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UNBRIDLED POWER AND THE WILD HORSES AND BURROS ACT

*Fund for Animals, Inc. v. U.S. Bureau of Land Management*¹

I. INTRODUCTION

The Wild Horses and Burros Act (“Act”) was Congress’ attempt to protect the wild free-roaming horses and burros that are “living symbols of the historic and pioneer spirit of the West.”² Congress gave the Secretary of the Interior and the Bureau of Land Management (“Bureau”) the responsibility and the power to enforce, administer, and implement the provisions of the Act.³ Overpopulation threatened various wild horse and burro herds in 1999-2000, and in response, the Bureau implemented a removal strategy that Congress funded and approved.⁴ In 2001, Fund For Animals, Inc., a non-profit animal protection organization, filed suit against the Bureau, alleging violations of both the Act itself and the National Environmental Policy Act.⁵ Fund For Animals specifically challenged the Bureau’s “Presidential Budget Initiative,” its “Instruction Memorandum,” and seven specific removals, or “gathers,” executed under the Bureau’s strategy.⁶ The case was ultimately dismissed because the Court of Appeals for the District of Columbia held that neither the “Initiative” nor the “Memorandum” constituted a “final agency action” for purposes of judicial review under the Administrative Procedure Act (“APA”), and Fund For Animals’ claim requesting injunctive relief from the gathers was moot.⁷ The Court of Appeals found the claim moot because at the time the case was decided, the gathers had already taken place, and the Court refused to apply the mootness doctrine of “capable of repetition yet evading review.”⁸ By ruling that the Bureau’s strategy was not subject to judicial review and refusing to apply the “capable of

¹ Fund For Animals, Inc. v. U.S. Bureau of Land Mgmt., 460 F.3d 13 (D.C. Cir. 2006).

² Wild Free-Roaming Horses and Burros Act, 16 U.S.C. § 1331 (2000).

³ 16 U.S.C. § 1332 (2000).

⁴ *Fund For Animals*, 460 F.3d at 17.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 13.

⁸ *Id.*

repetition yet evading review” exception to the individual gathers, the Court gave the Bureau ultimate power over the fate of the wild horses and burros and made their gather decisions untouchable. This decision leaves Fund For Animals, and other similarly situated litigants, with unrealistic means of challenging the Bureau’s actions under the Act.

II. FACTS AND HOLDING

In 1971, Congress passed the Wild Horses and Burros Act giving the Secretary of the Interior jurisdiction over all wild free-roaming horses and burros living on federal land.⁹ Pursuant to the Act, the Secretary is responsible for “manag[ing] wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance on the public lands.”¹⁰ The stated purpose of the Act is to protect wild horses and burros from “capture, branding, harassment, or death.”¹¹ The Act became the subject of controversy between the Fund For Animals organization and the Bureau, who acts as the Secretary’s delegate.¹²

In its role as the Secretary’s delegate, the Bureau controls the federal land at issue through localized “herd management areas.”¹³ The Bureau’s management responsibilities include determining the “appropriate management level” of wild horse and burro populations for that given area.¹⁴ According to the Bureau, an appropriate management level reflects “the median number of adult wild horses or burros determined through [the Bureau’s] planning process to be consistent with the objective of achieving and maintaining a thriving ecological balance

⁹ Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340 (2000).

¹⁰ *Id.* § 1333(a).

¹¹ *Id.* § 1331.

¹² *Fund For Animals*, 460 F.3d at 15.

¹³ 16 U.S.C. § 1332(c). These herd management areas were “established in accordance with broader land use plans.” *Fund For Animals*, 460 F.3d at 15 (citing 43 C.F.R. § 4710.1 (2000)). The Bureau established herd management areas in ten western states, and the Bureau’s local field and state offices manages each particular area. *Id.* At the time *Fund For Animals* was decided, there were 210 herd management areas. *Id.*

¹⁴ *Fund For Animals*, 460 F.3d at 16.

and multiple-use relationship in a particular herd area.”¹⁵ In order for the Bureau to effectively control and manage overpopulation, it is necessary to determine an appropriate management level.¹⁶ The Act mandates that when the Bureau determines that a given area is overpopulated with wild horses and burros, the Bureau must “immediately remove excess animals from the range so as to achieve appropriate management levels.”¹⁷ However, before the Bureau can take such action, it must prepare “a detailed ‘gather’ plan, including an environmental assessment in compliance with the National Environmental Policy Act.”¹⁸

In 1999, the Bureau faced a significant problem with population explosion and low funding.¹⁹ As a solution, the Bureau “developed a strategy to achieve nationwide [appropriate management level] and justify increased funding for the program.”²⁰ With input from state Bureau offices regarding specific needs for local herd areas, the national Bureau office reviewed several options and decided on a plan that would “achieve nationwide [appropriate management levels] in five years at a cost of an additional \$9 million per fiscal year from 2001 through 2005.”²¹ The Bureau presented its plan to Congress in February 2000 as a “Presidential Budget Initiative.”²² The Initiative stated that “one of the major threats to watershed health is an overabundance of wild horses and burros on rangelands,” and that as a result of “current funding capability and

¹⁵ *Id.* There is no set formula for calculating an appropriate management level, because each Bureau office has “significant discretion to determine their own methods of computing [appropriate management level] for the herds they manage.” *Id.* The discretion in determination among local offices ranges from finding a level that reflects “the midpoint of a sustainable range” or as a “single number.” *Id.*

¹⁶ *Id.*

¹⁷ 16 U.S.C. § 1333(b)(2) (2000). Removing the animals may include adoption for young and healthy horses, sale in certain circumstances, placement in private long-term pasturing arrangements, or humane slaughter. *Id.*

¹⁸ *Fund For Animals*, 460 F.3d at 16. “Gather decisions are subject to administrative appeal.” *Id.* (citing 43 C.F.R. § 4770.3 (2000)).

¹⁹ *Id.* In 1999, the nationwide wild horse and burro population was around 46,000 (approximately 19,500 above nationwide appropriate management level). *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* The formal title was “The Restoration of Threatened Watersheds’ Initiative,” and it was subtitled “Living Legends in Balance with the Land: A Strategy to Achieve Healthy Rangelands and Viable Herds.” *Id.*

adoption demand,” “the populations of these animals will increase at a rate faster than [the Bureau’s] ability to remove excess animals.”²³ Through the Initiative the Bureau asked for “additional appropriation” that would “enable the field offices to meet removal targets based on an initial four-year gather schedule,” and would result in a “large number of removals in the early years of implementation and a gradual decline to maintenance levels.”²⁴ Also included in the Initiative were strategies for “eliminating age restrictions on removals, enhanced marketing of animals and adoption events, and an expanded program of training and gelding for difficult-to-adopt animals.”²⁵ Congress approved the additional appropriations, and the local field offices began implementing the strategies outlined in the Initiative.²⁶

In 2001, the Fund For Animals and others challenged the Bureau’s Initiative strategy under the National Environmental Policy Act (“NEPA”).²⁷ Fund For Animals filed suit in district court alleging that the Bureau had violated the NEPA by “implementing the strategy without first preparing an environmental impact statement,”²⁸ the Bureau violated the Act by “adopting a strategy that would reduce herd populations to *below* their appropriate management levels,”²⁹ and the complaint objected to seven specific gathers of wild horses and burros carried out under the strategy approved and funded by Congress.³⁰ As relief, the complaint

²³ *Fund For Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 16 (D.C. Cir. 2006). According to the U.S. Environmental Protection Agency, a watershed is “the land area that drains water to a particular stream, river, or lake.” U.S. Environmental Protection Agency, *Water Science Glossary of Terms*, <http://ga.water.usgs.gov/edu/dictionary.html#W> (last visited Mar. 11, 2007).

²⁴ *Fund for Animals*, 460 F.3d at 16.

²⁵ *Id.* at 16-17.

²⁶ *Id.* at 17. The field offices proceeded on a herd-by-herd basis, and used a “common population model” to “determine how many animals to remove based on an initial four-year gather schedule.” *Id.* “[F]inal determinations concerning the number of animals to remove and the timing of such removals was left to the field offices to determine based on the particular characteristics of each herd and geography.” *Id.*

²⁷ *Id.* The other parties included the Animal Legal Defense Fund. *Id.*

²⁸ *Id.*

²⁹ *Id.* (emphasis in original).

³⁰ *Id.* The complaint also challenged the Bureau’s “pattern, practice and policy of removing wild horses and burros *pursuant to* the Restoration Strategy.” *Id.* (emphasis in original) (opinion does not address this claim separately).

requested an injunction against the Bureau's continuing implementation of the strategy.³¹

As the complaint was pending in 2002, an "Instruction Memorandum" was issued by the Bureau's assistant director to the local field offices.³² The message of the memorandum was to "communicate guidance and policy regarding how the Bureau would achieve [appropriate management levels] in herd management areas by 2005"³³ and included a chart estimating the number of horses to be removed from each state.³⁴ According to the memorandum, "horses five years and younger would be removed first, those ten years and older next, followed by horses six to nine years of age."³⁵ Field offices would be required to collect data on each herd and prepare a "Population Management Plan" detailing the "population objectives for the herd[s] and the rationale for those objectives."³⁶ As articulated in the memorandum itself, the procedures were to take effect immediately upon receipt and expired on September 30, 2003.³⁷ The memorandum explained that "the Bureau's policy regarding the removal of wild horses is reviewed and revised each year in an effort to balance the need to achieve [appropriate management levels], minimize the time excess animals are held in [the Bureau's] facilities awaiting adoption and enhance [the Bureau's] ability to place those animals into private maintenance and care."³⁸

In response to the Bureau's Memorandum, Fund For Animals filed a "Supplemental Complaint," alleging that "before the memorandum became effective the Bureau was bound to issue an environmental impact statement or an environmental assessment."³⁹ Under the Supplemental Complaint, Fund For Animals asked the court for both a preliminary and

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* As set forth in the Bureau's Manual, instruction memoranda "are of a short-term, temporary nature" and are "in effect for a short period of time." *Id.*

³⁹ *Id.*

permanent injunction against the Bureau.⁴⁰ The effect of the injunction would be to prohibit the Bureau from taking any steps to “implement the memorandum” and require the Bureau to prepare an environmental impact statement pursuant to NEPA.⁴¹

In the district court, Fund For Animals filed a motion for summary judgment, and the Bureau filed a cross-motion for summary judgment, or in the alternative, a motion to dismiss for lack of subject matter jurisdiction.⁴² The Bureau’s motion to dismiss argued that the court lacked subject matter jurisdiction over the Bureau’s strategy because, under the Administrative Procedure Act (“APA”), only a final agency action is subject to judicial review, and the Bureau’s strategy does not constitute a final agency action.⁴³ The motion also argued that the court lacked jurisdiction to hear the complaint regarding the challenged gathers because the gathers had already been completed at the time of trial, rendering the issue moot.⁴⁴ In response, Fund For Animals argued that the strategy did constitute a final agency action because it was of “general . . . applicability and future effect,”⁴⁵ and it was “binding on all of the state office [decisions].”⁴⁶

The district court, relying on the precedent established in *Lujan v. National Wildlife Federation*,⁴⁷ another APA final agency review decision, concluded that the type of relief that Funds For Animals was seeking was the same type of prohibited relief described in *Lujan* as “wholesale improvement.”⁴⁸ In *Lujan*, the Supreme Court held that “the final agency action requirement of the APA bars federal jurisdiction over suits for broad programmatic relief.”⁴⁹ The district court held that because “further decisionmaking on the part of the [Bureau’s] state offices is

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Fund For Animals v. U.S. Bureau of Land Mgmt.*, 357 F. Supp. 2d 225, 226 (D.D.C. 2004).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 228.

⁴⁶ *Id.* at 228-29.

⁴⁷ 497 U.S. 871 (1990).

⁴⁸ *Fund For Animals v. U.S. Bureau of Land Mgmt.*, 357 F. Supp. 2d 225, 229 (D.D.C. 2004).

⁴⁹ *Id.*

UNBRIDLED POWER AND THE WILD HORSES AND BURROS ACT

required prior to any implementation of the [s]trategy's goals or guidelines,"⁵⁰ and the strategy "is not the type of decision that will directly affect the parties because further agency action is necessary before any concrete action will be taken by the agency that might affect the rights of the plaintiffs,"⁵¹ the Bureau's strategy was not a final agency action.⁵² The district court also held that because the seven challenged gathers were completed, and Fund For Animals no longer had a redressable injury, the controversy is moot, leaving the court with no jurisdiction over the claim.⁵³ Therefore, all claims brought by Fund For Animals were dismissed.⁵⁴

Fund For Animals appealed the decision to the United States Court of Appeals, District of Columbia Circuit, claiming that two of the Bureau's documents constituted a final agency action.⁵⁵ Regarding the first document in question, the Bureau's Memorandum, the Court of Appeals noted that the only claim made by Fund For Animals in its Supplemental Complaint was that the Bureau's memorandum was "issued in violation of the NEPA."⁵⁶ Although the Bureau conceded that "the general national planning approach set forth in the February 2002 memorandum continues to serve as guidance to the field for the conduct of specific gather and removal decisions,"⁵⁷ the Court held that because the memorandum stated in its own terms that it was a "short-term, temporary" document and at the time of trial had already expired, the Fund For Animal's claim was moot.⁵⁸

The second document that Fund For Animals claimed constituted a final agency action was the Bureau's Presidential Budget Initiative.⁵⁹

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* 357 F. Supp. 2d at 230.

⁵⁴ *Id.*

⁵⁵ *Fund For Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 18 (D.C. Cir. 2006).

⁵⁶ *Id.*

⁵⁷ *Id.* at 18-19.

⁵⁸ *Id.* at 18. The Court placed little weight on the Bureau's concession. *Id.* at 19. The Court agrees with the Bureau in that "the record provides no evidence of [the Memorandum's] continued implementation." *Id.*

⁵⁹ *Id.*

When examining the Initiative, the Court explained that “the agency’s proposal to Congress, developed to secure the funds, may serve as a useful planning document, but it is not a ‘rule’—that is, ‘an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.’”⁶⁰ The Court further noted that the Initiative is not an “order,” “license,” “sanction,” or “relief.”⁶¹

Precedent played a large role in the Court of Appeal’s analysis. Like the District Court, the Court of Appeals also relied on *Lujan*’s broad “programmatically” statement prohibition.⁶² The Court of Appeals also looked at the analogous case of *Norton v. Southern Utah Wilderness Alliance*,⁶³ which presented a similar APA claim under the Federal Land Policy and Management Act of 1976.⁶⁴ In *Norton*, the Supreme Court held that the land use plans at issue did not constitute “agency action,” and the plans themselves are “generally unreviewable.”⁶⁵ The Supreme Court noted in that case that “only specific actions implementing the plans . . . are subject to strict scrutiny.”⁶⁶ Because the Court of Appeals found these cases analogous with respect to the agency action determination, the Court held that the Initiative, which operated much like a land use plan, did not constitute an agency action within the meaning of the APA and was therefore unreviewable.⁶⁷

With respect to Fund For Animal’s objection to the seven specific gathers, the Court of Appeals deemed the issue moot because the gathers had already been completed, and it was “impossible for the court to grant any effectual relief.”⁶⁸ The Court rejected Fund For Animal’s claim that the gathers represented issues or wrongs capable of repetition yet evading review, noting that “[p]articular decisions to remove wild horses and burros are highly fact-specific,”⁶⁹ and “[i]f there are to be more roundups

⁶⁰ *Id.* at 20 (citing 5 U.S.C. § 551(4) (2000)).

⁶¹ *Id.* (citing 5 U.S.C. § 551(13) (2000)).

⁶² *Id.*

⁶³ 542 U.S. 55 (2004).

⁶⁴ *Fund For Animals*, 460 F.3d at 21.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 21-22.

⁶⁸ *Id.* at 22.

⁶⁹ *Id.*

in the future—itself an open question—it remains to be seen whether they will be of the same magnitude as those which have come before, and whether the same criteria are applied.”⁷⁰

Ultimately, the Court of Appeals held that Fund For Animal’s NEPA claim against the Bureau was moot, the Bureau’s Memorandum and Initiative did not constitute an agency action under the APA, and Fund For Animal’s objection to the seven specific gathers was moot, and the capable of repetition yet evading review exception to the mootness doctrine did not apply.⁷¹

III. LEGAL BACKGROUND

A. *The Wild Free-Roaming Horses and Burros Act*

Congress passed the Wild Free-Roaming Horses and Burros Act (“Act”) in 1971 in response to the declining wild horse and burro populations in the United States.⁷² Because Congress considered the wild horses and burros to be “an integral part of the natural system of the public lands,”⁷³ the statute gave the animals protection from “capture, branding, harassment, or death.”⁷⁴ Under the Act, “wild free-roaming horses and burros” refers to “all unbranded and unclaimed horses and burros on public lands of the United States.”⁷⁵

The Act grants the Secretary of the Interior jurisdiction over all wild free-roaming horses and burros.⁷⁶ The Secretary is also responsible

⁷⁰ *Id.* at 23.

⁷¹ *Id.* at 13.

⁷² 16 U.S.C. § 1331 (2000).

⁷³ *Id.* Congress declared that

Wild free-roaming horses and burros are living symbols of the historic and pioneer spirit of the West . . . they contribute to the diversity of life forms within the Nation and enrich the lives of the American people; and that these horses and burros are fast disappearing from the American scene.

Id.

⁷⁴ *Id.*

⁷⁵ 16 U.S.C. § 1332 (2000).

⁷⁶ 16 U.S.C. § 1333(a) (2000).

for the management of the Act's various provisions.⁷⁷ The Secretary must "designate and maintain specific ranges on public lands as sanctuaries for their protection and preservation"⁷⁸ and "maintain a current inventory of wild free-roaming horses and burros on given areas of the public lands."⁷⁹

The inventory helps the Secretary

make determinations as to whether and where an overpopulation exists and whether action should be taken to remove excess animals; determine appropriate management levels of wild free-roaming horses and burros on these areas of the public lands; and determine whether appropriate management levels should be achieved by the removal or destruction of excess animals, or other options (such as sterilization, or natural controls on population levels).⁸⁰

If and when the Secretary determines that "an overpopulation exists" and "action is necessary to remove excess animals,"⁸¹ the Secretary must take immediate action to achieve appropriate management levels.⁸² Such action may include ordering "old, sick, or lame animals to be destroyed in the most humane manner possible,"⁸³ allowing "additional excess wild free-roaming horses and burros to be humanely captured and removed" for adoption,⁸⁴ and allowing those excess horses and burros that are not adopted "to be destroyed in the most humane and cost efficient manner

⁷⁷ *Id.* The Act's reference to "Secretary" actually refers to "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." 16 U.S.C. § 1332.

⁷⁸ 16 U.S.C. § 1333(a).

⁷⁹ 16 U.S.C. § 1333(b)(1).

⁸⁰ *Id.*

⁸¹ 16 U.S.C. § 1333(b)(2) (2000).

⁸² *Id.*

⁸³ 16 U.S.C. § 1333(b)(2)(A).

⁸⁴ 16 U.S.C. § 1333(b)(2)(B). In order for a horse or burro to be adopted, the Secretary must find that an adoption demand exists by "qualified individuals" who can assure that they will provide "humane treatment and care (including proper transportation, feeding, and handling)." *Id.* No one individual may adopt more than four horses or burros per year, unless the Secretary finds that the individual can provide the appropriate level of care to more than four horses. *Id.*

possible.”⁸⁵ The Secretary may also sell the horse or burro under certain conditions.⁸⁶

In addition to outlining the Secretary’s power and duties, the Act also creates criminal penalties for various violations.⁸⁷ These violations include: “willfully remov[ing] or attempts to remove a wild free-roaming horse or burro from the public lands, without authority from the Secretary,”⁸⁸ converting a horse or burro for private use without permission from the Secretary,⁸⁹ “maliciously caus[ing] the death or harassment of any wild free-roaming horse or burro,”⁹⁰ processing wild horse or burro remains into “commercial products,”⁹¹ directly or indirectly selling a wild horse or burro,⁹² or other willful violations of the Act’s regulations.⁹³ The Act’s prescribed punishments include a fine of no more than \$2,000, imprisonment of no more than one year, or both.⁹⁴

B. Administrative Procedure Act

The Administrative Procedure Act (“APA”) was designed to allow judicial review of agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Under the APA, “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”⁹⁵ Only a “final agency action” is subject to judicial review.⁹⁶ Defined elsewhere, an “agency action” includes “the whole or a part of an agency rule, order, license,

⁸⁵ 16 U.S.C. § 1333(b)(2)(C).

⁸⁶ An excess horse or burrow may be sold if it is more than ten years old or “has been offered unsuccessfully for adoption at least [three] times.” 16 U.S.C. § 1333(e).

⁸⁷ 16 U.S.C. § 1338 (2000).

⁸⁸ *Id.* at § 1338(a)(1).

⁸⁹ *Id.* at § 1338(a)(2).

⁹⁰ 16 U.S.C. § 1338(a)(3).

⁹¹ 16 U.S.C. § 1338(a)(4).

⁹² 16 U.S.C. § 1338(a)(5).

⁹³ 16 U.S.C. § 1338(a)(6).

⁹⁴ *Id.*

⁹⁵ 5 U.S.C. § 702 (2000).

⁹⁶ 5 U.S.C. § 704 (2000).

sanction, relief, or the equivalent or denial thereof, or failure to act.”⁹⁷ In order for an “agency action” to be considered “final,” the test is “whether the agency has completed its decision making process, and whether the result of that process is one that will directly affect the parties.”⁹⁸

C. “*Capable of Repetition Yet Evading Review*”

About a year before the *Fund For Animals* decision, the Court of Appeals for the District of Columbia addressed the application of the mootness exception doctrine of “capable of repetition yet evading review” in *People for the Ethical Treatment of Animals, Inc. v. Glittens* (“PETA”).⁹⁹ In that case, PETA brought an action against the District of Columbia, alleging that the District’s refusal to admit PETA’s designs into a city-wide art exhibit was a violation of its freedom of speech.¹⁰⁰ However, the Court never reached the merits of the Constitutional issue because it determined that the claim was moot and declined to apply the “capable of repetition yet evading review” exception.¹⁰¹ Finding the claim over PETA’s donkey and elephant exhibits highly fact-specific, the Court relied upon the idea that “[f]or a controversy or wrong to be ‘capable of repetition,’ there must be at least ‘a reasonable expectation that the same complaining party would be subjected to the same action again.’”¹⁰² The Court concluded that because “[t]he essential point is that the case before us is highly dependent upon a series of facts unlikely to be duplicated in the future,” the claim was moot and the exception of “capable of repetition yet evading review” did not apply.¹⁰³

⁹⁷ 5 U.S.C. § 551(13) (2000).

⁹⁸ *Fund For Animals, Inc. v. U.S. Bureau of Land Mgmt*, 357 F. Supp. 2d 225, 228 (D.D.C. 2004)(citing *Franklin v. Mass.*, 505 U.S. 788, 797 (1992)).

⁹⁹ *PETA*, 396 F.3d 416 (D.C. Cir. 2005).

¹⁰⁰ *Id.* at 387.

¹⁰¹ *Id.* at 388.

¹⁰² *Id.* at 393 (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

¹⁰³ *Id.* at 424.

IV. INSTANT DECISION

The Court of Appeals for the District of Columbia Circuit in *Fund For Animals, Inc. v. U.S. Bureau for Land Management*¹⁰⁴ held that because both Fund For Animals' NEPA claim against the Bureau and Fund For Animals' request for a permanent injunction were moot, and the Bureau's approved budget request was not an "agency action," Fund For Animals no longer had any "justiciable agency action" against the Bureau. Thus, the Court of Appeals affirmed the District Court's judgment for the Bureau.¹⁰⁵ The Court of Appeals also held that the "capable of repetition yet evading review" exception to the doctrine of mootness did not apply to Fund For Animals' request for a permanent injunction.¹⁰⁶

A. Majority Decision

The Court began its analysis with an acknowledgment that neither the Wild Horses and Burros Act nor the NEPA contained a specific statutory review provision, as such, review of an administrative action was only appropriate when there had been an "agency action" or "final agency action."¹⁰⁷ The Court then chose to address the question of whether the Bureau's challenged actions were considered "agency action(s)" in order to determine whether Fund For Animals' claims were justiciable.¹⁰⁸ The "final action" analysis involved two documents: the Bureau's Instruction Memorandum and the Presidential Budget Initiative.¹⁰⁹

The first disputed document that Fund For Animals claimed was a "final agency action" was the Bureau's Instruction Memorandum. The Court quickly dispensed of this portion of Fund For Animals' claim, holding that because the memorandum itself stated that it would expire on

¹⁰⁴ *Fund For Animals*, 460 F.3d 13.

¹⁰⁵ *Id.* at 23.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 18. Under the APA, when there is no specific statutory review provision, the APA provides a "generic cause of action to 'a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action'." *Id.* (citing 5 U.S.C. § 702 (2000)).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

September 30, 2003, the challenge was moot.¹¹⁰ Even though the Bureau conceded that “the general national planning approach set forth in the February 2002 memorandum continue[d] to serve as guidance to the field for the conduct of specific gather and removal decisions,”¹¹¹ the Court found that this concession “cannot support the weight the Fund would place on it.”¹¹²

After disposing of the Instruction Memorandum, the Court next considered whether the Bureau’s Presidential Budget Initiative constituted an “agency action” or “final agency action.” The Court first looked to the precise language of §§ 702 and 704 of the APA, noting that the APA’s definition of an “agency action” included an expansive list.¹¹³ The Court held that because the Presidential Budget Initiative did not “implement, interpret, or prescribe” any “law or policy,” and because it is not an “order. . . license. . . sanction. . . or relief,” the Presidential Budget Initiative was not an “agency action” for purposes of judicial review under the APA.¹¹⁴

The Court was also concerned about contravening the precedent established by *Lujan v. National Wildlife Federation*¹¹⁵ and *Norton v. Southern Utah Wilderness Alliance*.¹¹⁶ *Lujan* and *Norton* both involved challenges to land use plans authorized under the Federal Land Policy and Management Act. In those cases, the U.S. Supreme Court held “the plans themselves are generally unreviewable; it is only specific actions implementing the plans that are the subject of judicial scrutiny.”¹¹⁷ Borrowing from *Lujan*, the Court found that the Bureau’s Presidential Budget Initiative was a “broad programmatic statement” not capable of

¹¹⁰ *Id.*

¹¹¹ *Id.* at 18-19.

¹¹² *Id.* at 19.

¹¹³ *Id.* The portions of the APA that the Court referred to defined an “agency action” as “the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof.” *Id.* (citing 5 U.S.C. § 551(13) (2000)). The APA also defines “agency action” as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4) (2000).

¹¹⁴ *Fund For Animals, Inc.*, 460 at 20.

¹¹⁵ 497 U.S. 871 (1990).

¹¹⁶ 542 U.S. 55 (2004).

¹¹⁷ *Fund For Animals, Inc.*, 460 at 21.

judicial review.¹¹⁸ The Court also found that the Presidential Budget Initiative failed to satisfy *Norton's* requirement that there must be a "discrete agency action" before judicial review is appropriate.¹¹⁹ Relying heavily on precedent, the Court adhered to its "long-standing practice in circumstances like this . . . to require the complaining party to challenge the specific implementation of the broader agency policy."¹²⁰

The last claim that the Court addressed was Fund For Animals' objection to the seven specific gathers and its request for a permanent injunction enjoining the Bureau from taking any further actions regarding its restoration strategy. The Court initially noted that because the specific gathers were carried out in accordance with the Bureau's Restoration Strategy and they had already been completed, it would be impossible to grant a permanent injunction against these gathers.¹²¹ In response to Fund For Animals' claim that the "capable of repetition yet evading review" exception should apply, the Court held that because the appropriate management for a given herd is extremely fact-specific and the strategy was limited in time, the exception did not apply.¹²²

B. Dissenting Opinion

Conceding that the Bureau's Presidential Budget Initiative in and of itself was not a "final agency action" for purposes of judicial review under the APA, the dissent disagreed with the majority's treatment of the Bureau's Instruction Memorandum.¹²³ The dissent argued that Fund For

¹¹⁸ *Id.* at 20.

¹¹⁹ *Id.* at 21.

¹²⁰ *Id.* at 22. Other cases to which the Court cites are: *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001); *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588 (D.C. Cir. 2001); *DRG Funding Corp. v. Secretary of Housing and Urban Development*, 76 F.3d 1212 (D.C. Cir. 1996); *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726 (D.C. Cir. 2003); *AT&T Co. v. EEOC*, 270 F.3d 973 (D.C. Cir. 2001); and *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998).

¹²¹ *Fund For Animals, Inc.*, 460 F. 3d at 22.

¹²² *Id.* at 23. The Court again cites to an analogous case, *People for the Ethical Treatment of Animals, Inc. v. Gittens*, which held that the "essential point is that the case before us is highly dependent upon a series of facts unlikely to be duplicated in the future." *PETA v. Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005).

¹²³ *Fund For Animals*, 460 F. 3d at 23.

Animals' claim regarding the Instruction Memorandum was dismissed on an improperly raised mootness claim.¹²⁴ Because the majority raised the mootness claim *sua sponte*, the majority never gave the Bureau or Fund For Animals the opportunity to develop the argument.¹²⁵

Furthermore, the dissent argued that the majority improperly granted summary judgment in favor of the Bureau on the issue of mootness without giving both parties a chance to develop the issue.¹²⁶ The standard for summary judgment, as articulated by the dissent, was for the court to "view the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in its favor."¹²⁷ According to the dissent, the majority did not follow this maxim because it disregarded the Bureau's own acknowledgment that the "general national planning approach set forth in the February 2002 [M]emorandum continues to serve as guidance to the field," and the Instruction Memorandum was "intended . . . to provide guidance for the national wild horse and burro program for some unspecified period of time."¹²⁸ The dissent found the majority's grant of summary judgment in favor of the Bureau "particularly problematic because it comes on appeal, with the Fund having had no notice of the majority's argument or possibility of seeking discovery or introducing evidence in response."¹²⁹

The dissent also believed that, contrary to the normal rules regarding mootness, the majority improperly shifted the burden on Fund For Animals to show that the Instruction Memorandum's strategy had expired.¹³⁰ The dissent noted that the Bureau had made no attempt to persuade the court that the strategies implemented by the Instruction Memorandum had in fact expired and were no longer being practiced.¹³¹

¹²⁴ *Id.*

¹²⁵ *Id.* at 24.

¹²⁶ *Id.*

¹²⁷ *Id.* at 25.

¹²⁸ *Id.* at 24.

¹²⁹ *Id.* at 25.

¹³⁰ *Id.* "[I]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice except when the defendant meets its heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (quoting *Worth v. Jackson*, 451 F.3d 854, 860 (D.C. Cir. 2006)) (internal quotations omitted).

¹³¹ *Id.*

This did not mean that the Bureau would have necessarily failed to meet its burden, but that the Bureau should have been given the opportunity to try.¹³²

Finally, the dissent argued that under the two-part test articulated in *Bennett v. Spear*¹³³ the Bureau's Instruction Memorandum would constitute a "final agency action" under § 704 of the APA.¹³⁴ Under the *Bennett* test, the Instruction Memorandum "mark[ed] the consummation of the agency's decisionmaking process," and it was "one by which rights or obligations have been determined, or from which legal consequences will flow."¹³⁵ The dissent also added that if applied properly, *Lujan* would support the same result, because in that case there was no "discrete program to review."¹³⁶

Although the dissent agreed with the majority's treatment of the Bureau's Presidential Budget Initiative, it ultimately disagreed with the majority's treatment of the summary judgment motion. The dissent would have used the *Bennett* test to analyze whether the Instruction Memorandum constituted a "final agency action" for purposes of judicial review. To resolve the issue of mootness, the dissent would have given both parties the chance to research and brief the issue while keeping the burden of proof on the Bureau.

V. COMMENT

After holding that the Bureau's "Instruction Memorandum" and "Presidential Budget Initiative" are not eligible for judicial review under the APA, the Court of Appeals for the District of Columbia suggested that the proper way for *Fund For Animals*, and other similarly situated plaintiffs, to obtain relief is to challenge the individual gathers implemented under the Bureau's strategy.¹³⁷ However, in reality, the Court has foreclosed this theory by failing to apply the mootness doctrine

¹³² *Id.* at 26.

¹³³ 520 U.S. 154 (1997).

¹³⁴ *Fund For Animals, Inc.*, 460 F. 3d at 28.

¹³⁵ *Id.*

¹³⁶ *Id.* at 29.

¹³⁷ *Id.* at 20.

of “capable of repetition yet evading review.”¹³⁸ The Court’s decision on this issue was not well-justified, given the limited discussion in the opinion and its misinterpretation of precedent. Furthermore, a comparison between the Memorandum at issue and its predecessor reveal that the Bureau continued to implement the strategies controlling the challenged gathers, thus ensuring that the gathers complained of were likely to be duplicated.

The Court spends too little time on the mootness claim,¹³⁹ dismissing or completely ignoring important considerations raised by Fund For Animals in its Reply Brief. First, Fund For Animals points out that the Bureau admitted that “the general national planning approach set forth in the February 2002 memorandum continues to serve as guidance to the field for the conduct of specific gather and removal decisions.”¹⁴⁰ But, the Court determines that “this is hardly ‘evidence’ that the expiration date does not mean what it says.”¹⁴¹ Also included in Fund For Animals’ Reply Brief was a response to the Bureau’s argument that the gathers had been completed before the complaint was filed.¹⁴² Fund For Animals brought to the Court’s attention that at the time the complaint was originally filed, one of the gathers had not yet begun, five of the other gathers had not yet met their authorized targets (meaning that more horses would need to be removed), and the last gather was not completed until 2002, months after the complaint had been filed.¹⁴³ Because the Court did not give proper consideration to Fund For Animals’ arguments that some of the gathers were ongoing at the time suit was filed and the Bureau itself admitted to using the memorandum for guidance after its expiration date, the Court’s dismissal of Fund For Animals’ mootness claim is careless and tenuous.

The Court’s decision was also a product of misinterpreted precedent. The test to which the Court pointed in determining whether an

¹³⁸ *Id.* at 22.

¹³⁹ Out of an approximate twenty-three page opinion, the Court’s discussion of this part of the overall claim takes up less than a page. *Id.* at 22-23.

¹⁴⁰ *Id.* at 18-19.

¹⁴¹ *Id.* at 19 n.6.

¹⁴² Reply Brief of Appellants at 11-12, *Fund For Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13 (D.C. Cir. 2006) (No. 04-5359).

¹⁴³ *Id.*

UNBRIDLED POWER AND THE WILD HORSES AND BURROS ACT

issue is “capable of repetition yet evading review” does not automatically dispose of the issue. Under *People for the Ethical Treatment of Animals, Inc. v. Gittens*,¹⁴⁴ the mootness exception does not apply when the “essential point is that the case before [the court] is highly dependent upon a series of facts unlikely to be duplicated in the future.”¹⁴⁵ Although the individual gather decisions were fact-specific, they were all implemented according to the same strategy. And even though this particular strategy had an expiration date, if the fundamental concepts driving that strategy reappear in subsequent Bureau strategies, then the end results of those gathers are likely to be duplicated in the future. Proper determination of the mootness exception would require the Court to apply the test in its entirety by considering whether the gathers were likely to be duplicated in the future. Had the Court followed the test exactly, the “capable of repetition yet evading review” claim might have stood a chance.

A determination of whether these facts are likely to be duplicated in the future could be achieved through a comparison of the Memorandum at issue in the instant case with subsequent Memoranda promulgated by the Bureau. When comparing the “Gather Policy and Selective Removal Criteria” from the Memorandum at issue (2002) with its successor (issued in 2005), the criteria used in selecting wild horses for removal are extremely similar. Both policies primarily use the age of the wild horse as the sole determining factor for removal.¹⁴⁶ For example, under both Memoranda the wild horses are divided into age classes.¹⁴⁷ As laid out in the Memoranda, younger horses, classified as those horses five years old or younger, are automatically eligible for removal, while the older horses are to be removed as a last resort after the removal of younger horses has

¹⁴⁴ *PETA*, 396 F.3d 416 (D.C. Cir. 2005).

¹⁴⁵ *Id.* at 424.

¹⁴⁶ U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2002-095, 4 (2002), <http://www.blm.gov/nhp/efoia/wo/fy02/im2002-095.html>; U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., INSTRUCTION MEMORANDUM NO. 2005-206, 5 (2005) <http://www.blm.gov/nhp/efoia/wo/fy05/im2005-206.htm>.

¹⁴⁷ INSTRUCTION MEMORANDUM NO. 2002-095, at 4; INSTRUCTION MEMORANDUM NO. 2005-206, at 5.

been exhausted.¹⁴⁸ The Memoranda are also similar in the mandates for “unadoptable” wild horses.¹⁴⁹ Under both Memoranda, horses that are not otherwise eligible for adoption because of disease, congenital or genetic defects, physical defects due to previous injury, or recent but not life threatening injuries, are to be released to the range.¹⁵⁰ When considering whether an issue is “capable of repetition yet evading review,” it is essential to ask whether the facts are likely to be duplicated in the future. This could have easily been done in the present case with a simple comparison of the memorandum at issue and its successor.

Taking into consideration the Bureau’s own concession that the strategies articulated by the 2002 Instruction Memorandum continue to guide and influence subsequent strategies, and the fact that subsequent Memoranda continue to implement arguably identical selective removal requirements, it becomes clear that the gathers to which Fund For Animals objected—even though they had already been completed—were not only likely to be duplicated in the future but were also “capable of repetition.” By prohibiting the application of this exception to the case at hand, the Court has in effect foreclosed the Bureau from successfully challenging future gathers conducted by the Bureau under the Act.

VI. CONCLUSION

When Fund For Animals challenged the Bureau’s strategies implementing the Wild Horses and Burros Act, its suit not only challenged the Bureau’s adopted policies articulated in the Instruction Memorandum and Presidential Budget Initiative; it also challenged the individual gathers which the Bureau had carried out under the authority of those policies. Fund For Animals seemed to have anticipated the court’s reluctance to judicially review the Bureau’s general policies and strategies, so it included the individual gathers in the suit to provide the court with a concrete agency action. Little did Fund For Animals know that the court

¹⁴⁸ INSTRUCTION MEMORANDUM NO. 2002-095, at 4-5; INSTRUCTION MEMORANDUM NO. 2005-206, at 5.

¹⁴⁹ INSTRUCTION MEMORANDUM NO. 2002-095, at 5; INSTRUCTION MEMORANDUM NO. 2005-206, at 4.

¹⁵⁰ INSTRUCTION MEMORANDUM NO. 2002-095, at 5; INSTRUCTION MEMORANDUM NO. 2005-206, at 4.

would take a narrow and rigid approach to the mootness issue and refuse to apply an exception. The “capable of repetition yet evading review” doctrine should not be applied in every case where the challenged action has already happened, but in cases like the one at hand, it would have been proper for the court to investigate the Bureau’s ongoing policies to determine if the same violations of the Act were likely to repeat themselves in the future.

The message that this decision sends to future plaintiffs seeking to challenge the Bureau’s administration of the Act is: timing is everything. A potential plaintiff must not only wait until the Bureau starts making gathers (otherwise it is not a “final agency action” capable of judicial review), but then the plaintiff must act fast (before the gathers are finished and the claim becomes moot). Even if it were possible for any plaintiff to bring a claim within this small window of time, the difficulty in bringing successful claims under the Act seems to fly in the face of the original purpose of the Act—not to protect the Bureau from messy litigation, but to protect the wild horses and burros.

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