

## Ranchers wary of rules expanding scope of ESA

By MATEUSZ PERKOWSKI / Capital Press  
Wednesday, March 27, 2013

The federal government wants to clarify the Endangered Species Act with two upcoming policy changes that ranching interests fear will greatly increase the law's scope.

In both cases, the Obama administration is attempting to resolve legal disputes over language in the act -- and appears to side with arguments that would interpret its authority more broadly.

Ranchers would be affected by a more expansive understanding of the ESA's scope, as many rely on public lands for grazing and own property potentially inhabited by protected species.

The combined effect of the policies would be to subject more land to ESA restrictions while relieving the government from considering the law's full economic impact, according to rancher advocates.

The first policy deals with how the government deals with a species that faces varying levels of danger across its range.

Under the ESA, protections are extended to a species that is endangered or threatened "throughout all or a significant portion of its range."

The Bush administration understood the law to mean that protections may only apply to the "significant portion" where the species is threatened or endangered, not to areas where it's healthy.

However, two federal judges disagreed with that approach because it excluded some members of a listed species from ESA protection.

The Obama administration withdrew the previous policy and has proposed a replacement to resolve "tensions and ambiguities" in the law.

The proposed policy states that if the viability of a species is at risk in a significant portion of its range, protections will apply across all of its range.

One practical effect of the new policy will be to open more of the landscape to designation as "critical habitat," said Karen Budd-Falen, an attorney who represents ranchers and other natural resource industries.

"It will be more designations and bigger designations," she said.

Federal agencies cannot "adversely modify" critical habitat, even if an area isn't occupied by a species.

For example, cattle can be subject to greater restrictions on grazing near streams that are considered critical habitat even if no endangered or threatened fish swim in them, said Budd-Falen.

Another looming policy change involves the economic analysis that the government must conduct when designating an area as critical habitat.

Faced with conflicting appeals court rulings, the administration has chosen to adopt an interpretation that minimizes the full measure of economic disruption.

The policy assumes that a protected species already inhabits an area, said Budd-Falen. The economic analysis is thus limited to the incremental impact of the critical habitat designation.

In reality the species may not occupy the area at all, so the approach fails to consider the full economic consequences associated with the designation, she said.

Under the ESA, areas can be excluded from critical habitat based on economic harm, Budd-Falen said. If the administration assumes there's no impact, though, more land will qualify for designation.

"It's pretty critical to us to have economic considerations included in the Endangered Species Act," she said.

The issue is especially worrisome because critical habitat designations could result in restrictions on private land if ranchers receive federal crop insurance or other federal assistance, Budd-Falen said.

"It is massively far-reaching," she said.

Dustin Van Liew, executive director of the Public Lands Council, which advocates for grazing, said it's troubling that the federal government is trying to resolve a conflict between two appellate rulings, which should be the role of the U.S. Supreme Court.

Van Liew said he'd like Congress to resolve these questions more permanently as part of a broad ESA reform law.

"We'd like to see this as part of that discussion, so there would be certainty afforded to ranchers," he said.

The Center for Biological Diversity, an environmental group, believes the Obama administration's definition of "significant portion" is too restrictive.

Under the proposal, an area is considered significant only if its absence would put the species in danger of extinction.

Noah Greenwald, endangered species director for group, said that bar has been set too high.

He said it's an "erroneous conclusion" that the overall policy change would result in more critical habitat designations.

As for the economic analysis policy, Greenwald said it makes sense to consider the listing itself separately from the critical habitat designation.

Even if an area doesn't contain the species, it may be needed for critical habitat to provide stability for the population, he said.