FILED
United States Court of Appeals
Tenth Circuit

April 7, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AMELIA ARCAMONE-MAKINANO; CRAIG C. DOWNER; TOM GAGNON; TIM SAVAGE; PAULINE ST. DENIS,

Plaintiffs - Appellants,

v.

DEBORAH HAALAND, in her official capacity as Secretary of United States Department of Interior; TRACY STONE-MANNING, in her official capacity as Director of United States Bureau of Land Management,

Defendants - Appellees.

No. 22-8006
(D.C. No. 0:21-CV-00196-NDF)
(D. Wyo.)

ORDER AND JUDGMENT*

Before **MORITZ**, **BRISCOE**, and **CARSON**, Circuit Judges.

Pro se plaintiffs Amelia Arcamone-Makinano, Craig C. Downer, Tom Gagnon, Tim Savage, and Pauline St. Denis appeal the district court's dismissal for lack of jurisdiction. We agree with the district court's ruling and affirm.

---

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I. Background

Plaintiffs filed their complaint in October 2021 against the Department of the Interior ("the DOI") seeking declaratory and injunctive relief under the Administrative Procedures Act ("APA"). Specifically, Plaintiffs sought an order setting aside wild horse and burro gathers[1] by the United States Bureau of Land Management ("BLM") from September 20, 2017, to October 26, 2021. *See* ROA at 54 (district court extrapolates the gathers at issue based on Plaintiffs' references to various press releases). Plaintiffs argued the BLM was operating as a "rogue agency" as the Senate had yet to confirm a director. ROA at 6. Plaintiffs asserted they were injured by the BLM's removal of wild horses and burros from Wyoming. *Id*. at 10.

The district court dismissed Plaintiffs' complaint for lack of standing but included leave to amend. *Id.* at 26. In its order, the district court requested Plaintiffs remove all but two names from the case caption, as it appeared from the complaint only two individuals were "seeking review of the agency action." *Id*. at 27. The court then ruled that of the two proper plaintiffs—Bonifacio Makinano and Amelia Arcamone-Makinano—neither asserted a cognizable injury under Article III. *Id*. at

[1] "The BLM gathers and removes wild horses and burros from public lands to protect the health of the animals and health of our nation's public rangelands." *Wild Horse & Burro Gathers and Removals*, U.S. Dep't of the Interior, Bureau of Land Mgmt., https://www.blm.gov/programs/wild-horse-and-burro/herd-management/gathers-and-removals (last visited April 5, 2022).

28–29. The district court gave the two remaining Plaintiffs until November 22, 2021, to file an amended complaint to establish standing. *Id.* at 29.

Plaintiffs filed an amended complaint on November 16, 2021. But the district found that jurisdiction was lacking. *Id.* at 53. In its second order, the district court determined that none of the Plaintiffs had presented a claim that could be "redressed by a favorable decision by this Court." *Id.* at 55 (quotation omitted). The court noted that the horse and burro gathers challenged by Plaintiffs had already occurred. Thus, the district court reasoned that any "action which invalidates past, completed wild horse gathers/removals will have no effect in the real world." *Id.* Plaintiffs' assertion that a favorable decision would redress their injuries was legally insufficient to confer standing. *Id.* at 56. The court also noted that the Plaintiffs "have not exhausted any administrative remedy for any prior BLM decision" with one exception.[2] Nevertheless, the district court allowed Plaintiffs another opportunity to file an amended complaint. *Id*.

Upon review of Plaintiffs' third amended complaint, the district court concluded Article III standing was still lacking. First, only Plaintiff Amelia Arcamone-Makinano made any attempt to exhaust her administrative remedies. Second, even if Plaintiffs had exhausted their administrative remedies, their claims would be moot because Plaintiffs cannot show how "an order invalidating past,

[2] Arcamone-Makinano attempted to appeal the BLM's July 22, 2021, gather decision, but her appeal was dismissed for failure to demonstrate she had standing to appeal. ROA at 73–74.

completed removals will . . . affect the real world." *Id.* at 5. The district court dismissed Plaintiffs' case for lack of jurisdiction.

Plaintiffs have timely appealed. They now argue that administrative exhaustion is not required and that mootness does not apply under the capable-of-repetition-yet-evading-review exception.

II. Discussion

We review a district court's dismissal for lack of jurisdiction de novo. *Grynberg v. Kinder Morgan Energy Partners, L.P.*, 805 F.3d 901, 905 (10th Cir. 2015). For a court to exercise jurisdiction, all plaintiffs must have "standing," that is, the ability to show a concrete and particularized injury caused by the opposing party which a court may redress through some remedy. *See generally Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016).

First, the district court dismissed all Plaintiffs, except Arcamone-Makinano, for failure to exhaust administrative remedies. ROA at 5 (citing *Farrell-Cooper Mining Co. v. Dep't of Interior*, 864 F.3d 1105, 1115 (10th Cir. 2017)). Plaintiffs argue that administrative exhaustion is not required because BLM's decision to remove wild horses and burros is a final decision, ripe for review. Aplt. Br. at 10–11.

Plaintiffs misunderstand the exhaustion requirement the district court sought to enforce. To clearly delineate the requirement here, we begin with the statute Plaintiffs cite as the basis for their action—Title 16, Chapter 30 of the United States Code. Under 16 U.S.C. § 1333, the Secretary of the Interior is specifically given jurisdiction over "[a]ll wild free-roaming horses and burros." *See also* 16 U.S.C.

§ 1332(a) (specifying that the use of "Secretary" in chapter 30 means the "Secretary of the Interior"). Because the Secretary of the Interior has jurisdiction to act in this arena, appeals under chapter 30 are subject to the requirements found in 43 C.F.R. § 4.21. Under § 4.21(c), plaintiffs were required to exhaust their administrative remedies. Any plaintiff who has failed to timely seek "a petition for a stay of decision" has not exhausted applicable administrative remedies. Finally, we turn to 5 U.S.C. § 704, which provides judicial review of agency actions. Under § 704, judicial review only applies when "there is no other adequate remedy." By failing to timely file for a stay of agency action, Plaintiffs have bypassed other adequate remedies. Thus, judicial review is not available, and the claims of all Plaintiffs other than Arcamone-Makinano are subject to dismissal for failure to exhaust administrative remedies.

Second, the district court dismissed Arcamone-Makinano's claims because she advanced no legal theory which would support the return of horses previously removed, nor did she provide any basis for a court order that would "affect the real world." ROA at 5. Arcamone-Makinano also failed to demonstrate how the agency action challenged here would have any impact on future agency action. *Id.*

Arcamone-Makinano argues in response that this controversy is "live" so long as there is even one wild horse or burro that "is mis-managed by the BLM, yet survives and exists on the range; and/or in BLM captivity." Aplt. Br. at 13. She provides three examples of "relief sought as live controversies." *Id.* But the relief a plaintiff seeks does not establish a plaintiff's standing. Instead, a plaintiff must

demonstrate she has (1) suffered an "injury in fact," (2) that is "fairly traceable" to the defendant's conduct, and (3) redressable by "a favorable judicial decision." *Spokeo, Inc.*, 578 U.S. at 338; *see also* ROA at 26–27 (district court describing standing requirements).

Under the first standing requirement, Arcamone-Makinano claims the presence of wild horses and burros enriches the lives of the American people, and injury occurs "since the very subject of [] interest [wild horses and burros] will no longer exist." Aplt. Br. at 15 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 566 (1992)). She also claims "a procedural injury of fact" by the BLM because her claims never reached officials who were legally empowered to consider them. *Id.* at 16. Under the third standing requirement, she argues the district court could redress her injury by setting aside the agency's removal decision. *Id.* Finally, Arcamone-Makinano argues that the district court improperly dismissed her case as moot because her claim is "'capable of repetition but evading review' since the duration of the challenged action is too short to be fully litigated." *Id.* at 14 (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)).

Arcamone-Makinano's appellate arguments fail to establish standing. The only agency action that Plaintiff has identified is the July 22, 2021, gather decision. *See* ROA at 4 (district court explaining that this was the only gather for which Arcamone-Makinano exhausted administrative remedies). This specific gather has been completed and is not capable of repetition. Should Arcamone-Makinano seek to contest future BLM gathers, she must follow the applicable procedures to challenge

them. Second, none of the injuries identified by Arcamone-Makinano are legally cognizable. The injury she cites under *Lujan*—the disappearance of wild horses and burros on BLM lands—was specifically found in that case to be insufficient. *Lujan*, 504 U.S. at 567 ("It goes beyond the limit, however, into pure speculation and fantasy, to say that anyone who observes . . . an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which [s]he has no more specific connection."). Further, Arcamone-Makinano cites no legal authority that supports her contention that BLM procedures were inadequate. Finally, she fails to show how any decision by the district court or this court would redress her injury. As the district court noted, the invalidation of "past, completed removals will not affect the real world." Arcamone-Makinano does not show how a court ruling regarding the challenged July 22, 2021, gather will have any real world effect on future agency decisions, or on the return of the horses or burros removed during that gather.

We AFFIRM the dismissal for lack of jurisdiction.

Entered for the Court

Mary Beck Briscoe
Circuit Judge