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United States Court of Appeals
Tenth Circuit

December 13, 2013

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FRONT RANGE EQUINE RESCUE, et al.,

Plaintiffs-Appellants,

and

STATE OF NEW MEXICO,

Plaintiff-Intervenor-Appellant,

v.

TOM VILSACK, Secretary U.S. Department of Agriculture, et al.,

Defendants-Appellees,

and

RESPONSIBLE TRANSPORTATION, LLC, et al.,

Defendants-Intervenors-Appellees.

No. 13-2187
(D.C. No. 1:13-CV-00639-MCA-RHS)
(D. N.M.)

ORDER

Before **PHILLIPS** and **EBEL**, Circuit Judges.

Plaintiffs-Appellants and Plaintiff-Intervenor-Appellant (collectively, Plaintiffs), have filed an emergency motion for injunction pending appeal from the

district court's dismissal of their lawsuit asserting violations of the National Environmental Policy Act (NEPA). Plaintiffs ask this court to enjoin officials from the United States Department of Agriculture (USDA) and the Food Safety Inspection Service (FSIS) from carrying out federal meat inspections at three horse slaughter facilities until this appeal is resolved. They argue that, absent an injunction, horse slaughter operations will resume in this country for the first time in over five years, yielding potentially irreversible environmental harm from toxic horse slaughter byproducts. For the reasons explained below, we deny Plaintiffs' emergency motion.

I.

Earlier this year the FSIS, an agency within the USDA responsible for administering the Federal Meat Inspection Act (FMIA), issued Grants of Inspection to three prospective horse slaughterhouses: Defendants-Intervenors-Appellees, Valley Meat Company, LLC; Responsible Transportation, LLC; and Rains Natural Meats (the Slaughterhouses). The FSIS also adopted FSIS Directive 6130.1 (the Directive), which provides instructions to FSIS personnel regarding ante- and post-mortem equine inspections, including how to perform drug-residue testing. Shortly thereafter, Plaintiffs filed this lawsuit against USDA and FSIS officials, alleging NEPA violations and seeking declaratory and injunctive relief. Plaintiffs argued that the FSIS acted arbitrarily and capriciously by issuing the Grants of Inspection and adopting the Directive without first preparing an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) pursuant to NEPA.

On Plaintiffs' request, the district court entered a temporary restraining order. Ultimately, after briefing and a hearing, the district court rejected Plaintiffs' arguments, vacated the restraining order, denied Plaintiffs' request for permanent injunctive relief, and dismissed the case with prejudice. This appeal, and Plaintiffs' emergency motion for injunction pending appeal, followed.

II.

To obtain an injunction pending appeal, Plaintiffs must adequately address (1) their likelihood of success on appeal; (2) the threat of irreparable harm if the injunction is not granted; (3) the absence of harm to the opposing parties if the injunction is granted; and (4) any risk of harm to the public interest. 10th Cir. R. 8.1; Fed. R. App. P. 8. Contrary to Plaintiffs' position, a relaxed standard does not extend to cases, like Plaintiffs', seeking "to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme." *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation marks omitted) (affirming district court's denial of preliminary injunctive relief).

1. Likelihood of Success on Appeal[1]

The district court concluded that the FSIS's issuance of a Grant of Inspection is a mandatory, nondiscretionary act not subject to NEPA review and, that adoption of the Directive did not require the agency to prepare an EA or an EIS or to claim a

[1] Our determination is made without the benefit of full merits briefing and oral argument; thus, our necessarily tentative conclusions do not purport to constrain the ultimate resolution of this case. *See Homans v. City of Albuquerque*, 366 F.3d 900, 904-05 (10th Cir. 2004).

categorical exclusion under NEPA. Plaintiffs assert that they are likely to succeed in challenging these rulings on appeal because issuing or denying a Grant of Inspection by the FSIS is a discretionary act requiring the FSIS to comply with NEPA. Plaintiffs also argue that the possible environmental effects of the Grants of Inspection and the Directive preclude the FSIS from invoking its categorical exclusion.

The merits panel on appeal will evaluate Plaintiffs' challenges to the agency action pursuant to the Administrative Procedure Act (APA). *Colo. Wild, Heartwood v. U.S. Forest Serv.*, 435 F.3d 1204, 1213 (10th Cir. 2006). The merits panel will "review the district court's decision de novo." *Id.* at 1212-13. And, under the APA, FSIS's decisions will not be overturned unless this court determines "that the decision[s] w[ere] 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* at 1213 (quoting 5 U.S.C. § 706(2)(A)). It is through this lens that we assess the likelihood of success on appeal.

We turn first to the issuance of a Grant of Inspection, which is a prerequisite, 9 C.F.R. § 304.1(a), to FSIS's required ante-mortem examination of "all amenable species," 21 U.S.C. § 603(a), including horses, *see id.* § 601(w)(1). It appears Plaintiffs will argue on appeal that the district court erred as a matter of law in concluding that the issuance of a Grant of Inspection is a mandatory act not subject to NEPA. Plaintiffs submit that the FMIA's use of "shall" in requiring FSIS to examine animals before they enter a slaughterhouse, *id.* § 603(a), (and the use of "shall"

elsewhere in the FMIA, *id.* §§ 603(b), 604) cannot reasonably be interpreted as a non-discretionary command that FSIS grant a slaughterhouse authorization to begin operations regardless of other factors. Plaintiffs have shown a likelihood of success on this issue. Their position is supported by a fair reading of the FMIA's implementing regulations, 9 C.F.R. §§ 304.1(a), 304.1(b), 304.2(b), 500.7, and it is bolstered by the doctrine of judicial estoppel; namely, USDA's statement in a brief to the Ninth Circuit that the agency's decision whether to issue a Grant of Inspection is "plainly" "discretionary." *Kluver v. Sheets*, No. 00-35407, *available at* 2000 WL 33986949, at *24-25 (9th Cir. Nov. 7, 2000). *See Queen v. TA Operating, LLC*, 734 F.3d 1081, 1087 (10th Cir. 2013) (explaining that judicial estoppel "prohibit[s] parties from deliberately changing positions according to the exigencies of the moment").[2]

However, that is not the end of our inquiry of the likelihood that Plaintiffs will succeed on the merits. First, with regard to Plaintiffs' challenge to the Directive, we think it unlikely that that Directive constitutes final agency action subject to judicial review under the APA. *See Munsell v. Dep't of Agric.*, 509 F.3d 572, 585 (D.C. Cir. 2007) (observing that it "is not altogether clear whether" a FSIS Directive is "a final agency rule that is subject to judicial review, or a nonreviewable policy statement" (internal citation omitted)); *FPL Food, LLC v. U.S. Dep't of Agric.*, 671 F. Supp. 2d

[2] USDA succeeded in persuading the Ninth Circuit to accept its former position, *Kluver v. Sheets*, No. 00-35407, 27 F. App'x 873, 875 (9th Cir. 2001), and would arguably gain an unfair advantage here if not estopped. *See Queen*, 734 F.3d at 1087.

1339, 1344 (S.D. Ga. 2009) (describing FSIS Directives as "instructions" and "guidance documents" used by FSIS's staff "to implement the USDA's policies and procedures"). If the Directive is not final agency action, it would be subject to judicial review under the APA. Thus, Plaintiffs have not made a showing of likelihood of success on the merits as to their challenge to the Directive.

Next, we turn to the FSIS's Grants of Inspection to the Slaughterhouses. Although that action is likely final agency action, Plaintiffs have not shown they are likely to succeed in overcoming the high probability that the FSIS's Grants of Inspection fall within the agency's categorical exclusion to NEPA's review requirements, 7 C.F.R. § 1b.4(b)(1)(6). The FSIS is categorically excluded from "preparing procedures to implement NEPA," *id.* § 1b.4(a), and "a proposed action is precluded from categorical exclusion [only] if '*extraordinary circumstances*' exist such that 'a normally excluded action may have a *significant* environmental effect.'" *Utah Envt'l Cong. v. Bosworth*, 443 F.3d 732, 736 (10th Cir. 2006) (emphasis added) (quoting 40 C.F.R. § 1508.4); *see also Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1023 & n.7 (10th Cir. 2002) (discussing categorical exclusions). Here, the FSIS considered whether extraordinary circumstances existed and concluded they did not. That agency's determination is entitled to administrative deference. *Citizens' Comm. to Save Our Canyons*, 297 F.3d at 1023. Plaintiffs have not established a likelihood that they will be able to show that the FSIS was in error in invoking the categorical exclusion to NEPA.

So, with regard to Plaintiffs' challenge to both the Directive and the Grants of Inspection, Plaintiffs have failed to establish a likelihood of success on appeal. Thus, this most important factor weighs against granting Plaintiffs' emergency motion for a stay pending appeal.

2. Harm to the Plaintiffs

This factor also tips against granting Plaintiffs' emergency motion. Plaintiffs have not presented any non-speculative evidence that they (or the environment) will suffer irreparable harm if the FSIS, pursuant to the FMIA, inspects the slaughterhouse facilities and potentially allows limited horse slaughtering operations to commence (assuming the horse slaughter operations satisfy the FSIS review) before this appeal is resolved. To establish irreparable harm, which is "not an easy burden to fulfill," Plaintiffs must "demonstrate[] a *significant risk* that [they] will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical. [M]erely serious or substantial harm is not irreparable harm." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (citation and internal quotation marks omitted). Here, the injuries Plaintiffs suggest are speculative and insufficient to establish irreparable harm. Reliance upon environmental damage arising out of previous, unrelated, and limited instances of equine slaughter is too speculative and does not show a significant risk to establish irreparable harm. *See Greater*

Yellowstone Coal., 321 F.3d at 1258. Further, Plaintiffs have not shown that any alleged harm they may suffer could not be compensable by damages. *See id.* So, this factor also weighs against the grant of an injunction pending appeal.

3. Harm to the Opposing Parties

On the other hand, the Slaughterhouses have shown that they face a likelihood of cognizable harm because enjoining FSIS inspections during the pendency of this appeal would, in turn, prevent them from running their lawful businesses. Although horse slaughter has been in abeyance for some time, Congress lifted its de facto ban in the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552 (2011). The Slaughterhouses have put on evidence that a delay will be detrimental to their businesses. In addition, there is a presumed prejudice whenever government action pursuant to congressional authorization is preemptively halted for private interests (prior to a ruling on the merits). *See United States v. Oakland Cannabis Buyers' Coop*, 532 U.S. 483, 497 (2001) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought." (internal quotation marks omitted)); *Heideman*, 348 F.3d at 1191 ("[In the context of a municipal ordinance,] the ability of a city to enact and enforce measures it deems to be in the public interest is . . . an equity to be considered in balancing hardships."). There is harm from delaying administrative action preemptively here, including continued uncertainty, in addition to the potentially irreparable economic harm to the

Slaughterhouses during the pendency of this appeal. This factor also tips toward denying Plaintiffs' emergency motion.

4. Risk of Harm to the Public Interest

Plaintiffs have failed to show harm to the public interest in allowing the FSIS inspections to proceed pending appeal. Thus, this factor, as well, counsels against granting an injunction pending appeal.

III.

As our preceding analysis reveals, Plaintiffs have failed to meet their burden for an injunction pending appeal. Their emergency motion for injunction pending appeal is denied. This court's order of November 4, 2013, temporarily staying the district court's decision and granting Plaintiffs temporary injunctive relief is vacated. The motion to expedite consideration of the emergency motion is denied as moot.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk