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Center for Biological Diversity v. Zinke

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***Center for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018)**

Ryan L. Hickey

The oft-cited “arbitrary and capricious” standard revived the Center for Biological Diversity’s most recent legal challenge in its decades-long quest to see arctic grayling listed under the Endangered Species Act. While this Ninth Circuit decision did not grant grayling ESA protections, it did require the United States Fish and Wildlife Service to reconsider its 2014 finding that listing grayling as threatened or endangered was unwarranted. In doing so, the court found “range,” as used in the ESA, vague while endorsing the FWS’s 2014 clarification of that term. Finally, this holding identified specific shortcomings of the challenged FWS finding, highlighting how agency decision making can cross from acceptable to arbitrary.

I. INTRODUCTION

Arctic grayling, coldwater fish resembling trout topped with particularly prominent dorsal fins, historically ranged across modern-day Montana, Wyoming, and Michigan within the contiguous 48 states.¹ Today, however, populations survive only in Montana’s Upper Missouri River Basin.² The remaining grayling include two genetically distinct strains: river and stream-dwelling grayling (“fluvial grayling”), and grayling that spawn in rivers and streams but otherwise live in lakes (“adfluvial grayling”).³ Fluvial grayling adapt more readily than their adfluvial cousins, making the former particularly important for the broader species’ long-term survival.⁴

The Endangered Species Act (“ESA”) enables listing of a species as “threatened” or “endangered” if it imminently or currently faces extinction across most of its range.⁵ The United States Fish and Wildlife Service (“FWS”) handles listing decisions, which must adhere to ESA statutory guidelines.⁶ Those guidelines require the FWS to review available information that may warrant ESA listing, including habitat or range security and possible alternative non-ESA conservation measures.⁷

The FWS may consider a species for ESA listing on its own initiative or upon external petition.⁸ In the latter case, the FWS must review the petition for “substantial scientific or commercial information”

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1. *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1058 (9th Cir. 2018).
 2. *Id.*
 3. *Id.* at 1059.
 4. *Id.*
 5. *Id.* (citing 16 U.S.C. §§ 1532–33).
 6. *Id.* at 1060 (citing 16 U.S.C. § 1533).
 7. *Id.*
 8. *Id.*

supporting the listing request.⁹ If found, the FWS undertakes a more in-depth study of the species' status, a "12-month finding," culminating in a decision that the requested ESA listing is "warranted," "not warranted," or "warranted but precluded by higher priority pending proposals."¹⁰

Those three elements—arctic grayling, the ESA, and the FWS's listing-decision responsibilities—converged in this case after an initial encounter more than three decades ago.¹¹

II. FACTUAL & PROCEDURAL BACKGROUND

The FWS first considered listing arctic grayling as threatened or endangered in 1982.¹² While that evaluation concluded grayling may warrant such designation, the agency did not pursue that course for want of adequate information.¹³ The 1982 decision remained unchanged for a decade, but it marked the beginning of a long-running debate over the listing status of this particular freshwater fish.¹⁴

In 1991, photographer George Wuerthner and the Biodiversity Legal Foundation—which would later become part of the Center for Biological Diversity ("CBD")—petitioned the FWS to list the fluvial grayling, but not arctic grayling in general, as endangered.¹⁵ Approximately three years later, the agency categorized the requested listing as "warranted but precluded."¹⁶ The FWS acknowledged threats to fluvial grayling, but found non-ESA conservation efforts benefitting that strain compelling enough that other animals and populations faced more immediate concerns.¹⁷ That decision remained unchanged for nearly a decade until, in a 2003 complaint, the Western Watersheds Project and CBD challenged the grayling's "warranted but precluded" listing status.¹⁸

The FWS, instead of granting threatened or endangered status, raised the "listing priority" of arctic grayling; plaintiffs subsequently filed an amended complaint, and the two sides later settled.¹⁹ That settlement required the FWS to reevaluate arctic grayling and update its listing

9. *Id.* (quoting 16 U.S.C. § 1533(b)(3)(A) (internal quotations omitted)).

10. *Id.* (quoting 16 U.S.C. § 1533(b)(3)(B)).

11. *Id.*

12. *Id.* (citing Endangered and Threatened Wildlife and Plants; Review of Vertebrate Wildlife for Listing as Endangered or Threatened Species, 47 Fed. Reg. 58,454 (Dec. 30, 1982)).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 1060–61 (citing Endangered and Threatened Wildlife and Plants; Finding on a Petition to List the Fluvial Population of the Arctic Grayling as Endangered, 59 Fed. Reg. 37,738, 37,740–41 (July 25, 1994)).

17. *Id.*

18. *Id.* at 1061 (citing *Ctr. For Biological Diversity v. U.S. Fish & Wildlife Serv.*, No. CIV.A. 03-1110(JDB) (D.D.C.)).

19. *Id.*

decision by April 2007.²⁰ Thus, in April 2007 the FWS changed the arctic grayling's ESA listing status from "warranted but precluded" to "not warranted" ("2007 Finding").²¹ That decision introduced a new FWS conclusion: the agency deemed arctic grayling an indistinct population segment, barring the fish from threatened or endangered status.²²

The CBD and similar groups challenged the 2007 Finding in federal court.²³ Once more, the parties settled, and once more, the FWS committed to updating its arctic grayling listing decision, this time by August 2010 ("2010 Finding").²⁴ In the 2010 Finding, the FWS returned arctic grayling's listing status to "warranted but precluded," reversing its 2007 conclusion that those fish were not a distinct population segment.²⁵ Less than a year later, the FWS resolved to prevent further back-and-forth decisions by either proposing a listing rule or conclusively determining arctic grayling did not warrant listing by 2014.²⁶

In August 2014, the FWS again concluded that listing arctic grayling was "not warranted" ("2014 Finding").²⁷ Rather than distinct population segment concerns, the 2014 Finding relied on various evidence—arctic grayling numbers, including fluvial subpopulations, were increasing; habitat problems were already being addressed by non-ESA conservation efforts; climate change did not threaten the fish; and more—to show grayling did not need ESA protection.²⁸ Parts of the 2014 Finding directly contradicted the 2010 Finding, and the FWS had evaluated arctic grayling range by focusing on the species' limited "current range" rather than its broader historic territory.²⁹

In February 2015, the CBD filed an action in the United States District Court for the District of Montana challenging the 2014 Finding.³⁰

20. *Id.*

21. *Id.* (citing Endangered and Threatened Wildlife and Plants; Revised 12-Month Finding for Upper Missouri River Distinct Population Segment of Fluvial Arctic Grayling, 72 Fed. Reg. 20,305, 20,305 (Apr. 24, 2007)).

22. *Id.*

23. *Id.* (citing *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 1:07-cv-00152-RFC (D. Mont.)).

24. *Id.*

25. *Id.* (citing Endangered and Threatened Wildlife and Plants; Revised 12-Month Finding to List the Upper Missouri River Distinct Population Segment of Arctic Grayling as Endangered or Threatened, 75 Fed. Reg. 54,708, 54,708 (Sept. 8, 2010)).

26. *Id.* at 1061-62 (citing *In re Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377 (EGS), MDL Docket No. 2185 (D.D.C.)).

27. *Id.* at 1062 (citing Endangered and Threatened Wildlife and Plants; Revised 12-Month Finding on a Petition to List the Upper Missouri River Distinct Population Segment of Arctic Grayling as an Endangered or Threatened Species, 79 Fed. Reg. 49,384 (Aug. 20, 2014)).

28. *Id.*

29. *Id.*

30. *Id.*

The organization alleged: 1) FWS conclusions about arctic grayling population numbers were arbitrary; 2) evidence of lower water flows and higher water temperatures, both of which would worsen with climate change, was not correctly evaluated; and 3) the FWS analysis of arctic grayling range was improper.³¹ After both the State of Montana and Montana Department of Fish, Wildlife and Parks intervened alongside the FWS, both sides filed motions for summary judgment.³² The district court rejected each of the CBD's claims, granting summary judgment for the defendants in September 2016.³³ In October, the CBD appealed that decision to the Ninth Circuit Court of Appeals.³⁴

III. ANALYSIS

On appeal, the CBD alleged the FWS erroneously evaluated range for purposes of determining risk of arctic grayling extinction, and the FWS engaged in arbitrary and capricious decision making.³⁵

A. *The FWS Did Not Err When it Interpreted "Range" to Mean Current Rather than Historic Range*

The CBD argued the FWS erred when considering whether arctic grayling faced extinction "in all or a significant portion of its range" by evaluating the species' current territory rather than its larger historical home.³⁶ The FWS, however, addressed that exact issue in 2014 via its "Final Policy on Interpretation of the Phrase 'Significant Portion of Its Range' in the Endangered Species Act's Definitions of 'Endangered Species' and 'Threatened Species.'"³⁷ The "SPR policy" defined range as "the general geographical area within which [a] species can be found *at the time [the FWS] makes any particular status determination.*"³⁸ The CBD challenged the SPR policy via two cases clarifying "range" differently.³⁹ The court, however, pointed out that because the SPR policy arose after both of the CBD's cases, they would control only if "the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."⁴⁰

Because the SPR policy grew out of notice-and-comment rulemaking, the court analyzed it using *Chevron* deference, first asking

31. *Id.*

32. *Id.*

33. *Id.* at 1058, 1062.

34. *Id.* at 1062.

35. *Id.* at 1063.

36. *Id.*

37. *Id.* (citing 79 Fed. Reg. 37,578 (July 1, 2014)).

38. *Id.* (quoting 79 Fed. Reg. at 37,609 (July 1, 2014) (emphasis added)).

39. *Id.* at 1063–64.

40. *Id.* at 1063 (quoting Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982–83 (2005) (internal quotation marks omitted)).

whether “range” was ambiguous and, if so, then evaluating whether the SPR policy’s interpretation was reasonable.⁴¹ The CBD contended that “range” unambiguously meant “historical range” in this context, but the court disagreed.⁴² Instead, in a question of first impression for the Ninth Circuit, the panel applied the *Chevron* framework to the ESA’s use of “range.”⁴³ In doing so, the court held that “range” was ambiguous and the SPR policy was reasonable, with both decisions reinforced by comparisons to the D.C. Circuit’s recent evaluation of the same issue.⁴⁴ Finding no error, the court deferred to the agency on the range issue.⁴⁵

B. Portions of the 2014 Finding were Arbitrary and Capricious

The CBD’s second major appellate argument claimed the FWS decision-making process had been, in various ways, arbitrary and capricious. Referencing the Administrative Procedure Act (“APA”), which governs this type of judicial review, the panel noted the statute’s non-discretionary nature: a court “‘shall’ set aside agency actions, findings, or conclusions under the APA that are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’”⁴⁶

I. Overall Arctic Grayling Numbers

The CBD argued the 2014 Finding arbitrarily claimed increases in fluvial grayling numbers.⁴⁷ Considering this, the court focused on a 2014 FWS report—the DeHaan study—showing decreases in the Big Hole River’s population of breeding fluvial grayling between 1987 and 2012.⁴⁸ While the FWS cited part of the DeHaan study in the 2014 Finding, the agency ignored that study’s evidence of dwindling Big Hole grayling. The FWS instead relied on a different study, which concluded Big Horn River fluvial grayling were reproducing in growing numbers.⁴⁹

The FWS claimed it had not ignored data and had sufficiently explained its conclusions.⁵⁰ The court, however, found otherwise, noting that while an agency maintains discretion weighing evidence and can even ignore certain expert opinions in decision making, it may not ignore available biological data, which the FWS did.⁵¹ The court also held that conclusions based on only some available evidence must be sufficiently

41. *Id.*

42. *Id.* at 1064.

43. *Id.* at 1064–67

44. *Id.* (citing *Humane Society of the United States v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017)).

45. *Id.* at 1067.

46. *Id.* (citing 5 U.S.C. §§ 701-706 (quoting 5. U.S.C. §706(2)(A))).

47. *Id.* at 1068.

48. *Id.*

49. *Id.*

50. *Id.* at 1069.

51. *Id.* (citing *Conner v. Buford*, 848 F.2d 1441, 1454 (9th Cir. 1988)).

explained, which the FWS neglected.⁵² Because of those deficiencies, the court held this part of the 2014 Finding arbitrary and capricious.⁵³

2. *Water Flows and Temperatures*

Next, the CBD contended the 2014 Finding arbitrarily ignored dangers posed to arctic grayling by low stream flows and high stream temperatures (the “cold water refugia issue”).⁵⁴ Three specific areas were at issue: the Big Hole River, Centennial Valley, and the Madison River.⁵⁵

The court held the FWS acted arbitrarily and capriciously when it discounted evidence of dangerously high temperatures in much of the Big Hole River because, according to one insufficient study, those fish could conceivably access cold water refugia in tributaries.⁵⁶ The 2010 Finding considered that same study and the cold water refugia issue, but determined ESA listing remained warranted nonetheless.⁵⁷ The FWS failed to reasonably explain its change in position from 2010 to 2014.⁵⁸

The court also supported its arbitrary and capricious determination by pointing to evidence showing both the Big Hole River and its tributaries exceeding the cold temperatures needed by arctic grayling.⁵⁹ The 2014 Finding, the court explained, did not adequately address that data.⁶⁰ Clarifying, the court reiterated that, “[h]aving determined what is necessary, the [FWS] cannot reasonably rely on something less to be enough.”⁶¹ The FWS’s acknowledgement of arctic grayling’s cold water needs while simultaneously claiming warmer Big Hole water acceptable for the fish was deemed arbitrary and capricious.⁶²

Analyzing two additional habitats, the court found adequate evidence for and reasonable explanation of the 2014 Finding’s determinations regarding the Centennial Valley and its resident grayling.⁶³ While the 2014 Finding lacked similarly robust material regarding the Madison River, that deficiency rose only to the level of harmless error.⁶⁴

3. *Climate Change Effects*

In the 2014 Finding, the FWS “expressly disclaimed making any projection as to the synergistic effects of climate change, simply because

52. *Id.* at 1068–69.

53. *Id.* at 1069.

54. *Id.*

55. *Id.* at 1069–72.

56. *Id.* at 1070–71.

57. *Id.* at 1070.

58. *Id.*

59. *Id.* at 1070–71.

60. *Id.*

61. *Id.* at 1071 (quoting *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011)).

62. *Id.*

63. *Id.* at 1071–72.

64. *Id.*

of the uncertainty.”⁶⁵ The court rejected that choice, noting that excuses of “uncertainty” do not justify an action, conclusion, or lack thereof in an agency decision-making process.⁶⁶ Thus, especially considering evidence of record overtly acknowledged warm water temperatures and the likelihood that climate change would intensify those, the court held that the FWS acted arbitrarily and capriciously in ignoring climate change impacts.⁶⁷

4. *Distinct Arctic Grayling Populations*

Finally, the CBD argued that the FWS arbitrarily ignored risks posed by the small size of most remaining arctic grayling populations.⁶⁸ Tackling both of the CBD’s sub-arguments, the court first found adequate evidence in the record to support the FWS’s determination that small population sizes in and of themselves did not threaten the arctic grayling’s genetic viability.⁶⁹ Next, however, the court held that the FWS improperly relied too heavily on data from one isolated grayling habitat—the Ruby River—in judging the broader species’ genetic viability.⁷⁰ In doing so, the agency also violated its own guidelines, accepting only four years of additional data when the 2010 Finding explicitly stated that five to ten more years of data were needed for any determination regarding Ruby River grayling genetic strength.⁷¹ Because of those deficiencies, the court classified the 2014 Finding as arbitrary and capricious in its analysis of this issue.⁷²

IV. CONCLUSION

Though the Ninth Circuit rejected the CBD’s appeals regarding “range” definition, it ultimately found four specific areas in which the 2014 Finding relied on arbitrary and capricious decision making.⁷³ The case was thus remanded to the district court with instructions that the FWS correct those errors as it revisited the possibility of listing arctic grayling as threatened or endangered.⁷⁴ A decision like this provides no guarantees that anything will change in the future, even if the identified problems or deficiencies are corrected. The decision is interesting, however, because it provides practical examples of several decision-making deficiencies that could lead to an “arbitrary and capricious” finding during judicial review.

65. *Id.*

66. *Id.* (citing *Greater Yellowstone Coal.*, 665 F.3d at 1028).

67. *Id.* at 1073.

68. *Id.*

69. *Id.* at 1073–74.

70. *Id.* at 1074.

71. *Id.*

72. *Id.*

73. *Id.* at 1074–75.

74. *Id.*