

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING
2020 FEB 13 AM 11:24
MARGARET BOTKINS, CLERK
CHEYENNE

RANCHERS CATTLEMEN ACTION
LEGAL FUND UNITED
STOCKGROWERS OF AMERICA, et al,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF
AGRICULTURE, et al,

Respondents.

Case No: 19-CV-205-NDF

ORDER DISMISSING CASE FOR LACK OF JURISDICTION

This matter is before the Court on Respondents' Motion to Dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. (CM/ECF Document [Doc.] 11). By their motion, Respondents argue the United States Department of Agriculture, Animal and Plant Health Inspection Service (DOA-APHIS) withdrew the Factsheet at issue in this case on October 25, 2019 (Doc. 11, 11-1 at 4, 11-2 & 11-3). Because of the withdrawal, Respondents argue the case should be dismissed as moot and/or not ripe. In addition, Respondents argue the claim under the Federal Advisory Committee Act (FACA) should be dismissed for failure to state a claim. Finally, Respondents argue to the extent Petitioners seek to bring a claim under the Congressional Review Act, the Court lacks subject matter jurisdiction over any such claim.

Petitioners respond against dismissal arguing the case falls under the exception to mootness as DOA-APHIS's conduct is merely a voluntary cessation of illegal activity which constitutes an exception to the mootness doctrine.

For the reasons stated below, the Court finds there is no live controversy at issue and the "voluntary cessation" exception does not apply in this case. Therefore, the case is DISMISSED AS MOOT.

Statement of Relevant Facts

On October 4, 2019, Petitioners filed a Petition for Review of Agency Action and Complaint for Declaratory Judgment and Injunctive Relief (Petition). (Doc. 1). By their Petition, they challenge the action by DOA-APHIS in issuing the April 2019 "Factsheet" (Doc. 1-1) entitled "Advanced Animal Disease Traceability: A Plan to Achieve Electronic Identification of Cattle and Bison" (2019 Factsheet). (Doc. 1-1). Petitioners allege the 2019 Factsheet unlawfully mandates the use of radio frequency identification (RFID) eartags and technology for certain categories of livestock. (Doc. 1 at 2). Petitioners further allege the 2019 Factsheet phases out, by January 1, 2023, the use of other types of animal identification specifically allowed under 9 C.F.R. Part 86 (branding, official non-RFID eartags, tattoos, group/lot identification numbers, and backtags). (*Id.*). In addition to other relief, Petitioners request the Court declare unlawful, enjoin the implementation of, and set aside the 2019 Factsheet and any related efforts to impose additional identification requirements on livestock producers. (*Id.* at 7-8).

On October 25, 2019, DOA-APHIS posted a statement on its website announcing that it had removed the 2019 Factsheet from its website, "as it is no longer representative

of current agency policy.” (Doc. 11-3). As further explanation for the removal action, DOA-APHIS commented:

Recent executive orders have highlighted the need for transparency and communication on the issues set forth in the Factsheet before placing any new requirements on American farmers and ranchers. See Executive Orders 13891 and 13892. Consistent with these orders, APHIS has decided not to implement the requirements outlined in the April 2019 Factsheet regarding the type of identification devices that USDA-APHIS will regard as official eartags and the dates by which they must be applied to cattle.

While the need to advance a robust joint Federal-State-Industry Animal Disease Traceability (ADT) capability remains an important USDA-APHIS objective, we will take the time to reconsider the path forward and then make a new proposal, with ample opportunity for all stakeholders to comment.

Discussion

“Mootness is a threshold issue because the existence of a live case or controversy is a constitutional prerequisite to federal court jurisdiction.” *Disability Law Ctr. v. Millcreek Health Ctr.*, 428 F.3d 992, 996 (10th Cir. 2005) (quoting *McClendon v. City of Albuquerque*, 100 F.3d 863, 867 (10th Cir. 1996)). The Tenth Circuit recently summarized the mootness doctrine as follows:

In cases involving mootness, “[t]he starting point for [our] analysis is the familiar proposition that ‘federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.’” *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413, (1971)). The mootness doctrine “derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.” *Id.* The Supreme Court has described it as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (quoting Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)). “The crucial question is whether granting a present determination of the issues offered will have some effect in the real world.”

Wyoming v. U.S. Dep't of Agric., 414 F.3d 1207, 1212 (10th Cir. 2005) (quoting *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 11[7]4, 1223 (10th Cir. 2001)). “Put another way, a case becomes moot ‘when a plaintiff no longer suffers “actual injury that can be redressed by a favorable judicial decision.” ’ ” *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015) (quoting *Rhodes v. Judiscak*, 676 F.3d 931, 933(10th Cir. 2012)).

Ghailani v. Sessions, 859 F.3d 1295, 1300-1301 (10th Cir. 2017).

Further, actions seeking a declaratory judgment “must be sustainable under the same mootness criteria that apply to any other lawsuit.” *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1109 (10th Cir. 2010).

In opposition to DOA-APHIS’s argument that the case is moot, Petitioners rely on the “voluntary cessation” exception:

“One exception to a claim of mootness is a defendant's voluntary cessation of an alleged illegal practice which the defendant is free to resume at any time.” *Chihuahuan Grasslands Alliance v. Kempthorne*, 545 F.3d 884, 892 (10th Cir. 2008). “The rule that ‘voluntary cessation of a challenged practice rarely moots a federal case . . . traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.’” *Unified Sch. Dist. No. 259*, 491 F.3d at 1149 (quoting *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n. 1, 121 S.Ct. 743, 148 L.Ed.2d 757 (2001)). “In other words, this exception exists to counteract the possibility of a defendant ceasing illegal action long enough to render a lawsuit moot and then resuming the illegal conduct.” *Chihuahuan Grasslands Alliance*, 545 F.3d at 892.

Rio Grande, 601 F.3d at 1115. Voluntary actions will moot litigation if two conditions are satisfied: “(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979).

Petitioners argue that DOA-APHIS does not promise it “won’t do it again” nor admit wrongdoing, nor provide any substantive or enforceable assurance to follow the law (noting the Administrative Procedure Act (APA) and “other relevant statutory and regulatory requirements”). (Doc. 16 at 2). Petitioners also argue DOA-APHIS’s removal of the 2019 Factsheet, as well as the Shea affidavit both reaffirm the value of RFID technology and make “abundantly clear . . . that the agencies absolutely intend to proceed with requiring RFID eartags and to prohibit the use of other forms of identifications.” (*Id.* at 10). Because of this, along with the “transience” of Executive Orders, Petitioners argue the withdrawal is nothing but a naked attempt to moot the case and deprive the Court of jurisdiction. (*Id.* at 11-12). Thus, according to Petitioners, the voluntary cessation exception applies, and the case is not moot. Petitioners also argue the case is ripe inasmuch as they are not challenging future actions, but only DOA-APHIS’s prior illegal actions related to adoption of the 2019 Factsheet. (*Id.* at 19).

1. Will the alleged violations reoccur?

Petitioners allege violations by DOA-APHIS in the publication of the 2019 Factsheet which adopted a new livestock identification and traceability framework contrary to the 9 C.F.R. Part 86 (the 2013 Final Rule) and without compliance with: (1) the APA rule-making process; (2) the Congressional Review Act (CRA); (3) the Federal Advisory Committee Act (FACA); or (4) the Regulatory Flexibility Act (RFA). (Doc. 1). Petitioners complain that the 2019 Factsheet: (1) nullifies “the most important and substantive aspects of the 2013 Final Rule”; (2) imposes “the most onerous, burdensome, expensive, disruptive, and complicated method of animal identification and traceability currently

available”; and (3) mandates states and tribes require RFID for livestock notwithstanding the 2013 Final Rule prohibiting such a requirement. (*Id.* at 30-33).

In a statement posted on its website, DOA-APHIS removed the 2019 Factsheet “as it is no longer representative of current agency policy.” (Doc. 11-3 at 1). In that statement DOA-APHIS clearly says it “has decided not to implement the requirements outlined in the April 2019 Factsheet regarding the type of identification devices that USDA-APHIS will regard as official eartags and the dates by which they must be applied to cattle.” (*Id.*). DOA-APHIS goes on to say, “we will take the time to reconsider the path forward and then make a new proposal, with ample opportunity for all stakeholders to comment.” (*Id.*). In sum, DOA-APHIS has undertaken “reconsideration of whether or when to put new requirements in place, while still encouraging the use of RFID devices through financial incentives.” (*Id.*)

There is no question that the removal of the 2019 Factsheet is voluntary conduct by DOA-APHIS. Petitioners argue this voluntary conduct was taken to deprive the Court of jurisdiction. This is not persuasive given DOA-APHIS’s explanation that the action was taken because of “[r]ecent executive orders [which] have highlighted the need for transparency and communication on the issues set forth in the Factsheet before placing any new requirements on American farmers and ranchers.” (*Id.*). There is no basis to conclude this explanation is a sham to defeat jurisdiction and continue with implementation.

Petitioners also argue DOA-APHIS will simply proceed with requiring RFID eartags and prohibit the use of other forms of identifications. That may be true, but it is not an argument against the claim of mootness. While Petitioners object to RFID devices,

their complaint is styled as a violation of the Final 2013 Rule and the APA along with other statutory and regulatory requirements associated with rulemaking. Therefore, if DOA-APHIS does decide to proceed with RFID devices, which is speculative at this time, that will occur within a completely different procedural framework, which may include a repeal of the 2013 Rule. Such a procedural framework along with any future decision's scope, requirements and timeline are completely unknown to the Court. What is known is that the 2019 Factsheet is not recognized as agency policy and DOA-APHIS has unambiguously stated that the requirements of the 2019 Factsheet **will not be implemented**. There is no reason to discount DOA-APHIS's corrective action and the commitments contained therein.¹ Given DOA-APHIS's unambiguous statements that (1) the 2019 Factsheet is not agency policy; (2) DOA-APHIS will not implement its requirements; and (3) any new proposal will afford ample opportunity for all stakeholders to comment, the Court concludes it can be said with assurance that there is no reasonable expectation that DOA-APHIS will reverse course and implement the 2019 Factsheet, or revert to using the same process which resulted in the 2019 Factsheet.

2. Have events completely and irrevocably eradicated the effects of the alleged violation?

Petitioners comment that the effort by DOA-APHIS to implement RFID devices pursuant to the requirements outlined in the 2019 Factsheet had a “destabilizing impact on the livestock industry by trying to force universal compliance with an RFID mandate.”

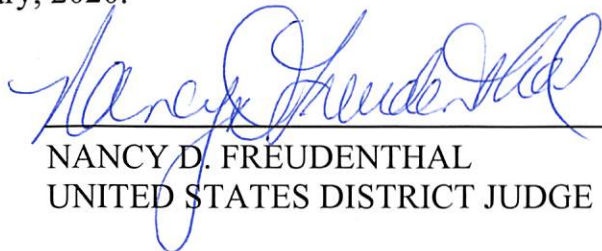
¹ The Tenth Circuit has recognized that some courts will accord governmental actors a “presumption of good faith” as to commitments that the objectionable behavior will not recur. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116, n. 15 (10th Cir. 2010).

(Doc. 16 at 2). Petitioners also contend that the removal of the 2019 Factsheet “created even more uncertainty in the livestock industry.” (*Id.* at 21). These claims are conclusory and nothing in the record suggests any lingering effects from DOA-APHIS’s alleged violations of the 2013 Final Rule, the APA, or related statutory and regulatory requirements associated with rulemaking. As discussed above, any injury inflicted upon Petitioners by DOA-APHIS’s purported failure to comply with statutes and regulatory requirements cannot be said to have survived the removal of the 2019 Factsheet along with DOA-APHIS’s statements that it did not represent agency policy and would not be implemented. Therefore, the Court concludes the corrective action taken by DOA-APHIS completely and irrevocably eradicated the effects of the alleged violations associated with issuing the 2019 Factsheet.

For all these reasons, the Court finds that Petitioners’ Petition seeking relief from the 2019 Factsheet is moot and this Court lacks jurisdiction to review the agency decision to issue the Factsheet, which is no longer effective.

IT IS ORDERED that Petitioners’ Petition for Review is DISMISSED FOR LACK OF JURISDICTION.

Dated this 13 day of February, 2020.



NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE