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' REPLY BRIEF IN SUPPORT OF THEIR CROSS-MOTION FOR SUMMARY JUDGMENT

Federal Defendants have provided an administrative record that supports the challenged decision in this case, and Plaintiff has failed to show that the Army's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. From the outset, Plaintiff makes numerous claims that are simply untrue. Pl.'s Resp. to Defs.' Cross-Mot. for Summ. J. and Reply in Supp. of Pl.'s Mot. for Summ. J., ECF No. 103 ("Pl.'s Resp."). Federal Defendants rebut the most significant of those allegations herein and ask this Court to find that Federal Defendants are entitled to summary judgment as a matter of law.

First, Plaintiff wrongly states the importance of the decisions by the Eastern District of Louisiana and the Fifth Circuit in *Coalition of Louisiana Animal Advocates v. United States ("COLAA").* JRTC-B-000139-56. Plaintiff asserts that the Army did not rely on these decisions during the decision-making process, that these decisions carry no weight, and that the current administrative record does not include the necessary materials from the previous litigation. By declaring the Army's reliance on these decisions was *post hoc*, Plaintiff argues that the Army

violated the National Historic Preservation Act ("NHPA"). None of these assertions are accurate.

Second, Plaintiff misstates the Section 106 process required under the NHPA. Pl.'s Resp. 4-5. There is no requirement that the agency state, on the record, a reasonable basis for its determination. The standard for both NHPA and National Environmental Policy Act ("NEPA") is whether the agency's actions were arbitrary or capricious, not whether Plaintiff would have preferred a different result.

Third, Plaintiff's NEPA arguments are also without merit. Again stating that the Army's Environmental Assessment ("EA") is inadequate, Plaintiff argues that the Army did not consider alternatives that would fail to meet the purpose and need of the project, and then takes issue with the Army's identified purpose and need. As stated on the first page of the EA, the proposed action is "to eliminate trespass horses to reduce safety risks, training impacts, and threats to the horses posed by their presence on Army-owned property at Fort Polk, Louisiana." JRTC-B-000040. Plaintiff may not agree with the purpose of this action, but that is within the agency's discretion to set. While the Army does not claim expertise in horse management, the Army has unquestionable expertise about the risks and limitations imposed by trespass horses to the Army's mission and Fort Polk's population.

I. The *COLAA* Decisions Directly Impact this Litigation and the Army's Decision

From the beginning, the Army clearly communicated the importance of the *COLAA* decision to the public, stating in its initial notice of intent that "[t]he U.S. District Court for the Eastern District of Louisiana has determined the horses are trespass livestock to which the Wild Free Roaming Horses and Burros Protection Act of 1971 is not applicable." JRTC-B-000242-63. The Army's EA also emphasizes its reliance on the *COLAA* decisions from the start in paragraph 1.2, entitled "Purpose, Scope, And Need For Proposed Action," which states that

"[t]he horses are trespass livestock not subject to regulation under the Wild Free Roaming Horses and Burros Protection Act of 1971 (16 U.S.C. § 1331). See appendix A (Court Rulings)." JRTC-B-000054. References to the importance of this litigation are also contained throughout the administrative record, including command briefs and in response to public comments. *See e.g.*, JRTC-G-000004 and JRTC-B-000852. It is also referenced in the resulting Finding of No Significant Impact ("FONSI"). JRTC-A-000004. Thus, the Army's supposed *post hoc* reliance on the *COLAA* decision is simply unsupported by the record.[1]

Additionally, the *COLAA* Record of Environmental Consideration ("REC") and its supporting documents *are* included in this record. When reviewing the *COLAA* record, the district court noted a September 1999 report, "Protection of Restored Lands (Capture and Removal of Trespass Horses)," and the Army's 1999 REC, with appendices. JRTC-B-000148-52. These documents, in their entirety, are included at JRTC-E-002980-3139, -3524-3560. In addition to those documents, the current administrative record also contains the 2010 EA concerning sterilization and the 2010 REC concerning public capture. JRTC-E-003564-4565. Rather than showing an "arbitrary and capricious" decision void of deliberation, the totality of the current administrative record indicates that the Army has been involved in studying and dealing with this issue for nearly two decades.

[1] Further, Plaintiff misunderstands inadmissible *post hoc* rationalizations. "[W]hen an agency provides further explanation of its decision in the course of litigation, it is not necessarily engaging in post hot rationalization. The rule is that an agency must defend its actions on the basis on which they were originally taken, not on some new basis that is developed in litigation to justify the decision." *Nat'l Oilseed Processors Ass'n v. Browner*, 924 F. Supp. 1193, 1204 (D.D.C. 1996) (citation omitted), *aff'd in part sub nom.*, Troy Corp. v. Browner, 120 F.3d 277 (D.C. Cir. 1997); *see also Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 440 (5th Cir. 1981). So, the Army not prevented from providing a more detailed explanation of agency action in response to Plaintiff's legal challenge. *Browner*, 924 F. Supp. at 1204.

Plaintiff asserts that the horses at Fort Polk are historic, thus making this area historic. The Army reasonably reached a different conclusion based on the *COLAA* court's finding that these horses were trespass livestock. Throughout this case, Plaintiff asserts that the Army ignored public comments that the trespass horses were historic. Pl.'s Resp. 5. Not so. The *COLAA* litigation definitively determined that these horses were trespass livestock. Nonetheless, the Army reviewed all of the comments it received and found no actual evidence to refute the prior judicial determination that the horses were not historic.

Further, the *COLAA* decisions also bear on the current matter. In *COLAA*,[2] the plaintiff sued the U.S. Department of Agriculture and the U.S. Army concerning the applicability of the Wild and Free Roaming Horses and Burros Act ("Wild Horse Act"), 16 U.S.C. §1331, to the same herds of horses at issue in this action. JRTC-B-000139-55. As previously stated, the applicability of the Wild Horse Act turned on the question of whether horses were introduced by "accident, negligence, or willful disregard of private ownership." 36 C.F.R. § 222.60(b). Given the plain language of that statute, the district court's conclusion 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," necessarily precludes further argument that the horses are a historic object. JRTC-B-00148-49. Absent such status, and even assuming a procedural violation of the NHPA, there can be no prejudicial error if no historic object exists. *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), *aff'd*, 888 F.3d 906 (8th Cir. 2018). Plaintiff correctly notes that the Fifth Circuit rule exempts unpublished opinions after 1996 as binding precedent, but they are

[2] Plaintiff notes that the *COLAA* litigation additionally included a NEPA claim, and that those issues were settled before the case reached the Fifth Circuit. The Army has not claimed that the NEPA component of the *COLAA* claim has any preclusive effect on this litigation. The settlement and further compliance documents are included at JRTC-D-000001-23.

still persuasive. *Ballard v. Burton*, 444 F.3d 391, 401 (5th Cir. 2006). Even without any binding effect on this Court, the Army was not arbitrary or capricious in relying on the determinations in the *COLAA* litigation, especially after considering the comments and information provided during the public comment period.

Plaintiff argues that its case is different from *COLAA* because its claims were not brought under the Wild Horse Act, but that is the very reason that its claims fail. Plaintiff has sought to change a substantive decision by attacking the agency's process through the NHPA and NEPA. But NEPA and the NHPA do not mandate particular results; they only prescribe necessary processes and allow the agency the discretion to decide that other values outweigh environmental or historical concerns. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). At bottom, Plaintiff is arguing that the horses should be protected and allowed to remain on the Army's land, like wild horses are protected on public lands under the Wild Horse Act. No statute requires such result.

II. There Is No Violation of the NHPA

The record contains the Army's decision regarding the NHPA's requirements. In response to public comments, which are a part of the decision-making process, the Army stated, "it is Fort Polk's determination that the actions proposed does [sic] not have the potential to cause effect to historic properties[,]" referencing the NHPA regulations at 36 C.F.R. § 800.3(a)(1). JRTC-B-000855. Section 800.3(a)(1) states that "[i]f the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such properties were present, the agency official has no further obligations under section 106 or this part." Plaintiff attempts to confuse this issue by citing additional requirements that are located further along in the regulations and in the Section 106 process. In other words, if the Army makes the determination it made here, Section 106 and its requirements do not apply.

As such, Plaintiff is left to argue that the horses should have been considered historic or that the Army overlooked something in order to try to show a NHPA violation. Plaintiff does this by arguing that the area should be considered a cultural landscape because of the horses. Yet, Plaintiff cites no case law supporting its assertion that animals may constitute part of a NHPA cultural landscape. And all of the claims concerning such landscapes are all dependent on the presence and nature of the horses, which were not supported by the administrative record. Here, the horses are not a natural part of the landscape; they are trespassing livestock.

In the *COLAA* litigation, the district court adopted "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. In an additional letter from 1998, the U.S. Forest Service also stated that the area was "trespass horse free" in the 1980s and that "[t]here is no record of any horses" as a historic component of the lands surrounding Fort Polk and the Kisatchie National Forest. JRTC-E-003549-50. Relying on additional documentation contained in the administrative record, the EA concurs and concludes that the current horse presence is due to the end of open grazing, cessation of capture efforts post-*COLAA*, further abandonment, and continued breeding. JRTC-B-000084-85. Plaintiff argues that this information should have been disregarded in favor of conflicting public comments. Pl.'s Resp. 4-5. However, "[w]here conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence." *Sabine River Auth. v. U.S. Dep't of the Interior*, 951 F.2d 669, 678 (5th Cir. 1992).

Even if the factual matter of the horse origins had not been fully litigated by a similarly-situated plaintiff and well documented in the record, arguments related to the *Dugong* litigation remain misplaced. In its response, Plaintiff cites language that is relevant only because a threshold determination found that the dugong was "a property which is on the applicable

country's equivalent of a National Register." Pl.'s Resp. 16; *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1100 (N.D. Cal. 2008). The related case of *Dugong v. Rumsfeld*, 2005 U.S. Dist. Lexis 3123, 14-15 (N.D. Cal. 2005), which provided the basis for the *Gates* decision, further explained that the extra-territorial jurisdiction of the NHPA resulted from U.S. participation in the "Convention Concerning the Protection of the World Cultural and National Heritage." *Id*. Although Plaintiff intimates that these cases provide protection for domestic animals under the NHPA, the setting of the *Dugong* litigation does not support this finding. Further, Plaintiff still offers no example of a court extending the *Dugong* decisions in such fashion.

III. The Army Satisfied Its Obligations Under NEPA

NEPA requires a federal agency to take a "hard look" at the potential environmental consequences of a proposed action. *Robertson*, 490 U.S. at 350. Here, the Army fully complied with NEPA's purpose and intent through public involvement, examining the environmental consequences, and considering a range of alternatives. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). Plainly, the purpose of this project is "to eliminate trespass horses to reduce safety risks, training impacts, and threats to the horses posed by their presence on Army-owned property at Fort Polk, Louisiana." JRTC-B-000040. Concerning the procedural requirements of NEPA, it is not the Plaintiff's place to determine a project's proper purpose.

Plaintiff, however, directly challenges the project's purpose, arguing that "there is no logical reason for the Army to be in the horse elimination business . . . ." Pl.'s Resp. 19. In doing so, Plaintiff not only impermissibly second-guesses the agency's determination of its needs, but also belittles the record's extensive documentation of safety risks and training impacts – considerations that "implicate[] substantial agency expertise." *Marsh*, 490 U.S. at 376. Again, the record demonstrates that training at Fort Polk has been degraded or cancelled due to the trespass horse presence. JRTC-B-000055, -181-191; JRTC-F-000082, -98-252. Further, the

record also documents that horses pose a safety risk by their presence on local roadways, office parking lots, near child care facilities, and throughout housing areas. JRTC-B-000038, -56, -157, -180; JRTC-F-000098-258. Although Plaintiff seeks to minimize such events as "occasional car accidents" or "very few instances of any training delays," such qualitative descriptions carry no weight. Pl.'s Resp. 24. Fort Polk's mission is to "support and train" units to "deploy, fight and win." JRTC-B-000051. The record adequately demonstrates that the trespass horses are an impediment to this mission and a safety hazard to personnel. As such, it is clear that the Army "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, 982 (9th Cir. 1985) (citation omitted).

Plaintiff's other arguments concerning alternatives examined by the EA and the Army's decision not to prepare an Environmental Impact Statement ("EIS") are also flawed. Although Plaintiff states that the "Army deliberately closed its eyes to reasonable alternatives," the record reflects that the Army considered a range of alternatives, including all alternatives gathered during the public scoping process. JRTC-B-000063, -234-824. To the extent that Plaintiff offers any other methods, it only broadly suggests allowing "some horses to remain in some less-dangerous areas . . . while implementing targeted measures to fulfill the purposes of protecting soldiers and maintaining training." Pl.'s Resp. 20 n.10. This alternative appears to suggest a form of enclosure fencing, which was examined in the EA. JRTC-B-000071. Notwithstanding the fact that a large, enclosed space filled with horses would constrain training, a problem the Army is trying to solve, Fort Polk previously estimated a cost between $12 and $89 million to implement such a plan, not including ongoing maintenance. JRTC-B-000071-72.

Plaintiff also ignores the permissibility of conducting an EA as an initial step under both the Council on Environmental Quality's and the Army's implementing regulations. 40 C.F.R.

§ 1501.4; 32 C.F.R. § 651.12. Under these regulations, an agency may prepare an EA if environmental effects are uncertain and then choose to prepare a FONSI or EIS following the EA's conclusion. 40 C.F.R. § 1508.13. Having made the decision not to proceed with an EIS, the Army's decision "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)). Here, Plaintiff argues that the Army should have conducted an EIS based on regulations that depend on the judgment of the "proponent, preparer, or approving authority . . . ." 32 C.F.R. § 651.41. As noted, the FONSI – signed by the then existing commanding general – permissibly determined that the proposed actions "would have no significant impact on the environment." JRTC-A-000005. Further, Plaintiff failed to identify any environmental effects in the record that the Army failed to take a hard look at in its EA.[3] Like the agency in *Don't Ruin Our Park v. Stone*, the Army did all that NEPA requires by giving full consideration to the relevant issues and made a reasoned determination that no additional study was warranted. 802 F. Supp. 1239, 1258 (M.D. Pa. 1992). Therefore, an EIS was not necessary for this agency action.

IV. The Extra-Record Evidence Offered By Plaintiff Remains Improper.

Federal Defendants renew their previous objections to the extra-record evidence offered by Plaintiff and maintain that the administrative record "already in existence" is the proper focus for review. 5 U.S.C. § 706; *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (*per curiam*); *see, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Given that this case is a review of

[3] Instead, Plaintiff cites a comment from Ms. Alleman-McKnight from the preliminary injunction hearing. Ms. Alleman-McKnight's comments are nothing more than speculation and ignore the agency's actual analysis. The record reflects that the Army considered the environmental consequences of each alternative on soil and other valued environmental components. JRTC-B-000101-131.

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 a part of the administrative record.'" *Aquifer Guardians in Urban Areas v. Fed. Highway Admin*., 779 F. Supp. 2d 542, 565 (W.D. Tex. 2011) (citation omitted).

Here, Plaintiff references the extra-record materials and testimony of Ms. Stacey Alleman-McKnight, Dr. Tom King, and Mr. Rickey Robertson. Regarding each, the Army objected both by motion and at the hearing that such consideration was improper. Regarding Dr. King, in particular, is it thus not true that the Army did not – or does not – object to his qualifications as an expert. In addition to impermissible augmentation of the record, Federal Defendants also note that Dr. King testified specifically as to his legal conclusions concerning the applicability and purpose of the NHPA. It is the Court's purview to assess the agency's actions in line with the language of the Act and its implementing regulations, not Dr. King's.

And Federal Defendants again state that Mr. Robertson took full advantage of the opportunity for public comment as reflected in the record. JRTC-B-000280, -892 Plaintiff's insinuation that his comments were specifically ignored in some way is wholly unsupported by any evidence. Pl.'s Resp. 23. Rather, Mr. Robertson had ample opportunity to share his opinions during the EA process, including an hour-long meeting with the commanding general.

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 other requests for relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 11, 2019, a copy of the foregoing *Federal Defendants' Reply Brief in Support of Their Cross-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
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