

**Public Lands Council Update
Idaho Association of Counties
Public Lands Steering Committee**

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National Cattlemen’s Beef Association – Federal Lands

Endangered Species Act – the Facts

- Enacted in 1973 – To prevent extinction & recover threatened and endangered species
- Over a quarter century since congress last reauthorized
- Currently 2,220 species on listed under the ESA
 - 1,334 animals (481 recovery plans)
 - 886 plants (676 recovery plans)
- Less than 2% of species have been declared recovered
- Sec. 3: The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct
- Sec. 11: Civil/Criminal penalties & Citizen Suit provision
 - Fines up to \$25,000 for violations
 - Any individual can file a lawsuit

Endangered Species Act Settlement

-Accelerated Listings

- 2011 Settlement between USFWS, WildEarth Guardians, & Center for Biological Diversity:
 - Closed-door settlement with no outside input
 - Requires over 1,000 listing decisions on 251 species (by 2016)
 - Limits petitions and lawsuits by only these two groups
 - Estimated costs to the taxpayer is in excess of \$200million
 - The rate of listing species has increased since the settlement
- Dan Ashe, Director of the Service, stated, "This work plan will allow the Service to more effectively focus our efforts on providing the benefits of the ESA to those imperiled species most in need of protection."

Proposed Regulatory Actions

- **Proposed Rules – Critical Habitat & Adverse Modification:**
 - Expand critical habitat designations without limit
 - Where species will “potentially” exist in the future
 - Expand adverse modification without limit
 - What may “potentially” adversely modify habitat in the future
 - PLC/NCBA filed comments strongly opposing the proposals
- **Proposed Rule – Petitions for Listing Species:**
 - Limit petition to one species at a time
 - Require petition to include known scientific information
 - Allows FWS to reject petitions
 - Industry recently filed comments generally supporting

PLC/NCBA Priorities to Modernize ESA

- Data Quality Act – Peer Reviewed Science
- Data/Scientific Research Available Online
- Delisting and Downlisting – Recovery Plans
- Voluntary Agreements with Agencies
- Require State and Local Government Involvement – Petitions/Critical Habitat
- Transparency of Legal Settlements and Agreements
- Economic Impacts of Decisions and Designations
- Limit Legal Abuses – Fee Payments & Access by Outside Groups Abusing the Legal System

Legislative Efforts to Modernize ESA – 114th

FY 16 NDAA

- Greater Sage Grouse/Lesser Prairie Chicken/American Burying Beetle

Interior Appropriations

- Greater Sage Grouse
- Lesser Prairie Chicken
- Desert Tortoise
- Wolves (Great Lakes, WY/UT/OR/WA)
- 6 Indiana Mussels
- Long Eared Bat
- Requirement of 5 Year Recovery Plan
- Limit Attorney’s Fees to \$125/hour

Legislative Efforts to Modernize ESA – 114th

- S. 292—21st Century Endangered Species Transparency Act
- S. 112 and H.R. 2098—Common Sense in Species Protection Act of 2015
- S. 293 & H.R. 585—Endangered Species Act Settlement Reform Act
- H.R. 1589— To prohibit the use of funds by the Secretary of the Interior to make a final determination on the listing of the northern long-eared bat under the Endangered Species Act of 1973
- H.R. 2109—Endangered Species Litigation Reasonableness Act
- H.R. 1667—21st Century Endangered Species Transparency Act
- H.R. 884—To direct the Secretary of the Interior to reissue final rules relating to listing of the gray wolf in the Western Great Lakes and Wyoming under the Endangered Species Act of 1973, and for other purposes
- S. 1142— Native Species Protection Act
- S. 855- Endangered Species Management Self-Determination Act
- S. 736 and H.R. 2352 —State, Tribal, and Local Species Transparency and Recovery Act
- H.R. 659—Lesser Prairie Chicken Voluntary Recovery Act of 2015
- H.R. 1985—Pacific Northwest Gray Wolf Management Act of 2015
- H.R. 843— Western Great Lakes Wolf Management Act of 2015
- H.R. 2134—Listing Reform Act
- H.R. 2910, the Mexican Wolf Transparency and Accountability Act

Legislative Efforts to Modernize ESA – 114th

- Senate EPW Committee Hearing (Earlier Today):
 - FWS & Western Governors
 - Improving the ESA
- House Natural Resources Committee:
 - Holding Meetings with Industry

Greater Sage Grouse

-Spotted Owl for Ranching?

- 2010 – USFWS determined “Warranted but Precluded”
- 2011 Settlement agreement included Greater Sage Grouse
 - Listing decision by September 2015
- Secretary Salazar calls for regulatory assurances from states & federal agencies
- States develop management plans to provide regulatory assurances
- Late 2013 – BLM/USFS release draft EISs across the west
 - Based in part on NTT & COT reports
- Early 2014 – Livestock industry filed comments opposing
 - BLM/USFS lacked information on existing management/regulation
- March 2015 – Multiple industry’s file suit alleging violations of the DQA
 - Flawed science, bias, incomplete analysis
- June 2015 – BLM/USFS released final EISs
 - Buffers, stubble height, permit retirement, surface disturbance
- July 2015 – Industry filed protests in 8 sub-regions

Greater Sage Grouse – Listing Decision

Decision:

- September 22nd Secretary Jewell Announced “Not Warranted”
- Issued a Record of Decision on EISs
- Claiming ‘not warranted’ due to impending implementation of land use plans

Litigation:

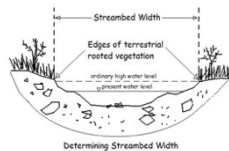
- September 23rd, Nevada Counties and Mining Companies Filed Suit
 - Challenged Nevada EIS in Nevada District Court
- September 25th, Idaho Governor & Legislature Filed Suit
 - Challenged Idaho EIS in DC District Court
- PLC/NCBA & Other Industry Weighing Legal Options

Clean Water Act

- Passed by Congress to regulate navigable interstate waterways
 - “Navigable” appears over 80 times in the act
- 3 Supreme Court decisions
 - Bayview – Wetlands connected to navigable waters are WOTUS
 - SWANCC – Migratory bird rule does not allow for isolated waters to be WOTUS
 - Rapanos - Split decision, Kennedy’s “significant nexus” to WOTUS

Rule Proposal

- Proposed April 2014 by EPA and Army Corps of Engineers in response to *Riverside Bayview*, *SWANCC*, *Rapanos*
- For the first time defined tributary “Bed, Banks, & Ordinary HWM”



Rule Proposal

- PLC Submitted Comments
- Worked with Congress
- OMB/OIRA Meeting
- Voiced Concerns with EPA

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WOTUS Final Rule

- May 27, 2015
- Over 1 million comments
- No Small Business Review Panel conducted

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WOTUS Final Rule

- 8 Categories of Waters that are Regulated (WOTUS)
 1. Traditional navigable waters
 2. Interstate waters
 3. Territorial Seas
 4. Impoundments
 5. Tributaries (to the above) Waters
 6. Adjacent (to the above) Waters
 7. Prairie Potholes, Western Vernal Pools, Pocosins, Delmarva and Carolina Bays, and TX Coastal Prairie Wetlands with Significant Nexus (SF)
 8. Within 100 yr Floodplain or 4000 ft from WOTUS with SF

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Changes to Final Rule

- *Good: Reaffirmed Ag Exemptions*
- (waste treatment systems, prior converted cropland, artificially irrigated areas, farm and stock ponds, irrigation ponds, settling basins, [lawfully constructed] grassed waterways, puddles, established normal farming, ranching, silviculture activities are exempted from adjacent waters)



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Changes to Final Rule part 2

- *Ugly: Circuitous Exemption for Erosional Features*
- (Erosional features, including gullies, rills, and other ephemeral features that do not meet the definition of tributary are exempt)
- *Ugly: Many Ditches that Convey Water are WOTUS*
- (Ditches that are a relocated tributary or excavated in a tributary or flow into a WOTUS are themselves a WOTUS)



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Changes to Final Rule part 2

- *Uglier: The Expansive Definition of Tributary Captures so Many Features that Pesticide and Fertilizer Applications on Farmland may Amount to CWA Discharge Liability*
- (EPA can use desktop tools (LiDAR, etc.) to make jurisdictional determinations. Landowners not able to determine existence of WOTUS without EPA/Corps intervention)



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Changes to Final Rule part 3

- *Ugliest:* EPA Officials in Region 7 have Stated that Stock Ponds and Grassed Waterways could Become Jurisdictional if they Overflow into a Tributary.
- (These features are exempt. EPA is adopting a very narrow interpretation of exemptions)
- Rule Went into Effect on August 28



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Legislation

- HR 1732 - Shuster
 - Passed the Full House
- S 1140 - Barrasso
 - Passed the EPW
 - Waiting for Full Senate
- Appropriations
 - Riders to Prohibit use of Funding to Implement the WOTUS Rule



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Lawsuit

- Coalition of ag, land use and energy groups
 - NCBA, PLC, AFBF, NPPC, Corn Growers, NAFO, NAHB, API, ARTBA, Leading Builders of America, NAM, NMA
- Arguments
 - Exceeds authority under commerce cl, Arbitrary & capricious, APA notice & comment rulemaking, Anti-lobbying Act
- Filed in TX District Court



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Other Lawsuits

- 28 states are suing EPA
- TX, LA, MS filed in Texas
- GA, SC, WV, AL, FL, KS, KY, UT, WI filed in Georgia
- ND, NE, AK, AZ, AR, CO, ID, MO, MT, NV, NM, SD, WY filed in North Dakota
- OH, MI filed in Ohio
- OK filed in Oklahoma
- Murray Energy
- Filed in West Virginia
- US Chamber of Commerce
- National Fed. Of Independent Businesses, Portland Cement Association, two OK-based Chambers of Commerce
- Filed in Oklahoma

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Where do we go from here?

- S 1140
 - Further action is unclear
- Omnibus
 - Likely in mid-December
- Courts
 - Stay granted in ND case
 - Many other district courts have deferred to circuit level

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FY 16 NDAA & Appropriations

(Funding Discussions are Developing this Week - CR)

FY 16 House Interior Appropriations

- Full Funding of Range Budgets
- Block Arbitrary Grazing Fee Increase (\$2/AUM on Top of Market Based Fee)
- Amendment Blocking Monument Designations in Many Counties
- Continued Block on Wildlands Order
- Require Alternative Allotments for Wildfire & Drought Impacts
- Automatic Delist of Species that Meet Recover Goals
- Multiple Species Provisions
- Cut to EPA's Budget

FY National Defense Authorization Act

- Block Listing of Sage Grouse for 10 Years
- Defer to Governor's & State Plans if Requested (Private & Federal Lands)
- Delist Lesser Prairie Chicken
- Delist American Burying Beetle

Antiquities Act

Passed in 1906 – Intended to allow for the protection of historic landmarks and structures:
“...reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with proper care and management of the objects to be protected”

- President Clinton – 19 times covering about 6 million acres
 - Grand Staircase in UT – about 2 million acres
- President Bush – Massive marine designation
- President Obama – 19 times covering over 260 million acres
 - NM; 500K acre Organ Mountains
 - CA; 320K acre Berryessa Snow Mountain & 350K acre San Gabriel Mountains
 - NV; 700K acre Basin and Range
- Generally reduced grazing and removal of grazing
- States and public must be brought into the process

Wildfire & EAJA Legislation

- Wildfire Funding & Management
- HR 2647 (Westerman) & S 1691 (Barrasso)
 - Treat 2 Million Acres/Year
 - Streamline NEPA
 - Create Collaboratives
 - Limit Appeals & Legal Challenges
- HR 167 (Simpson) & S 235 (Wyden)
 - Allows for Fire Funding as from Disaster Funds (FEMA)
 - Blocks Fire ‘Borrowing’
 - No Cap on Funding
- Equal Access to Justice Act & Judgement Fund
 - HR 3279 (Collins) – Open Book on EAJA
 - Reporting Requirements
 - Awards, Fees, and Expenses
 - Online & Searchable
 - Parties/Judges/Agencies/Issues

Questions

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