Analysis: 2007 legal opinion is a threat to imperiled species

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If the federal government implements a 2007 legal interpretation of the Endangered Species Act, the likely result will be a reduction in the number of species listed for protection, scientists say.

Researchers analyzed potential effects of a legal memorandum issued in March 2007 by the Department of the Interior, which, among other points, advised the U.S. Fish and Wildlife Service that only an endangered species' current range need factor into whether the species is listed for protection.

The researchers say such an interpretation sets the stage for the creation of sporadically located "wilderness zoos" that would reduce protections for endangered species and the habitat on which they depend.

The analysis shows, they also contend, that the interpretation is inconsistent with the way federal officials have historically defined threatened and endangered species, as most past listings took into account the loss of a species' historical range - the land it had occupied in the past.

The researchers recommended in two recently published papers that the Department of the Interior set a policy that can be consistently applied to all listings, which they say would go a long way toward protecting species and reducing lawsuits that support or contest proposed listings. They also suggest that the opinion's assertion that only current species land occupation is relevant to listing decisions could do real damage to

efforts to preserve species.

"As these populations contract, we don't want to confine them to the smallest possible geographical unit," said Jeremy Bruskotter, co-author of the analysis and an assistant professor in Ohio State University's School of Environment and Natural Resources.

"Essentially that's what this current policy sets up - a system whereby it's deemed OK to allow species' range and distribution to erode to the point where it's the smallest possible unit."

Bruskotter analyzed the opinion with Sherry Enzler, executive director of the University of Minnesota Institute on the Environment's NorthStar Consortium. Their research was published earlier this year in the Virginia Environmental Law Journal, and in a recent issue of the journal *Human Dimensions of Wildlife*.

Congress passed the Endangered Species Act in 1973. The act expanded on previous legislation by providing for the protection of any species in danger of or threatened with extinction in "a significant portion of its range."

At question is the meaning of the phrase "a significant portion of its range," which refers to the land occupied by the species being considered for protection. The phrase is a central part of the definition of endangered species.

Under the law, the secretary of the interior must decide whether a species is threatened with or in danger of extinction as a result of five listing factors that generally relate to changes to the habitat, disease and predation, or overuse of the species. The law also mandates that listing determinations be made "solely on the basis of the best scientific and commercial data available."

The question of what constitutes a significant portion of a threatened or endangered species' range was first raised in a lawsuit over the secretary's 1997 withdrawal of a proposal to list the flat-tailed horned lizard for protection. Federal officials argued that the animal didn't require the act's protection because despite a loss of a third of its habitat to development, large blocks of public land remained available to the species.

The Ninth Circuit Court of Appeals issued a ruling in 2001 in favor of listing the lizard that essentially set a precedent for future decisions relating to listings of species under the act. The court ruled that a species could "be extinct 'throughout … a significant portion of its range' if there are major geographical areas in which it is no longer viable but once was."

Several federal district courts adopted this same reasoning in subsequent cases. But in 2005, the Federal District Court in New Mexico dismissed the reasoning of the Ninth Circuit, ruling that a species thriving "in sufficient numbers and sufficient health" in 1 percent of its historical range does not require federal protection.

Following this decision, the solicitor for the Department of the Interior in 2007, David Bernhardt, issued his legal advice. He contended that that the present-tense language of the Endangered Species Act serves as a guide for the interpretation and concluded that the term "range" refers only to a species' current range: "The phrase 'is in danger' denotes a present-tense condition of being at risk … [h]ence, to say a species 'is in danger' in an area where it no longer exists - i.e., in its historical range - would be inconsistent with common usage."

He also argued that the Department of the Interior should not be held to any one standard in how it interprets the term "significant," but rather should be able to apply the term differently on a case-by-case basis.

Enzler said the results of a review of the act's legal history suggest that the 2007 interpretation is "plainly inconsistent with the statutory history." The review cites several historical sources that indicate Congress, as well as the Fish and Wildlife Service, have interpreted the term "range" to include the historical range of a species. For example, the authors cite a 1978 report issued by the House of Representatives that noted "the term 'range' is used in the general sense and refers to the historical range of the species."

The authors further contend that Bernhardt's interpretation of the phrase would set up a shifting definition, which would likely increase litigation.

"What has become clear with this act is that because administrations change, a concrete policy is needed," Bruskotter said. "We recommend that a policy be set that can be consistently applied so that from administration to administration, one can say, 'Henceforth, here is the standard.' That will go a long way to protecting federal agencies from these types of lawsuits."

Bruskotter and Enzler had expected that the Obama administration would discard the 2007 interpretation. So far, that has not occurred. Instead, his administration cited the opinion when it delisted the gray wolf in the Upper Midwest, Montana and Idaho in March. Since then, new litigation put the delisting of the wolf on hold in the Upper Midwest, and Montana and Idaho have announced plans for open hunts of the animal - which are expected to spur additional lawsuits.

Besides the legal opinion, politics have influenced application of the Endangered Species Act as well, Enzler noted. She and Bruskotter cited two cases in which administrators rather than scientists tried to influence listing decisions; in one case, an administrator was investigated for releasing nonpublic information to interest groups opposed to endangered species and ordering biologists to change their findings.

"We feel that if the Department of the Interior were pushed to have a more transparent standard, it would be more likely that the scientific viewpoint would prevail, as required by the act, and there would be a lower likelihood of political tampering in the listing process," Enzler said.

The authors point out that species listings have been on a downward trend for years. Interior listed an average of 42 species per year from 1973 to 1996. The number fell to 25 species per year in the next 10-year span. Between 2001 and 2007, the average fell to nine species per year.

"The law says listing decisions should be determined by scientists," Bruskotter said. "Implementing the 2007 legal interpretation, on the other hand, would further limit the number of species listed and the area in which they qualify for protections, ultimately diminishing the government's ability to conserve threatened and endangered species."

Source: The Ohio State University (news : web)