agency finds no significant environmental impact.'") (quoting *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1277 (10th Cir. 2004)). [8]

Further, the issue is not that the Army failed to consider *every* option. The issue is that the Army deliberately closed its eyes to reasonable alternatives, even though there is no logical reason for the Army to be in the horse elimination business as one of its missions. The underlying goal of the project was to "reduce the safety risks, training impacts, and threats to the health of the horses posed by their presence on Fort Polk." JRTC-B-000054.[9] Arbitrarily tacking on "eliminate the horses" as a necessary and co-equal "purpose" of the project makes no sense. Under NEPA, the Army cannot so unreasonably and illogically narrow the project purpose so as to preclude reasonable, less harmful options that could accomplish the Army's valid, legally supportable goals with less harm and cost.[10]

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[8] "It is irrelevant whether a decision notice includes a discussion (either explicit or implicit) of an alternative. An agency must meaningfully consider and discuss alternatives in the process of reaching a decision," "Furthermore, even if an EA effectively includes consideration of an alternative such that the agency has considered it in the decisionmaking process, NEPA demands more. One of NEPA's core purposes is to ensure "that an agency will inform the public that it has considered environmental concerns in its decision-making process. . . . A party reviewing an EA should not be forced to read between the lines to determine whether the agency has considered a reasonable alternative," and "In order to comply with NEPA's "hard look" requirement, the 2005 Permit Revision EA 'must not only reflect the agency's thoughtful and probing reflection of the possible impacts associated with the proposed project, but also provide a reviewing court with the necessary factual specificity to conduct its review.'" *Dine Citizens Against Ruining Our Environment v. Kline*, 747 F. Supp. 2d at 1256-57 (internal citations omitted).

[9] JRTC-G-000006, ("Proposed Problem Statement: How to eliminate trespass horses from Fort Polk IAW state and federal laws" and "Proposed Mission Statement: The Joint Readiness Training Center and Fort Polk will eliminate trespass horses from FPLA in a legal manner IOT prevent potential impacts to training events and ensure Soldier and animal safety NET JUN 2015); JRTC-G-000060 (After the COA to eliminate the horses is tentatively chosen by the Draft Finding of No Significant Impact (FNSI) and once the Environmental Assessment (EA) is complete on this tentative COA, FPLA will publish a Notice of Availability (NOA).

[10] "The evaluation of alternatives mandated by NEPA is to be an evaluation of alternative means to accomplish the general goal of an action…An agency cannot restrict its analysis to those 'alternative means by which a particular [actor] can reach his goals." *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 669 (7th Cir. 1997). The

C. The Army does not have expertise in the matters directly relevant to this case, and is not entitled to special deference.

The Army claims the Court should defer to the Army's expertise. To justify its assertion the Army cites to *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989), a case that discusses a particular type of deference in cases where agency decisions "implicate[] substantial agency expertise." Opp. 9, ECF No. 101 at 11. But this kind of deference only applies in cases where the agency has *particular* expertise in a complex subject matter at issue. *See, e.g.*, *Marsh*, 490 U.S. at 378 (where plaintiffs challenged an Army Corps of Engineers flood control project decision, based on a dispute over a particularly complex scientific conclusion, "[b]ecause analysis of the relevant documents 'requires a high level of technical expertise,' we must defer to "the informed discretion of the agencies.").[11]

But the Army does not have particular expertise in the issues before this Court, such as NEPA compliance, NHPA compliance, herd management, horse behavior, historic landscapes, effects of and best practices for removing a large horse herds from an area. When faced with a recommendation or opportunity to contact the experts in these issues in other federal government agencies, the Army did not want any help that might slow down the horse-elimination plan:

> It is a mistake to bring another federal agency into the NEPA process. NEPA requires any federal agency to conduct an analysis if their agency is involved as an

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Army's blind determination to completely eliminate all horses, no matter what, tainted its whole decision-making process, blinding it to reasonable options that might allow some horses to remain in some less-dangerous areas of the 200,000+ acres of Army land while implementing targeted measures to fulfill the purposes of protecting soldiers and maintaining training. Predetermination is also a violation under NEPA. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 716 (10th Cir. 2010). This happens when an agency makes a, "'irreversible and irretrievable commitment of resources' prior to completing the environmental review." *Id.* at 715. In judging whether an agency has impermissibly committed itself to a course of action before embarking upon a NEPA analysis agencies can look to evidence outside of the EA. *Id.* at 716*; see also*, *Fund For Animals v. Norton*, 281 F. Supp. 2d 209, 229-30 (D.D.C. 2003) (holding an agency had did not take the hard look required under NEPA prior to completing the EA because, the agency had already issued permits allowing killing of swans).

[11] *See also, Kleppe v. Sierra Club*, 427 U.S. 390, 412-23 (1976); *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103-04 (1983) ("…a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.")

> advisor or monetarily. The NEPA process would then require a joint NEPA document which would extend the timeline out by eighteen months.

JRTC-G-000066.[12] The Army *has* particular expertise in conducting military operations and in training military personnel, but cannot simply act on that knowledge and ignore all the issues it understands less well. Experts on horses, history, and the environment could help find other viable options, just as NEPA and the NHPA require.[13]

D. The Army was required to conduct an EIS.

The Army tries to argue that it was only required to conduct an EA. However, the Army's own regulations require it to conduct an EIS. The Army should have conducted an EIS under 32 C.F.R. § 651.41(b), because there are two wildlife management areas (WMA) within Fort Polk: "Peason Ridge WMA and the Fort Polk WMA." JRTC-G-000355. The Army also must consider the *significant, unique, and unknown environmental effects* of removing hundreds of horses from a unique landscape. 32 C.F.R. § 651.41(d).

An EIS is also required under 32 C.F.R. § 651.41(i) due to the controversial environmental nature of eliminating all the horses. The Army tries to lower this burden by

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[12] In the same document the Army states, as a reason for not doing more to comply with NEPA, "The basis of our action to eliminate trespass horses is training and safety, *not environmental impact*." *Id.* The Army in one fell swoop eliminated bringing in outside help and dismissed the importance of carefully examining the environmental impact. This kind of thought process is exactly what led the Army to fail to comply with the NEPA requirements. "Since these appointees have been unable to come up with a feasible solution year after year, it is time that not only horse advocates be allowed to brainstorm this problem, but that outside experts who are familiar with large-scale equine herd management be allowed to assist." JRTC-B-000374.

[13] In fact, Pegasus presented some testimony of exactly such experts at the preliminary injunction hearing. For example, Dr. Batt testified that,

> The most common method would be using a hot wire which is a simple electrical fence that can be turned on and off. Generally, especially wild type horses, when they associate getting a mild electrical shock to an area, they're going to stay away from that area. Going back to the fact that they're prey animals, they've sustained life on this planet for thousands of years using their instincts on how not to get injured or hurt or to stay away from dangerous places and objects to them. So implementing hot wire and, you know, other methods could easily drive horses out of areas that you didn't want them to be on, in my experience.

PI Tr. Hr'g 87, ECF No. 62.[13] Pegasus is not asking this Court to order the Army to choose this particular option. Rather, under NEPA the Army should have been willing to at least *consider* some such options that could accomplish the Army's goals with less cost and less harm.

claiming this action was not highly controversial *environmentally*, but only *politically*. The Army then argues that responding to public outcry would result in constant requirements to perform an EIS. But, the removal of hundreds of horses from an environment simply will "be highly controversial from an environmental standpoint," as *many* of the public comments point out. 32 C.F.R. § 651.41(i). As Stacey Alleman-McKnight's testified:

> you could actually follow the ecosystem that these horses do control and help. . . As they migrate through the rain, they reseed and they help the ground support . . . they've actually maintained and kept the weeds down, the china ball trees that will eventually take over.

PI Tr. Hr'g 60, ECF No. 62. Therefore, because there will be *significant, unique, and unknown environmental effects* the Army, under its own regulations, was required to conduct an EIS.

IV. Extra-Record Evidence

The Army tries to dismiss Plaintiff's evidence by stating that none of the witnesses read the entire administrative record. But the Army never explains why reading all 7,500 pages of the administrative record was required for any of the witnesses to testify competently. Dr. Tom King, who the Army did not dispute as an expert, reviewed all relevant documents for NHPA purposes, specifically including, but not limited to, the two planning documents totaling almost 3,000 pages that the Army is trying to use to support its claim that it was not required to conduct a Section 106 analysis. Dr. King testified that Peason Ridge is a cultural landscape that *should have been considered* through the Section 106 process. He also testified that landscapes are often the historic areas people are most concerned about.[14] Further, the Army tries to discount

[14] "Well, landscapes are often the kinds of areas that people are most concerned about. The National Historic Preservation Act was substantially enacted in order to reduce the tendency of government agencies to run roughshod over the interests of local parties. And often landscapes are the things that people relate to most heavily, most seriously. I think you have an example of that here where you have the heritage families organized around their relationship to the landscape that they and their ancestors have valued and treasured that they no longer can occupy but they still interact with in meaningful ways. . . . Q. And, in your opinion, is Peason Ridge and part of Fort Polk a

Plaintiff's witness by stating they made legal conclusions, but 1) the transcript is clear that the U.S. Magistrate Judge did not allow these witnesses to sit on the stand spouting legal conclusion,[15] and 2) the Army does not explain how any specific testimony constitutes an impermissible legal conclusion.

Finally, the Army tries to assert that "the record reflects [Mr. Robertson's] comments were considered." But as Mr. Robertson testified and as the Army's own administrative record reflects, the Army treated him as opposition to be "neutralized," setting up a strategic meeting to accomplish that mission, while the record does *not* reflect any meaningful response or consideration of any of his comments or concerns. PI Tr. Hr'g 40, ECF No. 62.

V. Other Arguments

The Government repeatedly claims that there is "no evidence" of some particular thing, but in doing so it repeatedly ignores both the hundreds of public comments in its own administrative record and also all of Pegasus's evidence and testimony. For example the Army says there was no evidence that the population of these animals is a historic fixture of this area" (Opp. 14, ECF No. 101 at 20), and "Plaintiff provides no evidence that hundreds of [horses] are a historic component of this area," (*Id. at 20.*), but this is factually incorrect. Pegasus provided evidence, including hundreds of public comments mentioning the historic value of the horses (JRTC-B-001044-1340), testimony from Tom King (PI Tr. Hr'g 17-31, ECF No. 62) and Ricky Robertson (*Id.* at 33-41), and books and other publications *published or funded by the Army* that the Army ignored or excluded from the record. ECF Nos. 43-11 & 43-13.

landscape that may be eligible for inclusion? A. They certainly appear to be. It's something that should be investigated. PI Tr. Hr'g 20-21, ECF No. 62.

[15] *See e.g.*, PI Tr. Hr'g 71, ECF No. 62.

The Army argued the horse population is a danger to troops and impedes army training. Opp. 7, ECF No. 101 at 1. Pegasus does not dispute that the Army should protect troops. But the administrative record has very few instances of any training delays or disruptions *actually* happening.[16] Thus there is no reason the Army could not have considered reasonable alternatives to the total elimination of all horses.

Also, the Army points to occasional car accidents involving horses off-base. Opp. 8, ECF No. 101 at 14. But the records do not indicate a rash of such accidents, and gives no context. JRTC-F-000004-72, -98, -259. There is no way to know how the frequency and severity of accidents in this area compares with other rural areas that include wild or roaming animals such as deer, cattle and horses.[17] There is no way to know if there is any increased risk from the horses, or whether they'll be replaced by other grazing animals such as deer, and therefore there is no indication whether the risk of accidents will decrease.

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[16] The Army alludes to the possibility that the horses might impede training, but has scant evidence that they actually do so. In the only specific incident the Army cites where training was actually impeded because a runway could not be used, the emails about the incident with horse manure on the runway in fact reveal that:

(1) the runway on Peason had not been used regularly in a long time. No one indicates how many years or months it had been since the last time the Peason air strip was used, or how often it has been used in the past;
(2) it appears that no one from range control had inspected or prepared the landing strip before the training;
(3) the horses at the airstrip that the Army usually uses, the "LZ," ordinarily move out of the way when training begins and pose no problems for training there, and
(4) the people participating in the email discussion were concerned that the horses at Peason, who they believed were not used to the Peason air strip being used, might not be as accommodating as the horses at the "LZ," but there was no actual incident of them getting in the way.

Opp. 7-8, ECF No. 101 at 13-14; JRTC-B-000181-191.

[17] Stacey Alleman-McKnight directly testified about this omission in her testimony at the preliminary injunction hearing, at PI Hr'g Tr. 58-59, ECF No. 62:

Q. And how many accidents would you estimate occur in your parish each year?
A. We probably have one major accident a month, be a stray horse, you know, walking down the road…So we probably handle one a month. Oftentimes it's cattle. It's not always horses. So I would tell you about 12 a year. This is handled through the St. Landry Parish Sheriff and the state troopers.
Q. And how does this compare with the number of incidents reported in the administrative record?
A. When I looked at their records, it was approximately 21 accidents that they had struggled for, I think, over a 10-year basis. So that's a pretty light load…I also did take note that they said that there was manure around residential places where their -- I guess their folks with the Army domicile at. What was very ironic is there was no boundary fence to actually keep these children and the people there from running into the road site. Most places where people live, even on barracks, have some sort of primary fencing that we deal with. So for me…it wasn't the most horrific number that I see or what we deal with in my parish.

Further, the Army talks about a sterilization program as it has implemented one, but there is no such evidence in the record. Opp. 8-10, ECF No. 101 at 14-16. Perhaps meetings were held, a bid was advertised, or other preliminary actions were taken. But no evidence anywhere in the record indicates that anyone actually tried to implement a sterilization program.

The Army only discusses fencing as if it is an all-or-nothing option. It dismisses the idea of fencing because it would be too expensive to fence *everything*. Opp. 8-10, ECF No. 101 at 14-16. There is no evidence in the record that the Army ever considered a more reasonable program of strategically fencing areas that needed to be fenced.

Finally, the Army failed to include a statement of material facts to support its cross-motion for summary judgment as required under L.R. 56.1. ECF No. 101. Therefore Pegasus cannot provide a statement of contested facts in response.

Conclusion

For the reasons stated above, this Court should **grant** Pegasus's Motion for Summary Judgment, ECF No. 96, and **deny** the Army's Motion for Summary Judgment, ECF No. 101.

Respectfully November 11, 2018,

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Certificate of Service

I certify that on November 11, 2018, I caused a copy of this document to be served through the Court's CM/ECF system to all parties registered to receive electronic notice.

s/ Machelle Hall
Machelle R. Lee Hall