Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service: Did the Ninth Circuit Take Deference to Agency Decisions Just a Little Too Far?

I. INTRODUCTION 137
II. BACKGROUND 139
III. THE COURT'S DECISION 141
IV. ANALYSIS 146
V. CONCLUSION 149

I. INTRODUCTION

The United States Fish and Wildlife Service (FWS) listed the Northern Spotted Owl as a threatened species pursuant to the Endangered Species Act (ESA) in 1990, and delineated its critical habitat in 1992.[1] In 1994, the federal government prepared a comprehensive forest management plan, known as the Northwest Forest Plan (NFP), for all federal forested lands in the northwest, extending from Northern Washington to Northern California.[2] The NFP's sought, in part, to regulate timber harvesting on these lands in an effort to protect the spotted owl.[3] The plan allocated the forests in this area into "late successional reserves" (LSRs), "matrix" lands, and "adaptive management areas," with different timber harvesting rules applied to each area.[4] Approximately seventy percent of the spotted owl's critical habitat fell within the LSRs, which maintained strict harvesting regulations.[5] A subsequent interagency analysis found that the NFP would provide for stable and well-distributed spotted owl populations.[6]

A biological opinion (BiOp) was issued concerning the plan, concluding that the NFP would neither jeopardize the spotted owl's continued existence nor result in the destruction or adverse modification of its critical habitat.[7] Because the NFP covered such a wide area,

1. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1063 (9th Cir. 2004).
2. *Id.* at 1063-64. The NFP was prepared by the United States Forest Service (USFS) and the Bureau of Land Management (BLM). *See* Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1304 (W.D. Wash. 1994).
3. *Pinchot*, 378 F.3d at 1063.
4. *Id.* at 1064.
5. *Id.* at 1064 n.2.
6. *Id.* at 1064.
7. *Id.*

involving virtually all of the federal government's forested land in this area, the NFP BiOp explicitly declined to address the unique impacts of any particular action or implementation of the NFP.[8] Nor did it authorize incidental takes of the species, deferring such consideration instead to future BiOps that would address specific projects.[9] The plan was ultimately adopted by the federal government, and in the years following adoption, the FWS issued nearly three hundred BiOps and incidental take statements for spotted owls in the lands covered by the NFP.[10] A total of 1080 incidental takes of spotted owls were authorized by these BiOps, and 82,000 acres of spotted owl habitat were removed, downgraded, or degraded during this time.[11]

In November 2000, a group of environmental organizations, the Pinchot Task Force (Pinchot), challenged many of the BiOps issued by the FWS in the United States District Court for the Western District of Washington.[12] The district court denied Pinchot's request for a restraining order to stop several of the projects approved by the BiOps. In March 2002, the parties filed cross motions for summary judgment as to six particular BiOps selected by Pinchot as representative because they presented common themes.[13] On July 12, 2002, the district court granted summary judgment for the FWS and Pinchot appealed.[14]

On appeal, the United States Court of Appeals for the Ninth Circuit *held* that the methods employed by the FWS in determining whether the

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 1065.
13. *Id.* The first BiOp, completed on February 18, 1998, was the Coos Bay BiOp which "authorized the removal of 2,000 acres of suitable owl habitat and 1,043 acres of critical habitat, and the incidental takes of at least eight spotted owls". *Id.* at 1064. The second BiOp, the Willamette BiOp, was completed on September 29, 1998, and allowed the modification of 29,276 acres of spotted owl habitat, with more than 9000 completely removed, and "authorized the incidental take of all spotted owls associated with the project." *Id.* The third BiOp was the Rogue Valley BiOp for timber sales in southwest Oregon and northern California. *Id.* This BiOp authorized the likely removal or degradation of 6,870 acres of critical habitat for spotted owls and the incidental take of "all spotted owl pairs or resident singles" affected by the action. *Id.* The fourth BiOp, the Upper Iron Timber Sale BiOp, completed on January 20, 1999, did not specify how many acres of critical habitat would be impacted, although the entire project area was classified as critical habitat. *Id.* The Upper Iron Timber Sale BiOp authorized the incidental take of two spotted owl pairs. *Id.* The fifth BiOp was the Acci BiOp, completed on September 23, 1999. *Id.* This BiOp allowed 1,000 acres of timber harvesting, degradation of 227 acres of critical habitat, and the incidental take of all spotted owls associated with the project. *Id.* at 1064-65. The sixth BiOp was the La Roux Timber Sale BiOp, approved on April 30, 1998. *Id.* at 1065. This BiOp allowed for removal of 148 acres of critical habitat, the incidental take of one known owl pair, and the incidental take of any owl in the non surveyed area. *Id.*
14. *Id.*

NFS jeopardized the owl's continued existence were permissible and accordingly affirmed summary judgment for the FWS as to that issue.[15] However, the court also *held*, in analyzing whether the NFS would likely result in the destruction or adverse modification of the owl's critical habitat, that the FWS's regulatory definition of "destruction or adverse modification" of critical habitat was invalid, and that the impact of this invalid regulation in the FWS's analysis was not harmless error.[16] Furthermore, the FWS's finding that loss of critical habitat was not an "adverse modification" because of the existence of suitable external habitat was arbitrary and capricious, and contrary to law.[17] The court reversed the decision of the district court as to the critical habitat issue and remanded with instructions to grant summary judgment to Pinchot on that issue. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1077 (9th Cir. 2004).

II. BACKGROUND

Congress enacted the Endangered Species Act in 1973 to provide a program for the conservation of endangered and threatened species and their ecosystems.[18] Section 7 of the ESA mandates that, for any federal action that may affect a threatened or endangered species or its habitat, the agency contemplating the action must consult with a consulting agency[19] to ensure: (1) that the federal action is not likely to jeopardize the continued existence of an endangered or threatened species and (2) that the federal action will not result in the destruction or adverse modification of the designated critical habitat of the listed species.[20]

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15. *Id.* at 1077.

16. *Id.* at 1071, 1075.

17. *Id.* at 1076.

18. 16 U.S.C. § 1531(b) (1973). An "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range. *Id.* § 1532(6). A "threatened species" is any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. *Id.* § 1532(20).

19. The FWS is the consulting agency for all land-based species, such as the spotted owl. *Pinchot*, 378 F.3d at 1063 n.1.

20. 16 U.S.C. § 1536(a). A species' "critical habitat" is defined as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed [as a threatened or endangered species], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species . . . upon a determination . . . that such areas are essential for the conservation of the species.

Id. § 1532(5)(A).

The action agency typically makes a written request to the consulting agency which, after formal consultation, issues a biological opinion.[21] The BiOp should address both prongs of ESA section 7 by considering the current status of the species, the environmental baseline, the effects of the proposed action, and the cumulative effects of the proposed action.[22] If the BiOp concludes: (1) that jeopardy is not likely and that there will not be adverse modification of critical habitat, or (2) that there is a "reasonable and prudent alternative" to the agency action that avoids jeopardy and adverse modification, the consulting agency can issue an Incidental Takes Statement (ITS), which exempts the action agency from the ESA's general prohibition of takings of endangered and threatened species.[23]

The issue in the noted case was whether the FWS, in finding "no jeopardy" for each of the six challenged BiOps, had properly assessed whether the proposed actions satisfied the jeopardy and adverse modification requirements of section 7. Under the Administrative Procedure Act (APA), a reviewing court must set aside any agency action, finding, or conclusion that it finds to be arbitrary and capricious.[24] In making this determination, courts are limited to deciding whether the agency's action was based on a consideration of relevant factors and whether there has been a clear error of judgment.[25] Under this very deferential standard, the court is prohibited from substituting its judgment for that of the agency, and the agency need only demonstrate a rational connection between the facts considered and the decision made.[26] The Ninth Circuit has specified that, in cases concerning scientific matters, deference to an agency's technical expertise and experience is particularly warranted.[27]

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21. 50 C.F.R. § 402.14 (2005).

22. *Id.* § 402.14(g).

23. 16 U.S.C. § 1536(b)(4). To "take" a species means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" any "subspecies of fish or wildlife or plants." *Id.* § 1532(19). The consulting agency may authorize a taking where, upon review of a permit application, the agency finds that such taking "is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." *Id.* § 1539(a)(1)(B).

24. 5 U.S.C. § 706(2)(A) (2005).

25. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

26. *Id.*

27. United States v. Alpine Land & Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989).

III. THE COURT'S DECISION

The Ninth Circuit began its analysis by addressing Pinchot's arguments under the jeopardy prong of section 7.[28] Pinchot first argued that the FWS painted an inaccurate picture of the true jeopardy that the spotted owls faced from the approved projects, and had done so on two accounts.[29] First, Pinchot criticized the FWS's practice of using changes to the owls' habitat as a proxy for the jeopardy that the spotted owl may face from any given proposed project.[30] The FWS had based its jeopardy prediction for each project on degradation to the owl's *habitat*, rather than on an examination of actual owl populations in the area.[31]

The court rejected this argument on the grounds that an agency's scientific methodology merits substantial deference.[32] The court stated that the standard for determining whether the FWS's use of the habitat proxy was permissible was simply whether it "reasonably ensure[d]" that the proxy results mirrored reality.[33] Here, the Ninth Circuit found that the FWS had met its burden.[34] The court noted that the habitat proxy took numerous factors into account, including the type of land, the extent of degradation of the habitat, the relationship between different habitats, the owls' distribution, and the owls' range.[35] Additionally, the proxy considered nonhabitat factors, such as competition from other species, forest insects, and disease.[36] The court found that this detailed model for owl population was "sufficient to ensure that the FWS's habitat proxy reasonably correlate[d] to the actual population of owls."[37]

Second, Pinchot argued that even if habitat proxy is a sound method, it is nonetheless prohibited by the ESA.[38] According to Pinchot, the ESA is concerned with two variables in the context of species preservation: the amount of species and the amount of species habitat.[39] Because "habitat" is already accounted for in the adverse modification prong of section 7, they continued, any analysis of jeopardy to species must

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28. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1065 (9th Cir. 2004).
29. *Id.*
30. *Id.* at 1065-66.
31. *Id.* at 1066.
32. *Id.* (citing *Alpine Land*, 887 F.2d at 213).
33. *Id.* (citing Idaho Sporting Cong. Inc. v. Rittenhouse, 305 F.3d 957, 972-73 (9th Cir. 2002)).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*

necessarily focus on the actual species themselves instead of simply analyzing habitat.[40]

The Ninth Circuit rejected this argument as well, finding Pinchot's focus on actual species count to be an overly narrow interpretation of section 7.[41] The court again deferred to the agency's method of analysis, stating that "[b]ecause the ESA does not prescribe how the jeopardy prong is to be determined, nor how species populations are to be estimated," a reasonable interpretation of the statute would suffice.[42] The court looked to the fact that the FWS used different methodologies when it analyzed habitat under jeopardy and adverse modification, which limited potential overlap.[43] Also, the habitat proxy could be used to evaluate a species' habitat that has not been designated as critical habitat, and therefore could indirectly evaluate species that live outside the critical habitat.[44] Lastly, the court found that if the habitat models were consistently accurate, then they essentially functioned as though the FWS were actually counting the owl populations.[45] As a result, the court held that the FWS's decision to base its jeopardy analysis on a habitat proxy was a permissible interpretation of the statute.[46]

Pinchot also argued that, under the jeopardy prong of section 7, the FWS could not substitute the NFP for an independent jeopardy analysis.[47] The FWS relied on the NFP's habitat allocation as the primary justification for its "no jeopardy" determination in the six BiOps at issue.[48] Specifically, the FWS relied on the NFP's LSR allocations, which maintained strict regulations on timber harvesting.[49] The NFP BiOp explicitly stated, however, that it did not authorize incidental takes, and that future project-specific BiOps would consider the issue.[50] The NFP BiOp also said that the NFP would be adjusted based on information developed through future section 7 consultations.[51] Pinchot asserted that relying on compliance with the NFP to find no jeopardy was like a "shell game."[52]

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40. *Id.* at 1067.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

The Ninth Circuit once again rejected Pinchot's argument, deferring to the FWS's methods.[53] The court concluded that reliance on the NFP was permissible in this situation because the plan had been "developed on sound scientific analysis as an effective method to conserve the spotted owl, and that the associated BiOps implement[ed] this method."[54] In addition, the court was persuaded that the FWS had not relied entirely on the NFP in completing the six BiOps, but instead conducted independent analyses of site-specific data, which is a method of environmental analysis previously approved by the Ninth Circuit.[55] The court concluded that the NFP is "a unique land-management plan" and that "in the absence of affirmative evidence showing why reliance on the NFP is inadequate or incorrect, the FWS may permissibly rely, in part, on the projections and assumptions of the NFP in its jeopardy analysis."[56] Having rejected each of Pinchot's arguments under the jeopardy prong, the court affirmed the district court's grant of summary judgment to the FWS on that issue.[57]

The Ninth Circuit then turned its attention to the second prong of section 7, which seeks to protect endangered and threatened species' critical habitats.[58] Pinchot's first argument was that the FWS's interpretation of "adverse modification" was unlawful.[59] Specifically, Pinchot argued that the regulatory definition set the bar too high because "the adverse modification threshold is not triggered by a proposed action until there is an appreciable diminishment of the value of critical habitat for both survival *and* recovery."[60] The court agreed with this argument, finding that the FWS's definition undermined Congress's express

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53. *Id.* at 1067-68.

54. *Id.* at 1067.

55. *Id.* at 1067-68 (citing Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994) (approving such an approach in the context of the National Environmental Policy Act)).

56. *Id.* at 1068.

57. *Id.*

58. *Id.* at 1069.

59. *Id.* In interpreting section 7's requirement that the consulting agency ensure that a proposed federal action will not result in the "destruction or adverse modification" of a listed species' critical habitat, the FWS defined "adverse modification" as:

> [D]irect or indirect alteration that appreciably diminishes the value of critical habitat for *both* the survival *and* recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02 (2005) (held invalid by Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004) (emphasis added).

60. *Pinchot*, 378 F.3d at 1069 (emphasis added).

command that adverse modification should be triggered whenever diminishment of habitat critical for survival *or* recovery has occurred.[61]

According to the court, it is "logical and inevitable" that a species requires more critical habitat for recovery than is necessary for survival.[62] Under the FWS's definition, the court said, the agency could authorize the complete elimination of habitat critical for recovery as long as the smaller critical habitat for survival remains protected.[63] However, the ESA is not concerned merely with preventing the extinction of species (i.e., promoting a species survival) but also with allowing a species to recover to the point where it is no longer threatened or endangered.[64] The court therefore concluded that "Congress intended that conservation and survival be two different (though complementary) goals of the ESA," and that "the requirement to preserve critical habitat is designed to promote both conservation and survival."[65] The FWS's regulatory definition of "adverse modification" thus impermissibly narrowed the scope of protection commanded by Congress.[66]

The Ninth Circuit then turned to whether the agency's error was harmless in the context of its no jeopardy determination.[67] The court found that the FWS's regulatory definition had an "inescapable bearing" on whether it considered recovery in its critical habitat inquiry.[68] The court is obligated to hold the agency to a presumption of regularity which, in this case, presumes that, "unless rebutted by evidence in the record, . . . the FWS followed its definition of adverse modification and thereby ignored the evaluation of whether adequate critical habitat would remain to ensure species recovery."[69] The FWS countered this presumption, arguing not that it had relied on its own regulatory

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61. *Id.* at 1069-70.

62. *Id.* at 1069.

63. *Id.* at 1069-70.

64. *Id.* at 1070 (citing 16 U.S.C. § 1532(5)(A) (1973) (defining "critical habitat" as including "the specific areas . . . occupied by the species . . . which are . . . essential to the *conservation* of the species" and the "specific areas outside the geographical area occupied by the species . . . that . . . are essential for the *conservation* of the species." (emphasis added)); *id.* § 1532(3) (defining "conservation" as all methods that can be employed to "bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary")).

65. *Id.*

66. *Id.*

67. In the context of agency review, harmless error occurs only "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." *Id.* at 1071 (citing Buschmann v. Schweiker, 676 F.2d 352, 358 (9th Cir. 1982) (internal quotations omitted)).

68. *Id.*

69. *Id.* at 1071-72 (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971)).

definition and that this reliance was harmless, but rather that it had implicitly recognized the role of recovery in its critical habitat analysis, and that regardless of how the court were to interpret the definition, the FWS had satisfied the requisite consideration of species recovery.[70]

The court addressed this argument by examining the FWS's critical habitat analysis in each of the six challenged BiOps.[71] The court found that the definitional error in four of the BiOps was clearly not harmless.[72] Nowhere in any of those opinions, the court stated, was there any mention of recovery or conservation, nor was there any suggestion that the agency had disregarded its regulatory definition.[73] The presumption of regularity, therefore, prevented the court from inferring that any such analysis had taken place.[74] As for the other two BiOps, the court found that, although they both mentioned recovery in their analysis, the language used was merely descriptive and could not be read to declare that the agency had considered recovery when its own regulation told it not to do so.[75] Because the court found that the agency had not adequately demonstrated that its erroneous regulatory definition of adverse modification was harmless, it concluded that the FWS's critical habitat analysis was "irredeemably flawed."[76]

Pinchot also challenged the FWS's critical habitat analysis by arguing that the agency had impermissibly based its no jeopardy decision, in part, on the existence of suitable alternative habitat within the LSRs but outside of the owl's critical habitat.[77] The FWS responded that the LSR was not used as a substitute but rather as a "mutually overlapping regime."[78] The Ninth Circuit, while acknowledging that critical habitat areas and the LSRs are inextricably linked, ruled that

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70. *Id.* at 1072.

71. *Id.* at 1073.

72. *Id.* (discussing the Coos Bay, Upper Iron Timber Sale, Acci, and La Roux Timber Sale BiOps).

73. *Id.* at 1073-74.

74. *Id.* at 1074.

75. *Id.* at 1072-73 (discussing the Rogue Valley and Willamette Province BiOps). The introductory paragraph of the Rogue Valley BiOp specified that "[t]he purpose of critical habitat is to identify those lands that may require special management to maintain *recovery* options" and "[t]he *recovery* strategy (USDI 1992a) [the 'final draft recovery plan'] was incorporated into the NFP which was adopted by the Federal government as its contribution to the *recovery* of the species." *Id.* (emphasis added). The court found nearly identical language located in the Willamette Province BiOp. *Id.* at 1073.

76. *Id.* at 1075.

77. *Id.*

78. *Id.*

LSRs could not stand in for critical habitat within the meaning of the ESA.[79]

The court pointed to the fact that the plain language of the ESA commands that the adverse modification inquiry examine a given project's effect on critical habitat, and that the purpose of designating critical habitat is to set aside particular areas that the agency deems to be essential for a species' survival and recovery.[80] If it were to permit the survival and recovery benefits derived from other conservation projects (the LSRs) to be considered in adverse modification analysis, the court deemed that it would be contradicting Congress's intention that critical habitat analysis focus on the actual critical habitat.[81] In the court's opinion, "that the spotted owl has suitable alternative habitat (e.g., non-critical habitat LSRs) has . . . no bearing on whether there is adverse modification of critical habitat."[82] The court continued, "what mattered to Congress, and what must matter to the agency, is to protect against loss or degradation of the designated 'critical habitat' itself."[83] The court thus held that the FWS's finding that loss of critical habitat was not an adverse modification because of the existence of suitable external habitat was both "arbitrary and capricious" and "contrary to law."[84]

Having concluded that the FWS's critical habitat analysis in the six BiOps was fatally flawed because it relied on an unlawful regulatory definition of "adverse modification" and impermissibly substituted LSRs for critical habitat, the court reversed the grant of summary judgment to the FWS on that issue and remanded with instructions to grant summary judgment to Pinchot on the critical habitat inquiry.[85]

IV. ANALYSIS

The Ninth Circuit's decision to affirm summary judgment for the FWS on the jeopardy question is justified given the substantial deference that the court must give to an agency's scientific expertise and experience. In determining whether the agency's habitat proxy was permissible, the court was bound to assess only whether this method *reasonably* ensured accurate predictions of spotted owl populations. While Pinchot may have been correct in arguing that the proxy model

79. *Id.*
80. *Id.* at 1075-76.
81. *Id.* at 1076.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 1077.

does not, in fact, yield as accurate results as actual population counts, their argument was not relevant to the court's analysis. A reviewing court is not obligated to inquire whether an agency's interpretation of a statutory duty is the best (or only) permissible construction, but merely if it is *reasonable*.[86] As the court pointed out, the FWS's detailed analysis took into account numerous factors that might affect owl populations in a given area. In addition, the Ninth Circuit has previously established that the use of such a method is considered reasonable in certain situations.[87]

Pinchot's argument that the ESA prohibited the proxy method was also misguided. The statute provides no explicit guidance as to what methods may or may not be employed in assessing whether a given action poses jeopardy to a species' existence. Pinchot's reading of the ESA merely infers a congressional intent that jeopardy analysis must include actual species population verification. The Supreme Court has held, however, that, where a statute does not directly address the precise question at issue, a reviewing court may only question whether the agency's action was based on a permissible construction of the statute.[88] Because the court had already established that the proxy method was permissible, Pinchot's narrow interpretation of section 7 could not be enforced against the FWS.

The court's rejection of Pinchot's argument that the FWS could not substitute the NFP for independent jeopardy analysis is somewhat more problematic. The NFP BiOp expressly stated that it did not authorize incidental takes, and that such takings would be addressed by future project-specific BiOps.[89] The NFP BiOp further stated that the NFP would be adjusted based on information developed through future section 7 consultations between the action and consulting agencies.[90] By allowing the FWS to base its decision on compliance with the NFP, however, the court has essentially given agencies a guaranteed justification for all future no jeopardy decisions, as the NFP can always be subsequently "adjusted" based on information that supports the agency's determination. The Ninth Circuit explicitly states in another

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86. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.11 (1984) (holding that where Congress has not spoken directly to an issue, the question for the court is whether the agency permissibly construed the statute).

87. *See* Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv., 273 F.3d 1229, 1250 (9th Cir. 2001) (holding that "the use of ecological conditions as a surrogate for defining the amount or extent of incidental take is reasonable so long as these conditions are linked to the take of a protected species").

88. *Chevron*, 467 U.S. at 842-43.

89. *Pinchot*, 378 F.3d at 1064.

90. *Id.*

part of its opinion that post hoc decision explanations are disfavored.[91] Yet the court has nonetheless granted post hoc explanations to federal agencies for decisions that have yet to be made. The court thus seems to have extended the reasonableness standard to include any justification put forth that is not entirely *un*reasonable. This approach circumvents Congress's explicit intent that conservation of endangered and threatened species and their habitats is to be at the forefront of any analysis of proposed agency actions.[92]

The reality, however, is that agency decisions, particularly those involving scientific matters, are to be afforded significant deference by the courts. The court is only looking for *clear* errors of judgment and not whether the agency chose the best possible method. Therefore, although the court's decision to uphold the FWS's determination may set a dangerous precedent for acceptable agency justifications in jeopardy analysis, it was not plainly erroneous.

The court's decision to reverse summary judgment on the adverse modification issue in favor of Pinchot was much more sound. By defining "destruction or adverse modification" as only occurring when critical habitat for both survival *and* recovery has been appreciably diminished, the FWS clearly contradicted an express statutory command. This definition ensures the owl's survival, but does not ensure that it will also have the opportunity to recover. The ESA's definitions of "conservation" and "critical habitat," however, clearly evince Congress's intent that all endangered and threatened species must have this opportunity for recovery.[93]

Chevron mandates that where Congress has spoken on a particular issue, the court's inquiry must end there.[94] Thus, the court was obligated to follow the plain language of the ESA and strike down the FWS's regulatory definition. The court's decision was also consistent with the Fifth Circuit, which has held that conservation is a much broader concept than mere survival, and that requiring section 7 consultations only "where an action affects the value of critical habitat to both the recovery and survival of a species imposes a higher threshold than the [ESA] permits."[95]

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91. *Id.* at 1072 (citing *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 419 (1971)).

92. *See* 16 U.S.C. § 1531(c) (1973) (stating that it is "the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of [this goal]").

93. *See id.* §§ 1532(3), 1532(5)(A).

94. *Chevron*, 467 U.S. at 842-43.

95. Sierra Club v. U.S. Fish & Wildlife Serv., 245 F.3d 434, 441-42 (5th Cir. 2001); *see also* N.M. Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv., 248 F.3d 1277, 1283 (10th Cir.

Lastly, the Ninth Circuit was justified in holding that this impermissible regulatory definition was not harmless with regards to the FWS's ultimate determination of no jeopardy. Although the court's opinion did not discuss any specific evidence as to how the definition negatively impacted the agency determination, this is irrelevant to the holding because the burden was on the *agency* to prove why the error is harmless. The court properly recognized the Supreme Court's mandate that it apply a presumption of regularity in these circumstances, which created a significant burden of proof for the agency to overcome. The agency's defense, however, that consideration of recovery was implicit in its analysis was clearly insufficient. None of the six BiOps made any clear indication to the court that consideration of critical habitat specifically for recovery had taken place. In fact, several of the BiOps failed to mention *any* consideration of habitat whatsoever. Because the burden of proof was so stringent, the FWS did not provide sufficient evidence to support its argument and the court properly ruled against it.

V. CONCLUSION

The Ninth Circuit's decision in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service* is an important step in establishing boundaries for judicial deference to agency decisions. In upholding the FWS's jeopardy analysis under the first prong of ESA section 7, the court properly recognized its general obligation to bow to reasonable agency determinations. The Ninth Circuit arguably may have bowed just a bit too far, however, in allowing the FWS to use compliance with the NFP as a partial justification for its decision. Acceptance of such circuitous agency reasoning sets a troubling precedent in contravention of the established concept that post hoc justifications are disfavored. Nonetheless, the court's rejection of the FWS's "adverse modification" analysis reinforces the important principle that agencies cannot play semantic games in order to evade statutory commands by Congress.

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2001) (recognizing that the FWS's regulatory definition of adverse modification is inconsistent with the ESA).

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