Stripping the Bear's Necessities: A Grizzly Future for Species Recovery Plans

INTRODUCTION

In *Center for Biological Diversity v. Haaland* (*Center v. Haaland*), the Ninth Circuit severely limited the power of organizations to subject agency recovery plans to judicial review. Holding that a grizzly bear recovery plan was not "final agency action," the Ninth Circuit effectively barred litigation against government agencies' recovery plans for threatened and endangered species. In the case's aftermath, government agencies have no obligation to act on or respond to public comments petitioning for review of species recovery plans. This holding severs the relationship between the public and government agencies for endangered species protection. *Center v. Haaland* has stripped away even more power from already ineffective recovery plans, leaving it unclear when–if ever–agency recovery plans can be subjected to judicial review.

I. BACKGROUND

A. The Endangered Species Act

The Endangered Species Act (ESA) requires the Secretary of the Interior to adopt a recovery plan for any endangered or threatened species.[1] These recovery plans are intended to promote the "conservation and survival" of these species by laying out a series of measures and objectives that aim to eventually remove the species from the endangered or threatened list. The ESA requires the Secretary to "provide public notice and an opportunity for public review and comment" before approving a new or revised recovery plan.[2] Agencies are "obligated to work toward the goals set in . . . recovery plan[s]."[3] The U.S. Fish and Wildlife Service (the "Service"), a bureau within the Department of the Interior, is one of the agencies that implements recovery plans.

B. The Administrative Procedure Act

The Administrative Procedure Act (APA), which governs the procedures of federal administrative agencies, binds the Service in its implementation of these

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1. 16 U.S.C. § 1533(f)(1).
2. *Id.* § 1533(f)(4).
3. Ctr. for Biological Diversity v. Haaland (*Center v. Haaland*), 58 F.4th 412, 418 (9th Cir. 2023) (quoting Friends of Blackwater v. Salazar (*Blackwater*), 691 F.3d 428, 437 (D.C. Cir. 2012)).

recovery plans.[4] The APA provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."[5] The term "rule" is "defined broadly"[6] as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ."[7] When an interested person petitions for the "issuance, amendment, or repeal of a rule," the APA grants courts jurisdiction to review a rule that is a "final agency action for which there is no other adequate remedy in a court . . . ."[8] In assessing whether an agency action is final, courts ask whether the action both "mark[s] the consummation of the agency's decisionmaking process" and "determines rights or obligations . . . from which legal consequences will flow."[9] When a final agency action is reviewed, courts determine whether the agency acted in a way that was "arbitrary [or] capricious."[10] In that case, the agency's action is remanded and the agency must reconsider its decision and, at the very least, provide further reasoning and justification for its action.[11]

C. Ursos arctos horribilis

Ursus actos horribilis, or the grizzly bear, once ranged throughout most of western North America.[12] By the 1930s, however, targeted efforts to eradicate the grizzly bear and other large carnivores reduced the grizzly bear's range to less than two percent of its original size. Its population declined from over 50,000 bears to less than 1,000 in the lower 48 states.[13] The Service identified the grizzly bear as "threatened" in 1975.[14] In 1982, the Service adopted the original Grizzly Bear Recovery Plan (the "Plan"), identifying four initial recovery zones of the grizzly bear's historical range with the goal of reintroducing grizzly bears to those zones.[15] The Service revised the Plan in 1993, issuing a Plan Supplement that added two more geographic regions.[16] The Service has since issued additional Supplements detailing recovery criteria for the grizzly bear,[17] and

4. *See* 5 U.S.C. §§ 556-58 (codifying necessary procedures for hearing evidence before establishing a new rule).

5. *Id.* § 553(e).

6. Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 95 (2015).

7. 5 U.S.C. § 551(4).

8. *Id.* § 704.

9. Bennett v. Spear, 520 U.S. 154, 178 (1997) (internal quotation marks omitted) (citing Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 72 (1970)).

10. 5 U.S.C. § 706(2)(A).

11. *Center v. Haaland*, 58 F.4th at 428 ("Further, when a court concludes that an agency's denial of a rulemaking petition was arbitrary and capricious, the remedy is limited to remanding the matter to the agency to further explain or reconsider its decision to deny the petition.").

12. U.S. FISH & WILDLIFE SERV., GRIZZLY BEAR RECOVERY PLAN ii (1993).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 167.

17. *See* Endangered and Threatened Wildlife and Plants; Draft Supplement to the Grizzly Bear Recovery Plan: Habitat-Based Recovery Criteria for the Northern Continental Divide Ecosystem, 82 Fed.

published a five-year review of the Plan in 2011, noting that other areas of the grizzly bear's historic range "should be evaluated to determine their habitat suitability for grizzly bear recovery."[18] However, the Service has not revised the Plan since 1993 to include any additional regions of the grizzly bear's historic range. As of the Service's 2021 Report, fewer than 3,000 grizzly bears remain in the lower 48 states.[19]

II. LEGAL HISTORY

A. Center for Biological Diversity v. Bernhardt

In 2014, the Center for Biological Diversity (the "Center") petitioned the Service to revise the Plan under the APA on the grounds that the Plan was inadequate to conserve grizzly bear populations.[20] The Center contended that the Service's Plan would leave grizzly bears "endangered across significant portions of their range," so it asked the Service to revise and update the Plan to include the grizzly bear's historic range.[21]

The Service denied this petition, asserting that "neither the ESA nor the APA authorizes petitions to create or revise recovery plans."[22] The Service added that it had satisfied its "statutory responsibilities" in planning and implementing the Plan.[23] The Center then brought suit, asking the court to find that the Service's denial was a "final agency action" subject to judicial review and to remand the issue back to the Service to reconsider its denial of the Center's petition.[24] The District Court for the District of Montana granted summary judgment for the Service on the grounds that an agency recovery plan was not a rule "because it does not, in and of itself, create change."[25] Because the Plan was not a "rule," the court held that it had no authority to review whether either the Plan or the Service's denial were "arbitrary and capricious" final agency actions.[26]

Reg. 58,444, 58,445 (Dec. 12, 2017) ("Supplements to the Recovery Plan were approved in 1997, 1998, 2007, and 2017.").

18. U.S. FISH & WILDLIFE SERV., 5-YEAR REVIEW: SUMMARY AND EVALUATION 107 (2011).

19. U.S. FISH & WILDLIFE SERV., *Grizzly Bear Recovery Program: 2021 Annual Report* 3-9 (2021) (estimating 1,069 in the Yellowstone area, 1,114 in northwest Montana, at least 50 near the border of Idaho and Montana, and at least 44 near the intersection of Idaho, Washington, and British Columbia).

20. *Center v. Haaland*, 58 F.4th at 415.

21. *Id.*

22. *Id.* at 416.

23. *Id.*

24. *Cf. id.* at 416-17 ("Because the Center does not claim that the Service's denial of its petition was otherwise 'made reviewable by statute,' the sole issue for decision is whether denial of the petition is 'final agency action.'").

25. Center for Biological Diversity v. Bernhardt, 509 F. Supp. 3d 1256, 1267 (D. Mont. 2020).

26. *Id.* at 1265.

B. Center for Biological Diversity v. Haaland

The Center appealed the district court's ruling to the Ninth Circuit Court of Appeals,[27] which rejected the district court's reasoning that the Plan was not a rule under the APA.[28] The Ninth Circuit held that the APA's definition of rule, "the whole or a part of an agency statement … designed to implement, interpret, or prescribe law or policy,"[29] is a "broad" definition which applies to "nearly every statement an agency may make."[30] Species recovery plans fall under that "broad umbrella."[31]

However, the Ninth Circuit upheld the district court's decision on other grounds, holding that neither the Service's grizzly bear recovery plan nor the Service's denial of the Center's petition to amend the Plan was "final agency action."[32] The court reasoned that the issuance of Plan Supplements indicated that the Service had not treated the 1993 version of the Plan as its "last step" and held that, consequently, the Plan was not "final agency action."[33] Essentially, because the Service's denial of the Center's petition did not "bind anyone to anything," the court held that the denial was not "final agency action."[34] Because neither the Plan nor the Service's denial was "final agency action" subject to review, the Ninth Circuit held that it had no authority to review whether either was arbitrary and capricious and held for the Service.[35]

In coming to its decision, the Ninth Circuit relied on its prior decision in *Conservation Congress v. Finley* (*Conservation Congress*), where it held that recovery plans are not "binding authorities."[36] In *Conservation Congress*, the Ninth Circuit held that because the Service had "specifically considered" information in the Spotted Owl Recovery Plan, it had fulfilled the statutory obligations the ESA imposed.[37] The *Conservation Congress* opinion went on to broadly state that while recovery plans "provide guidance[,] … they are not binding authorities," holding that agencies have no obligation to adopt every recommendation made in recovery plans.[38]

In both *Conservation Congress* and *Center v. Haaland*, the Ninth Circuit cited *Friends of Blackwater v. Salazar* (*Blackwater*) as authority that a recovery plan is a "non-binding document."[39] In *Blackwater*, the D.C. Court of Appeals reviewed the Service's decision to delist the West Virginia Northern Flying

27. *See Center v. Haaland*, 58 F.4th. at 413.
28. *Id.* at 416.
29. 5 U.S.C. § 551(4).
30. Batterton v. Marshall, 648 F.2d 694, 700 (D.C. Cir. 1980).
31. *Center v. Haaland*, 58 F.4th at 416.
32. *Id.* at 420.
33. *Id.* at 417.
34. *Id.* at 419.
35. *Id.*
36. Conservation Congress v. Finley (*Conservation Congress*), 774 F.3d 611, 614 (9th Cir. 2014).
37. *Id.* at 620.
38. *Id.* at 614.
39. *Id.*; *Center v. Haaland*, 58 F.4th at 418; *see Blackwater*, 691 F.3d at 434.

Squirrel (the "Squirrel") from the endangered species list.[40] In *Blackwater*, the Service had determined that the Squirrel was no longer endangered, even though all the "objective, measurable" criteria that had been set out in the initial recovery plan for the Squirrel had not been met.[41] The court in *Blackwater* held that although a recovery plan constituted a binding obligation while the species was still endangered, the Service's decision to delist the Squirrel based on criteria other than what was initially laid out in the Service's recovery plan was not arbitrary or capricious.[42]

The court in *Center v. Haaland* followed *Conservation Congress*'s interpretation of *Blackwater*. It held for the Service, declaring that it had no jurisdiction to review whether the Service's refusal to amend its recovery plan was "arbitrary and capricious."

III. ANALYSIS

In *Conservation Congress*, the Ninth Circuit fundamentally misinterpreted *Blackwater* and the ESA, weakening species recovery plans. *Center v. Haaland* took this misinterpretation even further, severely limiting environmental advocates' ability to petition for changes to recovery plans.

In both *Conservation Congress* and *Center v. Haaland*, the Ninth Circuit relied on *Blackwater* to support the proposition that recovery plans are non-binding.[43] *Blackwater* held that the Service could delist the Squirrel from the endangered species list, even though all the "objective, measurable criteria" set forth in the species recovery plan had not been met.[44] However, *Blackwater* also explicitly held that recovery plans do have binding effects prior to the delisting of a species.[45] The ESA places a "mandatory obligation[]" upon the Secretary, who "must implement the plan" set out in a recovery plan.[46] *Blackwater* stated that "as long as a species is listed as endangered, the agency is obligated to work toward the goals set in its recovery plan."[47] While *Conservation Congress* accurately stated that agencies are not required to follow through with every recommendation laid out in their initial recovery plans, the court fundamentally erred in *Center v. Haaland* by holding that recovery plans themselves are never binding documents.[48]

In *Center v. Haaland*, the Ninth Circuit stretched its misinterpretation of *Blackwater* even further. In *Center v. Haaland*, the court took *Blackwater*'s holding that recovery plans do not have binding effects when determining whether to delist a species and concluded that recovery plans in their entirety are

40. *Blackwater* at 429.
41. *Id.* at 432.
42. *Id.* at 429.
43. *Conservation Congress*, 774 F.3d at 614; *Center v. Haaland*, 58 F.4th at 418; *see Blackwater*, 691 F.3d at 434.
44. *Blackwater*, 691 F.3d at 433.
45. *See id.* at 429.
46. *Id.* at 436-37.
47. *Id.*
48. *See Conservation Congress*, 774 F.3d at 614.

"non-binding document[s]."[49] This interpretation that recovery plans are non-binding led to the conclusion that decisions made by agencies relating to recovery plans are non-reviewable.[50] *Blackwater*, however, explicitly held that the Service has "statutory obligations to create and to implement a recovery plan and to use notice and comment in order to revise such a plan."[51] This language clearly indicates that the ESA has a binding effect upon agencies and that agencies are not only obligated to create recovery plans but to follow through with them.[52] The court in *Center v. Haaland* disregarded and directly contradicted *Blackwater*'s conclusion that agencies are obligated to create and implement recovery plans, instead barring organizations from petitioning agencies to "revise such a plan."[53] Both *Conservation Congress* and *Center v. Haaland* fundamentally misinterpreted *Blackwater*, applying *Blackwater*'s analysis for delisting a species and applying it to the implementation of recovery plans while a species is still endangered.[54]

Center v. Haaland leaves the Service's obligation to develop recovery plans for endangered species intact.[55] However, the decision results in the agencies having no actual obligation to follow through with recovery plans and leaves environmental groups powerless to petition agencies for change. In evaluating whether an agency's decision is "final agency action," courts ask whether an action was "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'"[56] When the Service decided that the Center did not have the right to petition to amend the Plan, it determined that neither the Center, nor any other environmental organization, nor any interested member of the public, has the right to petition for improvements to species recovery plans.[57] In *Center v. Haaland*, the Ninth Circuit upheld that denial, severing public engagement from the agency's decision making.

CONCLUSION

The court's decision in *Center v. Haaland* effectively severed public involvement from agency decision making when it comes to recovery plans. The fate of endangered species, which Congress declared to have "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people,"[58] are left to the unchecked whims of agencies. By holding that

49. *Blackwater*, 691 F.3d at 434; *see Center v. Haaland*, 58 F.4th at 416 (9th Cir. 2023).

50. *See Center v. Haaland*, 58 F. 4th at 418.

51. *Blackwater*, 691 F.3d at 434.

52. *See id.*

53. *Compare Center v. Haaland*, 58 F.4th at 417-18 (providing no opportunity to petition), *with Blackwater*, 691 F.3d at 434 (requiring notice-and-comment period).

54. *See Conservation Congress*, 774 F.3d at 614 (conflating *Blackwater's* discussion of recovery plans and its treatment of delisting analysis); *Center v. Haaland*, 58 F.4th at 418 (same).

55. *See Center v. Haaland*, 58 F. 4th at 414.

56. *Bennett v. Spear*, 520 U.S. at 178 (1997) (quoting *Port of Boston Marine Terminal Ass'n*., 400 U.S. at 72).

57. *See Center v. Haaland*, 58 F. 4th at 426 (Sung, J, dissenting).

58. 16 U.S.C. § 1531.

the public cannot petition for changes to recovery plans and that agencies are not obligated to follow through with them, *Center v. Haaland* strips away the final obligations mandated by the ESA for recovery plans in the Ninth Circuit. In coming to its conclusion, *Center v. Haaland* leaves recovery plans both non-binding and impossible to review in the courts. Are they arbitrary? Are they capricious? The Ninth Circuit has declined to find out, leaving ultimate power unchecked in the hands of government agencies.

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