Center for Biological Diversity v. Haaland—Divided Ninth Circuit panel holds that denial of a petition to amend ESA grizzly bear recovery plan is not a final action subject to review under the APA

The Fish and Wildlife Service listed the grizzly bear population in the lower 48 States as a threatened species under the Endangered Species Act in 1975. Seven years later, the Service approved a Grizzly Bear Recovery Plan that it amended in 1993. Over the ensuing years, the Service issued Plan "Supplements" identifying recovery criteria for various recovery zones. In 2014, the Center for Biological Diversity petitioned to have the Plan revised and updated. The Service denied the request, contending that neither the ESA nor the Administrative Procedure Act "authorizes petitions to create or revise recovery plans." The Center thereafter sought judicial review under both statutes. The district court granted the federal and intervening defendants' motions for summary judgment, reasoning that "[a] recovery plan is merely a 'road map,' or a statement of intent, that may be followed at times and disregarded at others" and "that although vital, the nonbinding and discretionary nature of recovery plans means they do not 'prescribe' law or policy and therefore do not fit within the APA's definition of a rule" under 5 U.S.C. § 551(4). *Ctr. for Biological Diversity v. Bernhardt*, 509 F. Supp. 3d 1256, 1268 (D. Mont. 2020). As such, the Service's action was not subject to review under § 553(e) that "grants each 'interested person the right to petition for the issuance, amendment, or repeal of a rule.'" *Id.* at 1256. The district court also held that the ESA's citizen suit provision, 16 U.S.C. § 1540(g), did not confer a right to sue over the petition's denial. *Id.* at 1268-69.

A divided Ninth Circuit panel affirmed but found a lack of subject-matter jurisdiction on a different ground. *Ctr. for Biological Diversity v. Haaland*, No. 21-35121, 2023 WL 311212 (9th Cir. Jan. 19, 2023). The majority "assume[d], as our dissenting colleague argues, that a recovery plan fits under th[e] broad umbrella" of the term "rule" as defined in § 553(e). It further "assume[d], as our dissenting colleague argues, that an interested party can file a petition under § 553(e) to amend a recovery plan." Instead, because "the Center does not challenge the district court's holding that it lacked ESA jurisdiction" and did "not claim that the Service's denial of its petition was otherwise 'made reviewable by statute,'" the panel deemed "the sole issue for decision is whether denial of the petition is 'final agency action'" subject to APA judicial review under 5 U.S.C. § 704.

In resolving that issue, the majority applied the requirements identified in *Bennett v. Spear*, 520 U.S. 154 (1997): "An agency action is 'final' only if it both (1) 'mark[s] the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature,' and (2) is 'one by which rights or obligations have been determined, or from which legal consequences will flow.'" As for the first requirement, "the Service's plans for grizzly-bear recovery arguably 'are only steps leading to an agency decision, rather than the final action itself.' ... And, although 'the Agency's own designation of its action' is not determinative, ... the Service plainly has not treated the 1993 Plan as the last step, as it has repeatedly issued Plan Supplements." As for the second requirement:

> The caselaw makes plain that adoption of a recovery plan is not agency action "by which rights or obligations have been determined, or from which legal consequences will flow." ... "The Endangered Species Act does not mandate compliance with recovery plans for endangered species." ... The Service does not initiate enforcement actions based on recovery plans. ... Nor do recovery plans impose any obligation on or confer any right to

> anyone. ... Moreover, a recovery plan does not contain any "binding legal obligations to which [the agency] is subject."

The majority later added that "[n]or does the Service have any statutory obligation to modify a recovery plan once adopted. It follows that a decision not to grant a petition to modify a plan is not final agency action."

The majority then addressed the dissent:

> Our dissenting colleague argues that the denial of any petition filed under 5 U.S.C. § 553(e) is "final agency action" subject to judicial review under § 704. ... But that is not what the APA says. The APA does not provide that all agency denials of § 553(e) petitions are judicially reviewable. Indeed, § 553 does not address judicial review at all. Rather, judicial review is addressed in § 704, which, as relevant here, expressly limits review to "final agency action."

The proper analytical approach thus was not to "treat[] denials of rulemaking petitions as a species apart from other purportedly final agency actions" but, rather, to "evaluate the Service's denial of the petition to amend the Plan under the same test applicable to a 'direct' challenge to the Plan." Here, "denial of the Center's petition to amend the Plan is not final agency action because, like adoption of the Plan itself, it does not change the Service's statutory obligations, alter the rights of the Center or any other third party, or give rise to any binding legal consequences" or "'impose an obligation, deny a right, or fix some legal relationship.'" The majority concluded by distinguishing the authority relied upon the Center and the dissent for a contrary result.

The dissent began by arguing that ESA recovery plans fit squarely within the "broad definition" of the term "rule" in §551(4). It further reasoned that "[a]ll rules are subject to rulemaking petitions under 5 U.S.C. § 553(e)" that directs "'[e]ach agency [to] give an interested person the right to petition for the issuance, amendment, or repeal of a rule'" and mandates "'a brief statement of the grounds for [a] denial.'" Quoting Ninth Circuit authority, the dissent next argued that "'[a]n agency's denial of a petition for rulemaking constitutes final, reviewable agency action, except where there is evidence of a clear and convincing legislative intent to negate review'" that did not exist with respect to denials of petitions to modify recovery plans. Finally, it turned to the *Bennett* requirements and asserted that, one, "there is no dispute that the Service's denial of the Center's rulemaking petition is a final decision that is neither tentative nor interlocutory" and, two, "[b]ecause the Center petitioned for rulemaking pursuant to § 553(e), the 'agency's refusal to institute proceedings has sufficient legal consequence to meet the second criterion of the finality doctrine.'" The dissent criticized the majority for

> cit[ing] no authority for the proposition that, in a case challenging a denial of a rulemaking petition, the relevant action is *not* the denial of the petition but instead the underlying rule. The majority cites only cases that involved a direct challenge to a non-binding rule. ... None of the cited cases involved denials of rulemaking petitions. And none conflated the action of denying a rulemaking petition with the underlying rule, as the majority does here.

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2023/01/19/21-35121.pdf