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Center for Biological Diversity v. Jewell

Kirsa Shelkey

University of Montana, kirsa.shelkey@gmail.com

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Kirsa Shelkey

Following years of pressure to list the upper Missouri River population of Arctic grayling as an endangered or threatened species, the United States Fish and Wildlife Service issued a 2014 Finding that listing the fish was “not warranted at this time.” The Service relied on voluntary Candidate Conservation Agreements with Assurances in the Big Hole River Basin to determine that listing criteria under the Endangered Species Act was not met and therefore listing was not necessary. Ultimately, the court deferred to agency expertise and found that the Service’s decision not to list the Arctic grayling was reasonable.

I. INTRODUCTION

As a result of litigation proposing Arctic grayling listing in 2011, the United States Fish and Wildlife Service (“Service”) agreed to publish a proposed listing rule for the Upper Missouri River Distinct Population Segment (“DPS”) of Arctic grayling, or a not-warranted finding before the end of Fiscal Year 2014.¹ Accordingly, in 2014, the Service issued a Revised 12-Month Finding on a Petition to List the Upper Missouri DPS of Arctic grayling as an Endangered or Threatened Species (“2014 Finding”).² The 2014 Finding stated, “After review of the best available scientific and commercial information, we find that listing the upper Missouri River DPS of Arctic grayling is not warranted at this time.”³ On February 5, 2015, the Center for Biological Diversity (“Center”) challenged the Service’s action in Montana Federal District Court.⁴ While the Center argued that the Service’s 2014 Finding violated the Endangered Species Act (“ESA”) and the Administrative Procedure Act (“APA”), the court disagreed and upheld the 2014 Finding not to list the Arctic grayling.⁵

II. FACTUAL AND PROCEDURAL BACKGROUND

Arctic grayling are a freshwater fish species of the family salmonidae.⁶ They are both fluvial and adfluvial, meaning they reside in both river and lake habitats, respectively.⁷ In the conterminous United States, Arctic grayling are currently only located in the Missouri River

1. *Center for Biological Diversity v. Jewell*, ___ F. Supp. 2d ___, 2016 U.S. Dist. LEXIS 119114, 2016 WL 4592199, 7 (D. Mont. Sept. 2, 2016).

2. *Id.* at *2.

3. *Id.*

4. *Id.*

5. *Id.* at *2-3.

6. *Id.* at *3.

7. *Id.* at *3-4.

system above Great Falls in Montana and in Yellowstone National Park in northwest Wyoming.⁸ The Upper Missouri Arctic grayling population inhabits only ten percent of its historic range.⁹ It is found only in the Big Hole River and a few of its tributaries, the upper Ruby River, and a portion of the Madison River.¹⁰ In the era of Lewis and Clark, Arctic grayling inhabited an estimated 1,250 miles of streams in the upper Missouri River basin alone, including the Smith, Sun, Jefferson, Madison, Gallatin, Big Hole, Beaverhead, Red Rock, and Missouri Rivers in Montana.¹¹ Adfluvial populations, however, occupy numerous lakes throughout the DPS as a result of substantial stocking from 1898 to 1960.¹²

The Service has long wrestled over whether to list the Arctic grayling. In response to the first petition to list the Arctic grayling in 1991, the Service issued a 12-month Finding in 1994 stating that, although listing was warranted, it was precluded by other higher priority listing actions.¹³ The ensuing litigation settled in 2005.¹⁴ In 2007, the Service published another 12-month Finding, this time determining that the fluvial, or river, population of Arctic grayling was not a DPS on its own, and could not be listed under the ESA.¹⁵ Subsequent litigation again resulted in settlement. As part of the settlement, the Service published a revised 12-month finding in 2010 that again stated that listing was warranted but precluded.¹⁶ At the same time, the Service found that fluvial and adfluvial grayling populations were too evolutionarily similar to be distinguished.¹⁷ This conclusion “provided a basis to include both [fluvial and adfluvial grayling] in the same DPS for purposes of making a listing decision.”¹⁸

In 2014, the Service issued its 2014 Finding determining that the Upper Missouri DPS did not warrant listing.¹⁹ The DPS in the 2014 Finding integrated 26 Arctic grayling populations, including six with low conservation value, six occupying native habitat and fourteen reintroduced through stocking.²⁰ The six populations with low conservation value either occupied unnatural habitat, were not self-sustaining, or were used as captive brood reserves.²¹

The Center filed suit against the Service under the APA challenging the Service’s determination not to list the Arctic Grayling under the ESA.²² Under the APA, courts set aside agency decisions that

8. *Id.* at *3.
9. *Id.* at *4.
10. *Id.*
11. *Id.*
12. *Id.* at *5.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at *6-7.
17. *Id.* at *7.
18. *Id.*
19. *Id.* at *8.
20. *Id.* at *5.
21. *Id.*
22. *Id.* at *9.

are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.²³ Based on the best scientific and commercial data available, the ESA directs the Service to consider the following factors in its determination to list or delist a species: (A) the present or threatened destruction, modification, or curtailment of its habitat range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.²⁴ The APA standard of review is narrow and courts may not substitute their judgment over agency expertise.²⁵

Four months after the Center filed suit, the court granted a motion to intervene to the State of Montana and Montana Department of Fish, Wildlife and Parks (“MTFWP”).²⁶ All parties submitted cross-motions for summary judgement.²⁷ Ultimately, the court granted summary judgement to the Service and MTFWP, finding that the Service’s decision was a reasonable exercise of agency expertise.²⁸

IV. ANALYSIS

On appeal, the Center argued the Service acted arbitrarily and capriciously because it did not rely on best available scientific data and because it concluded that listing factors, like threatened habitat destruction, inadequate existing regulatory mechanisms and imperilment in a significant portion of its range, were not met and did not warrant listing the Arctic grayling.²⁹ The court addressed each objection in turn, acknowledging preferred deference to agency action.³⁰ Where the Service considered the relevant factors and articulated “a rational connection between the facts found and the choices made,” the court deferred to reasonable agency decision-making.³¹

A. Best Scientific Data Available

While the Center argued that the Service’s 2014 Finding arbitrarily ignored best available science, the court found no evidence supporting the Center’s claims.³² The Center alleged the Service ignored data showing a decline in Arctic grayling in the Ruby and Big Hole Rivers. The court found that the Service did not ignore the data, but considered it,

23. *Id.*

24. *Id.* at *11 (quoting 16 U.S.C. § 1533(a)(1)(A)-(E)).

25. *Id.* at *10

26. *Id.*

27. *Id.*

28. *Id.* at *28.

29. *Id.* at *8-9.

30. *Id.* at *10.

31. *Id.* (quoting *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008)).

32. *Id.* at *13.

and relied on an alternative study showing Arctic grayling numbers were increasing.³³ The court further found that “deference to agency determinations is at its highest when that agency is choosing between various scientific models.”³⁴ The same standard applied to the Center’s allegation that the Service ignored contrary MTFWP population data.³⁵

Next, the Center alleged the Service improperly evaluated the long-term genetic viability of the species by ignoring its own 2010 Population Viability Analysis (“PVA”).³⁶ The Service reasoned that new genetic data rendered the 2010 PVA data moot.³⁷ Without evidence that the Service ignored science, the court deferred to the agency’s chosen scientific method.³⁸

B. The Present or Threatened Destruction, Modification or Curtailment of the Species Habitat or Range

The Center next alleged that the Service’s reliance on voluntary conservation efforts in the 2014 Finding, specifically the Big Hole Candidate Conservation Agreement with Assurances (“Big Hole CCAA”), was inappropriate, and the Service’s climate change analysis was inadequate.³⁹ Thus, the Center argued the Service arbitrarily and capriciously dismissed threats to Arctic grayling habitat.⁴⁰ A CCAA is a voluntary conservation agreement between the Service and private or public parties, which encourages implementation of conservation measures for species potentially warranting listing.⁴¹ The Big Hole CCAA seeks to remove barriers to Arctic grayling migration, improve streamflows, reduce or eliminate entrainment threats, and improve and protect the function of riparian habitats.⁴² “In exchange, the CCAA provides assurances to participants that no additional conservation measures will be required if the species is listed in the future.”⁴³ Thirty-one Big Hole landowners, whose properties span 158,000 acres, currently participate in the Big Hole CCAA.⁴⁴

The court disagreed, finding that the Service acted reasonably when it relied on the Big Hole CCAA to form its 2014 Finding.⁴⁵ The court was not disconcerted by the voluntary nature of the CCAA.⁴⁶ Citing

33. *Id.* at *14.

34. *Id.* at *13-14 (citing *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014)).

35. *Id.* at *15.

36. *Id.* at *14.

37. *Id.* at *15.

38. *Id.* at *15-16.

39. *Id.* at *19.

40. *Id.* at *16.

41. *Id.* at *18.

42. *Id.*

43. *Id.* at *18.

44. *Id.* at *18.

45. *Id.* at *19.

46. *Id.*

the Big Hole CCAA for support, the 2014 Finding ultimately concluded that the Arctic grayling DPS is stable or increasing, despite fragmentation, and that climate change did not pose a future threat to the DPS.⁴⁷

The 2014 Finding compared pre-CCAA data from 2007 to post-CCAA data in its determination.⁴⁸ In 2007, there were 52 days in which stream temperatures reached lethal levels for Arctic grayling. In 2013, there were no such days.⁴⁹ Temperatures of 77 degrees or higher are lethal to Arctic grayling, and Post-Big Hole CCAA data from 2013 “shows no recorded days with maximum temperatures reaching greater than 70 degrees.”⁵⁰ The court found that the Service reasonably relied on the CCAA in its determination and reasonably determined that habitat destruction or curtailment, as a listing factor, was not met.⁵¹

C. The Adequacy of Existing Regulatory Mechanisms

The Center argued that the regulatory systems were inadequate, particularly for the Big Hole Arctic grayling because the DPS was surrounded by private lands.⁵² The court was unpersuaded by this argument.⁵³ While the 2014 Finding “recognized a potential lack of federal and state regulatory mechanisms for the Big Hole population,” the scale of analysis was DPS wide, and the majority of populations within the DPS were on federal land.⁵⁴ Furthermore, federal regulations, like the Clean Water Act, and voluntary conservation efforts, like the CCAA, mitigated concern in the Big Hole.⁵⁵ The court found the Service’s conclusion reasonable.⁵⁶

D. Significant Portion of its Range

Finally, the Center argued that the Service misinterpreted the phrase “significant portion of its range” by not considering the historical range Arctic grayling no longer inhabit.⁵⁷ The court disagreed and found the phrase “significant portion of its range” inherently ambiguous, thus triggering *Chevron* deference to reasonable agency decision-making.⁵⁸ In 2014, the Service published its final Significant Portion of its Range (“SPR”) policy interpreting the term.⁵⁹ The Service concluded that lost historical range was relevant to the species status analysis, but did not

47. *Id.* at *16-17.

48. *Id.*

49. *Id.*

50. *Id.* at *18-19.

51. *Id.* at *19.

52. *Id.* at *20.

53. *Id.*

54. *Id.* at *21.

55. *Id.* at *20-21.

56. *Id.* at *21.

57. *Id.*

58. *Id.* at *23.

59. *Id.* at *21-22.

constitute a significant portion of a species's range.⁶⁰ The court found the Service's SPR interpretation reasonable and upheld the 2014 Finding.⁶¹

V. CONCLUSION

Center for Biological Diversity v. Jewell is an important win for collaborative conservation, especially projects incentivized by the threat of ESA listing and litigation. An outcome in the alternative would not only perversely incentivize private property owners to quit the CCAA, but might actually increase their "take" of Arctic grayling to avoid listing because removal of grayling would mean no ESA protection or effect on private property. However, now that CCAAs, in part, provide a means for private property owners to sidestep ESA regulation, the Service should scrutinize the private commitments to the CCAA.

60. *Id.* at *22.

61. *Id.* at *28.