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Sustainable Development Law & Policy

Exploring How Today's Development Affects Future Generations Around the Globe

In This Issue:

The Role of Governance in Environmental Protection

2 | Editors' Note
by Nicole Waxman and Elizabeth Platt

4 | No Take Backs: Presidential Authority and Public Land Withdrawals
by Christian Termyn

19 | Does Importing Endangered Species' Body Parts Help Conservation? Discretion to Import Trophies Under the Trump Administration
by Brianna Marie

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Editors' Note

The *Sustainable Development Law & Policy Brief (SDLP)* strives to address and analyze cutting-edge legal issues developing within the fields of environmental law and sustainable development. For the last nineteen years, *SDLP* has examined the gap between public law and private sector solutions as well as society's needs.

Good governance requires a balance of transparency, effective collaboration, and proper implementation of policies. As the world becomes increasingly connected, the need for effective governance on the local, national, and international level increases as well. Within the realm of environmental protection, efficient governance at all levels can have a valuable impact on natural resources and wildlife. Yet, when the governing bodies lack transparency and openness, meaningful collaboration, or proper and lawful implementation of policies, the effect can have a shocking blow to natural resources around the world. Nevertheless, the public holds a powerful backstop power to prevent such detriment.

This issue examines that powerful force and the creative solutions employed throughout the world. On a national level, Congress wields a formidable authority over executive revocation of national monuments and public lands held for preservation. Further, Congress's spending power allows for incentivization of investment into beneficial environmental measures, including Carbon Capture technologies. The issue further highlights the influence of state power in cooperative federalism laws, such as the Federal Power Act. On an international level, the issue highlights the role of transparency in development projects funded by international organizations as well as the strength of international treaties.

Similarly, the public brandishes the strength of public comment to ensure effective collaboration with executive agencies. When that collaboration falters, the Administrative Procedures Act and the Endangered Species Act provide recourse to steer the agency back to informed policymaking. Judicial review of administrative procedures ensure that the agency implements the true intent of Congress, including the commitment to broad habitat and wildlife protection. Together, creative solutions, including those explored in this issue, ensure good governance complete with fair processes, dissemination of information, and benefits for all.

Features:

14 | Can the Expansion of 45Q Effectively Spur Investment in Carbon Capture?
by Shannon Zaret

16 | Jam v. IFC: One Step Forward, Two Steps Back?
by Nicholas Johnson

17 | FERC Ruling Undermines Energy Federalism and Arbitrarily Targets Mid-Atlantic Region Renewables
by Philip Killeen

24 | Continuing a Broad Application of Section 9 of the ESA to Prevent Future Mass Extinctions
by Alicia Martinez

26 | How Syria's Failure to Uphold the Kyoto Protocol and Paris Agreement Exacerbated the Effects of Climate Change in the Levant
by Nivea A. Ohri

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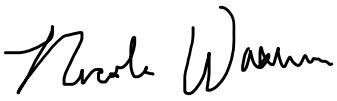
Sincerely,



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About SDLP

The Sustainable Development Law & Policy Brief (ISSN 1552-3721) is a student-run initiative at American University Washington College of Law that is published twice each academic year. The *Brief* embraces an interdisciplinary focus to provide a broad view of current legal, political, and social developments. It was founded to provide a forum for those interested in promoting sustainable economic development, conservation, environmental justice, and biodiversity throughout the world.

Because our publication focuses on reconciling the tensions found within our ecosystem, it spans a broad range of environmental issues such as sustainable development; trade; renewable energy; environmental justice; air, water, and noise regulation; climate change; land use, conservation, and property rights; resource use and regulation; and animal protection.

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No Take Backs:
Presidential Authority and Public Land Withdrawals

*By Christian Termyn**

I. Introduction

In the twilight of his presidency, Barack Obama made several announcements withdrawing federal land from development. These executive actions were protective measures taken under longstanding authorities of the Antiquities Act of 1906[1] and the Outer Continental Shelf Lands Act[2] (OCSLA), which delegate a portion of Congress' primary Constitutional authority over federal lands to the executive branch. Specifically, the statutes authorize the President to unilaterally withdraw certain land from development, which can be an extremely controversial measure depending on the location and size of the parcel to be protected, the productive uses restricted, and the heated politics of federal land management more generally. President Obama's last-minute land withdrawals were no exception.

A lingering question is whether the President, by the same authority, may revoke these protective measures and effectively reopen withdrawn lands to disposition. This question implicates the Constitution, statutes authorizing executive land withdrawals, and other sources of positive law, but is also susceptible to strong intuitions and normative judgments about the role of the Executive in land use policy. The Antiquities Act and OCSLA are silent as to revocability, even as similar statutes authorizing the President to withdraw lands expressly provide for reversal of those withdrawals. As no president until now has revoked a prior land withdrawal under these statues, the courts have not had the opportunity to weigh in.

President Trump converted these hypotheticals into reality. In April 2017, he issued an executive order calling for a review of national monument designations under the Antiquities Act, signaling an intention to return lands protected under the Act to the public domain.[3] Two days later, a second order reversed the Obama Administration's ban on Arctic drilling pursuant to the OCSLA.[4] Environmental groups have challenged both orders and, for the first time, a federal court was presented with the question whether the Executive may reverse a predecessor's land withdrawal.[5]

This paper concludes that the President currently lacks authority to reverse a land withdrawal under the Antiquities Act or OCSLA. It begins by reviewing executive withdrawal authorities under the two statutes, as well as President Trump's recent executive orders.[6] Part III then discusses the nature of executive action in the public lands context, taking care to distinguish it from the President's free exercise of Article II powers, including reversal of a predecessor's executive actions.[7] The President has no inherent authority in the land use context, and reversing a prior land withdrawal constitutes a unique policy decision requiring delegation of authority from Congress.[8] Part IV returns to the statutes themselves, concluding that the Antiquities Act and OCSLA cannot be read to delegate such authority.[9] Congress has repudiated implied executive authority in the public lands context and has demonstrated that it knows how to delegate revocation authority when necessary to fulfill its policy objectives.[10] Part V discusses the potential implications of executive reversal of land withdrawals on use of the Antiquities Act and OCSLA as tools to address environmental policy objectives.[11] Part VI then briefly concludes.[12]

II. Executive Withdrawal Authority Under the Antiquities and Outer Continental Shelf Lands Acts

The Constitution vests Congress with broad powers over the public lands.[13] One of the major legal mechanisms governing the status of public lands is a land "withdrawal." Historically, withdrawal of federal land refers to the process by which the public domain is withdrawn or reserved for certain specific purposes and thereby segregated from the operation of various other public land laws authorizing the use or disposition of the lands.[14] Withdrawals of public lands were initiated beginning in the earliest days of the Republic to establish military and Indian reservations, lighthouses, townsites, and, eventually, railroads.[15] Today, withdrawals are more commonly a protective measure to preserve the status quo and prevent specific future uses in designated areas.[16]

In general, withdrawals of public lands are accomplished by one of three means: (1) express withdrawals of specified lands for a particular purpose by act of Congress; (2) withdrawals by the Executive pursuant to statutory delegation, which can either authorize withdrawal for a particular purpose while leaving the selection and withdrawal of the qualifying lands to the Executive, or generally authorize the Executive to withdraw for public purposes; and (3) withdrawals by the Executive without statutory authority, for instance, where impliedly authorized by Congress' longstanding acquiescence to an executive withdrawal practice.[17] A comprehensive 1969 study of withdrawals and reservations of public domain lands marveled that "[o]ver four hundred statutes, thousands of Executive orders, numerous

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administrative regulations and administrative and judicial adjudications" govern the withdrawal process.[18]

The evolution of federal public lands policy, and the complex interrelationship between Congress and the Executive in setting and carrying out that policy, is a rich history well beyond the scope of this paper. However, two strands of the history are necessary as background. First, while the Antiquities Act and OCSLA have been applied expansively to withdraw land from development, executive withdrawal authority has narrowed overall. Presidents have exercised broad implied authority to withdraw lands throughout the nineteenth and into the early twentieth century. More recently, Congress has expressly repudiated any implied withdrawal authority and narrowed express statutory authorities.[19] This trend advises against implying an executive authority to return withdrawn lands to the public domain where a statute is silent.

The second historical note pertains to the shifting policy of retention, management and disposition of public lands, and an evolving conception of the public interest therein. Though public lands legislation was historically concerned with providing for the disposal of the public domain, a growing recognition of the shortcomings of disposal policy led the government to retain many tracts of land in federal ownership.[20] The Executive had historically withdrawn land for limited public uses, such as military or Indian reservations.[21] As conservation became a critical national concern in the late nineteenth century, [22] the Executive was to play a key role, and for good reason. Equipped with land withdrawal authority, the President could act decisively to identify and protect certain parcels while Congress remained free to undo or modify the action.[23]

The Antiquities Act and OCSLA are just two statutes in an expansive body of law governing executive withdrawal authority. Enacted fifty years apart and for very different purposes, they are not obvious partners for a legal analysis. They share a structural similarity in granting the President a unilateral authority to withdraw land from the public domain without saying anything about a corresponding authority to reverse the withdrawal. And under the Obama Administration, they became primary tools to protect federal land and were wielded with express reference to controversial environmental policy objectives including climate change mitigation. These apparent "one-way" authorities, applied to similar purposes, set the Antiquities Act and OCSLA apart from other federal laws and provide a unique lens into executive public lands authority.[24]

A. The Antiquities Act of 1906

The Antiquities Act of 1906 is "one of the earliest statutes vesting the Executive with discretion to make withdrawals."[25] Although the statute is only two sentences long, its impact on federal lands cannot be overstated. Since its passage, seventeen of twenty-one Presidents have used the Act to proclaim 158 national monuments, withdrawing hundreds of millions of acres from the public domain.[26] President Franklin D. Roosevelt used his authority thirty-six times, more than any other President, while President Obama withdrew the most acreage, over 550 million acres.[27] Numerous withdrawals were accomplished by lame duck Presidents, fueling the political fire around designations despite the fact that use of the Act has been distinctly bipartisan, with some of the most vigorous uses of the Act coming from Republicans.[28]

The Act authorizes the President to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments."[29] As part of a national monument, the President may reserve parcels of land from the public domain which "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[30] Conspicuously missing from the statute is any specification of procedure to create a national monument, beyond that the President shall "proclaim" one.[31] The Act is also silent as to whether a President may abolish a monument established by a previous presidential proclamation. No President has abolished a national monument, and no court has addressed whether the President has the authority to do so.

Much criticism of the Act centers on whether the President exceeds the statutory authority by proclaiming monuments of certain substance and acreage. Its scope was challenged soon after the Act's passage, but the United States Supreme Court gave a wide construction to the authority and has never overturned the designation of a monument.[32] However, despite longstanding precedent and Congressional acquiescence to executive national monument practice, some scholars still argue that certain monument proclamations are unlawful.[33] These arguments rely on a narrow reading of the original purpose of the Act as solely designed to protect objects of antiquity, rather than for impermissibly broad purposes such as "general conservation, recreation, scenic protection, or protection of living organisms."[34] Critics also argue that the designation of large monuments violates the Act's open-ended acreage limitation.[35] It is contended that the Act is an unconstitutionally broad delegation of Congress' power under the Property Clause.[36]

The presidential proclamation creating a national monument under the Act is also rarely the last word as to that monument's size and legal characteristics. Both Congress and the President have modified monuments established by earlier presidential proclamation—the Trump Administration is only the latest example.[37] Modifications include reductions in scope but also, commonly, Congress has enhanced protective designations for monuments. For instance, approximately half of our national parks were first designated as national monuments, including the Grand Canyon, Grand Teton, Zion, and Olympic.[38] In at least ten instances, Congress has outright abolished monuments created by the President.[39] The executive branch, however, has never outright abolished a monument.

The claim that many monument designations are "illegal"—either too large, inconsistent with the purpose of the Act, or otherwise—was the driving force behind calls for President Trump to rescind previous monument designations. Trump's Executive Order 13792 directed the Secretary of the Interior to review all monument designations or expansions under the

Antiquities Act since 1996 where the monument covers more than 100,000 acres, or "where the Secretary determines that the designation or expansion was made without adequate public outreach and coordination with relevant stakeholders."[40] The Secretary's charge was to consider each monument's compatibility with the Antiquities Act and the effects of the withdrawal on various uses of that federal land and surrounding communities, among other considerations.[41]

In response, the Department of Interior initiated the first-ever formal public comment period on monument designations under the Antiquities Act.[42] After receiving nearly three million public comments and issuing an interim report specific to the Bears Ears National Monument, Secretary of the Interior Ryan Zinke released a final report recommending modifications to ten monuments.[43] The Secretary's conclusions are aptly summarized as follows:

> (1) Monuments designated under the Antiquities Act were broadly and arbitrarily defined and in some instances mirrored broader land management legislation that had stalled circumventing the legislative process; (2) designating geographic landscape areas as objects of historic or scientific interest raises management questions that may be more appropriately regulated under FLPMA; (3) there is perception that monument designation was intended to prevent access and economic activity, including grazing, mining, and timber production as opposed to protect specific objects, and such designations may limit use of private land; (4) concerns have been raised by state, tribal, and local governments regarding lost jobs, access, and inadequate public involvement; and (5) large designations under the Act may provide less protection than applicable land-management authorities already in place and therefore undermine the intent of the Act.[44]

President Trump wasted no time diminishing the Bears Ears National Monument[45] and the Grand Staircase-Escalante National Monument,[46] issuing separate proclamations concurrent with the report's release. A broad coalition of federally recognized tribes, environmental groups, and others immediately filed suit alleging that President Trump's proclamations exceed presidential authority under the U.S. Constitution and Antiquities Act and that only Congress may diminish a national monument.[47]

President Trump's proclamations reduced in size, rather than outright abolished, the two monuments.[48] The Administration, however, is continuing to review other monument designations; its rhetoric around righting the perceived wrongs of prior administrations' land management decisions suggests further reductions or reversals could be in store.[49] This paper is not meant to parse the legality of monuments under review and does not wade into the nuanced legal arguments regarding reductions to Bears Ears and Grand Staircase-Escalation. Instead, it uses the hypothetical revocation of a national monument to explore the limits of presidential authority over federal land management decisions.

As I will explain, the exercise of presidential land management authority cannot rest on the perceived overreach of a predecessor. A successor may have political and legal gripes with a prior administration's withdrawals, but there is no on/off switch for these decisions, at least not under present authorities.

B. The Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act, passed on August 7, 1953, provides for federal jurisdiction over submerged lands of the outer continental shelf (OCS), a huge area defined as all submerged lands seaward of state coastal waters (three miles offshore) under U.S. jurisdiction.[50] OCSLA authorizes the Secretary of the Interior to lease those lands for mineral development.[51] It also grants the President broad authority to withdraw portions of the OCS from mineral leasing.[52]

The OCSLA withdrawal authority is limited to a particular federal action—mineral leasing—but affords the president more discretion than the Antiquities Act.[53] Section 12(a) allows the President to bar the disposition of title or rights to land or minerals under federal marine waters.[54] The president is not restricted to withdrawing "objects of historic or scientific interest" or the "smallest [land parcel] compatible with the proper care and management of the objects to be protected," as she is when proclaiming national monuments under the Antiquities Act.[55] Instead, the President can withdraw any sized area of OCS for any public purpose, making Section 12(a) a powerful tool for satisfying broader policy goals.[56]

Since 1953, six presidents have employed Section 12(a), withdrawing as much as several hundred million acres at a time.[57] Like the Antiquities Act, OCSLA is silent as to undoing actions taken under the withdrawal authority.[58] Interestingly, not all presidential withdrawals are permanent; some have been expressly time limited despite no textual distinction in Section 12(a) between a permanent or time-limited withdrawal.[59] While no president before Trump had reversed a permanent withdrawal under OCSLA, there have been several instances of modification and revocation of time-limited withdrawals.[60] Until the Trump Administration, neither permanent nor time-limited Presidential withdrawals under OCSLA had been tested by the courts.[61]

On April 28, 2017, President Trump issued an executive order (EO) titled "Implementing an America-First Offshore Energy Strategy."[62] Among other steps to enhance offshore energy development, the order revoked or modified four of President Obama's executive actions withdrawing portions of the outer continental shelf from mineral leasing.[63] President Obama had declared a policy of enhancing the resilience of the northern Bering Sea region and withdrawn from leasing the Norton Basin and St. Matthew-Hall Planning Areas.[64] President Trump revoked this order citing a need to "further streamline existing regulatory authorities."[65]

The Trump Order also effectively reversed three other expansive withdrawals of the outer continental shelf that Presi-

dent Obama accomplished through presidential memoranda.[66] Rather than explicitly revoke the Obama memoranda, the Trump Order merely replaced the language of the memoranda with a withdrawal provision limited just to "those areas of the Outer Continental Shelf designated as of July 14, 2008, as Marine Sanctuaries under the Marine Protection, Research, and Sanctuaries Act of 1972 . . . ."[67] Environmental organizations quickly filed suit making similar arguments to the challengers in the monument litigation: by exceeding Congress' delegation of authority to withdraw unleased lands under the OCSLA, President Trump violated the plain text of the statute and the constitutional doctrine of separation of powers.[68] In March 2019, the District Court of Alaska found that the Congress had not delegated to the president the authority to revoke a withdrawal under the OCSLA.[69] The court vacated the portions of the Trump Order revoking President Obama's prior withdrawals, holding that the withdrawals would remain "in full force and effect unless and until revoked by Congress."[70]

III. The Executive Authority to Withdraw Does Not Include the Power to Revoke a Withdrawal

As discussed above, President Trump has fully reversed several withdrawals under the OCSLA and signaled a desire to revoke monument designations under the Antiquities Act. His supporters argue that these actions are indistinguishable from modern Presidents' frequent modification and revocation of a predecessor's executive actions. This section explores what exactly the President accomplishes when she withdraws land from the public domain, in order to distinguish executive land withdrawals from executive actions taken pursuant to Article II powers. Since the President has no inherent constitutional authority to withdraw public lands, executive action under the Antiquities Act or OCSLA is confined to the underlying statutory authority. Reversing these actions is less consistent with familiar executive branch functions, and more accurately understood as a separate land action requiring express or implied delegation from Congress.

A. Distinguishing the Use of Executive Orders, Presidential Proclamations, and Presidential Memoranda in the Public Lands Context

Presidents utilize various written instruments to direct the Executive branch and implement policy. These include executive orders, proclamations, presidential memoranda, administrative directives, findings, and others. Most of the time, the President is free to choose the instrument she wishes to use to carry out the executive function.[71] While the Antiquities Act provides that the President may "declare by public proclamation" a national monument, neither that Act nor OCSLA specifies a particular form or procedure for the land withdrawal.[72]

To carry out land actions, Presidents have used executive orders, presidential memoranda, and presidential proclamations, sometimes interchangeably,[73] though any difference between these devices may be a matter of form rather than substance. As the Constitution contains no reference to executive orders, judges and scholars have been left to develop a legal and descriptive basis for the instruments from historical practice.[74] Though historical practice might suggest proclamations are more geared towards private individuals, while orders are more towards administration of government,[75] more recent accounts suggest that the instruments defy these distinctions too often for any differences to be legally significant.[76] Federal courts also tend to hold executive orders and proclamations to be "equivalent for the purposes of carrying out the President's legal authority."[77]

Just as the Constitution contains no definition of these instruments, it does not clearly authorize their issuance. The common thread, then, is that the execution and implementation of executive actions must stem from some express or implied legal authority.[78] The President, for instance, has issued a Thanksgiving Proclamation annually since 1863.[79] Though nobody is challenging the legal basis for this Proclamation, it likely emanates from Article II's vesting clause.[80] The bulk of executive action taken by the White House, as opposed to administrative agencies, emanates from Article II power. This would include declaring that it is the "policy of the United States to encourage energy exploration and production,"[81] or directing the Secretary of the Interior to perform a legal analysis of monument designations.

These actions, while referencing our public lands, are not acting upon them with legal force and effect. Arguments that the Article II executive function includes some inherent authority over public land have been rejected.[82] Executive orders, proclamations and memoranda to withdraw lands, then, must derive from express or implied statutory authority. A "one-way" delegation of authority—to withdraw land from, but not to return it to the public domain—is consistent with the Constitutional separation of powers.

B. A One-Way Executive Authority to Withdraw Lands is Permissible

In practice, Presidents freely revoke, modify and supersede their own orders or those issued by a predecessor. Executive actions, by their very nature, lack stability in the face of evolving presidential priorities.[83] It is a ritual of modern government that incoming Presidents reinstate or rescind President Reagan's 1984 executive order blocking foreign aid to organizations providing abortions.[84] Beginning with Gerald Ford's administration, presidents have actively issued, modified and revoked orders to assert control over and influence the agency rulemaking process.[85] That Thanksgiving Proclamation?[86] It's on thin ice each November.

Several commentators have argued that the executive power includes the authority to revoke executive actions taken under the Antiquities Act and OCSLA authorities. John Yoo and Todd Ganziano advocate a "general principle . . . that the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant *expressly* limits the power of revocation."[87] In their view, it is

rooted in the Constitution that "a branch of government can reverse its earlier actions using the same process originally used,"[88] and that "[n]o president can bind future presidents in the use of their constitutional authorities."[89] This leads them to suggest that "[i]t would be quite an anomaly to identify an executive directive or presidential proclamation that a subsequent president could not revoke."[90]

These principles might operate on the Article II executive function, but they cannot extend to executive land withdrawal authority, which has no roots in the Constitution. A Ninth Circuit case challenges the broad claim that a discretionary power to act includes a power to revoke.[91] The U.S. Attorney General had moved to denaturalize several recently naturalized U.S. citizens, arguing that the power to denaturalize is "inherent" to the power to naturalize, which the Attorney General derives from statute.[92] The court examined the statute, silent as to the matter of revocation of citizenship, and made a compelling analogy to the power of U.S District Courts to vacate their own judgments.[93] This seemingly "traditional inherent power" of federal courts to vacate their own judgments was nonetheless confirmed by Congress with an express rule.[94] The Ninth Circuit reasons that "[i]f [this power] needs confirmation by an express rule approved by Congress, it is too much to infer an analogous power in the Attorney General, for so weighty a matter as revocation of American citizenship, from silence."[95]

Where authority to act in the first place requires an express rule, as in executive action impacting public lands, a reviewing court should look for clear intent regarding the matter of revocation. The concept that what "one can do, one can undo," may be an intuitive one, but as the Ninth Circuit suggests, it is easily rebutted and should not control where the underlying authority is delegated to begin with:

> The formula the government urges, that what one can do, one can undo, is sometimes true, sometimes not. A person can give a gift, but cannot take it back. A minister, priest, or rabbi can marry people, but cannot grant divorces and annulments for civil purposes. A jury can acquit, but cannot revoke its acquittal and convict. Whether the Attorney General can undo what she has the power to do, naturalize citizens, depends on whether Congress said she could.[96]

We should be careful not to conflate Constitutional with statutorily delegated authority in the public lands context, as Yoo and Ganziano do.[97] A court examining President Trump's reversal of land withdrawals, then, should not be persuaded by instances where the President is permitted to undo certain Constitutional powers without Congressional authority.[98] Our approach to unilateral revocation under the President's appointment or treaty powers do not support some inherent executive authority to undo actions vested in another branch, such as Congress' plenary authority over public lands. Whether the President may reverse a predecessor's land withdrawal, therefore, "depends on whether Congress said she could."[99]

C. Revocation of a Land Withdrawal is a Separate Legislative Act

The sense that what "one can do, one can undo" may be a powerful one, but has no place in the public lands context, where the President is confined to specific delegations of authority. Executive action to undo a predecessor's land withdrawal requires express or implied authority. This section reaches a similar conclusion from a different angle, arguing that the act of returning withdrawn land to the public domain is not simply the inverse of withdrawing land in the first place. Rather, it has the characteristics of a separate legislative act, which requires a delegation of authority and an intelligible principle to guide the exercise of that authority.

Yoo and Ganziano argue that when Congress grants discretionary authority to issue regulations, Congress also confers the authority to substantially amend or repeal them.[100] They also suggest that reading the Antiquities Act to prevent Presidents from reversing earlier monument designations would read the Act to "micromanage" the discretion granted, "rais[ing] serious constitutional questions."[101] It would be laughable, on any reading, to suggest that the Antiquities Act micromanages Executive land withdrawal authority; indeed, the main criticism of the Act is that the authority delegated is too expansive. A power to revoke previous designations implicates entirely separate legislative goals, distinct policy questions, and would conflict with existing statutes.

A court should approach revocation of a withdrawal under the Antiquities Act or OCSLA as a decision with legislative character separate from the original withdrawal. In both statutes, Congress includes language to guide the President in her decision to remove land from the public domain, a decision with profound economic and environmental impacts. The inverse, returning land to the public domain, is not contemplated by the statutes and would involve a host of separate policy decisions not addressed by the statutory language guiding the original withdrawal.

President Trump directed the Secretary of Interior to review monument designations since 1996 with an eye for returning these lands to the public domain.[102] In the last twenty years, however, these lands have been integrated into a broader system of land management. Disentangling a national monument from this system not only removes legal protections of that land, but also erodes legal and economic structures that have grown up in surrounding communities by virtue of a monument's unique status. It would also negate funds appropriated by Congress over the years to improve and maintain the land for public use.[103] In short, revocation entails an entirely different cost-benefit analysis than the decision to withdraw land for the monument in the first place. This type of balancing is at the heart of Congress' legislative authority over public lands, and it can only delegate this authority with proper guidance.

The decision to revoke a monument designation would also conflict with several statutes articulating broad policies for management of monuments and other protected areas.

Amendments to the National Park Organic Act of 1916[104] make clear that national monuments are part of the National Park System,[105] and are fully covered by the general regulations protecting that System.[106] The various units of this System are a "cumulative expres[sion] of a single national heritage."[107] Furthermore:

> "[P]rotection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress."[108]

With the National Park Organic Act and subsequent amendments, Congress has imbued national monuments with purpose beyond the policy considerations guiding the Executive in withdrawing land under the Antiquities Act. Revoking a monument, and derogating these values, is a legislative act for Congress to take itself or to delegate with appropriating guiding principles.

Reading either the Antiquities Act or OCSLA to grant the executive authority to reverse previous withdrawals would also raise constitutional concerns under Nondelegation doctrine. The Supreme Court's Nondelegation doctrine prevents Congress from delegating its legislative authority to the executive branch without also providing an "intelligible principle" to guide its application.[109] The doctrine is rooted in separation of powers principles and intended to ensure Congress is making core policy choices as well as to facilitate judicial review of executive actions taken under delegated authority.[110]

Applied to the Antiquities Act and OCSLA, it is clear that the policies guiding land withdrawal would fail to provide adequate guidance for the decision to return the same land to the public domain. For instance, the Executive determines that a public resource is of "historic scientific interest" to justify monument designation under the Antiquities Act.[111] But can public land simply lose its historical or scientific interest? The two statutes are light on guidance to begin with (indeed, this is a valid criticism of the statutes and a reason for concern as the Executive identifies lands for withdrawal). A lack of guidance, however, should heighten concern about a decision to reverse a withdrawal, a legislative one with legal, economic, and environmental ramifications.

D. Reversing a Land Withdrawal Does Not Effectively Abolish an Act of Congress

Because the power to reverse a land withdrawal through executive action is not inherent to the power to withdraw land in the first place we would expect Congress to articulate some policy principles to guide the decision to return land to the public domain. This is notably distinct from the approach taken by the only existing legal authority on abolishing a national monument under the Antiquities Act, contained in a 1938 Attorney General opinion.[112] In the opinion for President Coolidge, the Attorney General reasoned that the executive action to withdraw land was in effect an act of Congress itself.[113] If one conceives of an executive order, or presidential proclamation as an act of Congress, then revoking that order or proclamation would effectively abrogate an act of Congress, something the President obviously cannot do.[114]

In 1924, President Calvin Coolidge proclaimed Castle Pinckney National Monument from a U.S. fort that had existed in the Charleston harbor since the early Nineteenth Century.[115] Fourteen years later, President Franklin D. Roosevelt wanted to abolish the monument and transfer the land to the control and jurisdiction of the War Department.[116] Attorney General Homer Cummings advised the President that he was without authority to issue the proposed proclamation revoking the monument.[117] The opinion borrowed heavily from an earlier 1862 Attorney General opinion regarding the President's power to return a military reservation to the public domain:

> A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will.[118]

The view that a land withdrawal made by the President under discretion vested in her by statute was in effect a withdrawal by the Congress itself pervades several earlier Attorney General opinions.[119] While I would reach the same outcome – requiring an express or implied delegation by Congress to revoke –the opinions rely on an outdated view of executive actions that will be updated if a court reaches the issue.

As noted above, executive actions taken pursuant to authority provided to the President by Congress are distinguished from orders based on the President's exclusive constitutional authority. Both are discretionary government functions. Both can be legislatively modified and nullified. And both, when based upon legitimate constitutional authority or statutory grants of power to the president, are equivalent to laws.[120] When an executive order conflicts with a statute, the statute takes precedence.[121] The validity of an executive action, then, is with reference to the underlying authority, but is not a stand-in for that authority where the Executive carries out a Congressional delegation.

Yoo and Ganziano are right that the 1938 Cummings Opinion is on uneven factual and legal ground.[122] The document is an outdated and unsatisfying guidepost for such a weighty issue, and it is unclear what influence the opinions will have on a reviewing court today.[123] On the one hand, Attorney General opinions are not binding on the President.[124] But statutes are, and as with jurisprudence, Congress can incorporate a legal interpretation of the Attorney General into a subsequent legislative schemes and ratify that interpretation. While a reviewing court today will likely disagree that President Trump is effec-

tively revoking an Act of Congress by reversing withdrawals under the Antiquities Act and OCSLA, it should be persuaded that executive action over public lands must derive from legislative authority.

IV. The Antiquities Act and OCSLA Cannot Be Read to Delegate Revocation Authority

The President has no inherent authority to revoke a land withdrawal. The authority to withdraw land in the first place emanates from Congress' Constitutional authority.[125] Whether a President may revoke a land withdrawal is properly understood as an executive action distinct from the original withdrawal itself. The lawfulness of that action depends on whether Congress intended her to have that power.[126]

A rough division of authority between Congress and the President has grown around specific statutes and long-term understandings.[127] Yoo and Ganziano argue that OCSLA and the Antiquities Act "*do not even attempt to limit* the president's power to reverse previous withdrawals."[128] This approach relies on their argument that possession of the authority to grant implies the authority to revoke. This theory is not only incorrect as a matter of law but is misplaced where the authority arose from Congressional delegation. It is also wholly inconsistent with Congress' treatment of executive withdrawal authority in other statutory schemes. Congress has (a) repudiated implied executive authority in the public lands context, and (b) demonstrated that it knows how to delegate revocation authority and has arguably ratified legal interpretations of limited executive authority under the Antiquities Act.

A. Congress has Repudiated Implied Executive Withdrawal Authority.

The Executive once exercised broad implied withdrawal authority, including an implied power to modify and revoke prior withdrawals. Beginning soon after the nation's founding, Presidents set aside land for numerous military bases and Indian reservations on the assumption that no statutory delegation of authority was needed.[129] In several instances, this assumption supported an implied power to modify or revoke the prior withdrawal.[130] For example, Presidents commonly eliminated or reduced the size of Indian reservations that had been established through executive order.[131] Eliminating and reducing Indian reservations was particularly controversial, since the withdrawal was not simply a protective action directed at the underlying land, but granted rights of occupancy and use to Indian communities.[132] The executive actions around reservations and oilfields were also categorically different from the withdrawals contemplated by the Antiquities Act and OCSLA. They were extremely granular actions, reflecting a local presence of the Executive in managing conflict between the Indian tribes and surrounding communities, as well as accommodating for development in the national interest, such as railroads and other public works.

As national policy toward public lands shifted from disposition to reservation, Congress conceded broad managerial authority to the executive in a series of statutes, including the Antiquities Act.[133] Congress' failure to repudiate earlier withdrawals also led the courts to infer acquiescence in some "implied nonstatutory authority . . . construed to fill all the interstices around express delegations."[134] A major Supreme Court case, *United States v. Midwest Oil Co.*,[135] upheld a withdrawal by President Taft that directly contradicted a recent statute, reasoning that "scores and hundreds" of executive orders establishing or enlarging Indian and military reservations and oil reserves had established an allocation of power.[136] The case came to stand for the proposition that presidential authority is stronger with respect to powers that Presidents applied expansively in a pattern of actions to which Congress has acquiesced.[137] Presidents continued to push the boundaries of delegated withdrawal authorities. [138]

Eventually, Congress reasserted control over withdrawals and reservations of public lands by limiting actions that could be taken by the executive branch. This included a policy of walking back executive authority to return withdrawn land to the public domain. For example, the National Forest Management Act provided that forest reserves could only be returned to the public domain by an act of Congress.[139] Then in 1976, Congress extinguished all non-statutory authority and most earlier statutory authority with the Federal Land Policy Management Act (FLPMA), replacing these authorities with new procedures for withdrawals.[140] FLPMA concluded an exhaustive review of federal land policy by the Public Land Law Review Commission, which reported to Congress in 1970 with an overall message of reasserting public control over executive withdrawal authority.[141] While earlier implied executive authorities are instructive, FLPMA's allocation of withdrawal authority between the Executive and Congress should control any present inquiry into the Antiquities Act and supplies a powerful background principle for interpreting OCSLA as well.

FLPMA expressly repealed the Executive's implied delegation of withdrawal authority as well as twenty-nine statutory provisions for executive withdrawal.[142] This acted on a principal recommendation by the review Commission that large-scale permanent or indefinite withdrawals should only be accomplished by an act of Congress.[143] The Commission also recommended that smaller-scale withdrawal authority remaining with the executive branch should be confined to specified purposes, governed by more specific procedures, open to public input, and generally of limited duration.[144] Despite these recommendations, Congress conspicuously left the Antiquities Act in place, with very limited discussion of why.[145] Congress also expressly exempted the "Outer Continental Shelf" from the FLPMA definition of "public lands," leaving OCSLA in place as well.[146]

In light of FLPMA, a court should be reluctant to find implied authority to revoke an executive action, particularly within statutory language that has withstood the review of legislators with an eye for eliminating implied authorities. There is no practice of executive reversal of land withdrawals under the Antiquities Act and OCSLA, and courts upholding implied

executive authority were only willing to do so in light of some practice in which Congress had acquiesced.

B. Congress Knows how to Delegate Revocation Authority and has Passed Up Opportunities to Amend the Antiquities Act and OCSLA

Congress knows how to delegate revocation authority when it wants to. Several turn-of-the-century statutes delegating withdrawal power to the President specifically included a provision allowing the President or the Secretary of the Interior to revoke a prior withdrawal. The Forest Service Organic Act of 1897 authorized the President to establish national forest reserves to "revoke, modify, or suspend" any past and future executive order or proclamation establishing a national forest.[147] Following a big fight about the controversial withdrawals of President Cleveland under earlier forest acts, Congress amended the statute to "remove any doubt which may exist pertaining to the authority of the President . . . to revoke, modify or suspend."[148] The President's express authority to revoke, modify, and vacate certain orders and proclamations establishing national forests remains today.[149]

Other examples of express revocation authority include Congress' 1901 amendment to the Federal Desert Land Act to authorize the Secretary of the Interior to restore withdrawn lands to the public domain after a period of time,[150] and the 1910 Pickett Act, which gave the President authority to "temporarily" withdraw public lands but also provided that those withdrawals were to "remain in force until revoked by him or an Act of Congress."[151] It is clear from these examples that both in the years leading up to the Antiquities Act and after its passage, Congress considered the difference between one and two-way withdrawal schemes in various contexts. To read an implied authority to revoke into the Antiquities Act or OCSLA would render the express revocation clauses in other statutory authorities as mere surplusage.[152]

FLPMA also created a process for the Secretary of the Interior to terminate several categories of prior executive withdrawals. With FLPMA, Congress did not expressly modify, revoke or extend previous withdrawals[153] but instead directed the Secretary of the Interior to review a substantial number of withdrawals and report to the President recommendations concerning their continuation.[154] The President would then report his recommendations to Congress, and the Secretary would be permitted to terminate any executive withdrawals unless Congress objected by a concurrent resolution within ninety days.[155] As of 1981, 233 withdrawals covering about 20.4 million acres had been revoked under this process.[156]

To reiterate, FLPMA expressly provided that the Secretary shall not modify or revoke any withdrawal creating a national monument under the Antiquities Act.[157] The House Committee on Interior and Insular Affairs report on the statute confirms it "would also specifically reserve to Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act." [158] This language is a clear signal that Congress was aware of the 1938 Attorney General opinion arguing that legislators retained sole authority to revoke a monument under the Antiquities Act.[159] And when "Congress is deemed to know the executive and judicial gloss given to certain language" a later statute comprehensively addressing the subject is persuasive that Congress has adopted the existing interpretation.[160] The House Report also alleviated concerns that FLPMA only restricted the Secretary of the Interior's authority to revoke monuments, while remaining silent as to the President's authority.[161]

There have been numerous proposals to amend the Antiquities Act over the last several decades, the most recent introduced on May 2, 2017.[162] In reviewing these proposals, I did not locate a single attempt to expressly authorize the President to unilaterally revoke a monument designation. If FLPMA did not confirm otherwise, we might infer that Congress already assumes the President has this authority. Instead, the bulk of the proposals have been to increase Congress' oversight over the designation and management of national monuments.[163]

V. Revocability and Our Environmental Policy Objectives

The foregoing analysis demonstrates that, as a matter of law, the President cannot revoke a unilateral land withdrawal under the Antiquities Act or OCSLA. This section raises normative arguments for reaching the same outcome, particularly in light of these statutes' utility in addressing contemporary environmental policy objectives such as climate change adaptation and mitigation.

Congress enacted the Antiquities Act and OCSLA with very different purposes, and their Presidential withdrawal authorities are different tools in contemporary environmental policy. The Antiquities Act was motivated primarily by concern for losing public land resources and historical artifacts before Congress could act. The withdrawal authority was central to this purpose. OCSLA was a much broader legislative scheme, providing for federal jurisdiction of the outer continental shelf and authorizing the Secretary of Interior to lease those lands for mineral development. The withdrawal provision carries nearly identical legal effect to its analogous provision in the Antiquities Act, though it is often obscured by the broader purposes of OCSLA.

The President may not proclaim a national monument under the Antiquities Act with the express purpose of addressing climate change, for instance. However, protecting areas deemed to have "historic or scientific"[164] interest under the Act can nonetheless have economic and environmental benefits consistent with our climate change goals. Proclaiming a national monument brings natural areas under the purview of an agency, generally the National Park Service, Forest Service, or Fish and Wildlife Service, with expertise in long-term conservation of natural resources and unique ecologies. These protected areas serve as carbon sinks and havens for biological diversity. Most importantly, the effect of monument status is also to freeze mineral extraction and other development there, keeping fossil resources in the ground.

Studies show that the old vulnerability of antiquities looting has given way to the new vulnerability of climate change for many of our country's most iconic and historic sites. A report by the Union of Concerned Scientists chronicles how many of these sites are particularly at risk from rising sea levels, more frequent wildfires, increased flooding, and other damaging effects of climate change. [165] The Antiquities Act would not seem to permit land withdrawal for the sake of creating a carbon sink to keep fossil fuels in the ground. However, once an area is deemed to have "historic or scientific interest" under the Act, the damaging effects of climate change should be a consideration in taking protective measures.

As previously discussed, OCSLA permits the President to withdraw areas of the outer continental shelf from mineral leasing for any purpose.[166] President Obama's Executive Order on the North Bering Sea relied on OCSLA to create a "climate resilience area."[167] The corresponding withdrawal of outer continental shelf lands "furthere[d] the principles of responsible public stewardship entrusted to [the White House] and . . . the importance of the withdrawn area to Alaska Native tribes, wildlife, and wildlife habitat, and the need for regional resiliency in the face of climate change."[168]

The controversy surrounding withdrawals under both statutes is understandable and extends much deeper than disagreement over how, if at all, to let our concern for climate change drive our decisions around resource extraction and natural area preservation. Outcry over President Obama's withdrawals and President Trump's reaction reflect both real political disagreement over federal land management priorities, as well as valid concern for the reach of executive authority over public lands. Unilateral executive authority to reverse these actions is improper regardless of the claim and would only seem to further aggrandize the President's public lands authority.

One observation is that a one-way authority to protect lands, but not to undo these protections, plays to the Executive's advantages while avoiding its faults. With the Antiquities Act, Congress recognized that the Executive could act more nimbly to identify and protect valuable resources. If it disagreed with a proclamation, Congress remained free to undo or modify the President's action, albeit subject to a possible presidential veto.[169] Grand Staircase-Escalante National Monument, with a boundary currently in legal limbo, is a good example. President Clinton withdrew the lands after legislative proposals for varying degrees of legal protection cleared House and Senate committees but ultimately failed.[170] Deliberative approaches to our public resources are preferable, but there is a fine line between productive deliberation and political gridlock. Gridlock might prevent us from taking any protection action at all, with irreversible consequences for natural and cultural resources.

We should be less concerned about gridlock in the reverse, to return lands to the public domain. Congress's failure to take protective action might be explained by the diffusion of pro-environment interests. By comparison, industry interests advocating for development and resource extraction of public lands are relatively concentrated. This dynamic supports a one-way executive authority to protect, overcoming gridlock to preserve the status quo and putting the onus on concentrated interests to make the case for development. Moving remedial legislation through both chambers can be a struggle[171] and ultimately requires the President's signature, but Congress has successfully reversed monuments and other withdrawals in the past.

It is also important to note that President Obama's use of the Antiquities Act and OCSLA was much more deliberative than critics would suggest. The designation of Bears Ears National Monument is a good example. The monument was first discussed in the 1930s as part of an unsuccessful proposal to establish an Escalante National Monument.[172] Several years ago, an Inter-Tribal Coalition unsuccessfully petitioned Utah's Congressional representatives.[173] The tribes then successfully petitioned President Obama, whose administration undertook extensive study and community engagement before making proclaiming the monument almost two years later.[174] The process exhibits some of the unique tools at the Executive's disposal in making withdrawal decisions, including field offices and experienced agency staff throughout the West. The Executive branch is also arguably better suited than Congress to integrate the policy considerations around withdrawal into the broader scheme of public lands authorities the agencies implement.

Singing the praises of executive withdrawal authority – exercising agency expertise, grassroots community engagement, and others – might undercut arguments that executive reversal of land withdrawals would be too drastic. Presumably, the reversal of a predecessor's monuments or outer continental shelf withdrawals would reflect patience, sound science and a balancing of stakeholder interests. Unfortunately, President's Trump's proclamations and the underlying review of monument designations by the Interior Department have none of these qualities. They are starkly political and evidence a concerning preoccupation with development our fossil fuel resources at a time when most economic and environmental assessments suggest leaving them in the ground.

A final justification for a one-way executive withdrawal authority, then, is that we cannot afford to play politics with our public resources. The benefits of protective measures under the Antiquities Act and OCSLA come in their stability, particularly with respect to climate change. National monuments are shown to have significant economic benefits over time, and these benefits can far outweigh the extractive value of the resources they hold.[175] However, it takes time for surrounding communities to invest in an economy of conservation, just as environmental benefits such as preserving biodiversity or a carbon sink, or the scientific research these resources enable, are measured not in years but lifetimes. It is in recognition of these long-term benefits that monuments have staying power and are frequently expanded and enhanced by Congress rather than reversed. We will never take full advantage of what Antiquities Act or OCSLA withdrawals have to offer if each Presidential election brings with it the specter of reversal for these unique places and the communities they support.

VI. Conclusion

The ongoing debate over executive land withdrawal authority implicates legal and practical considerations of great importance. As this paper has argued, President Trump's unprecedented steps to reverse the protective measures of his predecessors – not only President Obama but Presidents Bush, Clinton, and potentially others – have overstepped his existing legal authority. Congress could amend the Antiquities Act or OCSLA to expressly permit executive reversal, but this would further aggrandize executive authority over public lands. In this way, a power to revoke suffers from the same criticism that animates core opposition to the withdrawal authority to begin with: unilateral executive action has the potential to be disruptive and unaccountable in either direction. In considering its response to President Trump's recent actions, then, Congress may wish to update the Antiquities Act and OCSLA to clarify and modernize the scope of withdrawal authority. But in so doing, Congress should not be persuaded that the power to "do" requires the power to "undo" to be effective.

Endnotes

1 54 U.S.C. § 320301 (2012).
2 43 U.S.C. §§ 1331–1356 (2012).
3 *See* Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429 (May 1, 2017) (directing the Secretary of the Interior to review all Presidential designations or expansions of designations under the Antiquities Act made since January 1, 1996, where the designation or expansion covers more than 100,000 acres).
4 Implementing an America-First Offshore Energy Strategy, 82 Fed. Reg. 20,815, 20,817 (May 3, 2017) (reversing President Obama's January 27, 2015, and December 20, 2016, withdrawals in the Arctic and Atlantic Oceans).
5 *See* League of Conservation Voters v. Donald Trump, No. 3:17-cv-00101-SLG, 2019 WL 1431217 (D. Alaska, Mar. 29, 2019) (concluding that Section 12(a) of the OCSLA permits a president to withdraw lands from disposition but not to revoke a prior withdrawal). There are several cases challenging the reduction of Grand Staircase-Escalante Monument. *See* Wilderness Soc'y v. Trump, Case No. 1:17-cv-2587-TSC (D.D.C. Dec. 4, 2017); Grand Staircase Escalante Partners v. Trump, Case No. 1:17-cv-02591-TSC (D.D.C. filed Dec. 4, 2017). Five federally recognized tribes are challenging the reduction to Bears Ears National Monument. Hopi Tribe v. Trump, Case No. 1:17-cv-02590-TSC (D.D.C. Dec. 4, 2017).
6 *See infra* Part II.
7 *See infra* Part III.
8 *See infra* Part III.
9 *See infra* Part IV.
10 *See infra* Part IV.
11 *See infra* Part V.
12 *See infra* Part VI.
13 U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have the Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").
14 *See generally* Charles F. Wheatley, Study of Withdrawals and Reservations of Public Domain Lands (1969).
15 *Id.* at 2.
16 *Id.* at 1.
17 *Id.* at A-4, A-5.
18 *Id.* at 1.
19 *See infra* Part IV (discussing the Federal Land Policy Management Act).
20 Specific actions to "dispose" of the public domain included homestead laws and government sales to dispense cheap land, mining laws to open mineral wealth, gifts of free land to railroads and land grants to new states. Withdrawing specific lands from disposal was "to become an important means of accomplishing federal purposes or policies when disposal laws threatened to sweep too broad a brush." *See* David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands, 22* Nat. Resources J. 279, 282–83 (1982). The creation of Yellowstone National Park as a "pleasuring ground" on a large and remote tract of federal lands in Wyoming in 1872 is widely regarded as the beginning of the modern federal lands systems. *See* George Coggins, Federal Public Land and Resources Law 103, 106 (6th Ed. 2007).
21 *See* Getches, *supra* note 20, at 179 (listing early statutory authorities for executive withdrawals of land for Indian reservations, military installations, timber lands to preserve resources for the military, town sites, salt springs, mineral deposits, and other purposes).
22 *See id.* By the end of the nineteenth century, sixty-seven percent of the original public domain outside Alaska had been transferred to private ownership, but 473,836,402 acres were still owned by the United States. *Id.* The amount of land remaining in the public domain was reported as of June 30, 1904 by the Public Lands Commission. *See* S. Doc. No. 189, 58th Cong., 3d Sess. 139, 13 (1905).
23 *See infra* Part V.
24 *See infra* Part IV(B).
25 Getches, *supra* note 20, at 300.
26 *See Antiquities Act 1906–2016: Maps, Facts, and Figures,* Nat'l Parks Serv. Archeology Program, https://www.nps.gov/archeology/sites/antiquities/MonumentsList.htm (last visited April 7, 2019) (overviewing the National Park Service's chronological list of monuments created by Presidents from 1906 through September 15, 2016).
27 Carol Hardy Vincent, Cong. Research Serv., National Monuments and the Antiquities Act (2016).
28 *See id.* (noting that Presidents T. Roosevelt, Taft, Hoover, and G.W. Bush are the more prominent Republican users of the Act).
29 54 U.S.C. § 320301(a) (2012). The full text of the delegation reads: "*Sec. 2.* That the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may 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: Provided, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States." *Id.*
30 *Id.* There does not appear to be a functional difference between a "withdrawal" and "the reservation of parcels thereof."
31 *Id.*
32 *See* Roberto Iraolo, *Proclamations, National Monuments, and the Scope of Judicial Review under the Antiquities Act of 1906, 29* Wm. & Mary Envtl. L. & Pol'y Rev. 159, 172–174 (2004) (providing an exhaustive discussion of Supreme Court and lower court cases confronting challenges to national monument proclamations as well as the limited scope of judicial review over presidential proclamations under the Antiquities Act).
33 *See generally* John Yoo & Todd Ganziano, Presidential Authority to Revoke or Reduce National Monument Designations (2017) (contending Congress did not intend for the Act to be used at such a massive scale by the Executive).
34 *See* Iraolo, *supra* note 32, at 160, 161 (suggesting these broad purposes are more appropriate for a national park or designation established by Congress).
35 *See id.* at 160 (asserting that large monuments violate the Antiquities Act because the President's authority to determine size was intended to be limited).
36 *Id.* at 161 (referencing Congressional power under U.S. Const. art. IV § 3, cl. 2 to dispose of and make all needful Rules and Regulations respecting the Territory or Property belonging to the United States).
37 Presidents have both enlarged and diminished monuments in a handful of cases, and it is unclear whether these changes were legally authorized. It

continued on page 27

Can the Expansion of 45Q Effectively Spur Investment in Carbon Capture?

*Shannon Zaret**

Carbon capture technologies play a critical role in the global effort to mitigate carbon dioxide (CO_2) emissions.[1] Even with significant advancements in energy efficiency and an increase in renewable energy generation, the international community will not be able to meet critical climate goals without a strong carbon capture portfolio.[2] Moreover, it is one of the few technologies capable of reducing emissions from the fossil fuel industry—which is expected to remain a significant player in the energy sector well into the middle of the century.[3] Despite this, there have been few federal incentives for carbon capture, and those that exist have proven largely insufficient for supporting commercial deployment.[4] The 115th Congress attempted to address these issues by reforming and expanding incentives for investment in carbon capture through the passage of the Bipartisan Budget Act of 2018 (Act).[5] However, if this new framework is to have any real-world value, it must provide financial certainty to those willing to invest in carbon capture technologies. This article will argue that the success of these incentives hinges on a federal interpretation that is both in line with Congress's intent to stimulate private sector investment, and closely mirrors that of the similar, previously enacted solar tax credit.

Enacted on February 9, 2018, the Act includes a provision designed to extend and reform Section 45Q of the Internal Revenue Code, which provides tax credits for power plants and industrial facilities that utilize carbon capture technologies.[6] The original version of Section 45Q, which was enacted as part of the Energy Improvement and Extension Act of 2008, was much narrower in scope. As originally authorized, the credit was only available for two types of capture projects: ten dollars per metric ton of CO_2 captured through enhanced oil recovery and twenty dollars per metric ton of CO_2 captured through geologic storage.[7] Qualifying projects were required to capture a minimum of 500,000 metric tons of CO_2 before they were eligible to receive the credits and the entire program was set to expire once it met its seventy-five million metric ton cap.[8] Critics argued that this framework was largely ineffective in spurring investment due to the financial uncertainty created by the value, minimum eligibility requirements, and program cap.[9] Developers feared little return on their investment as the value of the credit was too low to recoup project costs and the program could potentially run out of funds long before the facility was up and running.[10] The program also excluded many other viable carbon capture projects that might attract additional investment.[11]

As amended, the new Section 45Q represents a serious attempt by Congress to broaden the credit's applicability and to make the credit more attractive for investors.[12] The new language of the Act specifically directs the Treasury Department to increase the value of the tax credit over a ten-year period, after which it will be adjusted to increase with inflation.[13] In addition, Congress authorizes Treasury to remove the cap on the program so that credits are not applied on a first-come first-served basis and to expand eligibility to include additional industries that capture and utilize carbon.[14] While this greater financial certainty is expected to usher in billions of dollars in investment, successful implementation will be supported by Treasury's interpretation of a number of provisions that Congress left open for clarification.

For example, the Act's new language provides that facilities that begin construction prior to January 1, 2024, are eligible to claim the tax credit for up to twelve years after the carbon capture equipment is placed in service.[15] This change allows investors to start earning credits as soon as construction begins. Therefore, Treasury's interpretation of what it means to "begin construction" can have significant implications for project developers and investors.[16] Knowing when a project has officially begun construction with respect to the program's eligibility ultimately facilitates the development of project timelines that maximize a firm's eligible tax credit rate and helps reduce financial risk to companies who are interested in bidding on construction projects in the near future. If this tax credit cannot be utilized by commercial developers, it has no real-world value. Therefore, this provision should be interpreted through the lens of Congress's intent to improve financial certainty for investment in carbon capture technologies.

A careful examination of the history of the similar solar tax credit guaranteed through the 2016 Consolidated Appropriations Act (Bill) offers a useful precedent.[17] Like the recent expansion of 45Q, Congress had elected to move the eligibility requirement away from the "placed in service" standard to "beginning construction" to increase financial certainty for investors.[18] Following the passage of the Bill in December 2015, the Internal Revenue Service issued Notice 2018-59, which clarified the meaning of the term "beginning of construction" in Section 48 of the Internal Revenue Code.[19] It outlined two methods by which taxpayers could evaluate whether they had begun construction with respect to tax credit eligibility: (1) engagement in significant physical work either directly or contractually (i.e., Physical Work Test) or (2) five percent of the ultimate tax basis of the project has already been paid or incurred (i.e., Five Percent Safe Harbor standard).[20] Both

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standards clarify what preliminary activities qualify as work of a significant nature to aid developers in creating project timelines that will increase their likelihood of qualifying for the tax credit.

With the expansion of 45Q, Congress has made clear its intent to minimize any uncertainty and undue financial risk for carbon capture. Similar to the expansion of the solar tax credit, they have done so by shifting the credit's eligibility determination to earlier in the development process so that investors can maximize their return.[21] Thus, similar guidance that is widely understood and accepted by industry and investors should apply here, and Treasury should include specific examples that illustrate work of a significant nature in the context of carbon capture. Once guidance is in place, the Act would then provide a meaningful incentive to increase the development of carbon capture facilities.

While additional federal incentives could help complement the recent expansion of 45Q, it still remains the most significant program for encouraging private investment in carbon capture deployment to date. However, Treasury must provide clear guidance if the tax credit is to offer any meaningful benefit to the carbon capture industry. Until Treasury does so, the interpretation of Congress' intent with regards to the similar solar credit should be used as a model for continued progress with the carbon capture industry.

Endnotes

1 Peter Folger, Cong. Research Serv., R44902, Carbon Capture and Sequestration (CCS) in the United States 2 (2018) (referring to the process of capturing waste CO_2 from a variety of power and industrial sources and either reusing or safely storing it so that it will not enter the atmosphere).

2 Int'l Energy Agency, Five Keys to Unlock CCS Investment 4 (2017), https://www.iea.org/media/topics/ccs/5KeysUnlockCCS.PDF (noting that limiting future temperature increases to two degrees Celsius will require around 760 gigatonnes of CO_2 emission reductions across the energy sector between now and 2060).

3 Intergovernmental Panel on Climate Change, Special Report on Carbon Dioxide Capture and Storage 3, 9-10, 111 (2005), https://www.ipcc.ch/site/assets/ uploads/2018/03/srccs_wholereport-1.pdf.

4 Carbon Utilization Research Council, IRC § 45Q Carbon Sequestration Tax Credit Reform (2018) http://www.curc.net/webfiles/45Q%20Press%20Release/45Q%20Background%20-%20February%202018.pdf.

5 Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. (2018). Sen. Heidi Heitkamp originally introduced the Act to the Senate on July 12, 2017 as Senate S. 1535, The Furthering carbon capture, Utilization, Technology, Underground storage, and Reduced Emissions Act (FUTURE Act). The Act was included in Senate Finance Committee Chairperson Orrin Hatch's (R-UT) larger tax extenders bill, S. 2256, before finally gaining inclusion in H.R. 1892, the Bipartisan Budget Act of 2018.

6 *Id*. § 41119.

7 Emergency Economic Stabilization Act of 2008, H.R. 1424, 110th § 115 (2008) (adding the Energy Improvement and Extension Act, which provided tax credits for carbon capture).

8 *Id*. § 1(c).

9 Energy Futures Initiative, Advancing Large Scale Carbon Mgmt.: Expansion of the 45Q Tax Credit 8 (May 2018), https://static1.squarespace.com/static/58ec123cb3db2bd94e057628/t/5b0604f30e2e7287abb8f3c1/1527121150675/45Q_EFI_5.23.18.pdf.

10 *Id*.

11 *Id*.

12 FUTURE Act, S. 1535, 115th Cong. § 45Q (explaining that the FUTURE Act would expand the scope of the 45Q tax credit provision and was eventually incorporated into the Bipartisan Budget Act of 2018).

13 Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. § 2 (2018).

14 *Id*. § 2(a)-(c).

15 *Id*. § 2(d).

16 *Id*. § 2(d)(1).

17 Consolidated Appropriations Act of 2016, H. R. 2029, 114th Cong. § 303(a) (2015).

18 Letter from Senators Cantwell & Heller to The Hon. David J. Kautter, Assistant Secretary for Tax Policy, U.S. Dep't of the Treasury (June 7, 2018) (on file with Novogradac & Co.).

19 Internal Revenue Serv., Notice 2018-59, Beginning of Constr. for the Inv. Tax Credit Under Section 48 (June 22, 2018), https://www.irs.gov/pub/irs-drop/n-18-59.pdf.

20 *Id*. at 2.

21 Bipartisan Budget Act of 2018, H.R. 1892, 115th Cong. § 2 (2018).

Jam v. IFC:
One Step Forward, Two Steps Back?

*Nicholas Johnson**

Jurisdictional questions often arise in cross-border development lawsuits. Claims against international organizations and foreign sovereigns, however, are especially challenged by broad immunity regimes.[1] A recent case before the Supreme Court, *Jam v. International Finance Corp*.,[2] reignited this debate in the October 2018 term, and the February 2019 decision established a new standard for proceedings against international organizations.[3] The Supreme Court decided that instead of referencing a historical and absolute immunity from suit for sovereigns based in common law, the immunities extended under the International Organization Immunities Act of 1945 (IOIA) will now mirror the more restricted statutory immunities enumerated in the Foreign Sovereign Immunities Act of 1976 (FSIA).[4] The decision, however, took the litigation one step forward and two steps back. Although the suit is no longer barred by immunity, the ultimate outcome of the case, and future cases like it, remains far from clear because the Court did little to clarify the mixed case law surrounding sovereign commercial act exceptions.[5]

The primary question before the Court was whether the IOIA—which grants international organizations the "same immunities from suit . . . as is enjoyed by foreign governments"—should be based on the common law definition of foreign sovereign immunity as understood in 1945 or whether the immunities are linked to statutory foreign sovereign immunities and remain at parity with the modern FSIA.[6] Notably, the FSIA was enacted after the Department of State initiated a policy shift from recognizing absolute sovereign immunity at the time of the IOIA to a form of restricted immunity in 1952.[7] Under the new theory, foreign sovereigns were presumed to have immunity from suits related to their sovereign acts but not for their commercial acts.[8] This theory was then codified into law with the FSIA and the judicial branch was tasked with interpreting when a foreign sovereign could be sued based on the enumerated exceptions.[9]

In the present case, the petitioners were a group of farmers and fisherman who lived in a region in India that was environmentally degraded by an energy project financed by the International Finance Corporation (IFC) and implemented by a local contractor under IFC loan agreements.[10] The IFC had required that the company follow a specific environmental and social action plan to protect the surrounding area in its loan agreement; the IFC also maintained the right to revoke funding if the company did not comply.[11] An IFC internal audit report following the project found that the local contractor had not complied with the protections plan and also criticized the IFC for inadequately supervising the project.[12] This internal audit report became an impetus for the petitioners to sue the IFC in the Federal District Court for the District of Columbia which followed the United States Court of Appeals for the District of Columbia's precedent by upholding the IOIA absolute immunity standard and dismissing the suit.[13]

Now that the Supreme Court remanded and decided that the IOIA will incorporate the FSIA restricted immunity, the exceptions to immunity will have to be reinterpreted and re-litigated in the new context of international organizations.[14] For the relevant commercial activity exception discussed in the present case, "a foreign government may be subject to suit in connection with its *commercial activity* that has *sufficient nexus* with the United States."[15] Courts have established further case law on this issue, but the record is unclear and the cases referenced in the opinion are filled with unsettled questions about the commercial activity and sufficient nexus elements.[16]

In its opinion, the Supreme Court twice referenced the U.S. Government's oral argument and amicus brief in support of the petitioner to suggest that future cases would not succeed at trial even if the Court linked the IOIA to the FSIA; however, this seems far from certain.[17] On the issue of commercial activity, the Court concluded that "[a]s the Government suggested . . . the lending activity of at least some development banks . . . *may not qualify* as 'commercial' under the FSIA."[18] On the issue of nexus to the United States, the Court concluded "the Government stated that it has *'serious doubts'* whether petitioners' suit . . . would satisfy the 'based upon' requirement."[19] Following this analysis, the Court concluded that "restrictive immunity *hardly means unlimited exposure* to suit for international organizations."[20] The language used in the opinion notably avoids committing to one conclusion on whether the commercial-activity or sufficient-nexus tests will ultimately allow the IFC to maintain immunity in the present case.

Serious doubts and generalizations aside, the legal questions left unanswered in the Court's past opinions on commercial act exceptions to the FSIA now carry over into cases against organizations subject to the IOIA. As *Jam v. International Finance Corp.* is remanded for further proceedings, it will again raise serious questions about sovereign and international organization immunity that will have broad consequences beyond the present case.[21]

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continued on page 30

FERC Ruling Undermines Energy Federalism and Arbitrarily Targets Mid-Atlantic Region Renewables

*Philip Killeen**

Part II of the Federal Power Act (FPA) requires that all prices set for the sale of electricity affecting interstate commerce between electrical utilities be "just and reasonable."[1] Pursuant to this requirement, the FPA authorizes the Federal Energy Regulatory Commission (FERC) to suspend such electricity sales prices upon finding that they unduly disadvantage or discriminate between locations or types of power plants.[2] In assigning this limited jurisdiction to the federal government, and by explicitly reserving to the states the exclusive jurisdiction over the mix of power plants supplying electricity demand, the FPA mandates a cooperative federalism model of electricity sector regulation.[3]

A recent FERC ruling in *Calpine Corp. v. PJM Interconnection, LLC*[4] expansively interprets federal regulatory authority under the FPA, asserting that state subsidies for clean energy provide grounds for FERC to suspend electricity price-setting activity.[5] This Article argues that FERC's ruling in *Calpine* not only undermines the FPA's federalist structure, but also arbitrarily and capriciously penalizes state support for renewable and nuclear energy while permitting historic and ongoing state support for fossil-fuel based electricity. By rejecting states' legitimate preferences for low emissions electricity, FERC's *Calpine* ruling limits states' ability to mitigate climate change by reducing greenhouse gas emissions from the electricity sector. These efforts are particularly important at a time when federal leadership on climate change is conspicuously absent.[6]

I. The Federalist Balance in Electricity Sector Regulation

While founded as vertical monopolies, electric utilities today exist in a nationally interconnected market.[7] Utilities have dramatically improved service reliability and reduced operating costs by sharing power generation, transmission, and distribution infrastructure in regional electrical grids.[8] FERC has exercised its jurisdiction over the resulting interstate commerce by mandating the formation of regional transmission organizations (RTOs) to coordinate, control, and monitor regional electrical grids.[9] Among other roles, RTOs satisfy electricity demand across their grid by operating auctions in which electricity generation companies (GENCOs) compete to sell electricity to utilities at the lowest price.[10] RTOs set a flat "clearing" price received by all GENCOs at the lowest bidding price that satisfies the demand for the entire network.[11]

Exercising their concurrent jurisdiction over in-state power plants, the District of Columbia and ten of the thirteen states in the Mid-Atlantic region RTO, PJM, implemented Renewable Portfolio Standards (RPS).[12] RPS programs require that utilities serving the state source a specified percentage of their electricity supply from specified renewable and nuclear energy resources.[13] To meet RPS targets, state governments and utilities offer a combination of subsidies to renewable and nuclear energy GENCOs, including rebates, tax incentives, and credits.[14] In *Calpine*, a natural gas GENCO filed a complaint with FERC claiming PJM states' RPS subsidies "artificially suppress" PJM electricity prices by allowing "uncompetitive" renewable and nuclear energy GENCOs to submit bids that do not reflect their actual costs.[15] FERC commissioners subsequently ordered PJM to "mitigate" the effect of state renewable energy subsidies in the interstate electricity market.[16]

II. FERC's *Calpine* Ruling Undermines State Jurisdiction Over Intrastate Electricity Generation

In *Hughes v. Talen Energy Marketing, LLC*,[17] the Supreme Court emphasized that, given the interconnected nature of the modern electric grid, FERC's interstate regulations and states' intrastate regulations will inevitably affect each other.[18] These crossover impacts are not only permissible but intended under the FPA's federalist structure; the only limitation is that neither sovereign may intentionally target the other's jurisdiction.[19] The mere existence of crossover impacts is not sufficient to show intentional targeting; instead, to show that a state overreached its jurisdiction, a plaintiff GENCO must prove that the state directly conditioned or "tethered" the GENCO's subsidy eligibility on supplying electricity through an RTO.[20]

The RPS subsidies at issue in *Calpine* do not satisfy the *Hughes* intentional targeting test. The RPS subsidies are distinguished from other state energy policies rejected by FERC and courts because they neither required subsidized GENCOs to submit bids that clear PJM's capacity market auction nor guaranteed those GENCOs an electricity price distinct from the interstate wholesale clearing price set by the RTO.[21] In this regard, the RPS subsidies are neither intentionally targeted at RTO electricity markets under federal jurisdiction nor "tethered" to GENCO participation in PJM's capacity market, and thus fall squarely within state jurisdiction. In ruling that RTOs may frustrate state subsidies for in-state power plants not directly tied

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to RTO market participation, FERC's *Calpine* ruling implies an unlimited federal jurisdiction over GENCOs, which was not contemplated by FPA's statutory structure.

III. FERC's *Calpine* Ruling Arbitrarily Targets Renewable and Nuclear Energy.

Regardless of its exercise of jurisdiction, FERC's application of the FPA's "just and reasonable" provision in *Calpine* to overturn PJM states' RPS subsidies for renewable and nuclear energy is arbitrary and capricious.[22] FERC's mandate to ensure RTO electricity wholesale rates are "just and reasonable" is, in essence, an obligation to reflect the price that an efficient market would produce.[23] FERC's *Calpine* ruling emphasized that state RPS subsidies threaten the integrity of PJM's capacity market because they allow certain GENCOs to submit suppressed bids in PJM capacity market without competing on a comparable basis with "competitive" resources.[24] However, FERC's *Calpine* ruling arbitrarily ignores the market distorting effects of longstanding state and federal subsidies for fossil fuel-based electricity generation.[25] These subsidies have propped up uneconomical and aging fossil fuel power plants by allowing fossil fuel GENCOs to submit suppressed bids into RTO capacity markets.[26] A reasonable and historically consistent application of FERC's *Calpine* standard, therefore, would require PJM to mitigate states' longstanding subsidy support for fossil fuel-based electricity, not just its newer subsidy support for renewable and nuclear energy.

More fundamentally, however, FERC's *Calpine* ruling arbitrarily ignores that government subsidies reflecting the relative environmental benefits of low-emissions electricity generation are essential to reaching the efficient market outcome mandated by the FPA.[27] Without subsidy programs encouraging low-emissions electricity generation, RTO markets will continue to produce inefficient outcomes for the U.S. electrical grid and the public.[28] Furthermore, emissions credits for renewable and nuclear energy GENCOs, like those at issue in *Calpine*, are awarded based on the positive environmental attributes of the electricity eligible GENCOs produce, rather than based on the value of that electricity in a RTO market.[29] Since these credits are traded in secondary markets wholly separate from RTO electricity auctions and reflect the environmental, rather than economic, value of electricity generation, they are effectively untethered to wholesale electricity markets under federal jurisdiction.[30]

IV. Conclusion

Consistent with the federalist design of the FPA and its interpretation of "just and reasonable" electricity prices in RTO markets, FERC should permit PJM states' legitimate pursuit of a cleaner and more economically efficient electricity resource mix. By failing to do so, FERC's *Calpine* ruling curtails essential state leadership on climate change.

Endnotes

1 16 U.S.C. § 824d(a) (2012).

2 *See* 16 U.S.C. § 824d(b) (distinguishing federal jurisdiction over prices for electricity sales across state lines between utilities (*interstate wholesale* rates) from state jurisdiction over prices for electricity sales within a state between a utility and customer (*intrastate retail* rates)).

3 *See* 16 U.S.C. § 824(b)(1); Hughes v. Talen Energy Marketing, LLC, 136 S. Ct. 1288, 1299-1300 (2016) (Sotomayor, J. concurring) (emphasizing the importance of preserving states' regulatory role to meeting the Federal Power Act's goal of ensuring a sustainable supply of efficient and cost-effective electricity).

4 163 F.E.R.C. 61,236, 2018 WL 3360507 (2018).

5 *See id.* at *35-37 (holding that subsidies provided by states to support the entry and continued operation of renewable and nuclear energy generation facilities in the wholesale market threatens the integrity and effectiveness of the PJM interstate electricity capacity market).

6 Shortly after being inaugurated, President Trump initiated U.S. withdrawal from the Paris Climate Agreement and is in the process of rolling back federal rules key to its implementation, including the Obama administration's Clean Power Plan, a regulatory program targeting electricity sector greenhouse gas emissions. *USA Climate Action Tracker Assessment*, Climate Action Tracker (2017), https://climateactiontracker.org/media/documents/2018/4/CAT_2017-11-06_CountryAssessment_USA_8fXxIrP.pdf.

7 *See* Cong. Research Serv., R44783, *The Federal Power Act (FPA) and Electricity Markets* 3 (2017).

8 *Id.* at 5-6.

9 While FERC's power to regulate interstate transmission and sales of electricity derives from passage of the Public Utility Act in 1935, FERC neither comprehensively nor consistently exercised this power until it introduced RTOs in a series of issued orders starting in 1996. *Id.* at 2-5.

10 PJM, the RTO affected by the *Calpine* ruling, operates a capacity auction, where GENCOs submit bids to supply predicted electricity demand three years in advance. *PJM Markets Fact Sheet*, PJM Interconnection, 1 (2017), https://learn.pjm.com/-/media/about-pjm/newsroom/fact-sheets/pjms-markets-fact-sheet.ashx.

11 *Id.*

12 Miles Farmer, *Clean Energy Groups Urge FERC to Reconsider PJM Order*, Nat. Resources Def. Council (Aug. 2, 2018), https://www.nrdc.org/experts/miles-farmer/clean-energy-groups-urge-ferc-reconsider-pjm-order.

13 *State Renewable Portfolio Standards and Goals*, Nat'l Conference of State Legislatures (Feb. 1, 2019), http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx.

14 *Id.*

15 *See* Calpine Corp. v. PJM Interconnection, LLC, 163 F.E.R.C. ¶ 61,236, 2018 WL 3360507, at *5 (2018).

16 *Id.* at 36. FERC ordered PJM to use its Minimum Offer Price Rule (MOPR) to mitigate state RPS subsidies. MOPR places a price floor on GENCO's RTO auction bids and was originally developed by FERC to prevent holding companies owning distribution utilities and natural gas power plants from offering artificially low capacity bids (thereby suppressing prices) to secure contracts knowing they can recoup losses by buying cheap capacity. Farmer, *supra* note 12.

17 136 S. Ct. 1288 (2016).

18 *See id.* at 1298 (noting that states may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain).

19 *Id.*

20 *See id.* at 1299 (noting that state energy subsidy payments "untethered," or not conditioned on recipients clearing RTO market auctions, would fall outside federal jurisdiction); Fed. Energy Regulatory Comm'n v. Elec. Power Supply Ass'n, 136 S. Ct. 760, 776 (2016) (holding that FERC regulation does

continued on page 31

Does Importing Endangered Species' Body Parts Help Conservation? Discretion to Import Trophies under the Trump Administration

By Brianna Marie[*]

I. Introduction

While endangered species face the risk of extinction, the Trump administration reversed an Obama administration ban on the importation of sport-hunted trophies.[1] Tasked with conserving endangered species, the U.S. Fish and Wildlife Service (Service) stated that beginning on March 1, 2018, it will issue permits to import sport-hunted trophies of endangered species on a case-by-case basis.[2] Trophy hunting[3] frequently occurs through hunting agreements that are typically between wealthy individuals from the Global North[4] and locals such as guides or landowners from the Global South[5] who assist with the planned hunt of rare, threatened, or endangered species.[6] As an agency that frequently regulates trophy hunting imports, the Service has the authority to issue regulations under the Endangered Species Act (ESA) to conserve[7] threatened and endangered species.[8] The Service's purpose includes protecting endangered species, conserving and restoring wildlife habitats, and helping foreign governments with their international conservation efforts.[9]

In 1972, President Nixon was dissatisfied with efforts to protect species from extinction and looked to Congress for assistance.[10] Congress responded by passing the ESA of 1973.[11] At that time, the ESA was the most wide-ranging legislation to aid endangered species conservation ever enacted.[12] In its current form, the ESA aims to get species to the point of recovery at which protection under the ESA is no longer needed.[13] Its purposes include conserving ecosystems that threatened and endangered species rely on as well as creating programs that work to conserve threatened and endangered species.[14] The ESA prohibits unlawful takings of wildlife including: (1) importing or exporting; (2) possessing, receiving, or shopping in interstate or foreign commerce during a commercial activity; and (3) selling or offering for sale in interstate or foreign commerce.[15] The statute applies to both dead and living animals.[16] Under the ESA, the Service can issue permits to take wildlife, and regulation of these permits differs depending on whether the species is threatened or endangered.[17] When a species is endangered or threatened, the Service may only issue permits for scientific research, survival, improvement of propagation, or a taking that is incidental to otherwise lawful activity.[18]

Because the Service can only issue permits for the listed reasons, the Service's recent decision to import sport-hunted trophies does not comply with the ESA.[19] If the Service's rule does not comply with the ESA, it is unlawful under the Administrative Procedure Act (APA).[20]

Part II of this Comment discusses the purposes of the Service, the ESA, and the Service's authority under the ESA.[21] It also analyzes the Service's actions under the Trump administration and compares these actions to the Service's recent decision to import sport-hunted trophies.[22] Part III discusses the Trump administration's decision to import sport-hunted trophies on a case-by-case basis and how the Service was able to repeal the previous ban on trophy imports.[23] Part IV explains why the Service's decision to import sport-hunted trophies on a case-by-case basis is unlawful in addition to arbitrary and capricious under the APA.[24] Lastly, Part V recommends that unless the Service can prove that trophy hunting is currently leading to species conservation, it must issue a new rule in accordance with the ESA and the APA.[25]

II. Background

In 1940, Congress merged the Bureau of Fisheries and the Bureau of Biological Survey into one agency, which is now known as the U.S. Fish and Wildlife Service.[26] The Service's objectives include developing and applying an "environmental stewardship ethic" for the public based on wildlife science and moral responsibility.[27] Its mission is to "conserve, protect, and enhance fish, wildlife, and plants" for the continuing benefit of our nation's citizens.[28] To fulfill its mission, the Service enforces federal wildlife laws, protects endangered species, and helps foreign governments with their international conservation efforts.[29] As a part of its foreign conservation efforts, the Service has an international affairs program.[30] This program aids the Service by helping to conserve at-risk species through the regulation of international trade.[31] Additionally, it increases protection for species through international treaties and agreements.[32]

The Service and the Commerce Department's National Marine Fisheries Service (NMFS) jointly administer the ESA.[33] The Service has the authority to issue rules, but is bound by the various guidelines under the ESA.[34] Congress created the ESA in part because multiple species went extinct due to development, and protection measures were needed to conserve species and habitats.[35] During the Senate Commerce Committee Hearing regarding the ESA, the Committee found that 109

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domestic species and over 300 international species were on the brink of extinction.[36] The Committee observed that one species was disappearing per year.[37] Further, it found that the two leading causes of extinction were hunting and destruction of natural habitat.[38] Passing the ESA was essential to protecting wildlife, as the previously existing laws did not provide the appropriate management tools needed to act before species became extinct.[39]

The ESA functions to provide programs for the conservation of endangered and threatened species and to take measures to further the purposes of treaties and conventions.[40] It also works to protect the ecosystems that threatened and endangered species rely on.[41] The ESA states that federal departments should strive to conserve endangered and threatened species by utilizing their authorities under the Act.[42] Section Four of the ESA describes different factors that determine if species are endangered or threatened such as present or threatened destruction of habitat, overutilization for commercial or educational purposes, disease or predation, the inadequacy of regulatory mechanisms, or other natural or manmade factors.[43] It also states that the Secretary of Interior must make decisions required in subsection (a)(1)[44] only on the basis of the best scientific evidence and commercial data available to him after reviewing the status of the species and taking into consideration efforts made by any state or foreign nation.[45] When the Service lists a species as threatened, the Secretary may only issue regulations if he finds them necessary and advisable to conserve such species.[46] Additionally, the Secretary cannot create recovery plans for species if he finds that a plan will not promote the conservation of a species.[47]

Like all rulemaking actions the federal agencies undertake, these regulations are governed by the Administrative Procedures Act (APA). When an agency issues a rule and formal procedures are not required, such as the rule to ban sport-hunted trophies, an agency must follow procedures outlined in the APA.[48] Under the APA, an agency must give the public the opportunity to participate in the rulemaking process through written data submissions, views, or arguments as a part of the notice-and-comment period.[49] Failure to comply with the notice-and-comment rule "cannot be considered harmless if there is any uncertainty as to the effect of that failure."[50] Section 706 of the APA states that it is unlawful for agency actions, findings, and conclusions to be arbitrary and capricious.[51] The requirement for actions to not be arbitrary or capricious entails the Service to properly explain its results.[52] Additionally, if the Service failed to give a reasoned explanation for its actions, the court must declare the actions as unlawful.[53] Therefore, if the Service's rule to import sport-hunted trophies does not prove to conserve species, that rule is likely unlawful under the APA.[54]

III. Previous Actions

Some presidential administrations have been more active than others in exercising their authority under Section 4(d) of the ESA.[55] While the Trump administration has issued rules that permit the taking of endangered wildlife, these rules are different from the recent decision to allow the importation of trophies.[56] Under the Trump administration, the Service has issued rules that include the removal of nuisance grizzly bears, sustainable timber harvests in black bear habitat, use of northern sea otter skins by Alaskan Natives, and accidental capture of the Sonora chub as part of recreational fishing for other species.[57] Unlike the decision to allow the importation of trophies, most special rules under this administration belong to a category of exceptions for taking wildlife that do not claim to help conserve species.[58] Other exceptions include allowing incidental takes as a part of a conservation plan, as well as takes for scientific research purposes designed to conserve species.[59]

IV. Recent Changes Under the Trump Administration

There is much debate as to whether trophy hunting promotes the conservation of a species, which is demonstrated through varying administrative decisions. On March 1, 2018, the Principal Deputy Director of the Service wrote that the Service withdrew 2014 and 2015 ESA enhancement findings[60] for African elephant trophies taken in Zimbabwe.[61] The Service also withdrew findings of African elephants taken in Tanzania, South Africa, Botswana, Namibia, and Zambia.[62] Additionally, it withdrew findings for bontebok in South Africa as well as lions in South Africa and Zambia.[63] The Service stated that this decision was in response to *Safari Club International v. Zinke*,[64] a recent D.C. Circuit case involving trophy hunting.[65] This case allowed the Service to reverse a ban on importing sport-hunted trophies due to the Obama administration's failure to use notice-and-comment rulemaking.[66]

This decision arose from President Obama's decision to issue an executive order that stated poaching protected species created an international crisis that continuously became worse.[67] He explained that wildlife species like elephants, rhinos, tigers, and great apes have economic, social, and environmental benefits that are important internationally.[68] Further, he stated that wildlife trafficking reduces these benefits while fueling an illegal economy and threatening security.[69]

Under the Obama administration, the Service was unable to make positive enhancement findings for elephants in Zimbabwe in 2014.[70] Because of this, the Service forbade the importation of elephants until the end of the year.[71] In 2015, the Service made negative enhancement findings and banned elephant trophies during the current hunting season in addition to future seasons.[72] In *Safari Club International*, the court found that the Service's negative enhancement findings were not improper even though the findings rested on the absence of evidence that trophy hunting enhances the survival of the species.[73] Regulations promulgated by the Service[74] allow the importation of African elephant trophies only if the Service can find that trophy hunting enhances a species' survival.[75]

The APA requires an agency to give the public an opportunity to participate in the rulemaking process during the notice-and-comment period.[76] When the Service decided to forbid the importation of sport-hunted trophies in 2014, it did not invite comment from the public.[77] Because the Court in *Safari Club International* found this error harmful, it remanded this case to

the District Court instructing the Service to initiate rulemaking in order to address findings for the time periods at issue in this case.[78] This case essentially opened the door for the Service to create a different rule that evidently resulted in permitting sport-hunted trophies on a case-by-case basis.[79]

V. Trophy Hunting Support And Opposition

There are many different reasons scholars, organizations, and researchers support or oppose trophy hunting. A common argument in support of trophy hunting is that it supports wildlife conservation. For example, the Service references a document created by the International Union for Conservation of Nature (IUCN) which argues that trophy hunting is consistent with conservation on the basis that the social and economic benefits from trophy hunting can provide incentives to conserve species and their habitats.[80] According to the IUCN, trophy hunting programs can serve as a conservation tool when programs are subject to a governance structure that allocates management responsibilities of the conservation plan.[81] It further states that programs must account for all revenue in a transparent manner, ensure there is no corruption, and completely comply with national and international rules and regulations to have successful conservation programs.[82] The IUCN Species Survival Commission (SSC) Caprinae Specialist Group stated that trophy hunting typically generates funds that can be used for conservation activities such as habitat protection and population monitoring.[83]

Additionally, the founder of Tanzania's Ruaha Carnivore Project believes that trophy hunting might be the best way to converse species in certain circumstances.[84] The Project argues that there are no non-lethal alternatives to trophy hunting that currently exist to protect species in many hunting areas.[85] Further, the Project argues that animals will die regardless of trophy hunting, such as from being poisoned by a villager or starved from lack of prey.[86] Instead, there should be a greater focus on sustainable mortality rather than trophy hunting itself.[87]

On the other hand, those against the Service's decision to issue permits on a case-by-case basis oppose trophy hunting for various reasons. According to Economists at Large, trophy hunting must be well regulated to be sustainable.[88] Similarly, in order for a conservation program to be effective, no corruption can occur, there must be accurate monitoring of animal populations, hunting quotas based on science, and proper regulations.[89] Economists at Large believe that since those requirements are unattainable, sustainable trophy hunting cannot be guaranteed.[90] Research conducted in 2015 found that just six-to-nine percent of economic benefits from trophy hunting is directed toward conservation.[91]

Many organizations oppose trophy hunting, such as the Humane Society of the United States.[92] As the Service continues to allow sport-hunted trophies into the United States every year, many organizations like the Humane Society work to slow down or completely stop the importation of these trophies.[93] Organizations are concerned that as the number of animals that are killed increases, populations will continue to decrease.[94] Data obtained from the Service shows that between 2005 and 2014, more than 1.26 million wildlife trophies were imported into the United States, including 32,500 trophies of the Africa Big Five species.[95] According to the Great Elephant Census, the Savanna elephant population subsequently declined by thirty percent between 2007 and 2014. [96]

Other prominent opposition comes from the African Wildlife Foundation, which expressed its disappointment by the lack of clarity from the Service under the Trump administration.[97] Additionally, the Center for Biological Diversity found that important decisions regarding trophy importation permits should not be made "behind closed doors."[98] National Geographic also reported that money from trophy hunting is typically siphoned away from conservation efforts due to corruption.[99] Given the spread of arguments for and against trophy hunting, it is conclusive that more research is needed before the Service can determine that allowing sport-hunted trophies into the United States promotes the conservation of endangered species.

VI. The Unlawful Rules

Based on all of the opposition and support of trophy hunting, there is not a clear answer as to whether trophy hunting can promote or enhance wildlife conversation. As the idea that trophy hunting supports conservation is highly contested, the Service must not issue rules that allow the importation of sport-hunted trophies without clear evidence that the killing of these endangered species promotes conversation.[100] Federal agencies must exercise their authorities in furtherance of the ESA's purpose.[101] The Service may only issue permits to take endangered species if the taking is for scientific research, survival, improvement of propagation, or taking that is incidental to otherwise lawful activity.[102]

Since the Service's new rule failed to demonstrate that it complies with the ESA, it is arbitrary and capricious under the APA. Further, keeping the Service's rule in place would set a dangerous precedent that could permit future rules to exist that are arbitrary and capricious under the APA.

VII. The Arbitrary and Capricious Trophy Hunting Rule

The Trump administration does not properly weigh whether trophy hunting benefits species,[103] and therefore its individual permitting decisions are unlawful in addition to arbitrary and capricious. The Service stated that it would permit applications to import trophies on a case-by-case basis pursuant to its authority under the ESA.[104] The Service based its decision to import trophies off of a document that included examples of two case studies neither prove trophy hunting always leads to conservation nor does it explain whether the Service's specific action to import trophies will lead to conservation.[105] Under the ESA, when a species is threatened or endangered, the Service may only issue regulations if it finds them necessary and advisable to conserve such species.[106] Additionally, the Service cannot implement recovery plans for species if it finds that a plan will not promote the conservation of a species.[107] Because the Service's rule to import sport-hunted trophies failed to prove it was necessary to conserve species, that rule is likely unlawful under the APA.[108]

In addition to the current rule, the Service's individual permitting decisions likely violate the ESA and the APA as well. The Service stated that it reviews each application to import sport-hunted trophies before the application is approved, in addition to available information regarding the status and management of species and populations to ensure wildlife programs are promoting conservation of species.[109] These guidelines are problematic, as scholars are uncertain as to whether the information that the Service is claiming to use as its permitting criteria will be available when the Service receives permit requests, as well as how much promotion of conservation is adequate to issue a permit to import a trophy under the ESA.[110] Because decisions are being made in a way that is not certain to benefit species, the Service's actions violated the APA.[111] The APA states that arbitrary and capricious agency actions, findings, and conclusions are unlawful.[112] The Service must examine relevant data and articulate a satisfactory explanation when issuing rules.[113] A satisfactory explanation is one that demonstrates a "rational connection between the facts and the choice made."[114] When a court is reviewing an agency's action, it is not substituting its judgment for that of the agency.[115] Instead, it is looking at whether the agency considered all relevant factors and whether there was a clear judgment error.[116]

Here, the Service failed to provide a reasoned explanation for its rule. The Service solely relied on an inconclusive document containing only two case studies.[117] Without conclusive evidence regarding whether trophy hunting promotes conservation, the Service cannot adequately explain its reasoning to allow sport-hunted trophies into the United States. Thus, a reviewing court must find that the Service acted in violation of the APA, and the Service must go back and revise its work.

A. The Service Violated the ESA

A reviewing court must also ensure that the Service exercised a "reasoned discretion" without deviating from or ignoring the ESA when engaging in rulemaking activity.[118] Under the ESA, when a species is endangered, the Service may only issue permits for scientific research, survival, improvement of propagation, or taking that is incidental to otherwise lawful activity.[119] Furthermore, the court in *Safari Club International* determined that the importation of sport-hunted trophies is unlawful unless the Service found that killing a trophy animal enhances the survival of the species.[120] To comply with the ESA, the Service should not issue a rule that allows individuals to import sport-hunted trophies unless the importation undoubtedly conserves or promotes the survival of the hunted species.

Rather than complying with the requirements under the ESA, the Service stated that properly regulated hunting with management programs could benefit the conservation of certain species, but did not guarantee that it will or currently does.[121] Additionally, it stated that hunters should choose to, but are not required to hunt in countries that have strong governments and healthy wildlife populations.[122] When justifying its decision to permit sport-hunted trophies, the Service relied on a document that discussed how trophy hunting could potentially contribute to species conservation.[123] Because this document does not claim that the Service's rule to import sport-hunted trophies will help conserve species,[124] it is not consistent with the ESA as the Service's rule is not necessary for the survival of the targeted endangered species. Furthermore, because the Service's rule is not consistent with the ESA, it is unlawful.

VIII. Recommendation to Ensure ABA and ESA Compliance

A. To ensure that the Service is making the most informed decision, it is essential that the Service diligently follows all required steps under the APA.

Rather than taking unlawful actions, the Service should instead follow the correct notice-and-comment rulemaking procedures under the APA. This step would allow the Service to obtain crucial public comment and adequately protect endangered species. For example, the ESA instructs federal agencies to use the best available science, but the best scientific evidence in the field of trophy hunting and conservation is often uncertain.[125] Additionally, the "best available science" is a term that is not defined by any statute.[126] Because of this, a reviewing court should consider the process by which decisions are made and communicated to the public when issuing its decision.[127]

B. Public participation is necessary to ensure the agency is properly informed on all issues relating to the proposed rule.

Under the APA, notice of proposed rulemaking must generally be published in the Federal Register.[128] The notice must include a statement of the time, place, and nature of the public rulemaking proceedings.[129] It must reference the legal authority under which the rule is proposed and include the terms or substance of the proposed rule or a description of the subjects and issues involved.[130] The proposed rule puts the public on notice of the issue and allows the agency to benefit from the input of interested parties and educates the agency.[131] The agency must give the public the opportunity to participate in the rulemaking process through written data submissions, views, or arguments with or without an opportunity for oral presentation.[132] After consideration of the public's comments, the agency shall include in the rules adopted a general statement regarding its basis and purpose.[133] Additionally, each agency must give interested persons the right to petition the issuance, amendment, or repeal of a rule.[134]

When creating rules about the survival of endangered species, all of these steps are crucial. Under the public trust doctrine, the government has a duty to protect wildlife for the enjoyment of all present and future citizens.[135] Additionally, under the ESA, the government pledged itself as a sovereign state in the international community to conserve threatened and endangered species.[136] To hold the government accountable, it is essential that the public has a right to participate in the rulemaking process.[137] Because the survival of wildlife impacts the public as a whole,[138] it is imperative that the public maintains its right to comment about proposed rules in addition to petition the issuance, amendment, or repeal of a rule.[139]

C. As the decision to import sport-hunted trophies is unlawful in addition to arbitrary and capricious, the Service must issue a new rule.

First, a reviewing court must find that the current rule is unlawful. To challenge the current rule, third parties can "assert a legal interest" in the protection of wildlife under the state ownership of wildlife doctrine.[140] A party has legal standing if the party has alleged a "personal stake in the outcome of the controversy."[141] Additionally, a party must be affected by the opposing party's activities or a party must use the resource it is trying to conserve in order to have standing.[142] To have a successful claim, plaintiffs should reference data that the Service omitted from consideration when issuing its current rule about trophy hunting importation, as the ESA requires the Service to use the best available scientific data when engaging in rulemaking.[143]

D. The Service must follow the APA and the ESA when creating and proposing a new rule to permit or deny the entry of sport-hunted trophies into the United States.

When creating a new rule, in addition to following the procedures in the APA,[144] the Service must make its decision based on whether importing trophies will enhance the survival of the targeted species.[145] To be sustainable, trophy hunting must be well regulated.[146] Throughout the trophy hunting process, there cannot be corruption, and there must be accurate monitoring of animal populations, hunting quotas based on science, and proper regulations.[147] Researchers argue that the ideal conservation operating system is unattainable, and therefore the sustainability of species cannot be ensured.[148]

The Service's new rule should only permit trophy hunting if it is proven to enhance conservation of the targeted species. This requires concrete evidence such as where and how money is being spent, what conservation efforts are being made if the population of the targeted species is increasing due to trophy hunting, and how trophy hunting negatively impacts species. According to *Safari Club International*, an acceptable version of enhancement findings look to see if a country has a sustainable number of animals to support its hunting program.[149] It also looks at the management plan, if the regulations adequately implement a hunting program, and if the participation of hunters from the United States provides a clear benefit to meet the ESA's special rule requirement to import trophies.[150] If there is no evidence of enhancement[151] and the rule is not necessary for the survival of species,[152] then the Service cannot meet the requirements of *Safari Club International*, and the Service should not issue a rule allowing the importation of sport-hunted trophies on a case-by-case basis. Instead, it should issue a rule that bans trophy hunting, as it is not contributing to the conservation of targeted species.[153]

Further, the Service should reverse its current rule and issue a new rule that is in compliance with the ESA and the APA. The court reversed the rule to ban sport-hunted trophies under the Obama administration because the Service failed to use notice-and-comment rulemaking when issuing its decision.[154] Therefore, it is imperative that the Service issues its new rule in compliance with the APA so that it is not reversed again. Additionally, the Service must comply with the ESA's requirement to only issue permits to take endangered species if it is necessary for the survival of endangered species.[155] Creating a legal and evidence-based rule will likely help stabilize endangered species populations and provide more evidence regarding the best way to conserve endangered species.

IX. Conclusion

To ensure that wildlife survives for generations to come, the public must hold the Service accountable when the agency engages in rulemaking about the taking of threatened and endangered species. The Service exists to protect, conserve, and enhance wildlife and their ecosystems for the current and future benefits of American citizens.[156] Additionally, the ESA states that the Service should strive to conserve endangered and threatened species.[157] Under the ESA, whenever the Service lists a species as threatened, the Service can only issue regulations if it finds them necessary and advisable to conserve such species.[158]

Because the information the Service relied on to allow sport-hunted trophies into the United States is speculative, and there is an abundance of disagreement as to whether trophy hunting does, in fact, contribute to the conservation of species, the Service should reinstate the ban on sport-hunted trophies and reverse its current rule. The Service can only issue rules to import threatened species if it finds the rule necessary.[159] However, since there is no concrete evidence the Service's current rule is necessary for the conservation of species, the current rule to permit sport-hunted trophies on a case-by-case basis is unlawful.

By issuing a new rule that complies with the APA and ESA, the Service will allow the public to participate in the rulemaking process and will help create consistency for endangered species. Since the Service can only issue rules that allow the taking of endangered species when it is necessary to the survival of the species,[160] the Service must follow that standard when creating rules that allow individuals to import trophies of endangered species. If there is no concrete evidence that hunting endangered species is necessary for their survival, the Service must create a new rule.

Endnotes

1 Memorandum from Greg Sheehan, Principal Deputy Dir., Fish and Wildlife Serv. (Mar. 1, 2018), https://www.fws.gov/international/pdf/memo-withdrawal-of-certain-findings-ESA-listed-species-sport-hunted-trophies.pdf [hereinafter Sheehan].

2 *Id.* (explaining how the new rule replaces an Obama Administration decision to ban sport-hunted trophies).

3 *See Trophy Hunting*, The Humane Soc'y of the U. S., http://www.humanesociety.org/issues/trophy_hunting/ [hereinafter Humane Society] (defining trophy hunting as the killing of wild animals for their body parts, such as the head, for display and not primarily for food or substance).

continued on page 31

Continuing a Broad Application of Section 9 of the ESA to Prevent Future Mass Extinctions

*Alicia Martinez**

Recent studies show a rising need to protect endangered and threatened species from events of mass extinction.[1] The Endangered Species Act of 1973 (ESA) is the primary mechanism to protect both species and habitats through the application of civil and criminal penalties.[2] One of the two main habitat protection provisions found in the ESA is Section 9.[3] This Section is a criminal provision prohibiting the "taking" of endangered fish or wildlife under section 9(a)(1), and endangered plants under section 9(a)(2).[4] The statutory definition of "taking" includes "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[5]

This Article explores the ESA's section 9 habitat protection provisions and argues that courts have consistently applied the *Palila*[6] and *Sweet Home*[7] decisions in cases where broad findings of proximate cause and foreseeability were needed to prove a Section 9 taking.[8] This Article also emphasizes how courts and agencies have narrowly and erroneously interpreted the proximate cause requirement to limit Section 9 takings protection in climate change cases. This Article recommends that the federal government and the public, via citizen suits, use this provision as a main tool in fighting mass extinctions by applying a broader scope to Section 9 takings cases including those concerning climate change and emissions pollution.

I. Background

Two federal agencies, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), carry out the ESA's mandate to list and protect endangered and threatened species.[9] The first step to ensure the protection of a species is for the FWS and the NMFS to follow the delineated regulatory steps to list a species as threatened or endangered.[10] Sections 7 and 9 of the ESA then protect the listed threatened and endangered species and their habitats.[11] Section 9 of the ESA makes it a criminal offense for any private or public entity to take a listed species.[12] Under the ESA, the taking of an endangered species is a violation of the Act that can incur a civil penalty of up to $25,000 and criminal penalties of up to $50,000 and up to one-year imprisonment.[13]

The Supreme Court has adequately addressed Congress's intent to provide broad protection to listed species through the ESA's section 9 takings prohibition.[14] In *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon,* the Court clarified that a taking includes intentional and direct threats to species and confirmed that a "harm" impacting a species' habitat also counts as a prohibited taking under the ESA.[15] In this case, the Court determined that harm included altering a species' habitat in a way that harms the species itself.[16] The Court reasoned that Congress intended to provide broad protection to listed species that included indirect or unforeseeable actions that could negatively impact listed species.[17] Furthermore, both the FWS and the NMFS have codified the Court's definition of harm and its application to an endangered or threatened species' habitat through the promulgation of "Harm Rules."[18]

In addition to the Court's clarification, two influential cases from Hawaii provided the framework for future Section 9 habitat harm cases. In the first case, *Palila I*, plaintiffs brought a suit on behalf of the endangered palila bird.[19] The district court found that the negative impact caused by the management program was consistent with the regulatory definitions of harm in *Sweet Home*.[20] In the second case, *Palila II*, the district court once again held that the state's game management program continued to constitute harm by negatively impacting the palilas' habitat.[21]

II. Analysis

Most courts continue to correctly follow the *Palila* and *Sweet Home* decisions and apply a broad reading to the proximate cause and foreseeability elements required to prove a Section 9 taking.[22] This broad application is consistent with Congress's intent to define a taking "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife."[23] However, some Section 9 takings cases concerning climate change are erroneously decided in circumstances where it is difficult to establish a concise link between the activity that causes harm and the actual harm.[24] In *Arizona Cattle Growers' Association v. United States Fish & Wildlife*,[25] the court erred in applying a narrow proximate cause and foreseeability analysis that resulted in a finding that the activity did not constitute a Section 9 taking.[26]

This narrow application of the proximate cause requirement is incorrect "considering that the policy goal of the ESA is to conserve species, any injury likely to substantially impact a species' long-term survival should be considered a proximate cause of harm."[27] In addition, cases such as *Defenders of Wildlife v. Administrator*[28] and *National Wildlife Federation v. Hodel*[29] clearly demonstrated how to follow the analytical framework set out by the *Palila I* and *Palila II* cases.[30] In *Defenders of Wildlife*, the court found that the direct or indirect poisoning of eagles by a registered pesticide constituted a taking.[31] In *National Wildlife Federation*, the court found that lead poisoning caused by bald eagles ingesting other birds who consumed or were hit with lead shots constituted a taking.[32] Both court's findings that "indirect"

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and "secondary" harm to endangered species still constitute takings under Section 9 permissibly follow and broaden the application of the *Palila* framework. By deciding not to follow this broad framework in climate change cases, courts deliberately ignore the ESA's statutory intent as established by Congress and clarified by *Sweet Home*.[33]

The enforcement of Section 9 takings as intended by Congress and clarified by the Supreme Court provides a powerful tool to protect more habitats and ecosystems from harm.[34] Therefore, courts should continue to apply this broad scope to future cases in which a threatened or endangered species taking occurred due to adverse harm to that species' environment, including cases in which this adverse harm was caused by climate change.

III. Conclusion

The broad application of Section 9's prohibition to include harms threatening broader ecosystems that may cause "indirect" and "unforeseeable" harm to threatened and endangered species is a permissible reading of Congress's intent to protect these species.[35] The prevention of harm should extend to protect a broader scope of ecosystems that could still foreseeably cause harm to a protected species if the habitat is harmed.[36] Enforcing agencies should continue to use the Section 9 takings prohibition as a mode of prevention against impending but avertable mass extinctions of species.

Endnotes

1 *See, e.g.*, Michelle Innis, *Australian Rodent Is First Mammal Made Extinct by Human-Driven Climate Change, Scientists Say*, N.Y. Times (June 14, 2016), https://www.nytimes.com/2016/06/15/world/australia/climate-change-bramble-cay-rodent.html; Carl Zimmer, *Ocean Life Faces Mass Extinction, Broad Study Says,* N.Y. Times (Jan. 15, 2015), https://www.nytimes.com/2015/01/16/science/earth/study-raises-alarm-for-health-of-ocean-life.html.

2 *See* Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or., 515 U.S. 687, 707 (1995) (referring to Congress's intent to include habitat modification as an incidental taking).

3 *See* 16 U.S.C. §§ 1536, 1538 (2012) (applying to all persons while the other main provision, section 7's "duty to insure," applies only to the federal government).

4 *Id.* § 1536(a)(1)-(2).

5 *Id.* § 1532(19) (including the word "harm" in its definition of taking).

6 649 F. Supp. 1070 (D. Haw. 1986) [hereinafter Palila II]; 639 F.2d 495 (9th Cir. 1981) [hereinafter Palila I].

7 515 U.S. 687 (1995).

8 *See, e.g.*, Defenders of Wildlife v. Admr. of Evntl. Prot. Agency, 882 F.2d 1294 (8th Cir. 1989); Nat'l Wildlife Fed'n v. Hodel, 1985 U.S. Dist. LEXIS 16490, *17 (E.D. Cal. 1985).

9 The FWS oversees the listing and protection of land-based fish and animals. The NMFS is within the Department of Commerce and is tasked with listing and protecting ocean-based fish and animals. 16 U.S.C. § 1532(15) (defining the term "Secretary" to mean the Secretary of the Interior or Commerce, thus allowing the delegation to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service).

10 *Id.* § 1533(a), (b) (outlining the process for placing a species on the endangered or threatened lists and designating the critical habitats for the listed species including going through a thorough risk review using the best commercial and scientific data available).

11 *Id.* §§ 1536, 1538.

12 *Id.* § 1533(d) (authorizing the FWS and NMFS to extend Section 9 prohibitions to threatened species through the promulgation of regulations).

13 *Id.* § 1540(a), (b) (outlining the ESA's civil and criminal violation penalties).

14 *See* Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or., 515 U.S. 687, 707-11 (1995).

15 *See id.* at 708 (reasoning that adverse habitat modification constitutes a harm and thus a possible violation of the section 9 takings prohibition).

16 *See id.* at 707 (holding that any adverse changes to a species' habitat are a legitimate application of harm under the section 9 takings prohibition).

17 *See id.* at 704 (determining that Congress intended for the ESA to apply "broadly to cover indirect as well as purposeful actions").

18 50 C.F.R. § 17.3 (codifying the FWS Harm Rule); *see also id.*§ 222.102 (codifying the NMFS Harm Rule).

19 *See* Palila v. Haw. Dep't. of Land and Nat. Res., 639 F.2d 495, 495-96 (9th Cir. 1981) (arguing that the state's game management program had a negative impact on the palila's habitat).

20 *See Babbitt*, 515 U.S. at 707; (resulting in the FWS's attempt to update their Harm Rule to clarify that any actions that constitute harm must result in the actual killing of a protected species; however, this attempt did not result in any substantial change as intended).

21 *See* Palila v. Haw. Dep't. of Land and Nat. Res., 649 F. Supp. 1070, 1082-83 (D. Haw. 1986).

22 *See* Nat'l Wildlife Fed'n v. Hodel, 1985 U.S. Dist. LEXIS 16490 at *17 (E.D. Cal. 1985) (applying the expansive reading of the Palila cases to prohibit the use of lead shot in hunting waterfowl because bald eagles were poisoned after consuming contaminated birds).

23 *See Babbitt*, 515 U.S. at 726 (quoting S. Rep. No. 93-307 at 7 (1973) to support the Court's reasoning that Congress intended for a broad application of Section 9).

24 *See* Morrill v. Lujan, 802 F. Supp. 424, 432 (S.D. Ala. 1992) (holding that "proof of a taking requires the plaintiff to establish a causal link between the habitat modification of a proposed project and the potential harm alleged").

25 273 F.3d 1229 (9th Cir. 2001).

26 *See id.* at 1242 (holding that there was no "rational basis" for concluding that a Section 9 taking would occur if the cattle continued to graze in areas where endangered species could be found).

27 *See* Ethan Mooar, Note, *Can Climate Change Constitute a Taking? The Endangered Species Act and Greenhouse Gas Regulation*, 21 Colo. J. Int'l Envtl. L. & Pol'y 399, 403-04 (2010).

28 882 F.2d 1294 (8th Cir. 1989).

29 No. S-85-0837, 1985 U.S. Dist. LEXIS 16490, at *1 (E.D. Cal. 1985).

30 *See Defenders of Wildlife*, 882 F.2d at 1300-01 (following *Palila I* and *Palila II* which conclude that a taking occurs when an act has "some prohibited impact on" or "significantly impairs" an endangered species); *Nat'l Wildlife Fed'n*, 1985 U.S. Dist. LEXIS at *17 (following the *Palila I* and *Palila II* framework that allows for a more indirect or "secondary" link between a harming activity and the actual harm caused to the species).

31 *See Defenders of Wildlife*, 882 F.2d at 1301.

32 *See Nat'l Wildlife Fed'n*, 1985 U.S. Dist. LEXIS 16490 at *2, *12.

33 *See* Babbitt v. Sweet Home Chapter of Communities for Greater Or., 515 U.S. 687, 707 (1995) (holding that the Secretary's broad interpretation of the word "harm" to included habitat modification was a permissible reading under the ESA).

34 *See id.* at 698 (taking the intended broad purpose of the ESA and the Court's support of this broad purpose to "extend protection against activities that cause the precise harms Congress enacted the statute to avoid" to include adverse impact to broader ecosystems that then causes harm to endangered and threatened species).

35 *See id.* at 698, 700; *see also* Palila v. Haw. Dep't. of Land and Nat. Res., 649 F. Supp. 1070, 1075 (D. Haw. 1986).

36 *See* Forest Conservation Council v. Rosboro Lumber Co., 50 F.3d 781, 783 (9th Cir. 1995) (arguing that failing to consider any foreseeability of future harm under the ESA is "antithetical to [its] basic purpose").

How Syria's Failure to Uphold the Kyoto Protocol and Paris Agreement Exacerbated the Effects of Climate Change in the Levant

*Nivea A. Ohri**

The drought in the Levant Region of the Arab Republic of Syria has caused massive destruction by disrupting agriculture and forcing migration to cities.[1] The drought, induced by climate change, has destroyed livelihoods, structures, and health of scores of people.[2] Environmental tensions fed a political discontent that had long been simmering in rural areas, and was a trigger for the Syrian Revolution.[3] Syrians even turned to USAID for help in 2008 when the Syrian minister of agriculture stated publicly, "the economic and social fallout from the drought was 'beyond [Syria's] capacity as a country to deal with."[4] However, the impacts of climate change and the drought in the Levant are still felt today in both Syria and its surrounding countries.[5] Syria's failure to uphold commitments under international environmental declarations such as the Kyoto Protocol and the Paris Agreement exacerbated the drought in the Levant Region of Syria.[6]

On June 26, 1997, Syria signed the Kyoto Protocol[7] and thus expressed its interest in mitigating climate change.[8] Under the Kyoto Protocol, Syria is a non-Annex country, which means that it is "a mostly developing country, vulnerable to the adverse impacts of climate change like desertification and drought."[9] Due to its non-Annex status, Syria is not bound to fulfill any goals or standards, or to make environmental changes to mitigate the effects of the drought.[10] Despite international environmental law lacking major repercussions for violations, countries voluntarily expressed their interests in making environmental improvements.[11]

Article 2 of the Kyoto Protocol encourages Syria to implement policies such as energy efficiency, sustainable forms of agriculture, updated research, and innovative technology in accordance to national circumstances.[12] Syria also signed the Paris Agreement on November 17, 2017, which similarly encourages environmental protection.[13] Article 6.1 of the Paris Agreement states that parties should voluntarily promote sustainable development and environmental integrity.[14] Article 7 of the Paris Agreement suggests that Syria should mitigate and adapt to climate change by improving effectiveness, durability, and scientific knowledge on climate change and research.[15]

Although Syria made an aspirational declaration to mitigate climate change by signing each of these treaties, Syria has failed to uphold its own stated goals. Syria has failed to honor Article 2 of the Kyoto Protocol, which states that countries "should not . . . mismanage and fail to govern their water resources, and use old and inefficient technology in farming and agriculture."[16] The violations have led to national distress as resources such as water, food, housing, and goods became scarce.[17] Article 2(1)(a)(i) of the Kyoto Protocol suggests that signatory countries should prioritize the "enhancement of the national economy," however, this is an obligation that Syria has failed to fulfill due to its mismanagement of water resources and continued use of old, inefficient technology in agriculture.[18] As of April 2017, an estimated sixteen billion dollars in potential agriculture revenue has been lost through inefficient production, as well as in damaged and destroyed assets and infrastructure within the agriculture sector.[19]

Likewise, Article 2(1)(a)(iv) suggests that countries should implement policies to further enhance "research on, and promotion, development and increased use of, new and renewable forms of energy."[20] Syria has neither devoted resources nor funds to environmental research and preservation, though it seems as if Syria is making some effort and consideration to the matter.[21]

Both the Kyoto Protocol and the Paris Agreement encourage the signatories to use resources as efficiently and sustainably as possible.[22] A state violates a treaty when it uses more than its allotted resources, and Syria used more than its allotted resources without redeeming itself after the initial violation.[23] Although there are few enforcement mechanisms that could incentivize Syria to submit update reports on its environmental progress, Syria has not voluntarily submitted an updated report on its progress and standing since 2010.[24] By using its resources inefficiently and outdatedly, and then failing to report its efforts to adhere to the treaties, Syria has failed to meet the goals that it adopted when signing the Kyoto Protocol and the Paris Agreement.[25]

The Paris Agreement is a treaty that Syria signed after the 2011 revolution, yet few improvements in water preservation or distribution of resources have been made.[26] The progress is in similar standing to the Kyoto Protocol.[27] The hot and humid region of the Levant is suffering from climate change and water scarcity.[28] It is essential that Syria abide by the rules of the treaties it has signed in order to further mitigate environmental degradation and national distress. Because the environment is directly linked to economic and political stability and growth, with a better environment and basic needs of its inhabitants fulfilled, Syria along with the Earth, will be more prosperous.[29]

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continued on page 34

continued from page 13

appears these changes were consistent with the purpose of the Act, and that if future changes were to deviate from the purpose for which a monument was designated, the analysis becomes similar to a revocation—it would require an Act of Congress. *See* Robert Rosenbaum et al., The President Has No Power Unilaterally to Abolish a National Monument Under the Antiquities Act of 1906 (Arnold and Porter Kaye Scholar, 2017) (stating that in small cases, Presidents have modified monument boundaries).

[38] *See* Vincent, *supra* note 27 (stating that Congress has converted certain monuments into protective designations, such as national parks).

[39] *See* Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906, 37* Ga. L. Rev. 473, 550 (2003) (referencing Congressional power to reverse presidential decisions establishing national monuments).

[40] Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429, 20,429 (May 1, 2017).

[41] *See id.* (tasking the Secretary to balance the original objectives of the Antiquities Act with the protection of landmarks, structures, and other objects).

[42] *See* Stephanie Regenold, *Monumental or Not: Presidential Authority Under the Antiquities Act of 1906, The* Fed. Law. 25, 28 (June 2018).

[43] *See id. at 28*–29 (summarizing the Department of Interior's process for studying and considering public comment regarding possible modifications to monuments).

[44] *Id. at 29*–30 (citing Secretary Zinke's Memorandum to the President: Final Report Summarizing Findings of the Review of Designations Under the Antiquities Act).

[45] Modifying the Bears Ears National Monument, Proc. 9681 (Dec. 4, 2017), 82 Fed. Reg. 58,081, 58,085 (Dec. 8, 2017).

[46] Modifying the Grand Staircase-Escalante National Monument, Proc. 9682 (Dec. 4, 2017), 82 Fed. Reg. 58,089, 58,089 (Dec. 8, 2017).

[47] *See* Hopi Tribe v. Trump, Case No. 1:17-cv-02590-TSC (D.D.C. Dec. 4, 2017).

[48] *See* Modifying the Bears Ears National Monument, *supra* note 45, at 58,085; Modifying the Grand Staircase-Escalante National Monument, *supra* note 46, at 58,093.

[49] *See, e.g.,* Remarks by President Trump at Signing of Executive Order on the Antiquities Act (Apr. 26, 2018) https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-executive-order-antiquities-act/ (declaring that "[t]oday, I am signing a new executive order to end another egregious abuse of federal power, and to give that power back to the states and to the people, where it belongs").

[50] 43 U.S.C. § 1331(a) (2012).

[51] *Id.* at § 1331(b)–(c).

[52] *Id.* at § 1341(a) ("The President of the United States may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf.").

[53] *Briefer on Presidential Withdrawal Under OCSLA Sec. 12(a),* Nat. Res. Def. Council (2016), https://www.nrdc.org/sites/default/files/briefer-on-ocsla-withdrawal-authority_20161121_0.pdf [hereinafter Natural Resources Defense Council].

[54] *See id.* (referring to President's power to bar disposition of land or titles under federal marine waters).

[55] 54 U.S.C. § 320301(a)–(b).

[56] Nat. Res. Def. Council, *supra* note 53, at 2.

[57] *Id.* at i (providing a chronology of withdrawals under §12(a), but not including President Obama's December 20, 2016, withdrawal of nearly 115 million acres of the Arctic Ocean and 3.8 million acres off the Atlantic coast; earlier in the year, President Obama excluded those areas for a five-year period, making the exclusion permanent following the results of the November election and before President-elect Trump took office).

[58] *See* League of Conservation Voters v. Donald Trump, No. 3:17-cv-00101-SLG, 2019 WL 1431217, *5 (D. Alaska, Mar. 29, 2019) ("The text of Section 12(a) refers only to the withdrawal of lands; it does not expressly authorize the President to revoke a prior withdrawal. Congress appears to have expressed one concept - withdrawal - and excluded the converse - revocation.").

[59] Section 12(a) does say the President "may, from time to time, withdraw from disposition any of the unleased lands of the outer Continental Shelf." 43 U.S.C. § 1341(a).

[60] In 1990, President George H.W. Bush issued a presidential directive ordering the Interior Department not to conduct offshore leasing or preleasing activity in places other than Texas, Louisiana, Alabama, and parts of Alaska until 2000—prohibiting leasing in the same areas covered by the annual moratoria enacted by Congress through the Interior appropriations process. President Clinton extended the temporary offshore leasing prohibition until 2012, while permanently withdrawing areas designated as marine sanctuaries. Then, in 2008, President George W. Bush revoked the time-limited withdrawal but left in place President Clinton's permanent withdrawal comprising approximately 10.8 million acres of marine sanctuary. *See* Bush, G.W. Memorandum on Modification of the Withdrawal of Areas of the United States Outer Continental Shelf from Leasing Disposition, 44 Weekly Comp. Pres. Docs. 986 (July 14, 2008).

[61] Nat. Res. Def. Council, *supra* note 53, at 2. Note that the permanent withdrawal is designated "for a time period without specific expiration," language which President Obama used in his most recent withdrawals under OCSLA. *Id.*

[62] Implementing an America-First Offshore Energy Strategy, Exec. Order No. 13795, 82 Fed. Reg. 20,815, 20,815 (Apr. 28, 2017) [hereinafter Implementing an America-First Offshore Energy Strategy].

[63] *Id.* at 20,816.

[64] Northern Bering Sea Climate Resilience, Exec. Order No. 13754, 81 Fed. Reg. 90,669, 90,669 (Dec. 9, 2016) (discussing in Section 3 the withdrawal "from disposition by leasing for a time period without specific expiration the following areas of the Outer Continental Shelf: [(1) Norton Basin Planning Area; and (2) St. Matthew-Hall Planning Area]. The . . . withdrawal prevents consideration of these areas for future oil or gas leasing for purposes of exploration, development, or production. This withdrawal furthers the principles of responsible public stewardship entrusted to this office and takes due consideration of the importance of the withdrawn area to Alaska Native tribes, wildlife, and wildlife habitat, and the need for regional resiliency in the face of climate change. Nothing in this withdrawal affects rights under existing leases in the withdrawn areas.").

[65] Implementing an America-First Offshore Energy Strategy, *supra* note 62, at 20,816, Section 4(c).

[66] These were presidential memoranda effecting "Withdrawal of Certain Areas of the United States Outer Continental Shelf from Leasing Disposition" issued on December 20, 2016, January 27, 2015, and July 14, 2008. It appears that the Trump Order leaves in place a memorandum of December 16, 2014 withdrawing the North Aleutian Basin Planning Area, including Bristol Bay, offshore Alaska.

[67] Implementing an America-First Offshore Energy Strategy, *supra* note 62, § 5. Presumably, the Administration wanted to avoid challenge under the Marine Protection, Research, and Sanctuaries Act, which requires specific procedures and findings of the Secretary of Commerce before a marine sanctuary designation could be withdrawn. *See* 16 U.S.C. § 1434 (2012).

[68] *See League of Conservation Voters v. Donald Trump,* 303 F. Supp. 3d 985 (D. Alaska, 2018) (citing Memorandum in Support of Plaintiffs' Motion for Summary Judgment asserting that President Trump's withdrawals under OCSLA exceed presidential powers.

[69] League of Conservation Voters v. Donald Trump, No. 3:17-cv-00101-SLG, 2019 WL 1431217, *16 (D. Alaska, Mar. 29, 2019).

[70] *Id.* at 30.

[71] Congress can also stipulate that the President use one or another of these instruments for a particular purpose. *See* Kenneth Mayer, With the Stroke of a Pen: Executive Orders and Presidential Power 58 (2001).

[72] 16 U.S.C. §§ 431–433; 43 U.S.C. §§ 1331–1356.

[73] For instance, both proclamations and executive orders have been used to create forest reserves. *See* U.S. Department of Agriculture: Forest Service, Establishment and Modification of National Forest Boundaries – A Chronological Record 1891–1973 (2012). President Obama declared and withdrew land for monuments through presidential proclamation, even though prior Presidents styled the withdrawals as executive orders. Maybe telling is that Obama's most recent Proclamations of national monuments were widely reported in the media as "executive orders." Meanwhile, to withdraw areas of the outer continental shelf under his OCSLA authority, Obama issued presidential memoranda. The Obama WhiteHouse.gov delineated "Presidential Actions" as, separately, Executive Orders, Presidential Memoranda, and Proclamations. *See Presidential Actions,* The White House, https://obamawhitehouse.archives.gov/briefing-room/presidential-actions.

[74] Mary Woodward, *Executive Orders: A Journey,* 10 Legal Reference Services Q. 125, 126 (1990) (explaining that neither the Constitution nor any statute defines an executive order).

[75] *See* Comm. on Gov't Operations, Executive Orders and Proclamations: A Study of a Use of Presidential Powers vii (1957) (observing that that proclamations primarily affect the activities of private individuals, while executive orders usually affect private officials only indirectly). The authors of the study reasoned that, "since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President's proclamations are not legally binding and are at best hortatory unless based on such grants of authority." *Id*. Subsequent accounts suggest that Presidents "are more apt to utilize executive orders on matters that may benefit from public awareness or be subject to heightened scrutiny," while Memoranda typically carry out more routine executive decisions, or to "perform duties consistent with the law or implement laws that are presidential priorities." Vivian S. Chu and Todd Garvey, Executive Orders: Issuance, Modification and Revocation 3 (2014). Proclamations seem to vary widely from merely declaratory in effect to those with substantive impact. *See* Louis Fisher, The Law of the Executive Branch, Presidential Power 103 (Stephen M. Sheppard, 2014).

[76] *See generally* Mayer, *supra* note 71, at 58.

[77] *Id*. at 58–59 (citing Comm. on Gov't Operations, Executive Orders and Proclamations: A Study of a Use of Presidential Powers *4*–5 (1957)).

[78] Chu & Garvey, supra note 75, at 2.

[79] *See Today in History – November 26*, Library of Cong., https://www.loc.gov/item/today-in-history/november-26/ (last visited Mar. 28, 2019) (chronicling the history of the Thanksgiving Proclamation) [hereinafter *Today in History – November 26].*

[80] The "vesting clauses" of the U.S. Constitution confer three discrete types of authority on three branches, without an explicit requirement of separation of powers or checks and balances. Art. I § 1 reads "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives. *See* U.S. Const. art. I § 1. Article II § 1 reads "The executive Power shall be vested in a President of the United States of America." *Id*.

[81] Implementing an America-First Offshore Energy Strategy, *supra note 62, at § 2*.

[82] Though these arguments have been made, they are no longer at issue. *See* Getches, *supra* note 20, at note 46.

[83] Chu & Garvey, *supra* note 75, at 7.

[84] *The Mexico City Policy: An Explainer,* Kaiser Family Found. (Jan. 28, 2019), https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/.

[85] Chu & Garvey, *supra* note 75, at 7 (chronicling a long line of substantive changes to Executive oversight through issuance, modification and revocation of executive orders).

[86] *See Today in History – November 26, supra* note 74.

[87] Yoo & Ganziano, *supra* note 33, at 7 (emphasis added).

[88] *Id*. at 8 (explaining, for example, that the Constitution describes no process for repealing a statute).

[89] *Id*.

[90] *Id*. at 9.

[91] *See* Gorbach v. Reno, 219 F.3d 1087, 1089 (9th Cir. 2000) (en banc) ("We must decide whether the power to confer citizenship through the process of naturalization necessarily includes the power to revoke that citizenship. We conclude that it does not.").

[92] *See id*. at 1090, 1095.

[93] *See id*. at 1091, 1095.

[94] *See id*. at 1095.

[95] *Id*.

[96] *Id*.

[97] *See* Yoo & Ganziano, *supra* note 33, at 5-9.

[98] For instance, Yoo and Ganziano cite that the President can unilaterally undo an appointment without the Senate's approval, even though this negates the earlier Senate confirmation of the appointee. *Id.* at 9 (citing Myers v. United States, 272 U.S. 52 (1926)). A plurality of the Supreme Court also allows the President to unilaterally terminate a treaty even though the treaty required the advice and consent of the Senate to be formed. *Id.* (citing Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979) (vacated by Goldwater v. Carter, 444 U.S. 996 (1979)); Kucinich v. Bush, 236 F. Supp. 2d 1 (D.D.C. 2002)).

[99] *Gorbach*, 219 F.3d at 1095.

[100] Yoo & Ganziano, *supra* note 33, at 7 (citing Pennsylvania v. Lynn, 501 F.2d 848, 855-56 (D.C. Cir. 1974)).

[101] *Id*. Yoo & Ganziano, *supra* note 33, at 9 (citing INS v. Chadha, 462 U.S. 919 (1983)).

[102] Review of Designations Under the Antiquities Act, 82 Fed. Reg. at 20,429 (Apr. 26, 2017).

[103] Congress can influence or even largely block national monument implementation through funding restrictions. The fact that it funds monuments, even controversial ones, suggests it has ratified the withdrawals. A ratification-through-appropriation theory might strengthen over time, with subsequent appropriations. The argument would also not hold for the most recent withdrawals, such as Bears Ears, which has not existed during an appropriations cycle.

[104] 16 U.S.C. § 1 (2012) (directing management of the national parks "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.").

[105] *See* Rosenbaum et al., *supra* note 37, at 13 (citing 54 USC §§ 100102(2), 100501 (2012)) (defining "National Park System" to include any area administered by the National Park Service, including for "monument" purposes).

[106] *See 36* C.F.R. § 1.2 (National Park Service regulations apply to federally owned land administered by NPS); *see generally* 36 C.F.R. § 7. The Interior Department regulations for parks and monuments vary widely; some are extensive management plans, others are relatively short or nonexistent for specific parks or monuments. There is an argument that revoking a national monument would also effectively rescind any applicable regulation or management plan, requiring some process under the Administrative Procedure Act. It would depend on the process used in implementing the regulation in the first place, whether through notice and comment rulemaking or the agency found good cause to waive notice and comment because the regulations "don't expand on the action already taken by the President." *Id*.

[107] *See* Rosenbaum et al., *supra* note 37, at 13.

[108] 54 U.S.C. § 100101(b)(12).

[109] *See* Mistretta v. United States, 488 U.S. 361, 372 (1989) (citing J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)).

[110] *See generally* Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457 (2001) (examining whether the Clean Air Act had impermissibly delegated legislative power to the Environmental Protection Agency).

[111] *See infra* Part II(A).

[112] Proposed Abolishment of Castle Pinckney National Monument, 39 Op. Att'y. Gen. 185, 186 (1938) [hereinafter *Pinckney].*

[113] *See id*. at 187.

[114] *See id*. at 186–187 ("[I]f public lands are reserved by the President for a particular purpose under express authority of an act of Congress, the President is thereafter without authority to abolish such reservation.").

[115] *See Castle Pinckney Uses,* Nat'l Park Serv., https://www.nps.gov/fosu/learn/historyculture/castle-pinckney-use.htm (last visited Apr. 10, 2019).

[116] *See* Pinckney, *supra* note 112, at 186. The justification for abolishing the monument was that the fort was in need of repair, that the public had not "manifested any great interest in it as an object of historical importance," and that the expense of restoring the fort for "future preservation" was unjustified. *Id*. Furthermore, the War Department was already using the land for storage purposes and wanted to continue doing so. *Id.*

[117] *See id.* at 189.

[118] *Id*. at 188 (citing Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 364 (1862)).

[119] *See* Rock Island Military Reservation, 10 Op. Att'y Gen. 359, 361–62 (1862) (*"*This view of the Executive authority in the premises seems to me to accord so exactly with the plain and well-accepted theory of the division of powers in our Government. . . . The appropriation of the public domain, either to public or private use, is eminently an act of sovereign power. It is the exercise of ownership and implies the right of control over the title. It is a conversion of the property of the nation equal in responsibility and gravity with the appropriation of the public money and derives its authority from the same high source. Under our system, this extreme power resides only in Congress."); *id*. at 364–65 ("This selection of Rock Island for military purposes was not, as we have seen, the unauthorized act of the President; but was made in the exercise of a discretion vested in him by Congress." [Because] the power to dispose of the public lands . . . belongs to Congress, and not to the President . . . the reservation of Rock Island for military purposes derives its validity . . . primarily from the statute which authorized that selection.");

id. ("[I]nstead of designating the place themselves, *[Congress] left it to the discretion of the President, which is precisely the same thing in effect*.")*; see also* 21 Op. Att'y Gen. 120, 121 (1895); 17 Op. Att'y Gen. 168 (1881); 16 Op. Att'y Gen. 121, 123 (1878).

[120] *See* Mayer, *supra* note 71, at 35; *see also* Jenkins v. Collard, 145 U.S. 546, 560–61 (18911892) (when a President issues a proclamation on matters either within the President's inherent powers or to execute a delegated authority, the proclamation has the force of law); Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 234 (8th Cir. 1975); *see also* Gnotta v. Unites States, 415 F.2d 1271, 1275 (8th Cir. 1969).

[121] Mayer, *supra* note 71, at 35–36; *see also* Marks v. Cent. Intelligence Agency, 590 F.2d 997, 1003 (D.C. Cir. 1978) (noting that an executive order cannot supersede a statute).

[122] *See generally* Yoo & Ganziano, *supra* note 33 (providing their main critiques of the AG opinion as: (1) its reliance on trust law to suggest that a great of power to create something must include the power to abolish it; (2) its reading of the original purposes of the Antiquities Act; and (3) general lack of support and depth of analysis for its conclusion that the President is without authority to revoke the Castle Pinckney National Monument).

[123] The challengers in the OCSLA action cite the Attorney General opinion as persuasive authority for a strict reading of the OCSLA text. *See* Memorandum in Support of Plaintiffs' Motion for Summary Judgment, League of Conservation Voters v. Donald Trump, 303 F. Supp. 3d 985 (D. Alaska 2018). The Court agreed those opinions are "persuasive." *See* League of Conservation Voters v. Donald Trump, No. 3:17-cv-00101-SLG, 2019 WL 1431217, *10 (D. Alaska, Mar. 29, 2019) (noting that "Congress has used the terms 'withdrawal' and 'reservation' interchangeably for many decades.")

[124] *See* Yoo & Ganziano, *supra* note 33, at 5 (explaining that Attorney General opinions are binding on executive branch agencies, but a president is free to disregard them – especially if he concludes that his oath to take care that the laws are faithfully executed conflicts with such an opinion.)

[125] Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(4) (2012) ("[I]t is the policy of the United States that Congress exercise its constitutional to authority withdraw . . . Federal lands for specific purposes and that Congress may delineate the extent to which the Executive may withdraw lands without legislative action.").

[126] James R. Rasband, *The Future of the Antiquities Act, 21* J. Land Resources & Envtl. L. 619, 625 (2001).

[127] Coggins, *supra* note 20, at 340.

[128] John Yoo and Todd Ganziano, *Opinion: Trump Can Reverse Obama's Last Minute Land Grab,* Wall St. J. (Dec. 30, 2016), https://www.wsj.com/articles/trump-can-reverse-obamas-last-minute-land-grab-1483142922.

[129] Getches, *supra* note 20, at 279.

[130] *See* United States v. S. Pac. Transp. Co., 543 F.2d 676, 686 (9th Cir. 1976) ("We recognize that even after 1975, the President or the Secretary of the Interior could still alter the boundaries of, or even extinguish completely, an executive order reservation in order to make way for a railroad."); *id.* at 690 ("[b]efore Congress prohibited future changes in Indian reservations by executive order, it was common practice for the President to terminate or reduce in size executive order reservations without payment of compensation."); s*ee also* Rasband, *supra* note 126, at 626 ("It thus appears that if a withdrawal is accomplished by executive authority implied from congressional silence, a court will be more willing to recognize implied authority in the executive to undo what it has already done.").

[131] Numerous examples appear in *Indian Affairs: Laws and Treaties*, a seven-volume compilation of U.S. treaties, laws and executive orders pertaining to Native American Indian tribes compiled by Charles J. Kappler in the early twentieth Century and first published in 1903-1904 by the Government Printing Office. *See, e.g.,* Charles J. Kappler, 1 Indian Affairs: Laws and Treaties *467, 740* (Government Printing Office 1904); Charles J. Kappler, 3 Indian Affairs: Laws and Treaties 694 (Government Printing Office 1913); Charles J. Kappler, 7 Indian Affairs: Laws and Treaties 1463, 1505 (Government Printing Office 1971). Oklahoma State University has digitized the work, library.okstate.edu/kappler/index.htm. The language used to revoke a reservation is sometimes, literally, "hereby revoke," and other times action to "restore to the public domain" lands previously reserved. See WM. H. Taft, Exec. Order No. 522 (April 24, 1912) ("it is hereby ordered that Executive order dated August 25, 1877, setting aside certain described land in the State of California for Indian purposes, be, and the same hereby is, revoked in so far as it relates to the south half of section 20, township 3 south of range 1 east of the San Bernardino meridian."); *see also* WM. H. Taft, Exec. Order No. 1224 (July 7, 1910) ("It is hereby ordered that Executive orders of August 25, 1877, March 9, 1881, and December 29, 1891, reserving certain described lands in the State of California for Indian purposes be, and the same are hereby, modified and amended in so far as to restore to the public domain for the purpose of settlement and entry the tracts described as follows. . .").

[132] *See* 7 Indian Affairs, *supra* note 131 (stating the opinion of Attorney General Harlan F. Stone, "Whether the President might legally abolish, in whole or in part, Indian reservations once created by him, has been seriously questioned (citation omitted) and not without strong reason; for the Indian rights attach when the lands are thus set aside; and moreover, the lands then at once become subject to allotment under the general allotment act. Nevertheless, the President has in fact, and in a number of instances, changed the boundaries of Executive order Indian reservations by excluding lands therefrom, and the question of his authority to do so has not apparently come before the courts . . . .When by an Executive order public lands are set aside, either as a new Indian reservation or an addition to an old one, without further language indicating that the action is a mere temporary expedient, such lands are thereafter properly known and designated as an Indian reservation; and so long, at least, as the order continues in force the Indians have the right of occupancy and use, and the United States has the title in fee.").

[133] Getches, *supra* note 20, at 285.

[134] *Id.* at 280.

[135] 236 U.S. 459 (1915).

[136] *Id.* at 469; *see also* Getches, *supra* note 20, at 290–92.

[137] *See* Christine A. Klein, *Preserving Monumental Landscapes under the Antiquities Act*, 87 Cornell L. Rev. 1333, 1355–63 (2002) (elaborating when presidential authority is strengthened by congressional acquiescence).

[138] Pamela Baldwin, Authority of a President to Modify or Eliminate a National Monument 2 (2000).

[139] National Forest Management Act of 1976, Pub. L. No. 94-588, § 9, 90 Stat. 2949 (1976) ("Notwithstanding the provisions of the Act of June 4, 1897. . . . no land now or hereafter reserved or withdrawn from the public domain as national forests pursuant to the Act of March 3, 1891. . . or any act supplementary to and amendatory thereof, *shall be returned to the public domain except by an act of Congress.") (emphasis added).*

[140] Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1782 (2012).

[141] Public Land Law Review Comm'n, One Third of the Nation's Land: A Report to the President and the Congress 54–57 (1970).

[142] Pub. L. No. 94–579, § 704(a), 90 Stat. 2743 (1976) (citing *U.S. v. Midwest Oil Co.* in repealing the implied executive authority).

[143] Public Land Law Review Comm'n, *supra* note 141, 54–55.

[144] *Id.* at 55.

[145] *See* Baldwin, *supra* note 138, at 2.

[146] Federal Land Policy and Management Act, 43 U.S.C. § 1702(e) (2012).

[147] The Forest Service Organic Act of 1897, ch. 2, § 1, 30 Stat. 11, 36 (repealed 1905) (asserting that "to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests" and that "[t]he President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve"). *See generally* Robert Bassman, *The 1897 Organic Act: A Historical Perspective, 7* Nat. Res. L. 503, 510 (1974) (providing a rich backstory to the inclusion of the revocation provision). Basically, this legislation was the culmination of years of controversy surrounding the withdrawal of considerable tracts of federal land for forest reserves, starting with the Act of March 3, 1891. *Id.* President Cleveland had issued 13 proclamations establishing forest reserves in 7 states, which outraged Western public officials. An earlier appropriations bill in 1897 including a proposal to abolish the reservations and an amendment to give the President authority to abolish any and all reserves. The Western members were opposed to relying on the President to abolish the reserves himself claiming that they could not trust the President to revoke his own orders. The final compromise did not specifically abolish President Cleveland's earlier withdrawals, but instead gave him the authority to do so. *Id.*

[148] The Forest Service Organic Act of 1897, ch. 2, § 1, 30 Stat. 11, 36 (repealed 1905).

[149] 16 U.S.C. § 473 (2012).

[150] Desert Land Act, 43 U.S.C. § 641 ("The Secretary of the Interior may, in his discretion, continue said segregation for a period not exceeding five years, or

may, in his discretion, restore such lands not irrigated and reclaimed to the public domain upon the expiration of the ten-year period or of any extension thereof.").

[151] 1910 Pickett Act, ch. 421, 36 Stat. 847 (1910) (repealed 1976) (expressly authorized the revocation or vacating of executive orders or proclamations creating forest reserves under the Act of March 3, 1891, ch. 561, 26 Stat. 1103).

[152] *See* Rasband, *supra* note 121, at 627 (affirming an established canon of statutory interpretation that the court should avoid reading a statute in a way that would render statutory language superfluous).

[153] 43 U.S.C. § 1701 ("All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act shall remain in full force and effect until modified under the provisions of this Act or other applicable law.").

[154] 43 U.S.C. § 1714.

[155] *Id.*

[156] Getches, *supra* note 20, at 316-17 (describing that the revocations were not made according to the prescribed procedures for referral of the Secretary's recommendations for continuation or termination of withdrawals).

[157] 43 U.S.C. § 1714(j).

[158] H.R. Rep. 94-1163 at 9 (1976) ("With certain exceptions, H.R. 13777 will repeal all existing law relating to executive authority to create, modify, and terminate withdrawals and reservations. It would reserve to the Congress the authority to create, modify, and terminate withdrawals for national parks, national forests, the Wilderness System, Indian reservations, certain defense withdrawals . . . . It would also specifically reserve to the Congress the authority to modify and revoke withdrawals for national monuments created under the Antiquities Act . . . . These provisions will insure that the integrity of the great national resource management systems will remain under the control of the Congress.").

[159] *See* 39 U.S. Op. Atty. Gen 186 (citing 10 U.S. Op. Atty. Gen. 359 (1862)).

[160] *See* Rosenbaum et al., *supra* note 37 (citing Bledsoe v. Palm Beach Cty. Soil & Water Conservation Dist., 133 F.3d 816, 822 (11th Cir. 1998)) (addressing legislative action after an earlier legal interpretation by the Attorney General); *see also* United States v. Estate of Romani, 523 U.S. 517, 530-31 (1998) (stating that later congressional actions need not amend the earlier statute in order for ratified principles of law to govern, particularly when the later statute comprehensively addresses a subject).

[161] *See* Baldwin, *supra* note 133, at 4-5 ("The FLPMA language addresses only actions of the Secretary, while the Antiquities Act is worded in terms of actions the President may take . . . . However, it appears from the breadth of the committee report language that Congress may have believed that controlling revocations by the Secretary in this regard would operate to control the revocation of national monument withdrawals – i.e. to control the actions of the President.").

[162] H.R. 2284, 115th Cong. (2017).

[163] For instance, the 114th Congress considered proposals to subject monument designations to Congressional and state approval, prohibit the President from establishing or expanding national monuments in particular locations, and make the President's authority subject to NEPA or impose other requirements for consultation. *See* Vincent, *supra* note 27, at 11-12. Recent proposals in the 115th Congress are similar. *See Improved National Monument Designation Process Act, S. 33, 115th Cong. (2017) ("*Before a national monument can be designated on public land, the President must obtain congressional approval, certify compliance with the National Environmental Policy Act of 1969 (NEPA), and receive notice from the governor of the state in which the monument is to be located that the state legislature has enacted legislation approving its designation.").

[164] 54 U.S.C. § 320301(a) (2012).

[165] Debra Holtz et al., *National Landmarks at Risk: How Rising Seas, Floods, and Wildfires are Threatening the United States' Most Cherished Historic Sites,* Union of Concerned Scientists (2014) http://www.ucsusa.org/global_warming/science_and_impacts/impacts/national-landmarks-at-risk-from-climate-change.html?_ga=1.143705777.562670586.1493413292#.WQvaarsrLbi.

[166] *See supra* Part II(B).

[167] Northern Bering Sea Climate Resilience, *supra* note 64.

[168] *Id.*

[169] A 1913 memorandum summarizing Congressional and judicial pronouncements on the Executive withdrawal authority confirms a one-way perspective: "the President in the exercise of his executive powers stands in a position to protect and administer the public domain until Congress can act." 3 Indian Affairs, *supra* note 131, at 693.

[170] Congress debated a bill to designate as wilderness 1.8 million acres owned by the federal government in Utah. The proposal cleared House and Senate committees but was not enacted. *See* Justin James Quigley, *Grand Staircase Escalante National Monument: Preservation or Politics*, 19 J. of Land, Res., & Envtl. L. 55, 69-71 (1999). President Clinton then issued Proclamation 6920 to establish the Grand Staircase-Escalante National Monument, setting aside approximately 1.7 million acres under the Antiquities Act. 61 Fed. Reg. 50223, 50225 (Sept. 4, 1996). In response, legislation was introduced to provide that for any national monument in excess of 5,000 acres, the President would need an act of Congress and the concurrence of the governor and the state legislature. The House passed the legislation, but the Senate did not. *See* Louis Fisher, Executive Orders and Proclamations, 1933-99: Controversies with Congress and the Courts 18-19 (1999).

[171] Fisher, *supra* note 70, at 106 ("Congress can retaliate against executive orders and proclamations it finds objectionable, but moving remedial legislation through both chambers can be an uphill struggle.").

[172] Jonathan Thompson, *Bears Ears a Go – But Here's Where Obama Drew the Line: The Designation's Concessions are Unlikely to Appease Ardent Opponents,* High Country News (Dec. 29, 2016), https://www.hcn.org/articles/obama-designates-bears-ears-national-monument.

[173] *See 5-year Timeline of Tribal Engagement to Protect Bears Ears,* Bears Ears Inter-Tribal Coalition, https://bearsearscoalition.org/timeline/ *(last visited March 28, 2019).*

[174] *Proposal to President Barack Obama for the Creation of Bears Ears National Monument,* Bears Ears Inter-Tribal Coalition (Oct. 15, 2015) https://bearsearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf.

[175] *See* Ray Rasker, *West Is Best: How Public lands in the West Create a Competitive Economic Advantage,* Headwaters Economics (Dec. 2012) https://headwaterseconomics.org/economic-development/trends-performance/west-is-best-value-of-public-lands/.

Endnotes: Jam v. IFC: One Step Forward, Two Steps Back?

continued from page 16

[1] *See* Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 767 (2019) (referencing International Finance Corporation's motion to dismiss for lack of subject matter jurisdiction).

[2] *Id.*

[3] *Id.* at 771.

[4] *See generally* 22 U.S.C. § 288 (1945) (codifying the International Organizations Immunities Act); 28 U.S.C. § 1605 (2016) (codifying the Foreign Sovereign Immunities Act); *Jam,* 139 S. Ct. at 772 (interpreting the IOIA to allow for the modern immunities of foreign sovereigns under FSIA).

[5] *Jam*, 139 S. Ct. at 766.

[6] *Id.* at 768 (quoting 22 U.S.C. § 288a(b)).

[7] *Id.* at 765-66.

[8] *Id.*

[9] *Id.* at 766.

[10] *Id.* at 767.

[11] *Id.*

[12] *Id.*

[13] *Id.* (outlining D.C. District Court Judge Pillard's dissent and the circuit split between the D.C. and Third Circuits in 2010).

[14] *Id.* at 772.

[15] *Id.* at 766 (emphasis added) (citing 28 U.S.C. § 1605(a)(2) (2016)).

[16] *See generally* OBB Personenverkehr AG v. Sachs, 136 S. Ct. 390 (2015) (declining to review novel argument presented by petitioners about substantial contacts with U.S. element); Saudi Arabia v. Nelson, 507 U.S. 349, 358-59, 377-78 (1993) (including numerous dissents and not reviewing substantial contacts with U.S. element because the Court did not find commercial activity); Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 611 (1992) (reviewing only one of three scenarios that could establish commercial activity with substantial contacts to U.S.).

[17] *See Jam*, 139 S. Ct. at 771.

[18] *Id.* at 772.

[19] *Id.* (emphasis added).

[20] *Id.* (emphasis added).

[21] *See id.*

Endnotes: FERC Ruling Undermines Energy Federalism and Arbitrarily Targets Mid-Atlantic Region Renewables

continued from page 18

not violate state jurisdiction merely because it substantially affects intrastate electricity markets under state jurisdiction and emphasizing the importance of the target at which the regulation aims); Rochester Gas & Electric Corp. v. Public Serv. Comm'n, 754 F.2d 99, 105 (2d Cir. 1985) (holding that merely considering or incorporating wholesale prices in rate-setting for a state-regulated activity does not intrude on federal authority).

[21] *Compare Hughes*, 136 S. Ct. at 1297-98 (rejecting Maryland's subsidy program because it requires subsidy recipients to sell electricity through PJM's capacity auction and guarantees subsidy recipients an electricity price distinct from PJM's market clearing price) *with* Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 524-25 (7th Cir. 2018) (permitting Illinois' nuclear energy subsidy because it does not condition payment on recipients clearing the RTO capacity auction nor regulates the rate or transaction terms of wholesale power).

[22] *See generally Elec. Power Supply Ass'n*, 136 S. Ct. at 782 (defining the scope of judicial review of FERC agency rulemaking under the arbitrary and capricious standard as determining whether the agency reviewed all salient considerations and articulated a rational explanation connecting facts found with the choice made).

[23] *Id.* at 769.

[24] Calpine Corp. v. PJM Interconnection, LLC, 163 F.E.R.C. ¶ 61,236, 2018 WL 3360507, at *16 (2018).

[25] *See Subsidy Short List*, PJM Capacity Construct/Public Policy Senior Task Force Meeting, (June 5, 2017), http://www.pjm.com/-/media/committees-groups/task-forces/ccppstf/20170605/20170605-item-02-subsidy-short-list-20170531.ashx (listing over 100 subsidy programs in PJM states significantly reducing the cost of natural gas and coal production, and thereby suppressing capacity bids, including West Virginia tax benefits for coal, Pennsylvania gross receipt tax exemption on natural gas utility sales, and Pennsylvania sales and use tax exemption for coal purchases).

[26] From 2013-2014 alone, federal and state support for fossil-fuel based electricity generation exceeded $8.5 billion annually. *See* Ivetta Gerasimchuck et al., *Zombie Energy: Climate benefits of ending subsidies to fossil fuel production*, Int'l Inst. for Sustainable Development, viii (2017), https://www.iisd.org/sites/default/files/publications/zombie-energy-climate-benefits-ending-subsidies-fossil-fuel-production.pdf.

[27] *See Calpine Corp.*, 163 F.E.R.C. at *51 (Glick, C. dissenting) (noting that, by mitigating low-emissions electricity subsidies, FERC allows GENCOs to focus only on private generation costs and disregard the external societal costs of fossil fuel-based electricity).

[28] Sylwia Bialek & Burcin Unel, *Capacity Markets and Externalities: Avoiding Unnecessary and Problematic Reforms*, Inst. for Policy Integrity at 12 (2018) (explaining that climate change damages associated with a typical 1,000 MW coal plant exceed $230 million annually).

[29] *See* EPA, Energy and Environment Guide to Action: Renewable Portfolio Standards 5-2 (2015), https://www.epa.gov/sites/production/files/2017-06/documents/guide_action_full.pdf.

[30] *See* Coal. for Competitive Elec. Dynegy Inc., v. Zibelman, 272 F. Supp. 3d 554, 560 (S.D.N.Y. 2017) (permitting New York's nuclear energy subsidy because GENCO recipients receive credits for renewable energy's environmental attributes which are bought and sold separately from RTO markets).

Endnotes: Does Importing Endangered Species' Body Parts Help Conservation? Discretion to Import Trophies Under the Trump Administration

continued from page 23

[4] *See North and South, The (Global)*, International Encyclopedia of the Social Sciences, https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/north-and-south-global (explaining Europe, Canada, the United States, Australia, New Zealand, and Japan are examples of the Global North, as they have been developed for many years).

[5] *See* Diana Mitlin & David Satterthwaite, Urban Poverty in the Glob. South: Scale and Nature 13 (2013) (defining the Global South as all countries classified as low- and middle-income by the World Bank in Africa, Asia, Latin America, and the Caribbean, as compared to the more prosperous and developed Global North).

[6] Myanna Dellinger, *Trophy Hunting Contracts: Unenforceable for Reasons of Public Policy*, 41 Colum. J. Envtl. L. 395, 396 (2016). S*ee generally* 16 U.S.C. § 1532(16) (2012) (defining species as any subsection of wildlife or fish and "any distinct population segment of any species of vertebrate fish or wildlife" that interbreeds at the age of maturity).

[7] *See* § 1532(3) (defining conserving as all methods necessary to get endangered and threatened species to the point which the measures to protect them are no longer necessary. These methods include habitat maintenance, transplantation, and live trapping. Regulated taking is only allowed in extraordinary cases where population pressures cannot be otherwise relieved).

[8] *About the U.S. Fish and Wildlife Service*, U.S. Fish & Wildlife Serv. (last updated May 31, 2018), https://www.fws.gov/help/about_us.html.

[9] *Id.*

[10] *See* § 1531(a)(1)–(3) (stating that economic growth and development without adequate concern and conservation have caused species to become extinct); *see also* H.R. Rep. No. 97-567, at 9 (1982) (explaining that previous efforts included the Endangered Species Preservation Act of 1966 and the Endangered Species Conservation Act of 1969); *see also Endangered Species Act*, U.S. Fish and Wildlife Serv., https://www.fws.gov/endangered/laws-policies.

[11] *Endangered Species Act*, U.S. Fish and Wildlife Serv. Endangered Species, https://www.fws.gov/endangered/laws-policies (last visited Mar. 10, 2019) (summarizing the ESA and its history).

[12] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978) (stating that the ESA requires that federal agencies do not act in a way that will jeopardize the existence of an endangered species and that under the ESA, Congress intended that the protection of endangered species would be given the "highest of priorities").

[13] *See* § 1533 (a)(1) (laying out that a species is considered endangered or threatened depending on: "(1) [t]here is the present or threatened destruction, modification, or curtailment of its habitat or range . . . (2) overutilization for commercial, recreational, scientific, or educational purposes (3) disease or predation (4) the inadequacy of existing regulatory mechanisms [or] (5) . . . other natural or manmade factors affecting its continued existence"); *see also* Safari Club Int'l v. Jewell, 960 F. Supp. 2d 17, 27–28 (D.D.C. 2013) (quoting M. Lynne Corn *et al.*, Cong. Research Serv., RL31654, *The Endangered Species Act: A Primer*, at 5 (2012)) (explaining that the ESA is considered successful when it helps stabilize or increase the populations of listed species).

[14] § 1531(b) (establishing the purpose of the ESA as "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species").

[15] *See* § 1538(a)(1) (defining "take" to include harm, harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect).

[16] § 1532(8) (expanding the definition of "fish or wildlife" to dead animals).

[17] §§ 1539(a)(1)(A)–(B) (empowering the Service to permit a taking of an endangered or threatened animal).

[18] *Id.* (enumerating the reasons for which the Service can give a permit).

[19] *Id.*

[20] 5 U.S.C. § 706(2)(A) (stating that a reviewing court shall hold unlawful any agency action that is arbitrary, capricious, or otherwise unlawful).

[21] *See infra* Part II.

[22] *Id.*

[23] *See infra* Part III.

[24] *See infra* Part IV.

[25] *See infra* Part V.

[26] *About the U.S. Fish and Wildlife Service*, *supra* note 8.

[27] *Id.*

[28] *Id.*

[29] *Id.*; *see also About Us*, U.S. Fish & Wildlife Serv., https://www.fws.gov/international/about-us/ (last visited February 24, 2019) (showing how the Service's International Affairs program helps with international conservation by administering grant programs that support human and institutional capacity building and research, providing technical assistance to wildlife managers worldwide, regulating international trade, and regulating species exported from the United States).

[30] *See generally International Affairs*, U.S. Fish & Wildlife Serv., https://www.fws.gov/international/ (last visited Feb. 24, 2019).

[31] *See generally Permits*, U.S. Fish & Wildlife Serv., https://www.fws.gov/international/permits/ (last visited Feb. 24, 2019).

[32] *See generally International Affairs Program Strategic Framework (2014-2019*), U.S. Fish & Wildlife Serv. (Aug. 2014), https://www.fws.gov/international/strategic-plan.pdf; *see also Treaties and Conventions*, U.S. Fish & Wildlife Serv., https://www.fws.gov/international/laws-treaties-agreements/treaties-and-conventions/ (last visited Feb. 24, 2019) (stating that many international programs are based on conventions, like the Convention on International Endangered Species and the Convention on Wetlands of International Importance).

[33] *See About Us*, Nat'l oceanic and atmospheric admin., https://www.fisheries.noaa.gov/about-us (last visited Feb. 24, 2019) (explaining the NMFS is an office of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce which works to establish sustainable fisheries, safe sources of seafood, and to conserve healthy ecosystems); *see also ESA Basics,* U.S. Fish & Wildlife Serv. (Jan. 2013), https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf (outlining the Service's responsibility for dealing with terrestrial and freshwater species, while the NMFS focuses on marine wildlife).

[34] *See generally* 16 U.S.C. § 1533(a)–(g) (2012) (listing guidelines for the categorization of endangered and threatened species, habitat conservation, and protective regulations).

[35] *See* § 1531(a)(1)–(3) (stating that economic growth and development without adequate concern and conservation caused species to become extinct); *see also* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 177 (1978) (reiterating that Congress was motivated to pass the ESA in part by the dramatic increase in the number and seriousness of threats facing the planet's wildlife).

[36] S. Rep. No. 93–307, at 2 (1973).

[37] *Id*.

[38] *Id*.

[39] *Id*. at 3.

[40] *See* § 1531(a)–(b) (explaining the background of the ESA and that relevant conventions include the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere and the Convention on International Trade in Endangered Species of Wild Fauna and Flora).

[41] § 1531(b).

[42] § 1531(c) (stating that Federal agencies must exercise their authorities in furtherance of the ESA's purpose).

[43] § 1533(a)(1)(A)–(E).

[44] This subsection describes why and how different species are labeled as threatened and endangered. *See* § 1533(a)(1).

[45] § 1533(b).

[46] § 1533(d).

[47] The Secretary must give priority to endangered and threatened species that are likely to benefit from recovery plans. In these plans, the Secretary must also describe site-specific management actions and measurable criteria which would result in the species being removed from the endangered or threatened species list. *See* § 1533(f)(1).

[48] 5 U.S.C. § 553; *see* Safari Club Int'l v. Zinke, 878 F.3d 316, 332 (D.C. Cir. 2017).

[49] § 553(c).

[50] *Safari Club Int'l*, 878 F.3d at 335 (quoting Sugar Cane Growers Coop. of Fla. v. Veneman, 289 F.3d 89, 96 (D.C. Cir. 2002)).

[51] § 706(2)(A) (stating that an agency cannot act in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Safari Club Int'l*, 878 F.3d at 325 (stating that when the court applies the arbitrary and capricious standard, it must consider whether the agency gave an explanation for its decision that runs counter to the evidence before the agency).

[52] Safari Club Int'l v. Jewell, 960 F. Supp. 2d 17, 46 (D.D.C. 2013) (explaining that agencies must review relevant data and implement satisfactory explanations to establish a rational connection between data collected and the choice made).

[53] *Id*.

[54] 5 U.S.C. § 706(2)(A) (2012).

[55] *See* Stephen Lee, *Endangered Species Listings Sharply Down Under Trump*, Bloomberg Env't (Nov. 30, 2018), https://news.bloombergenvironment.com/environment-and-energy (stating that the Trump administration has listed fewer species in its first twenty-two months than any other president since Ronald Reagan).

[56] *See generally* Issuance of Import Permits for Zimbabwe Elephant Trophies Taken on or After January 21, 2016, and on or Before December 31, 2018, 82 Fed. Reg. 54,405 (Nov. 17, 2017) (to be codified at 50 C.F.R. § 17); *Federal Register Documents*, U.S. Fish & Wildlife Serv., https://www.fws.gov/policy/frsystem/default.cfm (last visited Feb. 26, 2019) (compiling final rules issued by the Trump administration regarding endangered and threatened wildlife and plants).

[57] Ya-Wei Li, Section 4(d) Rules: The Peril and The Promise, Defenders of Wildlife 8 (Jan. 2017), https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf.

[58] *Id*. at 8–9.

[59] *Id*. at 7 (explaining that exceptions are permitted for conservation when activities are for an educational, scientific, or conversation purpose and are likely to be considered "necessary and advisable").

[60] *See* Memorandum from the Principal Deputy Dir., U.S. Fish and Wildlife Serv., https://www.fws.gov/international/pdf/memo-withdrawal-of-certain-findings-ESA-listed-species-sport-hunted-trophies.pdf (Mar. 1, 2018) (withdrawing enhancement findings for trophies of African elephants taken in Zimbabwe). *See generally* Memorandum from the Chief of the Branch of Permits, U.S. Fish and Wildlife Serv., https://www.fws.gov/international/pdf/enhancement-finding-March-2015-elephant-Zimbabwe.pdf (Mar. 26, 2015) (determining that the Service is unable to make a finding that the killing of elephants in Zimbabwe, on or after January 1, 2015, whose trophies are intended for importation into the United States, would enhance the survival of the African elephant in the wild).

[61] *See* Sheehan, *supra* note 1.

[62] *Id*.

[63] *Id*.

[64] 878 F.3d 316 (D.C. Cir. 2017).

[65] *See id.* at 325–26, 334–36 (holding the Service's reasoning for the ban was appropriate, but the Service's failure to use notice-and-comment rulemaking when it banned the importation of certain sport-hunted trophies was a harmful error). Because of the procedural error, the Court remanded the case so the Service could initiate rulemaking to address enhancement findings for the relevant time periods which therefore allowed the Service to reverse the ban. *Id.* The District Court had found that the court cannot substitute its judgment for the judgment of the Service, especially when the decision requires a high level of technical expertise and gave deference to the agency. Safari Club Int'l v. Jewell, 213 F. Supp. 3d 48, 80–81 (D.D.C. 2016); s*ee also* Sheehan, *supra* note 1.

[66] *See Safari Club Int'l*, 878 F.3d at 335–36.

[67] Exec. Order No. 13,648, 78 Fed. Reg. 40,621 (July 1, 2013).

[68] *Id*.

[69] *Id*. (describing how the United States will help foreign governments with anti-wildlife trafficking activities when requested, promote the creation and enforcement of laws that prohibit the illegal taking and trading of species, and prosecute people who partake in wildlife trafficking).

[70] *Safari Club Int'l*, 878 F.3d at 323–24.

[71] *Id*. at 324.

[72] *Id*. at 324, 327 (describing that enhancement findings looked to see if a country has a sustainable number of animals to support its hunting program, what the management plan is like, if the regulations are effective to implement the hunting program, and if the participation of hunters from the United States provides a clear benefit to meet the ESA's special rule requirement to import trophies).

[73] *Id*. at 328 (opposing the appellants' claim that the Service's negative enhancement claim was improper because the Service did not make an affirmative finding that trophy hunting fails to enhance the survival of the African elephant in Zimbabwe).

[74] 50 C.F.R. § 17.40(e)(6)(i)(B) (2019).

[75] *Safari Club Int'l*, 878 F.3d at 328; 50 C.F.R. § 17.40(e)(6)(i)(B).

[76] 5 U.S.C. § 553(c) (2012).

[77] *Safari Club Int'l*, 878 F.3d at 335.

[78] *Id*. at 336.

[79] *See id.* (ruling that the Service may initiate rulemaking because the previous rule did not comply with all of the technical requirements of the APA, but not specifically direct the Service to issue a new rule); *see also* Sheehan, *supra* note 1.

[80] Species Survival Commission, Int'l Union for Conservation of Nature, Guiding Principles on Trophy Hunting as a Tool for Creating Conservation Incentives, 2 (2012) [hereinafter International Union for Conservation]; *see also Import of Hunted Lions*, U.S. Fish & Wildlife Serv., https://www.fws.gov/international/permits/by-activity/sport-hunted-trophies-lions.html (demonstrating the Service's reliance on the Species Survival Commission document).

[81] International Union for Conservation*, supra* note 80*,* at 7.

[82] *Id*.

[83] *Id*. at 3.
[84] Amy Dickman, *Ending Trophy Hunting Could Actually Be Worse For Endangered Species*, CNN (Jan. 4, 2018), https://www.cnn.com/2017/11/24/opinions/trophy-hunting-decline-of-species-opinion-dickman/index.html.
[85] *Id*. (explaining that if trophy hunting aids conservation by creating habitat protection and preventing illegal killing of animals then threatened species could be better off if trophy hunting is legally permitted).
[86] *Id*.
[87] *Id*. (stating that trophy hunting must be well managed because poor management can negatively impact lion populations).
[88] *The Lion's Share? On the Economic Benefits of Trophy Hunting*, Economists at Large 5 (2017) [hereinafter The Lion's Share].
[89] *Id*. at 5–6.
[90] *Id*. at 6 (explaining that complicated political climates, corruption, lack of monitoring, ignoring science, not placing age limits on hunted species, and permitting hunting in unstable populations are all factors that contribute to the fact that ideal trophy hunting conservation programs cannot exist).
[91] *Id*. at 15.
[92] *See generally* Humane Society, *supra* note 3 (explaining that trophy hunting is a global business that promotes killing contests and that trophy hunting could not and does not help conserve species).
[93] *See* Michael Markarian, *Eco-Tourism Worth More to African Economies than Trophy Hunting*, Huffington Post (Nov. 2, 2015), https://www.huffingtonpost.com/michael-markarian/eco-tourism-worth-more-to_b_8455186.html (discussing how trophy hunter Walter Palmer paid 55,000 dollars to kill a lion that would have generated about one million dollars from eco-tourism during the lion's lifetime and how eco-tourism is generally more beneficial to Africa's economy than trophy hunting because the total revenue gained for eco-tourism is much greater for than trophy hunting). *See generally* The Lion's Share, *supra* note 88, at 4; *The $200 Million Question*, Economists at Large 5 (2013), http://www.hsi.org/assets/pdfs/trophy-hunting-african-communities.pdf.
[94] *See generally* Humane Society, *supra* note 3.
[95] *See Trophy Hunting by the Numbers,* Humane Soc'y of the U.S. 1, 3 (Feb. 2016), http://www.hsi.org/assets/pdfs/report_trophy_hunting_by_the.pdf (explaining that between 2005 and 2014, an average of more than 126,000 trophies every year were imported to the United States). During that time period, 5,600 African lion and 4,600 African elephant trophies were imported. *Id*. at 3. Top countries of origin include South Africa, Namibia, Zimbabwe, Tanzania, and Botswana. *Id*. at 4. The top ports of entry for wildlife trophies were New York, New York; Pembina, North Dakota; Chicago, Illinois; Dallas, Texas; and Portal, North Dakota. *Id*. at 1. Additionally, the Africa Big Five Species include African lions, elephants, leopards, white rhinos, and buffalo. *Id*.
[96] *Great Elephant Census Final Results*, Great Elephant Census, http://www.greatelephantcensus.com/final-report (last visited July 11, 2018).
[97] Colin Dwyer, *Trump Administration Quietly Decides-Again-To Allow Elephant Trophy Imports*, Nat'l Pub. Radio (Mar. 6, 2018), https://www.npr.org/sections/thetwo-way/2018/03/06/591209422/trump-administration-quietly-decides-again-to-allow-elephant-trophy-imports. *See generally Hunting Overseas*, U.S. Fish & Wildlife Serv. Int'l, https://www.fws.gov/international/permits/by-activity/sport-hunted-trophies.html (stating that well-regulated hunting in addition to a properly managed program can benefit the conservation of species but does not provide current statistics or other data to show how current rules and regulations are impacting species and whether there has been increased conservation due to current trophy hunting imports).
[98] Dwyer, *supra* note 97.
[99] *Id*.; *see also* Donald J. Trump (@realDonaldTrump), Twitter (Nov. 19, 2017), https://twitter.com/realDonaldTrump/status/932397369655808001?ref_src=twsrc%5Etfw (showing how President Trump said the decision to lift the ban on importing sport-hunted trophies was a "horror show" and that it would be hard for him to change his mind).
[100] 16 U.S.C. § 1533(d) (2012); Rachel Nuwer, *U.S. Lifts Ban on Some Elephant and Lion Trophies*, N.Y. Times (Mar. 7, 2018), https://www.nytimes.com/2018/03/07/science/trump-elephant-trophy-hunting.html (expressing disagreement with the Service's decision, noting that nothing has changed since the Obama administration's ban, as elephant populations have not made a comeback, and there are still major issues such as poaching and corruption). *But see* Dickman, *supra* note 84 (arguing that trophy hunting may be the best way to conserve species in certain circumstances).
[101] § 1531(c).
[102] § 1539(a)(1)(A)–(B).
[103] The Service references a document that described two previous case studies about trophy hunting and conservation. These case studies discuss how populations increased but did not explain how trophy hunting directly helped conserve species, nor did it prove that trophy hunting was the cause of the population increase. *See* International Union for Conservation, *supra* note 80, at 8–10.
[104] *See* Sheehan, *supra* note 1.
[105] *See* International Union for Conservation, *supra* note 80, at 8–10; *Import of Hunted Lions*, U.S. Fish & Wildlife Serv., https://www.fws.gov/international/permits/by-activity/sport-hunted-trophies-lions.html (demonstrating the Service's reliance on the document).
[106] § 1533(d).
[107] The Secretary must give priority to endangered and threatened species that are likely to benefit from recovery plans. If it created a recovery plan, the Secretary would have to provide a description of site-specific management actions and measurable criteria which would result in the species being removed from the endangered or threatened species list. *See* § 1533(f)(1).
[108] 5 U.S.C. § 706.
[109] *Id*.; *see also* 16 U.S.C. § 1539(a)(1)(A)–(B) (stating that the Service may only issue permits for scientific research, survival, or improvement of propagation).
[110] *See generally* Holly Doremus, *Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy*, 75 Wash. U. L. Rev. Q. 1029, 1035–36 (1997) (explaining that the best available science is often uncertain).
[111] 5 U.S.C. § 706(2)(A); 16 U.S.C. § 1533(d).
[112] 5 U.S.C. § 706(2)(A); *see* Safari Club Int'l v. Zinke, 878 F.3d 316, 325 (D.C. Cir. 2017) (stating that when the court applies the arbitrary and capricious standard, it must consider whether the agency has "relied on factors that Congress has not intended it to consider" and gave an explanation for its decision that opposes evidence before the agency).
[113] Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).
[114] *Id*. at 43.
[115] *Id*.
[116] *Id*.
[117] *See* International Union for Conservation, *supra* note 80, at 8–10.
[118] Ethyl Corp. v. U.S. Envtl. Prot. Agency, 541 F.2d 1, 35–36 (D.C. Cir. 1976) (quoting Greater Boston Television Corp. v. Fed. Commc'n Comm'n, 444 F.2d 841, 850 (D.C. Cir. 1970)).
[119] 16 U.S.C. § 1539(a)(1)(A)–(B) (2012).
[120] Safari Club Int'l v. Zinke, 878 F.3d 316, 326 (D.C. Cir. 2017).
[121] *Hunting Overseas*, U.S. Fish & Wildlife Serv. Int'l Aff. (last visited Feb. 24, 2019), https://www.fws.gov/international/permits/by-activity/sport-hunted-trophies.html.
[122] *Id*.
[123] The following document provides two case studies as examples. The first case study discusses population increases but does not discuss how many animals were killed, how much money generated from trophy hunting was used directly for conservation efforts, and how trophy hunting caused increases in population. The second case study follows suit and provides even less detail. *See* International Union for Conservation, *supra* note 80, at 2 (discussing how trophy hunting may assist in furthering conservation objectives by creating economic incentives).
[124] *See generally* International Union for Conservation, *supra* note 80.
[125] 16 U.S.C. § 1533(b) (2012); *see* Building Indus. Ass'n v. Norton, 247 F.3d 1241, 1246 (2001) (explaining that the Service must utilize the best scientific data available, not the best scientific data possible); Doremus, *supra* note 110, at 1035–36.
[126] Doremus, *supra* note 110, at 1034; *see also* Ya-Wei Li, *supra* note 57, at 6-7 (describing how under the ESA, basic information such as the number and types of species covered by section 4(d) rules continue to be inscrutable to ESA practitioners).
[127] Doremus, *supra* note 110, at 1036 (explaining that a strict science-based directive has led agencies to apply closed, technocratic decision-making processes that are common in the scientific community).
[128] 5 U.S.C. § 553(b) (explaining the exception when persons subject thereto are named and personally served or otherwise have notice per the law).
[129] § 553(b)(1).
[130] § 553(b)(2)–(3).
[131] Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985) (explaining that by allowing interested parties to educate the agency, the agency is better informed during its decision-making process).

[132] § 553(c).
[133] *Id*.
[134] *Id*.
[135] Dellinger, *supra* note 6, at 468 (explaining how the public trust doctrine could be used, by third parties, as a mechanism to ensure plaintiffs have standing when challenging the government's ability to issue trophy hunting permits).
[136] 16 U.S.C. § 1531(a)(4) (pledging to protect endangered species within practicable means).
[137] When a rule was proposed in 2015 to increase protections for African elephants, the public submitted 6345 comments in response to the proposed rule. *See generally* Endangered and Threatened Wildlife and Plants; Revision of the Section 4(d) Rule for the African Elephant (Loxodonta africana), 80 Fed. Reg. 45,154 (July 29, 2015) (to be codified at 50 C.F.R. § 17).
[138] *See* § 1531(a)(3) (recognizing the inherent value in diverse species of plants and animals).
[139] 5 U.S.C. § 553(e).
[140] Dellinger, *supra* note 6, at 458. (utilizing the public trust doctrine to establish standing in third-parties).
[141] Sierra Club v. Morton, 405 U.S. 727, 732 (1972).
[142] *Id*. at 735.
[143] 16 U.S.C. § 1533(b)(1)(A); Building Indus. Ass'n v. Norton, 247 F.3d 1241, 1246 (2001); *see also* Franks v. Salazar, 816 F. Supp. 2d 49, 56 (2011) (explaining that the plaintiff has the burden to demonstrate that the Service's action is arbitrary and capricious).
[144] It is crucial that the Service follows the guidelines under the APA and provide the public an opportunity to participate in the rulemaking process as the public generally has an interest in the future of endangered and threatened species. *See generally* Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985).Additionally, as the failure to use notice-and-comment rule-making invalidated the Obama administration's ban on sport-hunted trophies in *Safari Club International v. Zinke*, it is crucial that procedure outlined in the APA is adequately followed. *See* Safari Club Int'l v. Zinke, 878 F.3d 316, 326 (D.C. Cir. 2017).
[145] *Safari Club Int'l*, 878 F.3d at 326.
[146] The Lion's Share, *supra* note 88.
[147] *Id*. at 5–6.
[148] *Id*. at 6 (explaining that ideal trophy hunting conservation programs cannot exist due to factors such as political climates, corruption, lack of monitoring, ignoring science, not placing age limits on hunted species, and permitting hunting in unstable populations are all factors that contribute to the fact that).
[149] *Safari Club Int'l*, 878 F.3d at 324, 327.
[150] *Id*.
[151] *See Id*. at 328; 50 C.F.R. § 17.40(e)(6)(i)(B) (2019).
[152] 16 U.S.C. § 1533(d) (2012).
[153] *See generally Safari Club Int'l*, 878 F.3d at 328 (holding that the Service's negative enhancement findings were not improper even though they rested on the absence of evidence that trophy hunting enhances the survival of the species).
[154] *Id*. at 334–35 (concluding that the Service's failure to meaningfully engage the public is not a harmless error).
[155] *See* § 1539(a)(1)(A)-(B) (describing the two-step analysis for the issuance of permits under the ESA).
[156] *See About the U.S. Fish and Wildlife Service*, *supra* note 8.
[157] § 1531(c).
[158] § 1533(d).
[159] *Id*.
[160] *See* § 1539(a)(1)(A)-(B).

Endnotes: How Syria's Failure to Uphold the Kyoto Protocol and Paris Agreement Exacerbated the Effects of Climate Change in the Levant

continued from page 26

[1] Edward Yeranian, *Water Crisis Looms as Syria Military Conflict Winds Down*, Voice of Am., Aug. 28, 2018, https://reliefweb.int/report/syrian-arab-republic/water-crisis-looms-syria-military-conflict-winds-down (noting that the lack of agriculture between 2006 and 2010 created an "army of idle young men," which may have contributed to the conflict in 2011).
[2] *Gender, Climate Change, and Health*, World Health Org., https://www.who.int/globalchange/GenderClimateChangeHealthfinal.pdf.
[3] Francesca De Châtel, *The Role of Drought and Climate Change in the Syrian Uprising: Untangling the Triggers of the Revolution*, Vol. 50, Middle E. Studies, Jan. 27, 2014.
[4] *Id*.
[5] Peter H. Gleick, *Water, Drought, Climate Change, and Conflict in Syria*, Pac. Inst., July 1, 2014, https://doi.org/10.1175/WCAS-D-13-00059.1.
[6] *See* United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC]; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998).
[7] UNFCCC, *supra* note 6.
[8] *See* Kyoto Protocol, *supra* note 6.
[9] *Parties and Observers*, United Nations Framework Convention on Climate Change https://unfccc.int/parties-observers (last visited Apr. 23, 2019).
[10] Kyoto Protocol, *supra* note 6.
[11] *Id*.
[12] *Id*.
[13] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, art 6.1, 7 [hereinafter Paris Agreement].
[14] *Id*. at art 6; Romany Webb and Jessica Wentz, *Human Rights and Article 6 of the Paris Agreement: Ensuring Adequate Protection of Human Rights in the SDM and ITMO Frameworks*, Columbia L. Sch. Sabin Center for Climate Change (2018) http://columbiaclimatelaw.com/files/2018/05/Webb-Wentz-2018-05-Human-Rights-and-Article-6-of-the-Paris-Agreement.pdf.
[15] Paris Agreement, *supra* note 13, at art. 7.
[16] Kyoto Protocol, *supra* note 6, art. 2.
[17] Kyoto Protocol, *supra* note 6, art. 2(i); Margaret Suter, *Running Out of Water: Conflict and Water Scarcity in Yemen and Syria*, Atl, Council (Sep. 12, 2017), https://www.atlanticcouncil.org/blogs/menasource/running-out-of-water-conflict-and-water-scarcity-in-yemen-and-syria (linking violent political turmoil and water shortages)
[18] *See* Kyoto Protocol, *supra* note 6, art. 2(i).
[19] *Counting the Cost: Agriculture in Syria after six years of crisis*, Food and Agric. Org. of the United Nations (Apr. 2017), http://www.fao.org/emergencies/resources/documents/resources-detail/en/c/878213/.
[20] Kyoto Protocol, *supra* note 11, art. 2(iv).
[21] *Syria*, Reg'l Ctr. for Renewable Energy and Energy Efficiency, http://www.rcreee.org/content/syria (last visited Apr. 23, 2019) (noting that "[t]he government has set a 4.3% target of primary energy demand to come from renewable energy resources by 2030").
[22] Kyoto Protocol, *supra* note 6; Paris Agreement, supra note 13, at art 7.
[23] *An Introduction to the Kyoto Protocol Compliance Mechanism*, United Nations Framework Convention on Climate Change, https://unfccc.int/process/the-kyoto-protocol/compliance-under-the-kyoto-protocol/introduction (last visited Apr. 23, 2019).
[24] *Nat'l Commc'n Submissions from Non-Annex I Parties*, United Nations Framework Convention on Climate Change, https://unfccc.int/process-and-meetings/transparency-and-reporting/reporting-and-review-under-the-convention/national-communications-and-biennial-update-reports-non-annex-i-parties/national-communication-submissions-from-non-annex-i-parties (last visited Apr. 23, 2019).
[25] Jane Cohen, *There is No Time Left: Climate Change, Envtl. Threats, and Human Rights in Turkana, County Kenya*, Human Rights Watch (Oct. 15, 2015) https://www.hrw.org/report/2015/10/15/there-no-time-left/climate-change-environmental-threats-and-human-rights-turkana.
[26] *See generally Water Quality Management – Syria*, Mediterranean Envtl. Technical Assistance Program, http://siteresources.worldbank.org/EXTMETAP/Resources/WQM-SyriaP.pdf (last visited Apr. 23, 2019).
[27] Gleick, *supra* note 5.
[28] *See generally* Ido Bar & Gerald Stang, *Water and Insecurity in the Levant*, European Union Inst. for Sec. Studies (Apr. 2016), https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief_15_Water_in_the_Levant.pdf.

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