

Occupied versus Unoccupied Critical Habitat

Critical habitat plays a valuable but often misunderstood role in species' recovery. Critical habitat designations describe the areas that are important for recovery.

The Services are providing clarity in the final rules by explaining that they designate unoccupied critical habitat only when occupied areas are inadequate to ensure the conservation and recovery of the species. In addition, for an unoccupied area to be considered essential, the Services must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more physical or biological features essential to the conservation of the species.

The Alliance supports this change.

This could be particularly helpful in determining the range of smelt in California's Bay-Delta. Currently, there is a dispute among some as to how close the smelt get to the Delta pumps as part of their habitat, and due to turbidity requirements and a lack of clarity over how far the smelt live away from the pumps, the pumping levels are often limited.

This could also help to prevent the reoccurrence in other areas of what happened in Idaho in 2010. That year, the Fish and Wildlife Service proposed to designate several areas in the Boise and Payette basins as critical habitat for Bull Trout, even though the areas in the Payette were uninhabited. Idaho water users submitted comments opposing that proposal. Ultimately, however, the uninhabited area was designated as critical habitat. To date, Idaho water users are unaware of any Bull Trout identified in these designated uninhabited areas.

While it cannot be conclusively stated that anything "bad" has necessarily happened because of that designation (to date), the designation opens up this uninhabited area for potential issues should some litigious activist group decide to raise the matter. The designation has opened these areas to a new, and different, world of administrative regulation and potential issues. This is unnecessary given that the area remains uninhabited.

Even though we cannot conclude that the Payette would not have been designated under this rule, this new rule would provide a higher threshold for such a designation – a good thing for the regulated community.