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Buffalo Field Campaign v. Zinke

Hallee C. Kansman
Alexander Blewett III School of Law at the University of Montana, hallee.kansman@umontana.edu

Buffalo Field Campaign v. Zinke, 289 F. Supp. 3d 103 (D.D.C. 2018)

Hallee C. Kansman

Despite years of litigation and legislation, the protection status of bison in and around Yellowstone National Park remains unsettled. Buffalo Field Campaign, a non-profit group, has spent decades spearheading the fight to list the species as either endangered or threatened under the Endangered Species Act. *Buffalo Field Campaign v. Zinke* tests the scope of agency directives and the strictness of the statutory language which guides agency actions.

I. INTRODUCTION

In 2014, Buffalo Field Campaign, alongside Western Watersheds Project, filed a citizen petition to list the Yellowstone bison population as an endangered or threatened species under the Endangered Species Act ("ESA").[1] A second petition, filed in 2015, endeavored to expose flaws in the Interagency Bison Management Plan ("IBMP").[2] The U.S. Fish and Wildlife Service ("Service") rejected both petitions, stating there was no substantial evidence supporting the claim that the Yellowstone bison population was distinct.[3] From there, Buffalo Field Campaign, Western Watershed Project, and Friends of Animals (collectively, "Buffalo Field") filed suit via the Administrative Procedure Act ("APA"), claiming the Service's determination was arbitrary and capricious.[4] The United States District Court for the District of Columbia agreed the Service improperly determined the outcome of the petitions, therefore granting Buffalo Field's motion for summary judgment and remanding the case for a 90-day finding using the proper agency standard.[5]

II. FACTUAL AND PROCEDURAL BACKGROUND

In the 1800s, millions of square kilometers of North American land were home to large bison herds.[6] By the late 1800s, however, the species faced extinction with fewer than 1,000 bison left in the wild.[7] Those remaining bison that were neither sent to zoos nor private ranches established their range in a 20,000-square kilometer area inside Yellowstone National Park and the Greater Yellowstone Area.[8] The Yellowstone bison population is genetically distinct in that it shows no

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1. Buffalo Field Campaign v. Zinke, 289 F. Supp. 3d 103, 107 (D.D.C. 2018).
2. *Id.*
3. *Id.* at 108.
4. *Id.* at 105.
5. *Id.*
6. *Id.* at 106.
7. *Id.*
8. *Id.*

sign "of hybridization with cattle[.]"[9] Some studies suggest that separate migrating herds from the larger Yellowstone herd, denoted as "Central" and "Northern" herds, are genetically distinct populations and should be preserved.[10] Meanwhile, other studies challenge that the two herds were artificially created and therefore are not distinct and should not be protected.[11] Currently, the ESA does not list the Yellowstone bison population or any of its subpopulations as endangered or threatened.[12] Rather, the IBMP, which was created to "continue research and take conservative but protective steps toward cooperative management of the bison while protecting Montana's brucellosis class-free status[,]" offers Yellowstone bison other legal protections.[13]

The IBMP includes a provision that sets a target population of 3,000 bison in Yellowstone and establishes their territorial boundaries.[14] Additionally, the IBMP allows capturing bison and testing for brucellosis during winter migrations.[15] If at any time Yellowstone's bison population exceeds 3,000, the IBMP provides for the "removal, quarantine, and slaughter of bison that exit the Park boundaries."[16]

In 2014, the Western Watersheds Project and Buffalo Field Campaign filed the first citizen petition to list the Yellowstone bison population as an endangered or threatened species.[17] James Horsley filed a second citizen petition seeking similar relief in 2015. Both petitions arose out of the Service's denial of similar petitions in 1999 and 2011.[18] In their petition, Buffalo Field Campaign and Western Watersheds Project contended that hunting, disease, and climate change threatened the Yellowstone bison's survival and that the IBMP was insufficient to protect its distinct herds.[19] James Horsley's second petition extended this argument by stating the IBMP target population was inadequate to preserve the genetic diversity of the bison.[20]

In late 2015, the Service denied the two petitions, determining both failed to provide any significant scientific evidence showing that

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9. *Id.*

10. *Id.* at 107. (citing Natalie D. Halbert et al., *Genetic Population Substructure in Bison at Yellowstone National Park*, 103 J. HEREDITY 360, 367 (2012)).

11. *Id.* (citing Patrick J. White & Rick L. Wallen, *Yellowstone Bison – Should We Preserve Artificial Population Substructure or Rely on Ecological Processes?*, 103 J. HEREDITY 751, 752 (2012)).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* ("Brucellosis is a disease that can be transmitted from bison to cattle and that causes reproductive failure in infected animals." (citation omitted))

16. *Id.*

17. *Id.*

18. *Id.* ("Individuals may petition the Secretary 'to add a species to, or to remove a species from' the list of endangered and threatened species." (quoting 16 U.S.C. § 1533(b)(3)(A))).

19. *Id.* at 108.

20. *Id.*

listing the species as either threatened or endangered was appropriate.[21] The Service ignored the basis—historical loss, livestock grazing, infrastructure and development, and invasive species—on which Buffalo Field Campaign and Western Watershed Project built its petition.[22]

Buffalo Field filed suit against Secretary of Interior Ryan Zinke, the Service, and its director, Jim Kurth, to challenge the Service's 90-day finding.[23] Buffalo Field alleged the Service arbitrarily and capriciously denied the petitions by ignoring the plain language of the ESA.[24] Both Buffalo Field and the Service filed cross-motions for summary judgment.[25] After a January 2018 hearing, the court held the Service did not utilize the proper standard in making its 90-day determination.[26] Thus, the court granted Buffalo Field's motion for summary judgment and determined remand was the appropriate remedy, during which the Service must use the correct standard and conduct a 90-day finding.[27]

III. ANALYSIS

A. The Service Failed to Apply the Proper Standard in Making its 90-day Determination.

The Service has the discretion to make a "may be warranted" finding based on a reasonable person standard; "disagreement among reasonable scientists" is deemed a situation in which such a finding should be made.[28] In making its determination, the Service cannot entirely disregard scientific studies that support petitions, nor can they resolve

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21. *Id.* (citing the Endangered Species Act, 16 U.S.C. § 1533(b)(3)(A) ("When the Secretary receives such a petition, he is directed '[t]o the maximum extent practicable, within 90 days after receiving the petition' to 'make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.'")).

22. *Id.*

23. *Id.*

24. *Id*. The Administrative Procedure Act requires a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." 5 U.S.C. § 706(2)(A)-(F).

25. *Id.* at 108.

26. *Id.* at 111.

27. *Id.* at 112.

28. *Id*. at 109 (quoting Center for Biological Diversity v. Kempthorne, 2004 U.S. Dist. LEXIS 4816, 2007 WL 163244 (N.D. Cal. 2007)).

scientific disputes.[29] Ultimately, if there is conflicting scientific evidence, then the Service must include the discordant information.[30]

The court stated this case contained a clear dispute over scientific evidence.[31] One study conducted by Halbert et al. contended two genetically distinct populations naturally existed, while a second study by White and Wallen argued the two populations were artificially created. If the findings of the latter was the only information considered, the Service would have no requirement to alter the target population level instituted by the IBMP.[32] In its response to the Halbert et al. study, the Service stated the IBMP sets population targets for each herd individually.[33] The court noted, however, that the Service ignored the study's conclusion that the overall population target was too low or inaccurate, having been determined before the two herds were recognized individually.[34] The court also remarked that the Service merely adopted the White and Wallen study's conclusion stating maintenance of subpopulations has no beneficial effect on the overall genetic diversity and thus there is no need for preserving the two populations individually.[35]

The Service did not indicate a legitimate reason for denying the Halbert et al. study, therefore failing to abide by agency regulations.[36] Essentially, the Service attempted to resolve a scientific dispute by relying on sources that supported the position it had already taken.[37] The court held in denying the Halbert et al. study with no justification, the Service applied an inappropriate standard to their 90-day determination of Buffalo Field's petitions.[38] The court alluded to its ability to give deference to the Service, stating that a reasonable scientist would not rely on the Halbert et al. study; however, the Service failed to provide reasoning to persuade the court.[39]

Additionally, the Service argued the court's decision would obfuscate the distinction between the agency's 90-day determination and the agency's 12-month review.[40] However, the court did not require the Service to accept the scientific evidence nor credit an unreliable study.[41] Rather, the court required support in denying the study for review of the

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29. *Id.* at 110.

30. *Id.* ("[I]f two pieces of scientific evidence conflict, the Service must credit the supporting evidence unless that evidence is unreliable, irrelevant, or otherwise unreasonable to credit.").

31. *Id.*

32. *Id.* (citing Halbert et al. (2012) and White & Wallen (2012)).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 111.

40. *Id.*

41. *Id.* (citing Center for Biological Diversity v. Morgenweck, 351 F. Supp. 2d 1137, 12 (D. Ariz. 2008) (stating that "the Service can disregard obsolete studies or unsupported allegations")).

petition.[42] Thus, in applying an improper standard, the Service's 90-day determination was arbitrary and capricious, entitling Buffalo Field to summary judgment.[43]

B. The Court Applied an Appropriate Remedy.

In determining the remedy for the case, the court faced differing stances.[44] Buffalo Field contended that the court should instruct the Service to begin a 12-month review rather than remand the case to the Service, while the Service argued that remand was the only remedy.[45] The court, in applying D.C. Circuit standards, reasoned "a district court reviewing a final agency action 'does not perform its normal role but instead sits as an appellate tribunal.'"[46] Therefore, when a court reviews an agency action and an error in the law is made by that agency, then the appropriate remedy is to remand to the agency with instructions to proceed with proper agency standards.[47]

Buffalo Field presented case evidence finding that remand was not appropriate in instances where an agency applies the improper standard.[48] The court, however, determined those cases involved improper determinations resulting from third-party information.[49] Thus, the Service prematurely started a 12-month review, despite the ongoing 90-day determination.[50] The cases Buffalo Field relied on were not appropriate for requesting a 12-month review because the courts were "simply directing the Service to continue what it had in essence already begun."[51] In this case, because the Service did not begin a 12-month review during their 90-day determination, the court held remand was appropriate.[52]

IV. CONCLUSION

The *Buffalo Field Campaign v. Zinke* holding reaffirms the need for agencies to properly follow regulations and standards, set forth by the legislature. Although it neither matters where the regulations and standards came from nor the question of agency-created regulations and

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* (quoting Palisades General Hospital Inc. v. Leavitt, 426 F.3d 400, 403 (D.C. Cir. 2005) (internal citations omitted) (holding that "[t]he district court had jurisdiction only to vacate the Secretary's decision . . . and to remand for further action consistent with its opinion")).
47. *Id.* (citing County of Los Angeles v. Shalala, 192 F.3d 1005, 1011 (D.C. Cir. 1999) (holding it would have been an error for the district court to "devise a specific remedy for the Secretary to follow" after declining to remand)).
48. *Id.* at 112.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

standards less deserving of adherence, agency discretion must be supported by legitimate reasoning to avoid unsubstantiated decisions. In this particular case, the Service must provide credible support and reasoning in making a 90-day determination, rather than arbitrarily deciding the standard.

The status of the Yellowstone bison herd remains scientifically contested, but the procedure by which a determination must ultimately be made is clear and concise. Agencies, like the Service, have clear directives laid out in the statutory regulations and should follow the relevant plain language to avoid the worst possible scenario: arbitrary and unsupported agency decisions. Furthermore, the decision to remand instructs the agency to use the proper legal standard in making its decisions and discourages repeat failures when the agency regulations and standards are plainly clear and concise.