Center for Biological Diversity v. Zinke: The Fight for the Arctic Grayling Forges a Sword in the Battle for the Dusky Gopher Frogs

I. OVERVIEW

The arctic grayling has had a somewhat troubled existence in the past decade. A cold-water fish belonging to the *Salmonidae* family, its historical habitat consisted of Montana, Wyoming, and Michigan.[1] However, due to rising water temperatures, climate change, and human actions, its existence is now limited to the Upper Missouri River Basin in Montana.[2] Being a cold-water fish, waters measuring over twenty-five degrees Celsius (seventy-seven degrees Fahrenheit) can be dangerous to the population.[3] For several decades, the Center for Biological Diversity (CBD) has advocated for the categorization of the arctic grayling as an endangered species by the Fish and Wildlife Service (FWS).[4] In 1982, the FWS initially considered listing the arctic grayling as an endangered or

1. Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1058 (9th Cir. 2018).
2. *Id.* at 1058-59.
3. *Id.* at 1059. The arctic grayling may incur psychological stress at temperatures over twenty degrees Celsius (seventy degrees Fahrenheit), which can impair breeding functions. Its upper incipient lethal temperature (UILT), the temperature that would kill fifty percent of the sample or population in a week, is twenty-five degrees Celsius (seventy-seven degrees Fahrenheit). *Id.* at 1059 n.3.
4. *Id.* at 1060.

threatened species but declined due to insufficient data;[5] in 1994, the FWS deemed listing the species as "warranted but precluded";[6] in 2007, it again declined to list the species because it was not a distinct population segment;[7] and, in 2010, the FWS reversed and decided that it was a distinct population segment but concluded that listing it was warranted but precluded.[8]

In a 2014 decision, the FWS determined that listing the arctic grayling as endangered or threatened was not warranted.[9] The decision (2014 Finding) was based on several conclusions: (1) that "range" in the phrase "in all or a significant portion of its range" meant current range and not historical range;[10] (2) that the fluvial arctic population was increasing;[11] (3) that the arctic grayling's ability to migrate to colder waters (cold-water refugia) minimized the threats caused by warmer water temperatures;[12] (4) that climate change is not negatively impacting their population;[13] and (5) the arctic grayling's small population size does not place its genetic viability at risk.[14] The CBD appealed this decision, arguing that the FWS used the incorrect interpretation of the word "range" in determining whether the arctic grayling was in danger of becoming threatened or extinct "in a significant portion of its range" and that several of the conclusions the FWS drew in making its decision were arbitrary and capricious.[15]

At the apex of this appeal was the "Final Policy on Interpretation of the Phrase 'Significant Portion of Its Range' in the Endangered Species Act's (ESA) Definitions of 'Endangered Species' and 'Threatened Species'" (SPR Policy) promulgated by the FWS in 2014, which generally defined "range" as current range and disallowed the FWS from using historical range as a significant portion of a species' range.[16] The district court had granted summary judgment for the FWS, holding that the 2014

5. *Id.*
6. *Id.*
7. *Id.* at 1061.
8. *Id.* (noting a reason for preclusion was the existence of "higher priority actions.").
9. *Id.* at 1062.
10. *Id.* at 1062-63.
11. *Id.* at 1062, 1068.
12. *Id.* at 1069-70.
13. *Id.* at 1062, 1072.
14. *Id.* at 1073-74.
15. *Id.* at 1058.
16. *See id.* at 1063 (citing EPA 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," 79 Fed. Reg. 37,578 (July 1, 2014)).

Finding was reasonable because it was made on the best available science, considered all the ESA-mandated factors, and made a determination based on agency expertise.[17] Upon appeal, the Ninth Circuit Court of Appeals *held* that the 2014 Finding was arbitrary and capricious because it (1) did not use all available scientific evidence, (2) did not reasonably explain its reason for relying on the existence of cold-water refugia, (3) based the decision on "uncertainty," and (4) failed to meet its own established criteria developed in the 2010 Finding. *Center for Biological Diversity v. Zinke,* 900 F.3d 1053 (9th Cir. 2018).

II. BACKGROUND

The ESA, as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation," provides a means for the conservation of endangered and threatened species and their ecosystems.[18] Equally important, it imposes upon federal departments and agencies the responsibility to use their respective authorities to seek to conserve endangered and threatened species.[19] In deciding whether a species warrants being listed as an endangered or threatened species, the FWS must follow specific guidelines set by the ESA.[20]

A. "A Significant Portion of Its Range"

As defined by the ESA, an endangered species is "any species which is in danger of extinction throughout all or a significant portion of its range."[21] 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."[22] However, until the 2014 SPR, there had not been a clear definition of the term "range."[23] The SPR defined "range" as "the general geographic area within which that species can be found at the time FWS or NMFS [National Marine Fisheries Service] makes any

17. Ctr. for Biological Diversity v. Jewell, No. CV 15-4-BU-SEH, 2016 WL 4592199, at *11 (D. Mont. Sept. 2, 2016).

18. 16 U.S.C. § 1531(b) (2018); *Zinke*, 900 F.3d at 1059 (quoting Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978)).

19. 16 U.S.C § 1531(c)(1).

20. *See Zinke*, 900 F.3d at 1059-60.

21. 16 U.S.C. § 1532(6).

22. *Id.* § 1532(20).

23. *See* EPA 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," 79 Fed. Reg. 37,578, 37,583-84 (July 1, 2014).

particular status determination."[24] The SPR also noted that, while lost historical range is "relevant to the analysis of the status of the species, it cannot constitute a significant portion of a species' range."[25]

When a statute fails to provide a clear definition for a provision and the agency's definition of the statutory provision is reasonable, courts have traditionally applied the *Chevron* deference framework.[26] In *Chevron, U.S.A., Inc. v Natural Resources Defense Council, Inc.*, the Supreme Court created a legal test to determine whether deference to a government agency's interpretation of a statute is to be given the force of law.[27] First, a court must examine whether Congress' intent was clear and unambiguous in the statute.[28] If not, the question turns to whether the agency's interpretation of the statute is permissible when considering the purpose and construction of the statute.[29]

Two prior decisions by the Ninth Circuit held that a species' lost historical range should be addressed in a decision of whether or not to list the species as threatened or endangered.[30] In *Defenders of Wildlife v. Norton*, the court ruled that, while the phrase "significant portion of its range" was ambiguous and the Secretary of the Interior had broad discretion in its interpretation, the Secretary "must at least explain [the] conclusion that the area in which the species can no longer live is not a 'significant part of its range.'"[31] In *Tucson Herpetological Society v. Salazar*, the court ruled that the FWS must provide a rational explanation as to why the "lost and threatened portions of a species' range" are not significant to the assessment of its designation.[32]

Despite these prior decisions, the 2014 SPR release by the FWS was intended to clarify the definition of "range"[33] and, therefore, was a consideration in determining whether the *Chevron* deference framework

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24. *Id.* at 37,609.

25. *Id.*

26. *See, e.g.*, Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1141-44 (9th Cir. 2007) (holding that the FWS's determination that the Washington population of the grey squirrel was not a "distinct population segment" deserved *Chevron* deference because the term was not unambiguously defined by Congress and the agency's construction was reasonable).

27. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

28. *Id.*

29. *Id.* at 843-44.

30. *See* Tucson Herpetological Soc'y v. Salazar, 566 F.3d 870, 876-77 (9th Cir. 2009); Defs. of Wildlife v. Norton, 258 F.3d 1136, 1145-46 (9th Cir. 2001).

31. *Defs. of Wildlife*, 258 F.3d at 1145.

32. Tucson Herpetological Soc'y, 566 F.3d at 876-77.

33. *See* EPA 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," 79 Fed. Reg. 37,578, 37,609 (July 1, 2014).

applied. In instances where agency interpretations appear inconsistent, the leading approach is that supplied in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, which held that agency inconsistency in reference to a certain interpretation is not a reason to decline the *Chevron* framework, and that a judicial precedent trumps agency construction in regards to a statute only if the prior decision holds that the terms of the statute are unambiguous and "leave[] no room for agency discretion."[34]

B. Arbitrary and Capricious

The Administrative Procedure Act (APA) allows for courts to review and decide all relevant questions of law, including interpretations of constitutional and statutory provisions. Under the APA, reviewing courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[35] The Supreme Court has held that an agency rule is arbitrary and capricious if the agency relied on factors that Congress did not intend to be considered, disregarded an important factor, failed to explain why its decision was contradictory to the evidence, or if the rule was "so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[36] Otherwise, agency rules deserve the highest deference when they pertain to the agency's area of expertise.[37] In circumstances where the available evidence has multiple rational interpretations, *San Luis & Delta-Mendota Water Authority v. Jewell* held that courts should uphold an agency's findings if the findings are reasonable.[38]

Agency policy changes based on factual findings that contradict the findings used to support previous policies must be accompanied by a "reasoned explanation" so as to justify why the agency is now disregarding the factors and findings on which the previous policy was based.[39] Agency policy changes comply with the APA if the agency "(1) displays 'awareness that it is changing position,' (2) shows that 'the

34. Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005).
35. 5 U.S.C. § 706(2)(A) (2018).
36. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
37. *See, e.g.*, Ctr. for Biological Diversity v. Zinke, 900 F.3d 1053, 1067 (citing Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008)).
38. *Id.* at 1068 (citing San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014)).
39. *Id.* at 1067 (citing FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515-16 (2009)).

new policy is permissible under the statute,' (3) 'believes' the new policy is better, and (4) provides 'good reasons' for the new policy."[40]

Further, if a new policy is based on factual findings that contradict the findings on which the old policy was based, the agency must provide a "reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy."[41] The FWS, according to the ESA, is required to make determinations "solely on the basis of the best scientific and commercial data available," while taking into account conservation efforts, whether by states or foreign nations.[42]

III. THE COURT'S DECISION

In the noted case, the Ninth Circuit Court of Appeals reversed the district court's ruling and held that the FWS acted arbitrarily and capriciously in finding that listing the arctic grayling was not warranted because it (1) ignored a scientific study evidencing a decrease in breeders in the grayling population; (2) failed to provide a reasoned explanation for relying on the existence of cold-water refugia in Big Hole River; (3) used "uncertainty" as a reason for the negative listing determination; and (4) undermined its own established criteria for viability.[43] The court also addressed the issue of the FWS's interpretation of the term "range" as used in the ESA, holding that the SPR's definition of it as "current range," as opposed to "historical range," warranted deference.[44]

A. Interpreting "Range"

The court applied the *Chevron* deference framework, first asking whether the meaning of "range" was ambiguous.[45] In doing so, the court initially analyzed the definition of the word "range" and its usage in 16 U.S.C. § 1532.[46] It noted that the use of the present tense in the underlying dictionary definition ("a geographical reference to the physical areas in which a species lives or occurs") was likely a function of dictionary composition rather than a signifier of congressional intent.[47]

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40. Organized Vill. of Kake v. USDA, 795 F.3d 956 (9th Cir. 2017) (quoting *Fox*, 556 U.S. at 515-16).
41. *Id.*
42. 16 U.S.C. § 1533(b)(1)(A) (2018).
43. *Zinke*, 900 F.3d at 1074-75.
44. *Id.* at 1067.
45. *Id.* at 1064.
46. *Id.*
47. *Id.* at 1065.

Next, the court looked at usage of "range" within the ESA.[48] The first use of the term referred to the "curtailment of [a species'] habitat or range," which the court deemed to be indeterminate and not insightful with regard to Congress's intent.[49] Upon analyzing the second use of the term, in which the ESA requires agencies to specify "over what portion of its range" the species is endangered or threatened, the court acknowledged that the legislative history indicated that Congress intended for "range" to refer to "the historical range of the species."[50] Central to this conclusion was the court's dependence on H.R. Rep. No. 95-1625, which states, "The term 'range' is used in the general sense, and refers to the historical context of the species."[51] However, the court was reluctant to deem that this resolved all issues of ambiguity as to the meaning of "range," noting that section 4(c)(1), to which H.R. Rep. No. 95-1625 refers, functions as an informational provision for the agency, as opposed to a substantive provision.[52] Lastly, the court turned to the usage of "range" in section 10(j) of the ESA, which allows for the release of an endangered or threatened species "outside the current range of such species."[53] The court focused on the addition of "current" as a qualifier to "range," considering two conflicting possibilities: (1) that the presence of such a qualifier could indicated that usage of "range" in other parts of the statute meant "historical range," or (2) that the usage of "current range" was an indicator of how other uses of "range" should be construed.[54]

Given this analysis, the court determined that the term "range" was ambiguous, which led to consideration of the second prong of the *Chevron* test: whether the agency's interpretation was reasonable.[55] In making this determination, the court considered that the purpose of the ESA is to protect and preserve endangered species, and the fact that threats to where a species currently lives often "affect[] its continued survival the most and

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48. *Id.* at 1064-65. The statute defines an endangered species as "[a species that] is in danger of extinction throughout all or a significant portion of its range" and a threatened species as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. §§ 1532(6), 1532(20). A primary question addressed was whether the use of the present-tense verb term in these definitions ("is in danger" and "is likely to become") implied that "range" must refer to current range. *Zinke*, 900 F.3d at 1065.

49. *Zinke*, 900 F.3d at 1065 (citing 16 U.S.C. § 1533(a)(1)(A)).

50. *Id.* at 1065-66 (citing 16 U.S.C. § 1533(c)(1)).

51. *Id.* (citing H.R. REP. NO. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468).

52. *Id.* at 1066.

53. *Id.* (citing 16 U.S.C. § 1539(j)(2)(A)).

54. *Id.*

55. *Id.*

thus bear influentially on whether it should be listed."[56] The court ruled that, because the SPR recognized that a species' loss of its historical range can lead to negative effects, and such a consideration was a factor in the FWS's negative listing decision, the interpretation of "range" as "current range" warranted deference.[57]

B. Arbitrary and Capricious Agency Actions

1. The Fluvial Arctic Grayling Population

The plaintiff argued that the FWS did not base the 2014 Finding on the "best scientific and commercial data available" in determining that the fluvial arctic grayling population was increasing.[58] The agency relied on a study that implied an increase in the arctic grayling population (the Leary study), while also citing to a portion of a 2014 report (the DeHaan study), but omitted evidence from the DeHaan study that evidenced a decrease in the arctic grayling population, while also failing to provide an explanation for the omission.[59] Because the FWS had a responsibility to consider the best data available, and because it failed to properly account for the DeHaan study, the court held that the agency acted in an arbitrary and capricious manner.[60]

2. Cold-Water Refugia

The court found the 2014 Finding's reliance on the existence of cold-water refugia in Big Hole River to be arbitrary and capricious but its reliance on cold-water refugia in Centennial Valley was not.[61] The 2014 Finding, basing its conclusion on a single study,[62] determined that the existence of cold-water refugia and the arctic grayling's ability to migrate to them minimized the threat of low stream levels and high water temperatures in Big Hole River.[63] The court found that the FWS acted arbitrarily and capriciously in making this determination because it (1) failed to provide a reasoned explanation for the contradictory nature of

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56. *Id.* at 1067 (quoting Humane Soc'y of the U.S. v. Zinke, 865 F.3d 585, 605 (D.C. Cir. 2017)).
57. *Id.*
58. *Id.* at 1068 (quoting 16 U.S.C. § 1533(b)(1)(A)).
59. *Id.*
60. *Id.* at 1069.
61. *Id.* at 1071-72.
62. That was the Vatland study. *Id.* at 1070.
63. The Vatland study found that the tributaries near Big Hole River provided cold-water refugia for the grayling to seek shelter from warmer temperatures. *Id.*

the 2014 Finding in relation to the 2010 Finding and (2) failed to address the high temperatures of the tributaries.[64] Drawing from *Organized Village of Kake v. United States Department of Agriculture*, the court determined that, because the 2014 Finding was inconsistent with the 2010 Finding, the agency was required to provided a reasoned explanation for its change in position.[65] Not only did the FWS fail to provide a reasoned explanation for the change, it also neglected to address the issue of water temperature in the tributaries; specifically, while lower than those in Big Hole River, the temperatures in the tributaries still exceeded that at which the arctic grayling can live and breed.[66] The 2010 Finding and the 2014 Finding resulted in conflicting conclusions pertaining to cold-water refugia in tributaries, despite reliance on the same factual findings; therefore, the court found that the FWS acted arbitrarily and capriciously in determining that these cold-water refugia would aid the survival of the arctic grayling.[67]

In contrast, the court held that the agency's determination that cold-water refugia in the Centennial Valley lessened the threat to the arctic grayling was not arbitrary and capricious because this conclusion was supported by a "reasoned explanation" that referenced two supporting sources.[68] Lastly, the court ruled that an agency finding that cold-water refugia exist in the Madison River was improper because evidence suggested that water in the Madison River was actually a higher temperature and the river's arctic grayling population was decreasing.[69] However, the court deemed that error harmless, as the extinction of the Madison River arctic grayling population would not compromise the population in the Upper Missouri River Valley and the FWS "did not rest its ultimate 2014 Finding on the continued existence" of the Madison River population.[70]

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64. *Id.* at 1070-71.

65. *Id.* at 1070 (citing Organized Vill. of Kake v. USDA, 795 F.3d 956, 966 (9th Cir. 2017)).

66. *Id.* at 1070-71.

67. *Id.* at 1071.

68. *Id.* at 1071-72 (citing *Organized Vill. of Kake*, 795 F.3d at 968). One of these sources was an email sent by Matt Jaeger, a fisheries biologist for the Montana Fish, Wildlife & Parks department who is part of the Montana Arctic Grayling Recovery Program. *See* MONTANA ARCTIC GRAYLING RECOVERY PROGRAM, https://www.montanaarcticgrayling.org/biologistsstaff.html (last visited Nov. 3, 2018). The email from Jaeger also noted uncertainty as to whether the existence of the cold-water refugia would "fully mitigate warm water temperatures." *Zinke*, 900 F.3d at 1071.

69. *Zinke*, 900 F.3d at 1072.

70. *Id.*

3. Effects of Climate Change

In addressing the issue of whether climate change may affect the survival of the arctic grayling, the FWS stated that "uncertainty about how different temperature and precipitation scenarios could affect water availability" made such consideration "too speculative" and declined to consider it as a factor in its negative listing determination.[71] The court ruled that this approach was "unacceptable," noting that uncertainty about water availability did not justify the decision to not list the arctic grayling.[72] In such a situation of uncertainty, the court stated, a more prudent course of action would have been one in keeping with the ESA's policy of "institutionalized caution."[73] Because the 2014 Finding acknowledged warming water temperatures and decreased water flow due to global warming, it was arbitrary and capricious of the agency to use uncertainty as a reason for the negative listing determination while failing to explain why such uncertainty supported that determination.[74]

4. FWS's Dismissal of Threats of Small Population Sizes

FWS's 2010 Finding concluded that four of the five native arctic grayling populations were at risk due to low population numbers.[75] As discussed, one of the considerations involved in the FWS's decision on whether to list a species is whether the species "is likely to become an endangered species within the foreseeable future."[76] "Foreseeable future," as defined by the FWS in 2010, was thirty years.[77] The 2010 Finding determined that the arctic grayling population was "below the level presumed to provide the genetic variation necessary to conserve long-term adaptive potential."[78] In contrast, the 2014 Finding determined that an increase in population and "[u]pdated genetic information that was not available in 2010" rendered long-term genetic viability concerns not sufficiently serious to warrant the listing of the species.[79] On this issue, the court, similar to the approach it took regarding the existence of cold-

71. *Id*
72. *Id.* (citing Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1028 (9th Cir. 2011)).
73. *Id.* at 1073 (citing Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1167 (9th Cir. 2010)).
74. *Id.*
75. *Id.*
76. 16 U.S.C. § 1532(20) (2018).
77. *Zinke,* 900 F.3d at 1073 (citation omitted).
78. *Id.* (citation omitted).
79. *Id.* (citation omitted).

water refugia in Centennial Valley, held that the FWS based its determination on new information, the usage of which was sufficient to provide a reasoned explanation for the determination.[80]

The court, however, held that the agency's reliance on the Ruby River population as a reason for not listing the arctic grayling was arbitrary and capricious.[81] In coming to this conclusion, the court concentrated on the criteria for viability set forth by FWS in its 2010 Finding, which recognized the importance of having multiple populations for the purpose of genetic reservoirs and determined that judging viability would require "at least 10 years" of monitoring data and that "at least five to ten more years of monitoring" would be required before a determination of viability could be made about the arctic grayling.[82] In the 2014 Finding, the FWS ignored these criteria and relied on a study showing population increases in Ruby River, determining that this increase supported a determination that low population size was no longer a concern.[83] The court, using a similar approach as it did in evaluating the Big Hole River cold-water refugia issue, noted the agency's failure to provide a reasoned explanation for its change in position and disregard of the viability criteria it set in the 2010 Finding.[84] The court emphasized it had been only four years between the 2010 Finding and the 2014 Finding, which was less time than recommended by the viability criteria, and that the lack of such data was crucial because the population of arctic grayling in the Ruby River was one of only two fluvial populations.[85] As a result, the court ruled that the FWS did not provide a reasoned explanation for its change in position and that its conclusion that the Ruby River population was viable enough to act as a genetic reservoir was arbitrary and capricious.[86]

IV. ANALYSIS

In the noted case, the court's decision regarding agency interpretation of statutory terms was generally consistent with prior jurisprudence.[87] However, by declaring that the FWS's definition of "range" deserved

80. *Id.* at 1073-74.
81. *Id.* at 1074.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *See, e.g.*, *id.* at 1072-73 (citing *Greater Yellowstone Coalition, Inc. v. Servheen* with regard to the unacceptability of using (climate change) uncertainty in itself as a justification to not protect a species).

Chevron deference, the Ninth Circuit arguably distinguished its holding from the Arizona district court's ruling in *Center for Biological Diversity v. Jewell*, which held that the agency's definition of "significant" in its SPR Policy was arbitrary and capricious because its purpose and effect were arguably adverse to the EPA's purpose.[88] The *Jewell* court noted that the conditions presented in the SPR Policy could not logically be satisfied all at once, such that the policy seemed to have the goal of "giv[ing] as little substantive effect as possible to the SPR language of the ESA in order to avoid providing range-wide protection to a species based on threats in a portion of the species' range."[89] Here, the Ninth Circuit's determination that the SPR Policy's definition of "range" was reasonable seemed to rely on the agency's emphasis that, while historical range was not determinative to a species' status, it was still a factor that required significant consideration.[90] In acknowledging that loss of historical range affects a species' viability and is an "important component of evaluating the current status of the species," the SPR Policy, while it may narrow the protections provided relative to consideration of "range," is arguably not incongruent to ESA's purpose.[91]

Applying the implication of the noted case to an ongoing one, *Zinke* may provide support for the defense of the Dusky Gopher Frog habitats—the center of conflict in the Supreme Court case, *Weyerhaeuser Co. v. United States Fish & Wildlife Service*.[92] One of the central issues in *Weyerhaeuser* is whether the FWS can designate an unoccupied area of private property as "a critical habitat" for the Dusky Gopher Frog—and whether such a decision by the agency is subject to judicial review.[93] The area in question is currently not inhabited by the frogs, but was deemed by the FWS as essential for preservation of the species.[94] Within the ESA, section (5)(A) defines "critical habitat" and allows for the designation of "specific areas outside the geographical area occupied by the species . . .

88. Ctr. for Biological Diversity v. Jewell, 248 F.Supp. 3d 946, 958 (D. Ariz. 2017).

89. *Id.*

90. *See Zinke*, 900 F.3d at 1067 ("The SPR policy still requires that FWS consider the historical range of a species in evaluating other aspects of the agency's listing decision . . . . The SPR policy recognizes that loss of historical range can lead to reduced abundance, inhibited gene flow, and increased susceptibility to extinction.").

91. *See* EPA 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," 79 Fed. Reg. 37,578, 37,584 (July 1, 2014).

92. *See* Weyerhaeuser Co. v. United States Fish & Wildlife Serv., No. 17-71, 2018 WL 617253, at *1, *2-3 (Nov. 27, 2018).

93. *Id.* at *2.

94. *Id.* at *4.

upon determination by the Secretary that such areas are essential for the conservation to the species."[95] As the Ninth Circuit has ruled in the noted case, agencies have wide authority in interpreting statutes that are within their area of expertise and, as long as there exists a reasoned explanation, are owed deference.[96] In a recent *Weyerhaeuser* decision, the Supreme Court remanded the case to the Fifth Circuit with instructions that "critical habitat" must refer to a habitat (meaning inhabited) and that the FWS's decision was subject to review.[97]

The Ninth Circuit's ruling in the noted case concerning whether the FWS's decisions, which were in line with prior jurisprudence, were arbitrary and capricious may help to reinforce the determination made by the FWS regarding the gopher frog habitats in the Fifth Circuit. As previously discussed, the APA allows courts to "hold unlawful and set aside . . . arbitrary, capricious" agency decisions and findings.[98] A decision may be arbitrary and capricious if the agency disregarded an important factor of the issue.[99] Otherwise, deference to the agency is required.[100] The Ninth Circuit's ruling in the noted case frequently hinged on the failure of the FWS to consider scientific, factual evidence contrary to its ruling or to provide reasoned explanations for its change in position.[101] In contrast, the FWS, in making its determination regarding the gopher frogs, has supported its position with reasoned explanations based on factual evidence from its study and recovery plan of the gopher frog. Amici curiae briefs were filed by numerous eminent scientists on behalf of the FWS, supporting its position to expand the gopher frogs' critical habitats.[102] Considering the factors above, the court's ruling in the noted case may have a beneficial impact for the respondents in *Weyerhaeuser.*

V. CONCLUSION

The holding in the noted case may be considered a two-fold victory for the conservation of species. First, it requires the FWS to reassess its

95. 16 U.S.C. § 1532(5)(A) (2018).
96. *Zinke*, 900 F.3d at 1068.
97. Weyerhaeuser, 2018 WL 6174253, at *18, 25.
98. 5 U.S.C. § 706(2)(B).
99. Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1023 (9th Cir. 2011).
100. *Zinke*, 900 F.3d at 1067 (citing Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008)).
101. *See generally id.*
102. *See generally* Brief of Amici Curiae Scientists in Support of Respondents, Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 138 S. Ct. 924 (2018) (No. 05-1631).

determination of whether the arctic grayling warrants listing as an endangered species or, alternatively, wait until more monitored data is available before making another determination. While this is not a guarantee that the grayling will be listed as an endangered species, it forces the FWS to consider scientific data that seems to support the claim that the species is in danger of becoming extinct due to warming waters and low populations. Secondly, this decision supports the argument for extending the "critical habitat" for gopher frogs, thereby reinforcing the *Chevron* deference framework in regard to the FWS's rulings and actions, as well as emphasizing the agency's usage of factual evidence in its determination.

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