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Noah P. Hill

Alexander Blewett III School of Law at the University of Montana

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PREVIEW; Gallatin Wildlife Association v. United States Forest Service: *Public Influence in Administrative Discretion*

Noah P. Hill*

The United States Court of Appeals for the Ninth Circuit was scheduled to hear oral arguments in the matter of *Gallatin Wildlife Association v. United States Forest Service* on October 8, 2020 at 9:00 a.m. in Portland, Oregon, but upon issuance of an order on September 25, 2020, the court decided to rule on the record and briefs alone. John Meyer submitted the briefs on behalf of the Appellant Gallatin Wildlife Association and Yellowstone Buffalo Foundation (“Gallatin”), Michael T. Gray submitted briefs on behalf of the Appellee United States Forest Service (the “Forest Service”), and Dana L. Hupp submitted briefs on behalf of the Intervenor-Defendants and Appellees Helle Livestock, Rebish/Konen Livestock Limited Partnership, and the Montana Wool Growers Association (“Helle and Rebish/ Konen”).

I. INTRODUCTION

This case concerns private grazing rights included in the management plan governing the Beaverhead-Deerlodge National Forest, and comes to the Ninth Circuit from the United States District Court for the District of Montana, Butte Division. The issues presented are (1) whether the Forest Service violated the National Environmental Policy Act (“NEPA”) when it used a coarse-filter analysis in its review of the 2009 Forest Plan required by the National Forest Management Act (“NFMA”) for the Beaverhead-Deerlodge National Forest; and (2) whether the district court abused its discretion when it determined a history of private livestock grazing on public lands had not caused irreparable harm to Gallatin’s members.¹ This case is significant because it considers the influence of both courts and the public opinion in the administrative implementation of federal conservation policy.

II. FACTUAL AND PROCEDURAL BACKGROUND

The NFMA requires the Forest Service to adopt comprehensive land and resource management plans for each individual national forest.² The Forest Service adopted a revised forest plan for the Beaverhead-

* J.D. Candidate, Alexander Blewett III School of Law at the University of Montana Class of 2022.

¹ Plaintiffs/Appellants’ Opening Brief at *1, *Gallatin Wildlife Ass’n v. United States Forest Serv.*, (9th Cir. Oct. 2, 2019) (No. 19-35528) [hereinafter Opening Brief]; Answering Brief for the Federal Appellees at *1, *Gallatin Wildlife Ass’n v. United States Forest Serv.*, (9th Cir. Oct. 12, 2019) (No. 19-35528) [hereinafter Answering Brief].

² 16 U.S.C. § 1604.

Deerlodge National Forest in 2009 (“2009 Forest Plan”) which included prescriptions for domestic sheep grazing.³ Prior to adopting the 2009 Forest Plan, the Forest Service considered its environmental impacts on species present in the forest as required by NEPA.⁴ The Forest Service specifically considered how the 2009 Forest Plan would impact bighorn sheep using a coarse-filter methodology and determined use of the fine-filter methodology would not substantially change the data.⁵ Pursuant to a district court order, the Forest Service has also conducted subsequent evaluations of the viability of bighorn sheep population in relation to the 2009 Forest Plan, again concluding that a fine-filter analysis would not yield appreciably different data.⁶

Gallatin raised concerns about the effects of 2009 Forest Plan both before and after its adoption.⁷ Gallatin’s primary concern focused on the viability of bighorn sheep under the 2009 Forest Plan, and how disease transmission from domestic sheep grazing might endanger the native bighorn sheep population.⁸ Based on its concerns, Gallatin filed an administrative appeal of the 2009 Forest Plan.⁹ The Reviewing Officer directed the Regional Forester to review the record and other relevant information to determine if the 2009 Forest Plan should be amended to provide for more comprehensive management of the interactions between bighorn sheep and domestic sheep.¹⁰ Although the Regional Forester never issued a final report on possible amendments, the Reviewing Officer denied the appeal because bighorn sheep were not identified as a sensitive species in 2010.¹¹ After the Reviewing Officer denied Gallatin’s appeal, the Forest Service designated bighorn sheep as a sensitive species in 2011.¹²

Following this designation, Gallatin filed suit in district court in June 2015, alleging that the Forest Service had not fully complied with NEPA when it used the coarse-filter analysis and seeking to permanently enjoin domestic sheep grazing in the Beaverhead-Deerlodge National Forest.¹³ After nearly five years of complex litigation, which saw the addition of Helle and Rebish/Konen as Intervenor-Defendants, and a previous appeal of a decision not to award a preliminary injunction to the Ninth Circuit, the district court ruled on summary judgment that the Forest Service’s use of the coarse-filter analysis complied with NEPA

³ Answering Brief, *supra* note 1, at *1.

⁴ 42 U.S.C. § 4332(C) (stating that federal agencies must consider the environmental impacts of “major Federal Actions”).

⁵ Answering Brief, *supra* note 1, at *7.

⁶ *Id.* at *12.

⁷ Opening Brief, *supra* note 1, at *9–10.

⁸ *Id.*

⁹ *Id.* at *12–13

¹⁰ *Id.*

¹¹ *Id.* at *10.

¹² *Id.* at *11.

¹³ *Id.* at *12.

requirements and denied Gallatin's request to enjoin domestic sheep grazing.¹⁴

III. SUMMARY OF THE ARGUMENTS

Agency actions are reviewed under the highly deferential standard of the Administrative Procedure Act ("APA").¹⁵ As long as the Forest Service considered the relevant factors and articulated a rational connection between the facts and choices made, the Forest Service's action is valid.¹⁶ Gallatin argues that the Forest Service's flawed methodology in applying the coarse-filter analysis failed to consider all of the factors relevant to allowing domestic sheep grazing, while the Forest Service argues that the 2009 Forest Plan complies with the statutory framework and its decisions reflect careful consideration of scientific and economic considerations.¹⁷

A. *Appellant's Argument*

Gallatin argues that the Forest Service violated NEPA when it declined to conduct a fine-filter analysis on bighorn sheep populations and instead conducted a coarse-filter analysis.¹⁸ Gallatin asserts that its public comments on the 2009 Forest Plan and a letter from the Forest Service to Montana Fish, Wildlife & Parks ("Montana FWP") constitute evidence before the Forest Service that application of the fine-filter analysis to bighorn sheep was the proper methodology.¹⁹ The letter to Montana FWP, which states that bighorn sheep occur in small, discrete populations, supports an application of the fine-filter analysis because the coarse-filter methodology, by its own description, will not ensure the viability of species "with consistently sparse population densities" or those "that occupy highly fragmented or isolated habitats."²⁰ Gallatin further asserts that the Forest Service represented that it would use the fine-filter analysis to address species viability concerns raised by the public, such as those raised by Gallatin in its public comments to the 2009 Forest Plan.²¹

¹⁴ Gallatin Wildlife Ass'n v. United States Forest Serv., CV-15-27-BU-BMM, 2016 WL 3282047, at *13–14 (D. Mont. June 14, 2016) (granting summary judgment in favor of Forest Service's initial use of the coarse-filter analysis); Gallatin Wildlife Ass'n v. United States Forest Serv., CV-15-27-BU-BMM, 2018 WL 1796216 (D. Mont. 2018) (denying Gallatin's motion for an injunction prohibiting domestic grazing on the Beaverhead-Deerlodge National Forest).

¹⁵ 5 U.S.C §§ 701–706.

¹⁶ *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc) (abrogated in part on other grounds by *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008)).

¹⁷ Opening Brief, *supra* note 1, at *23; Answering Brief, *supra* note 1, at *17–18.

¹⁸ Opening Brief, *supra* note 1, at *20.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at *20–21.

Gallatin claims that, despite the Forest Service's representations, Gallatin's public comments, and the Montana FWP letter, the Forest Service reneged on its commitment to use a fine-filter analysis, thereby making a decision that runs counter to the facts before the agency.²² Gallatin asserts such misrepresentations of research methodology constitute a procedural violation of NEPA, and caused the Forest Service to ignore evidence that would have otherwise led to changes to the 2009 Forest Plan.²³

Gallatin also argues that the district court abused its discretion when it did not grant an injunction enjoining domestic sheep grazing on the Beaverhead-Deerlodge National Forest.²⁴ Gallatin alleges that the district court improperly found that Gallatin did not suffer irreparable harm necessary to merit an injunction because the grazing has occurred longer than Gallatin members have been alive.²⁵ Gallatin asserts that the district court's reasoning was unlawful because such reasoning leads to the result that no plaintiff seeking to enjoin private livestock grazing on public land will ever suffer the requisite irreparable harm if the grazing has been occurring longer than the plaintiff has been alive.²⁶

Gallatin further argues that its members have been irreparably harmed by domestic grazing in three ways. First, Gallatin asserts grazing irreparably harms its members because the presence of sheepdogs accompanying domestic herds on a 44,000-acre swath of land pose a safety threat to those who would otherwise use the land for recreational purposes.²⁷ Second, Gallatin asserts that private livestock grazing causes irreparable harm to its conservation interest in bighorn sheep because domestic sheep might spread disease to wild native herds.²⁸ Finally, Gallatin argues that the private livestock grazing causes irreparable harm to its conservation interest in grizzly bears, relying on testimony ruled inadmissible by the district court which asserts, without providing any factual support, that "elevated levels of grizzly bear mortality are associated with sheep operations."²⁹ Gallatin concludes its argument by stating that the potential for irreparable harms and general public interest favor injunctive relief.³⁰

²² *Id.* at *20.

²³ Plaintiffs/Appellants' Reply Brief at *4-5, *Gallatin Wildlife Ass'n v. United States Forest Serv.*, (9th Cir. Feb. 27, 2020) (No. 19-35528) [hereinafter Reply Brief].

²⁴ Opening Brief, *supra* note 1, at *25.

²⁵ *Id.* at *25-26.

²⁶ *Id.* at *26.

²⁷ *Id.* at *28.

²⁸ *Id.* at *32.

²⁹ *Id.* at *37.

³⁰ *Id.* at *40, 42.

B. Appellee's Argument

In response to Gallatin's first argument, the Forest Service asserts that its coarse-filter evaluation of bighorn sheep fulfilled all NEPA requirements.³¹ Based on internal guidance, the Forest Service concluded that bighorn sheep were not a species that necessitated a fine-filter analysis.³² Moreover, the Forest Service argues that it never represented that any species of concern raised by the public would be guaranteed a review using the fine-filter method, but rather that it had included a fine-filter analysis review for some species identified by the public based on its own discretion.³³ The Forest Service further asserts it has reviewed species viability for bighorn sheep following the sensitive species designation and determined that such a designation did not require any further amendment to the 2009 Forest Plan because the actions for managing the bighorn sheep herds would remain substantially the same.³⁴

In response to Gallatin's request for injunctive relief, the Forest Service argues that the Court must deny injunctive relief based on the APA.³⁵ However, were the Ninth Circuit to consider Gallatin's request for an injunction on its merits, the Forest Service argues that Gallatin has not made the necessary showing of irreparable harm.³⁶ The Forest Service observes that grazing is restricted to only a small percentage of the total acreage of the Beaverhead-Deerlodge National Forest.³⁷ The Forest Service further observes that the grazing lands are not closed to any person wishing to enjoy the land, and that any encounter with a sheepdog is purely speculative, and not irreparable.³⁸ The Forest Service also argues that Gallatin has failed to demonstrate how its conservation interest in bighorn sheep could be irreparably harmed, since there have not been any mass-fatalities for bighorn sheep or any known commingling of wild and domestic sheep herds.³⁹ Finally, the Forest Service argues that Gallatin cannot support an injunction based on a conservation interest in grizzly bears because management of bighorn sheep, not grizzly bears, forms the basis for Gallatin's claims.⁴⁰

Helle and Rebish/Konen additionally argue that an injunction enjoining sheep grazing on the Beaverhead-Deerlodge National Forest

³¹ Answering Brief, *supra* note 1, at *14.

³² *Id.* at *15–16.

³³ *Id.* at *18–19.

³⁴ *Id.* at *22.

³⁵ *Id.* at *23 (explaining that injunctions in APA cases do not apply indefinitely, only until the agency corrects errors in its analysis).

³⁶ *Id.* at *26.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at *28.

⁴⁰ *Id.* at *30.

would be improper based on a balancing of all potential harms.⁴¹ They argue that Gallatin members face no immediate irreparable harm, given the long history of livestock grazing in the Beaverhead-Deerlodge National Forest.⁴² Rather, an injunction would irreparably harm sheep operations, affecting businesses, families, employees, and communities. Such an injunction would disrupt traditions and an economy dating back more than a century.⁴³

IV. ANALYSIS

A. Coarse-Filter Analysis

To determine whether or not the Forest Service committed a NEPA violation, the Court will likely rely on its decision in *Lands Council v. McNair*. Under *McNair*, a party must show that the Forest Service's actions were arbitrary or capricious as specified by the APA. Otherwise, scientific determinations made by the Forest Service should receive deference from the Court.⁴⁴ The Court has affirmed the *McNair* standard as recently as May 2020, stating that “the lesson of [*McNair*] is that we are not a panel of scientists, and cannot review agency decisions as such.”⁴⁵ The parties in this case do not dispute this standard; rather the parties dispute what, precisely, constitutes an arbitrary or capricious action by the Forest Service.

The Court will likely find that the Forest Service did not act in an arbitrary or capricious manner when it declined to conduct a fine-filter analysis for bighorn sheep. The Forest Service acts in an arbitrary or capricious manner only if the Forest Service relies on factors Congress did not intend to consider, fails to consider a material aspect of the problem, or offers an explanation that is plainly contradicted by scientific evidence before the agency or that is so implausible that it could not be explained by a difference in opinion or the result of agency expertise.⁴⁶ Absent a strong showing of arbitrary or capricious decision making, the Court may not impose procedural requirements not explicitly enumerated in the pertinent statutes.⁴⁷

Nothing in Forest Service guidance suggests that it must conduct an analysis for any species for which the public expresses a concern. Instead, Forest Service guidance states that species which require a fine-

⁴¹ Answering Brief of Intervenor-Defendants/Appellees Helle Livestock and Rebish/Konen Livestock Limited Partnership at *15, *Gallatin Wildlife Ass'n v. United States Forest Serv.*, (9th Cir. Jan. 3, 2020) (No. 19-35528) [hereinafter Intervenor's Answering Brief].

⁴² *Id.* at *14.

⁴³ *Id.* at 15, 17–18.

⁴⁴ *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008).

⁴⁵ *Oregon Natural Desert Ass'n v. United States Forest Serv.*, 957 F.3d 1024, 1036 (9th Cir. 2020).

⁴⁶ *McNair*, 537 F.3d at 987.

⁴⁷ *Id.* at 993.

filter analysis include those that: “(1) have undergone significant declines in abundance or distribution, (2) are known to use highly specialized or unique habitat, or (3) are isolated endemics.”⁴⁸ Although the letter to Montana FWP suggested that bighorn sheep occupy fragmented habitats, the habitat was not sufficiently unique or specialized to require a fine-filter analysis.⁴⁹ The absence of a fine-filter analysis, therefore, is not likely arbitrary or capricious because the Forest Service determined that bighorn sheep are not at risk under the above factors.

The Court is also unlikely to find that the Forest Service’s description of the coarse-filter methodology constitutes a reversible error. The Court has granted great degrees of deference to the Forest Service when determining habitat viability of species.⁵⁰ Moreover, the Forest Service is entitled to interpret its own regulations and procedures.⁵¹ Gallatin’s argument that the description of the coarse-filter methodology undermines its use in the bighorn sheep population is a dispute over interpretation. Here, as it has done before, the Court will likely defer to the Forest Service’s expertise and judgment for the use of its own methodologies.

Under these facts, demanding a fine-filter analysis would constitute a procedural requirement not required by statute. Therefore, the Court will likely uphold the district court’s decision to not demand a fine-filter analysis. Because the district court previously ordered reconsideration of the bighorn sheep population for other reasons, an alternative ruling that the Forest Service had an obligation to conduct a fine-filter analysis based on Gallatin’s public comments and the Montana FWP letter will not likely have any effect on the outcome of these proceedings since the district court ordered reconsideration of the bighorn sheep population for other reasons.⁵² However, such a ruling could alter the implementation process for future forest management plans.

The Court is also unlikely to find that the Forest Service made any misrepresentations that would violate NEPA procedural requirements. Gallatin alleges that the Forest Service stated in its Environmental Impact Statement (“EIS”) for the 2009 Forest Plan that it “used fine-filter methodology for species identified by the public as having viability concerns,” but Gallatin takes this statement out of context.⁵³ A thorough review of the record shows that this statement, made in response to comments in the final EIS, was not intended to represent Forest Service

⁴⁸ Gallatin Wildlife Ass’n v. United States Forest Serv., CV-15-27-BU-BMM, 2016 WL 3282047, at *5 (D. Mont. June 14, 2016).

⁴⁹ Answering Brief, *supra* note 1, at *20.

⁵⁰ Lands Council v. McNair, 537 F.3d 981, 994 (9th Cir. 2008).

⁵¹ Oregon Natural Desert Ass’n v. United States Forest Serv., 957 F.3d 1024, 1035 (9th Cir. 2020).

⁵² Answering Brief, *supra* note 1, at *12.

⁵³ Opening Brief, *supra* note 1, at *13–14.

methodology for all species, but provide an example of the positive impact of public comment.⁵⁴

Even if the Court did find that this comment constituted a procedural error by the Forest Service, a comment forum probably does not constitute “relevant statutes,” regulations, or even agency policy under *McNair*. To impose a requirement to conduct a fine-filter analysis would still constitute a judicially imposed procedural requirement, as opposed to a requirement imposed by existing laws. Thus, the decision to conduct additional research on bighorn sheep remains squarely within the discretion of the Forest Service.

B. Irreparable Harm Caused By Domestic Sheep Grazing

The Court will likely find that the district court did not abuse its discretion when it denied injunctive relief to Gallatin. To determine whether or not the district court should have granted an injunction preventing domestic sheep grazing while the Forest Service resolved other deficiencies in its analysis, the Court will have to consider the analysis set forth in *Winter v. Natural Resource Defense Council, Inc.*⁵⁵ Under *Winter*, a plaintiff seeking a preliminary injunction must establish that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest.⁵⁶

The primary issue that the Court must resolve is whether or not the district court applied the proper irreparable harm analysis. Gallatin alleges that under the test set out in *Winter*, the duration of the activity causing the alleged irreparable harm should not be considered. However, in *Winter*, and contrary to Gallatin’s assertions, the Supreme Court briefly considered the duration of the activity alleging harm, holding, “we find it pertinent that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment.”⁵⁷ Similarly, the district court held in this case that the prior history of grazing in the Beaverhead-Deerlodge National Forest mitigated concerns about future irreparable harms. Therefore, in consideration of the Supreme Court’s holding in *Winter*, the district court did not abuse its discretion by considering the prior history of grazing in the region.

Given the appropriateness of the historical context in the irreparable harm analysis, the Court may decline to consider the merits of Gallatin’s claims for irreparable harm. In the event that the Court decides

⁵⁴ Answering Brief, *supra* note 1, at *19 (the misrepresented statement reads: “Species identified by the public as having viability concerns through public comment were also included in the analysis. These include the northern goshawk and great gray owl (see the Revised Biological Evaluation).”)

⁵⁵ 555 U.S. 7 (2008).

⁵⁶ *Id.* at 20.

⁵⁷ *Id.* at 23.

to consider the merits, Gallatin's arguments will still likely fail. First, Gallatin's members have not pointed to any new activity that would have unknown effects on the environment and thereby merit injunctive relief under *Winter*. Second, the Gallatin's members still have access to the Beaverhead-Deerlodge National Forest, and are not prohibited from recreating on the land. The argument that Gallatin members could not use the land because of sheepdogs also seems far-fetched when considering (1) the size of the forest, (2) the comparatively small portion used for grazing, and (3) the fact that the plaintiffs want to see grizzly bears on the land, which likely pose a far greater threat to personal safety than sheepdogs.⁵⁸ Third, after 150 years of sheep grazing in the forest, harms to conservation interests alleged by Gallatin's members have failed to materialize. The Forest Service has not recorded any instance of disease transmission and only recorded one bighorn sheep death.⁵⁹ Further, Gallatin's members have failed to articulate how their grizzly bear conservation interest relates to the use of an improper methodology for bighorn sheep population which constitutes the basis for their injunction.

When balancing the potential harms alleged by Gallatin with the harms of an injunction, the Court will likely find that the balance favors the Forest Service and the Intervenor-Defendants and Appellees. Congress has consistently acknowledged that the Forest Service must balance competing demands, and national forests have never been designated for "non-use."⁶⁰ Grazing practices occupy a place of historical and economic importance for the families who hold permits. Enjoining grazing in the Beaverhead-Deerlodge National Forest could cause irreparable economic and cultural loss to those families and negatively affect businesses that rely on their wool distributions. These harms likely outweigh any conservation concerns that have failed to materialize over the last 150 years.

Finally, enjoining grazing in the Beaverhead-Deerlodge National Forest likely does not support public interests. Even if plaintiffs show irreparable injury, such injury may be outweighed by the public interest.⁶¹ Grazing has built strong private-public relationships throughout the state of Montana which contribute to the good management of public lands. The public interest is best supported by maintaining working relationships between public agencies and private parties, not by suddenly stripping private parties of their historical right to use public lands.

⁵⁸ Reply Brief, *supra* note 23, at *31 ("The grazing causes irreparable harm to Gallatin members' aesthetic interest in seeing bears . . ."). [I think this is redbook style, but obviously ignore if I'm wrong]

⁵⁹ Opening Brief, *supra* note 1, at *34; Answering Brief, *supra* note 1, at *29 (both parties acknowledge the death of a single bighorn sheep in 2013).

⁶⁰ *Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008).

⁶¹ *Winter*, 555 U.S. at 23.

V. CONCLUSION

The Court will likely conclude that the Forest Service did not violate NEPA when it used the coarse-filter methodology to assess bighorn sheep viability, and that the district court did not abuse its discretion when it declined to enjoin private grazing on the Beaverhead-Deerlodge National Forest. This case offers the Ninth Circuit an opportunity to assess the role of the judiciary as it relates to scientific determinations. More importantly, the Court will be asked to rule on the degree to which the Forest Service must adjust scientific determinations based on public comment. Additionally, this case presents the Ninth Circuit an opportunity to clarify the appropriate judicial standard for evaluating whether or not a potential harm can be considered irreparable in environmental issues. Resolving these issues will streamline environmental disputes and improve public land management practices.