

## Sustainable Development Law & Policy

---

Volume 12

Issue 1 Fall 2011: *Natural Resource Conflicts*

Article 9

---

# Natural Resource “Conflicts” in the U.S. Southwest: A Story of Hype over Substance

Laura Peterson

Jay C. Lininger

Marty Bergoffen

Bill Snape

Curt Bradley

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/sdlp>

 Part of the [Environmental Law Commons](#)

---

### Recommended Citation

Peterson, Laura, Jay C. Lininger, Marty Bergoffen, Bill Snape, and Curt Bradley. "Natural Resource “Conflicts” in the U.S. Southwest: A Story of Hype over Substance." *Sustainable Development Law & Policy* 12, no. 1 (2011): 32-36, 61-63.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Sustainable Development Law & Policy* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# NATURAL RESOURCE “CONFLICTS” IN THE U.S. SOUTHWEST: A STORY OF HYPE OVER SUBSTANCE

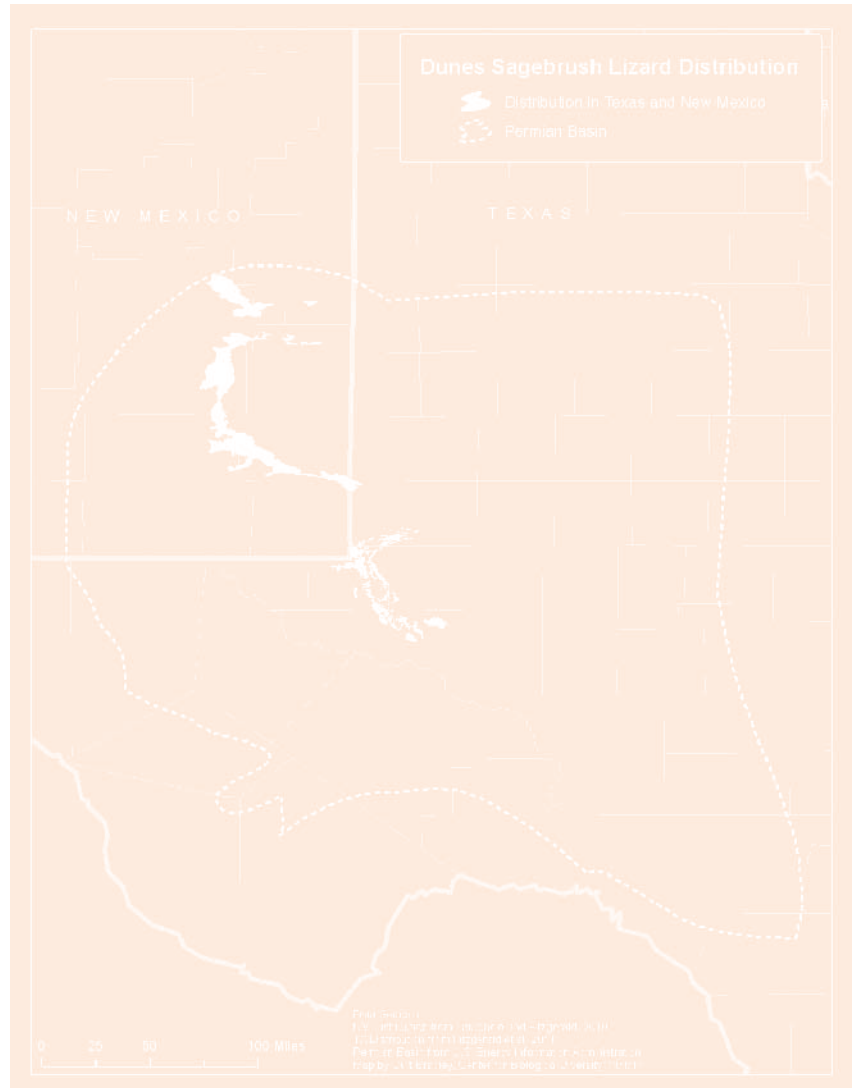
by Laura Peterson, Jay C. Lininger, Marty Bergoffen, Bill Snape, and Curt Bradley\*

## INTRODUCTION

Environmental laws and the ecosystems they support are under attack. Intermittently since the Reagan administration and increasingly since the 2008 economic collapse, certain politicians and their industry sponsors have inundated the media with angry rhetoric, blaming historic job losses on “overregulation.”<sup>1</sup> Environmental laws are a frequent target of these politicians who often benefit from contributions supplied by the fossil fuel and mining industries.<sup>2</sup> Ignoring the successes of these laws—cleaner air, cleaner water, and recovering imperiled wild species and habitat—they claim that environmental regulations are “job killers.”<sup>3</sup> Reflecting the success of these claims, the recent House Fiscal Year 2012 Interior and Environment spending bill contained forty-two proposed anti-environmental riders. These riders range from limiting the Environmental Protection Agency’s ability to curb carbon emissions<sup>4</sup> to blocking the U.S. Fish and Wildlife Service’s ability to list new threatened and endangered species.<sup>5</sup>

In the midst of these attacks, the Endangered Species Act (“ESA”)—an act President Nixon signed in 1973 with the enormous popular support of the American people—has become a target for repeal.<sup>6</sup> A bedrock environmental law, the ESA protects both imperiled species and the habitat necessary for those vulnerable species to survive.<sup>7</sup> Capitalizing on widespread economic anxieties, opponents of industry regulation have proposed legislation to undermine the ESA and block the listing of threatened and endangered species.<sup>8</sup> Sometimes based on more hyperbole than fact, these opponents promote the false belief that resource development and environmental protection are mutually exclusive. Some industry supporters argue that jobs would be created if the government opened up protected lands for private use,<sup>9</sup> and that increased regulation may block development and destroy jobs, leading to further economic depression.<sup>10</sup> Such attacks on the ESA characterize the issue as a tradeoff between the economy and the environment, claiming that the government must choose between using scarce natural resources to protect wildlife or help the economy.<sup>11</sup> In the current climate of economic distress, these arguments, regardless of their truth, are particularly effective. Whenever environmental protections are proposed or enforced, industry proponents predictably forecast dire economic consequences.<sup>12</sup> However,

Figure 1: Dunes Sagebrush Lizard Distribution, 2010



these gloomy predictions rarely materialize.<sup>13</sup> There is no stark dichotomy of economy versus the environment when it comes to developing natural resources; the issues are much more nuanced. Overblown rhetoric about environmental regulation obstruct the public’s access to open and honest debate about the best uses for scarce natural resources.

\* Laura Peterson is a Legal Fellow at the Center for Biological Diversity; Jay C. Lininger is an Ecologist at the Center for Biological Diversity; Marty Bergoffen is an Endangered Species Organizer at the Center for Biological Diversity; Bill Snape is Senior Counsel at the Center for Biological Diversity and a Practitioner in Residence at American University, Washington College of Law; Curt Bradley is a GIS Specialist and Information Technology Director at the Center for Biological Diversity.

## CONTROVERSY IN THE PERMIAN BASIN

The American Southwest, which is itself an intersection of diverse cultures, ecosystems, and political ideologies, is the on the front line for the cutting-edge natural resource battles of the early 21st Century.<sup>14</sup> The Permian Basin in southeast New Mexico and west Texas is the focus of the latest and most serious attacks on the ESA (See Figure 1). The Permian Basin is an area of great economic and ecological significance. It is one of the largest domestic producers of fossil fuel in the United States, providing seventeen percent of the nation's domestic crude oil.<sup>15</sup> In 2004, the Permian Basin produced about 841,000 barrels of oil per day.<sup>16</sup> In addition to oil and gas extraction, the Permian Basin is home to significant agricultural interests, producing both food crops and grazing livestock.<sup>17</sup> While these activities are important for the region's economy, they also have a significant effect on wildlife.<sup>18</sup> The lesser prairie chicken and the dunes sagebrush lizard are particularly vulnerable to these industrial activities that are destroying their diminishing habitats.<sup>19</sup> Their habitats and populations have been declining steadily for decades and their survival depends on protection under the ESA.<sup>20</sup>

As a result of their population decline, these two species are now candidates for listing under the ESA.<sup>21</sup> If approved, their listing would trigger certain protections for both the species and their habitats.<sup>22</sup> However, opponents argue that listing these imperiled species would virtually shut down oil and gas drilling and inhibit agricultural production, both of which are bases of the local economy.<sup>23</sup> These opponents argue that public resources should be dedicated to economic development to benefit workers rather than protecting environmental resources.<sup>24</sup> Responding to these claims, local members of Congress have spearheaded legislation that would preclude listing the dunes sagebrush lizard and lesser prairie chicken, regardless of the scientific merit of protecting them as endangered species.<sup>25</sup>

This article examines the pronounced controversy over natural resources in the Permian Basin, arguing that the supposed conflict between environmental protection and resource exploitation is not as stark as many claim. Protection would have little real effect on energy development and may ultimately help the economy of the American Southwest and lead to improved land management practices.<sup>26</sup> To the extent that there is a real conflict over use of scarce resources, the controversy presents a much-needed opportunity for healthy dialogue about sustainable development in the region. Any actual conflict can be resolved within the existing flexible mechanisms provided in the ESA.

## THE LESSER PRAIRIE CHICKEN

The lesser prairie chicken is a medium-sized, gray-brown member of the grouse family that lives in the short grass prairies of the American Southwest.<sup>27</sup> It forages for insects, leaves, and buds on the shinnery oak and sand sagebrush grasslands in limited areas of Colorado, Kansas, New Mexico, Oklahoma, and Texas.<sup>28</sup> While the prairie chicken is best known for the male's unique courtship displays on communal breeding grounds, it also provides the vital ecosystem service of regulating the grassland insect populations, which can cause substantial economic

damage to agricultural operations.<sup>29</sup> Destruction of habitat is one of the primary threats to the lesser prairie chicken.<sup>30</sup> Since the 1800s, its range has been reduced by over 90%, and its population has declined significantly.<sup>31</sup> The remaining habitat faces a myriad of ongoing threats from livestock grazing, oil and gas drilling, fire suppression, deliberate poisoning of shinnery oak, and fragmentation from structural and transportation development.<sup>32</sup>

The lesser prairie chicken has been caught in regulatory limbo for over a decade. In 1998, the U.S. Fish and Wildlife Service ("FWS") concluded that it warranted protection as an endangered species.<sup>33</sup> However, it has since remained a "candidate species" with no protection while its numbers decline.<sup>34</sup> Now, the FWS characterizes the extinction threat to this terrestrial bird as high, ongoing, and imminent.<sup>35</sup> To survive and recover, the lesser prairie chicken needs protection under the ESA.

## THE DUNES SAGEBRUSH LIZARD

The dunes sagebrush lizard is arguably the most controversial animal in the current ESA fight. The lizard exclusively makes its home in shinnery oaks on the sand dunes of southeastern New Mexico and west Texas.<sup>36</sup> This habitat specialist has a limited range,<sup>37</sup> living under the shade of oak trees and burying itself in white sand to avoid predators and regulate its body temperature.<sup>38</sup>

The primary threats to the lizard stem from fossil fuel development and agricultural activities within the lizard's specialized habitat.<sup>39</sup> Roads, pipelines, and power lines, as well as vehicular traffic and soil compaction associated with extraction operations, have destroyed and fragmented the lizard's native environment.<sup>40</sup> In addition, ranchers historically used herbicides to kill the shinnery oak necessary for the lizard's survival because it is poisonous to livestock in the spring when it is budding.<sup>41</sup> Farmers also remove the oak to clear land for livestock grazing and crop production.<sup>42</sup> Killing the shinnery oak not only removes the lizard's habitat, it also destabilizes the entire dunes ecosystem.<sup>43</sup>

The FWS classified the dunes sagebrush lizard as a candidate for listing under the ESA in 1982.<sup>44</sup> As a candidate species, neither the lizard nor its habitat has received any federal protection.<sup>45</sup> As a result, and despite listing by the State of New Mexico as an endangered species, its habitat has decreased by forty percent since 1982.<sup>46</sup> This fact is particularly troubling given the direct link between the lizard's survival and the quality and quantity of the shinnery oak.<sup>47</sup> In 2010, after twenty-eight years, the FWS proposed to formally list the dunes sagebrush lizard as endangered under the ESA.<sup>48</sup> The survival of the dunes sagebrush lizard depends on its ultimate protection under the ESA. However, this protection could be undermined if federal action under the ESA is blocked by oil, gas, and agricultural interests.

## BACKLASH OVER PROTECTION EXPLOITS ECONOMIC FEARS

Based on media reports, it would seem that protecting the lesser prairie chicken and the dunes sagebrush lizard from extinction would have a significant negative impact on economic

## THE ESA PROVIDES THE FLEXIBILITY TO DEAL WITH CONFLICTS THAT ARISE

activity in the Permian Basin.<sup>49</sup> Proposed ESA listings have generated virulent opposition, with some predicting dire economic scenarios in the region if these at-risk species receive protection.<sup>50</sup> Representative (“Rep.”) Steve Pearce (R-NM) alleged that protecting the lizard would place “[m]ost of the oil and gas jobs in southeast New Mexico . . . at risk.”<sup>51</sup> Echoing this sentiment, a Texas newspaper asserted that listing the lizard as an endangered species would put 27,000 jobs in jeopardy by severely limiting oil production.<sup>52</sup> Senator (“Sen.”) John Cornyn (R-TX) has advanced similar claims, stating that lizard protection is just another way the federal government puts obstacles in the way of job creation.<sup>53</sup> These members of Congress have proposed legislation that would preclude the ability of the FWS to list either species as endangered.<sup>54</sup> In addition to these claims, industry has inundated the local media with claims that environmentalists are determined “to shut down the oil and gas industry in Texas.”<sup>55</sup>

However, when the rhetoric is peeled away, these claims of imminent job loss resulting from wildlife protection have little substance. Instead, protection of at-risk wildlife would arguably have little or no effect on continued fossil fuel extraction in the Permian Basin.<sup>56</sup> A recent study on the impact of listing the dunes sagebrush lizard on oil and gas activities in New Mexico shows that claims of economic calamity are overblown.<sup>57</sup> The dunes sagebrush lizard’s potentially suitable habitat covers only 600,000 acres—less than one percent of all oil and gas lands in the Permian Basin.<sup>58</sup> The study examined the leasing activity from January 2010 to July 2011 of the Bureau of Land Management (“BLM”) Pecos District, which manages most of the land in the animal’s range in New Mexico.<sup>59</sup> Instead of the consequences purported the media, the study shows that lizard protection will have almost no effect on oil and gas activity.<sup>60</sup> Only five percent (2,920 acres) of 52,874 acres offered for lease in New Mexico are habitat for the lizard.<sup>61</sup> Moreover, only fifteen percent (3,484 acres) of 22,383 acres where BLM proposed leases in the second half of 2011 were lizard habitat.<sup>62</sup> The Permian Basin Petroleum Association claims that lizard protection “would shut down drilling activity for a minimum of two and as many as five years” while the FWS determines whether listing is warranted.<sup>63</sup> On the contrary, BLM will defer leasing of only 560 acres—less than one percent of lands proposed for oil and gas development during the study period—to conserve habitat for the animal.<sup>64</sup> Further, leases offered by BLM during the study period outnumbered those purchased by oil and gas companies, indicating a market surplus.<sup>65</sup> Additionally, in Texas, the state comptroller and land commissioner jointly found that only three percent of the 197,606 acres of dunes sagebrush lizard habitat overlaps developable oil and gas land.<sup>66</sup>

Instead of shutting down all oil and gas activities in the Permian Basin, protecting the dunes sagebrush lizard and its habitat would affect only a miniscule portion of lands that the oil and gas industry wishes to exploit in the Permian Basin.<sup>67</sup> Given the current surplus of leasing opportunities on public land in New Mexico alone, listing the lizard would have little effect on oil and gas activities in the Permian Basin.<sup>68</sup>

This article does not deny the existence of conflict over natural resource development in the American Southwest or that the ESA can inhibit resource development. The ESA does and should prevent development in certain circumstances. However, to the extent that conflicts about the use of natural resources in the Permian Basin exist, the ESA provides flexible mechanisms to minimize the economic impacts of wildlife protection.

The ESA requires public involvement and recognition of competing interests when the FWS considers protection of at-risk species.<sup>69</sup> The ESA is flexible: it either mandates or allows socio-economic considerations at nearly every stage of the process including designation of critical habitat,<sup>70</sup> consultation with federal action agencies,<sup>71</sup> recovery planning,<sup>72</sup> and prohibition against “take”<sup>73</sup> (i.e., harm or harassment of endangered species).<sup>74</sup> The act provides ample opportunity for public involvement and for provision of information on listing decisions and critical habitat determinations.

The decision to list an imperiled species under the ESA must take into account only “the best scientific and commercial data available” after a status review.<sup>75</sup> This science-based listing requirement ensures that decisions are based on the actual status of the species as opposed to politics.<sup>76</sup> However, the FWS does not act unilaterally.<sup>77</sup> Before making a determination of whether to list a species as endangered, the agency must take into account any state or local efforts to protect that species.<sup>78</sup> Although the FWS ultimately must base its decision to list a species only on the best available science—a requirement that is essential to prevent extinction—it must undertake extensive procedural steps to ensure that wildlife protection is accomplished through a transparent process.<sup>79</sup> The FWS must notify the state and local jurisdiction that might be affected by the listing decision.<sup>80</sup> If it decides that listing is warranted, the FWS must conduct a “status review” and solicit comments and information from the public, including industry and conservation groups, scientific experts, as well as affected state, local, tribal and federal agencies.<sup>81</sup> After the status review, the FWS must publish a proposed rule in the *Federal Register*, which then undergoes another public comment process and sometimes includes public hearings.<sup>82</sup> The FWS then incorporates the comments into a final listing rule.<sup>83</sup> In addition to the public review processes, listings undergo considerable internal review as well as formal, independent scientific peer review.<sup>84</sup>

The FWS must undertake a similarly public process when it designates critical habitat, which by law is necessary for the survival and recovery of imperiled species.<sup>85</sup> The FWS must consider economic impacts, the impacts on national security, as well as any other relevant impact of specifying a particular area as critical habitat.<sup>86</sup> The FWS can go so far as to exclude an area from critical habitat if it determines that the benefits of excluding the area outweigh the benefits of designation as long as this decision will not result in the extinction of the species.<sup>87</sup>

Beyond these opportunities for involvement in the decision-making process, stakeholders can minimize the impact of



regulatory protections by voluntarily entering into conservation agreements to prevent extinction of a species and potentially preclude the need for listing under the ESA.<sup>88</sup> Conservation agreements routinely facilitate the protection of species that are candidates for listing or are proposed to be candidates for listing.<sup>89</sup> They give non-federal property owners incentives to implement measures that prevent the decline of imperiled species.<sup>90</sup> Conservation agreements are not overly burdensome, and participants must only address the issues that they can control under their property rights.<sup>91</sup> Such agreements can protect populations on participants' land, restore degraded habitat, create new habitat, and promise not to take an action that would harm an at-risk population of wildlife.<sup>92</sup> After signing a conservation agreement, if the FWS later lists the species under the ESA, non-federal property owners may not be subject to additional use restrictions beyond those agreed to in the conservation agreement.<sup>93</sup> This provides landowners with valuable operational certainty in the face of potential regulation.

### WHAT IS DRIVING THE ATTACKS ON THE ESA IN THE PERMIAN BASIN?

Resistance to regulation by affected industries is the primary force driving attacks on the ESA. By capitalizing on widely-shared anxieties created by the current economic climate and high unemployment, industry proponents can advance a long-standing agenda to avoid new regulations and rollback existing ones.<sup>94</sup> Backers of industry claim that listing the chicken or the lizard will lead to regulatory uncertainty and cost jobs in rural communities.<sup>95</sup> However, there is little evidence to support this contention.<sup>96</sup> Studies show that there is little connection between supposed "regulatory uncertainty," and economic growth.<sup>97</sup>

Financial incentives play a significant role in the decisions of potentially affected industries. Accordingly, industry financial support of Congressional initiatives to block wildlife protection is not surprising. Rep. Pearce is largely funded by the oil, gas and agriculture industries.<sup>98</sup> In the 2011 to 2012 campaign cycle, the oil and gas industry was his number one industrial contributor.<sup>99</sup> Yates Petroleum, Mack Energy, and Exxon Mobil were included in Pearce's top five individual contributors.<sup>100</sup> In 2009-2010, Pearce's top contributors included Yates Petroleum, Marbob Energy, Devon Energy, Chesapeake Energy and Exxon Mobil.<sup>101</sup> Sen. Cornyn is similarly funded by the oil and gas industry—Exxon Mobil is his largest organizational contributor.<sup>102</sup> The heavy industry backing of both politicians may explain their stances on federal regulation that would financially benefit these contributors with promises of increased profits.

### BLOCKING WILDLIFE PROTECTION IS COUNTERPRODUCTIVE TO THE PUBLIC INTEREST

Proposed amendments to shortcut listing the lesser prairie chicken and dunes sagebrush lizard under the ESA would exclude the public from standard ESA involvement in the decision-making process.<sup>103</sup> Rep. Pearce and Sen. Cornyn's proposed policy riders to appropriations bills would therefore prevent the consideration of competing interests in making

decisions regarding natural resources. This result is unacceptable. A functioning democracy requires accurate information about the real implications and benefits of wildlife protection and an open and honest dialogue about the best uses for natural resources.

Creating a false dichotomy between economic development and wildlife protection is also counterproductive to the economic future of the Permian Basin. Studies show that protection of natural resources actually helps to diversify local economies and can even lead to job growth.<sup>104</sup>

The Pacific Northwest provides an instructive example of habitat protection improving long-term economic health.<sup>105</sup> Like the current controversy in the Permian Basin, there were foreboding claims in the Pacific Northwest that species protection would lead to significant job losses in the region.<sup>106</sup> In response to a federal court ruling temporarily banning logging on twenty-four million acres of national forest land to protect the northern spotted owl from habitat loss, the local timber industry rallied communities around predictions of a widespread economic depression.<sup>107</sup> Industry spokespersons stated that the ban would cost hundreds of thousands of jobs and create ghost towns throughout the region.<sup>108</sup> However, these predictions failed to materialize. Instead, in the decade following the temporary logging ban, the Pacific Northwest's economy outperformed the rest of the country in job and income growth.<sup>109</sup> The regional economy's base has continued shifting away from the logging industry and the newly-protected forests provide recreational opportunities and enhanced quality of life, drawing new businesses and mobile professionals.<sup>110</sup> Accordingly, protection of owl habitat directly contributed to the economic growth of the Pacific Northwest, leading to higher quality of life, higher income, and more jobs.<sup>111</sup>

Protecting the lesser prairie chicken and the dunes sagebrush lizard in the Permian Basin would arguably lead to similar benefits. For one, a healthy economy is linked to a healthy environment and preservation of resources.<sup>112</sup> From quality of life to public health to recreation and tourism, preservation of resources has a positive effect on regional economies.<sup>113</sup> In addition, protecting at-risk wildlife in the Permian Basin will likely have a beneficial effect on the very industries that currently seek to avoid new regulation. Preserving the shinnery oak habitat that is necessary for the survival of both species keeps sand dunes intact and prevents erosion.<sup>114</sup> The continued existence of the lesser prairie chicken allows that species to continue regulating the insect population in a way that could benefit agricultural interests.<sup>115</sup> Sustainable development of energy resources will promote the continued vitality of the region in the long term. Therefore, species protection will not only benefit these individual species, but will benefit the public at large.

### CONCLUSION

Conflicts over the allocation of natural resources in the American Southwest are overblown, driven more likely by economic greed and political power than a rational examination of

the public interest. The economic downturn has provided a convenient opportunity for industry-backed interests to capitalize on economic fears and campaign for de-regulation of the powerful fossil fuel industry. Listing and protecting the lesser prairie chicken and the dunes sagebrush lizard under the ESA will not destroy the economy of the Southwest, nor will it stop oil and gas drilling or lead to widespread job loss. Instead, protecting these animals from extinction will uphold an honest and science-based debate of the best uses of the natural resources.

To ensure constructive dialogue about the use of natural resources, Congress and the current Administration must allow environmental laws to work. Yielding to hyperbolic rhetoric neither preserves natural resources nor aids the working people directly impacted by natural resource conservation. The goal of natural resource management must continue to be the recovery of imperiled species and their natural habitats, which remain the best gauge of healthy ecosystems and the economies upon which we ultimately depend.



## Endnotes: Natural Resource “Conflicts” in the U.S. Southwest: A Story of Hype over Substance

<sup>1</sup> See, e.g., Paul Krugman, *Phony Fear Factor*, N.Y. TIMES, Sept. 29, 2011, [http://www.nytimes.com/2011/09/30/opinion/krugman-phony-fear-factor.html?\\_r=3&hp](http://www.nytimes.com/2011/09/30/opinion/krugman-phony-fear-factor.html?_r=3&hp) (describing flawed claims that regulation is to blame for the weak economy and asserting that such claims are “pure fantasy” because there is no evidence to suggest such a connection).

<sup>2</sup> See, e.g., *Foul Environmental Winds Blow Through D.C.*, SFGATE.COM, Sept. 24, 2011, [http://articles.sfgate.com/2011-09-24/opinion/30196805\\_1\\_polluters-coal-burning-plants-environmental-panel](http://articles.sfgate.com/2011-09-24/opinion/30196805_1_polluters-coal-burning-plants-environmental-panel). (emphasizing that GOP-backed changes would undermine clean air and water laws to help big industry polluters).

<sup>3</sup> Many studies show that there is no truth to this claim. There is no connection between environmental regulation and job loss. See, e.g., E.B. GOODSTEIN, ECON. POLICY INST., JOBS AND THE ENVIRONMENT: THE MYTH OF A NATIONAL TRADE-OFF 1, 2 (1994), [http://epi.3cdn.net/83dfae8d6d0c6151e1\\_55m6id8x6.pdf](http://epi.3cdn.net/83dfae8d6d0c6151e1_55m6id8x6.pdf).

<sup>4</sup> See H.R. 2584, 112th Cong. § 431 (2011) (requiring the EPA to stop its work limiting harmful carbon dioxide pollution from power plants and refineries for one year).

<sup>5</sup> This sweeping “extinction rider” would have prevented the U.S. Fish & Wildlife Service from spending any money to list new species, designate critical habitat, or upgrade the status of a species from threatened to endangered. It was strongly defeated with a vote of 224-202 in favor of an amendment to strip the bill of this detrimental rider. See DEFENDERS OF WILDLIFE, ASSAULT ON WILDLIFE: THE ENDANGERED SPECIES ACT UNDER ATTACK 3 (2011), [http://www.defenders.org/resources/publications/policy\\_and\\_legislation/esa/assault\\_on\\_wildlife\\_the\\_endangered\\_species\\_act\\_under\\_attack.pdf](http://www.defenders.org/resources/publications/policy_and_legislation/esa/assault_on_wildlife_the_endangered_species_act_under_attack.pdf).

<sup>6</sup> See DEFENDERS OF WILDLIFE, *supra* note 5, at 6-8.

<sup>7</sup> See generally Endangered Species Act (“ESA”) 16 U.S.C. § 1531-1544 (2006).

<sup>8</sup> See DEFENDERS OF WILDLIFE, *supra* note 5, at 20, 21 (discussing Senator Cornyn’s, and Senator Inhofe’s proposals amending the ESA to exempt the dunes sagebrush lizard and the lesser prairie chicken from ESA protection).

<sup>9</sup> See Nick Snow, *Alaskan Officials Cite Job, Economic Gains From Opening ANWR*, OIL & GAS J., Sept. 31, 2011, <http://www.ogj.com/articles/2011/09/alaskan-officials-cite-job-economic-gains-from-opening-anwr.html?cmpid=EnLEDSeptember222011> (describing Alaska officials’ claims that opening the Alaska National Wildlife Refuge to drilling would provide thousands of new jobs and help reduce the federal deficit).

<sup>10</sup> See Joe Newby, *Administration Set to Put Lizards Ahead of Energy Jobs*, SPOKANE CONSERVATIVE EXAMINER, Sept. 19, 2011, <http://www.examiner.com/conservative-in-spokane/administration-set-to-put-lizards-ahead-of-energy-jobs> (claiming that protecting the dunes sagebrush lizard would lead to the loss of 27,000 jobs and inhibit energy exploration in the Permian Basin).

<sup>11</sup> See Newby, *supra* note 10.

<sup>12</sup> See, e.g., ERNIE NIEMI ET AL., ECONORTHWEST, THE SKY DID NOT FALL: THE PACIFIC NORTHWEST’S RESPONSE TO LOGGING REDUCTIONS 1, 21-33 (1999), <http://pages.uoregon.edu/whitelaw/432/articles/SkyDidNotFallFull.pdf> (discussing the timber industry’s prediction that a federal judge’s temporary ban on logging 24 million acres of national forest in the Pacific Northwest to protect the northern spotted owl would lead to wide spread job losses and an economic depression).

<sup>13</sup> See Krugman, *supra* note 1; see also GOODSTEIN, *supra* note 3, at 32, 33 (debunking the myth that environmental regulation threatens jobs and finding that environmental protection actually raises overall employment levels).

<sup>14</sup> THE NEW MEXICO LPC/SDL WORKING GROUP, COLLABORATIVE CONSERVATION STRATEGIES FOR THE LESSER PRAIRIE-CHICKEN AND SAND DUNE LIZARD IN NEW MEXICO: FINDINGS AND RECOMMENDATIONS OF THE NEW MEXICO V (2005), [http://nwcws.org/Resources/LPC\\_SDL\\_Conservation\\_Strategy\\_CD.pdf](http://nwcws.org/Resources/LPC_SDL_Conservation_Strategy_CD.pdf).

<sup>15</sup> Tex. R.R. Comm’n & N.M. Oil Conservation Div., *Graphs and Data on Permian Basin Oil Production and Reserves*, UNIV. OF TEX. PERMIAN BASIN CTR. FOR ENERGY & ECON. DIVERSIFICATION, <http://ceed.utpb.edu/energy-resources/petroleum-library/permian-basin-statistics/graphs-and-data-on-permian-basin-oil-production-and-reserves/> (last visited Oct. 26, 2011).

<sup>16</sup> ADVANCED RESOURCES INT’L, BASIN ORIENTED STRATEGIES FOR CO<sub>2</sub> ENHANCED OIL RECOVERY: PERMIAN BASIN 2-1 (Feb. 2006), [http://fossil.energy.gov/programs/oilgas/publications/eor\\_co2/Permian\\_Basin\\_Document.pdf](http://fossil.energy.gov/programs/oilgas/publications/eor_co2/Permian_Basin_Document.pdf). Although the Permian Basin is one of the largest domestic oil producers, oil production in the region has been declining for thirty years since its peak in 1974. *Id.*

<sup>17</sup> See THE NEW MEXICO LPC/SDL WORKING GROUP, *supra* note 14, at 1, 12.

<sup>18</sup> *Id.* at 4-5.

<sup>19</sup> DEFENDERS OF WILDLIFE, *supra* note 5, at 20-21 (describing threats faced by lesser prairie chickens and dunes sagebrush lizards such as loss of habitat caused by oil and gas drilling).

<sup>20</sup> See *id.* (arguing that without protection the lesser prairie chicken and dunes sagebrush lizard could face extinction).

<sup>21</sup> See 75 Fed. Reg. 66370, 66385 (Oct. 26, 2011) (concluding that the priority for listing the lesser prairie chicken is high); 75 Fed. Reg. 77801 (Dec. 14, 2010) (proposing to list the dunes sagebrush lizard as endangered under the ESA).

<sup>22</sup> See 75 Fed. Reg. 66370, 66385 (Oct. 26, 2011); 75 Fed. Reg. 77801 (Dec. 14, 2010).

<sup>23</sup> See Patrick Manning, *Saving the Dunes Sagebrush Lizard Could Endanger Oil Production, Lawmakers Say*, FOXNEWS.COM (May 10, 2011), <http://www.foxnews.com/politics/2011/05/10/saving-dunes-sagebrush-lizard-kill-oil-production/>; Caroline May, *Is the Obama Administration Protecting Lizards at Expense of Jobs?*, THE DAILY CALLER (Sept. 19, 2011, 12:18 AM), <http://dailycaller.com/2011/09/19/is-the-obama-administration-protecting-lizards-at-expense-of-jobs/> (repeating the president of the Permian Basin Petroleum Association’s statement that listing the dunes sagebrush lizard would shut down drilling in the Permian Basin for a minimum of two years and as many as five years).

<sup>24</sup> See Manning, *supra* note 23; May, *supra* note 23.

<sup>25</sup> Representative Steve Pearce proposed two amendments for inclusion in the FY 2012 Interior Appropriations bill that would block listing of the dunes sagebrush lizard and the lesser prairie chicken. Representative Pearce has a presence in the media predicting economic calamity if the listing of either species moves forward. See, e.g., Milan Simonich, *New Mexico Congressman Pearce: Protecting Lizard Would Put Jobs at Risk*, EL PASO TIMES (Apr. 19, 2011, 6:53:12 AM), [http://www.elpasotimes.com/news/ci\\_17877554](http://www.elpasotimes.com/news/ci_17877554).

<sup>26</sup> See GOODSTEIN, *supra* note 3, at 5, 8, 32, 33.

---

## Endnotes: A CASE FOR THE UNITED STATES' OPPOSITION OF INTERNATIONAL AND DOMESTIC COAL SUBSIDIES

continued from page 31

- <sup>1</sup> U. N. Framework Convention on Climate Change (“UNFCCC”), May 9, 1992, S. Treaty Doc. 102-38, 1771 U.N.T.S. 107.
- <sup>2</sup> BRUCE RICH, ENVTL. DEFENSE FUND, FORECLOSING THE FUTURE 6 (2009), [http://www.edf.org/sites/default/files/9593\\_coal-plants-report.pdf](http://www.edf.org/sites/default/files/9593_coal-plants-report.pdf).
- <sup>3</sup> The U.S. Treasury Department has issued guidance to multilateral development banks stating that lending policies should foster planning for and development of no or low carbon energy sources rather than funding conventional coal-fired facilities. See U.S. DEP’T OF TREASURY, GUIDANCE TO MDBS FOR ENGAGING WITH DEVELOPING COUNTRIES ON COAL-FIRED POWER GENERATION (2009).
- <sup>4</sup> See LUCY JOHNSTON ET AL., SYNAPSE ENERGY ECON., PHASING OUT FEDERAL SUBSIDIES FOR COAL 6-17 (2010) (listing examples of domestic coal subsidies, including tax credits, low interest loans, and loan guarantees); Daryl Glaser, *Does hypocrisy matter? The Case of US foreign policy*, 32 REV. OF INT’L STUD. 251-68 (2006) (arguing that the United States damages its credibility with hypocritical policies).
- <sup>5</sup> Daryl Glaser, *Does Hypocrisy Matter? The Case of US Foreign Policy*, 32 REV. OF INT’L STUD. 251-68 (2006) (arguing that the United States damages its credibility with hypocritical policies).
- <sup>6</sup> Richard S.J. Tol, *The Economic Effects of Climate Change*, 23 JOURNAL OF ECON. PERSPECTIVES 29-51 (2009).
- <sup>7</sup> Heike Mainhardt-Gibbs, Bank Info. Ctr., *World Bank Group Energy Sector Financing Update*, 1 (2010).
- <sup>8</sup> See, e.g., Press Release, Bank Info. Ctr., South Africans Say No to Eskom’s R29 Billion World Bank Loan, BANK INFORMATION CENTER (Feb. 16, 2010), <http://www.bicusa.org/en/Article.11773.aspx> (reporting a protest consisting of over 50 organizations opposed to IBRD’s loan for a coal-fired power plant).
- <sup>9</sup> World Bank Group Mgmt., *Striking a Better Balance—The World Bank Group and Extractive Industries: The Final Report of the Extractive Industries Review*, vii (Sept. 17, 2004), <http://siteresources.worldbank.org/INTOGMC/Resources/finaeirmanagementresponse.pdf> (“[T]he Extractive Industries Review recommend[ed] that the Bank Group should withdraw from investment in oil and coal in developing countries”).
- <sup>10</sup> The United States has substantial influence over the IBRD, comprising sixteen percent of the voting power, when the next closest country, the United Kingdom, only has four percent. See World Bank Group, *International Bank for Reconstruction and Development Subscriptions and Voting Power of Member Countries* (Sept. 30, 2011), <http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDCountryVotingTable.pdf>.
- <sup>11</sup> World Bank Group, *Minutes of Joint Meeting of the Executive Directors of the Bank and IDA, and the Boards of Directors of IFC and MIGA* (April 8, 2010), [http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2010/04/28/000112742\\_20100428165745/Rendered/PDF/542790MIN0M201101OfficialUseOnly1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2010/04/28/000112742_20100428165745/Rendered/PDF/542790MIN0M201101OfficialUseOnly1.pdf).
- <sup>12</sup> Mainhardt-Gibbs, *supra* note 7, at 4.
- <sup>13</sup> See, e.g., Inter-American Dev. Bank, *Brazil Expands Energy Supply in North-eastern Region with IDB Financing* (Mar. 20, 1009), <http://www.iadb.org/en/news/news-releases/2009-03-20/brazil-expands-energy-supply-in-northeastern-region-with-idb-financing,5178.html> (stating that the Inter-American Development Bank gave just under \$200 million to two new coal-fired power plants in Brazil).
- <sup>14</sup> AFRICAN DEV. BANK, MEDUPI POWER PROJECT, PROJECT APPRAISAL REPORT iii (2009), <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/South%20Africa%20-%20Medupi%20Power%20Project.pdf> (reporting that the African Development Bank recently gave a \$1.7 billion loan to a coal-fired power plant).
- <sup>15</sup> I.R.C. § 45K (2011).
- <sup>16</sup> ADENIKE ADEYEYE ET AL., ENVTL. LAW INST., ESTIMATING U.S. GOVERNMENT SUBSIDIES TO ENERGY SOURCES: 2002-2008 7 (2009), [http://www.elistore.org/Data/products/d19\\_07.pdf](http://www.elistore.org/Data/products/d19_07.pdf).
- <sup>17</sup> *Id.*
- <sup>18</sup> JOHNSTON ET AL., *Supra* note 4, at 13-15.
- <sup>19</sup> *Id.* at 15-17.
- <sup>20</sup> Guri Bang, *Energy Security and Climate Change Concerns: Triggers for Energy Policy Change in the United States?*, 38 ENERGY POL’Y 1645-53 (2010) (“The US economy is dependent on easy and plentiful access to cheap oil, coal, and natural gas.”)
- <sup>21</sup> JAMES T. BARTIS ET AL., RAND, PRODUCING LIQUID FUELS FROM COAL 5 (2008).
- <sup>22</sup> *Coal and Climate Change Facts*, PEW CTR. ON GLOBAL CLIMATE CHANGE, <http://www.pewclimate.org/global-warming-basics/coalfacts.cfm> (last visited Nov. 1, 2011).
- <sup>23</sup> *Id.*
- <sup>24</sup> *Id.*
- <sup>25</sup> See LINDA LUTHER, CONG. RESEARCH SERV., MANAGING COAL COMBUSTION WASTE (CCW): ISSUES WITH DISPOSAL AND USE 1 (2010), <http://www.fas.org/sgp/crs/misc/R40544.pdf> (stating that coal combustion waste, including coal ash and toxic chemicals like arsenic, constitutes the nation’s second largest waste stream after municipal solid waste).
- <sup>26</sup> See e.g., A.M. Donoghue, *Occupational Health Hazards in Mining*, 54 OCCUPATIONAL MED. 283-286 (2004) (detailing health risks to coal miners, including silicosis, “black lung,” and lung cancer).
- <sup>27</sup> Coal use accounts for nearly twenty percent of global—and over thirty percent of United States—green house gas emissions. PEW, *Supra* note 20. The United States produces over seven billion tons of CO<sub>2</sub> per year, with two billion coming from coal-burning power plants. *Id.*
- <sup>28</sup> The external costs of the United States’ coal use include costs associated with water pollution, toxic coal waste, and air pollution. See Peter Rafaj & Socrates Kypreos, *Internalisation of External Cost in the Power Generation Sector: Analysis with Global Multi-regional MARKAL Model*, 35 ENERGY POL’Y 828-843 (2007).
- <sup>29</sup> Paul Epstein et al., *Full Cost Accounting for the Life Cycle of Coal*, 1219 ANNALS OF THE NY ACAD. OF SCI. 73, 93 (2011) (“The low estimate is \$175 billion, or over 9¢/kWh, while the true monetizable costs could be as much as the upper bounds of \$523.3 billion.”).
- <sup>30</sup> NAT’L RESEARCH COUNCIL, HIDDEN COSTS OF ENERGY: UNPRICED CONSEQUENCES OF ENERGY PRODUCTION AND USE (2010) (“Just the damage from external effects the committee was able to quantify add up to more than \$120 billion for the year 2005.”).

---

## Endnotes: NATURAL RESOURCE “CONFLICTS” IN THE U.S. SOUTHWEST: A STORY OF HYPE OVER SUBSTANCE

continued from page 36

- <sup>27</sup> 63 Fed. Reg. 31400, 31401 (June 9, 1998).
- <sup>28</sup> WILDEARTH GUARDIANS, LESSER PRAIRIE-CHICKEN: A DECADE IN PURGATORY 2, 3 (2008), [http://www.wildearthguardians.org/site/DocServer/WildEarth\\_Guardians\\_Decade\\_in\\_Purgatory.pdf?docID=924&AddInterest=1059](http://www.wildearthguardians.org/site/DocServer/WildEarth_Guardians_Decade_in_Purgatory.pdf?docID=924&AddInterest=1059).
- <sup>29</sup> See generally DAVIS ET AL., LESSER PRAIRIE CHICKEN INTERSTATE WORKING GROUP, LESSER PRAIRIE-CHICKEN CONSERVATION INITIATIVE 13, 14 (May 2008), [http://www.wafwa.org/documents/LPCC\\_FINAL.pdf](http://www.wafwa.org/documents/LPCC_FINAL.pdf) (showing that the lesser prairie chicken’s diet consists largely of insects).
- <sup>30</sup> *Id.* at 40.
- <sup>31</sup> *Id.* at 15.
- <sup>32</sup> 75 Fed. Reg. 69222, 69243 (Nov. 10, 2010).
- <sup>33</sup> See 63 Fed. Reg. 31400, 31400 (June 9, 1998) (discussing the importance of listing the lesser prairie-chicken as threatened and designating critical habitat). In the end, the Fish and Wildlife Service determined that their listing though warranted, was precluded by higher priority species. *Id.*
- <sup>34</sup> *Id.*
- <sup>35</sup> 75 Fed. Reg. 69222, 69243 (Nov. 10, 2010).
- <sup>36</sup> FITZGERALD ET AL., THE RANGE AND DISTRIBUTION OF *SCELOPORUS ARENICOLUS* IN TEXAS: RESULTS OF SURVEYS CONDUCTED 8-15 JUNE 2011, 1 (2011), [http://twri.tamu.edu/media/278298/tx\\_dsl\\_final.pdf](http://twri.tamu.edu/media/278298/tx_dsl_final.pdf).
- <sup>37</sup> *Id.* at 1.
- <sup>38</sup> 75 Fed. Reg. 77801, 77805 (Dec. 14, 2010).
- <sup>39</sup> *Id.* at 77805-06.

<sup>40</sup> *Id.* at 77805; U.S. FISH & WILDLIFE SERV. ET AL., TEXAS CONSERVATION PLAN FOR THE DUNES SAGEBRUSH LIZARD (*SCOLOPORUS ARENICOLUS*) 21-22 (Sept. 27, 2011), [http://texasahead.org/texasfirst/resources/task\\_force/priority/reference\\_docs/dsl/TCP\\_DSL\\_Plan\\_92711.pdf](http://texasahead.org/texasfirst/resources/task_force/priority/reference_docs/dsl/TCP_DSL_Plan_92711.pdf).

<sup>41</sup> 75 Fed. Reg. 77801, 77809 (Dec. 14, 2010) (noting that the shinnery oak is poisonous to livestock in the spring when it is budding).

<sup>42</sup> *Id.*

<sup>43</sup> U.S. FISH & WILDLIFE SERV. ET AL., *supra* note 40, at 86. Farmers also kill shinnery oak for fire suppression purposes and control of the boll weevil. This destabilization is ultimately not all that economically beneficial for farmers because it leads to erosion. *Id.*

<sup>44</sup> 47 Fed. Reg. 58454 (Dec. 30, 1982).

<sup>45</sup> See 75 Fed. Reg. 69222, 69243 (Nov. 10, 2010) (finding that sagebrush lizards warrant listing as endangered but are precluded by higher listing priorities).

<sup>46</sup> 75 Fed. Reg. 77801, 77805 (Dec. 14, 2010).

<sup>47</sup> *Id.*; see also Nicole L. Slomensky & Lee A. Fitzgerald, *Population Variation in Dune-Dwelling Lizards in Response to Patch Size, Patch Quality and Oil and Gas Development*, 56(3) SW. NATURALIST 315 (2011).

<sup>48</sup> 75 Fed. Reg. 77801 (Dec. 14, 2010).

<sup>49</sup> See U.S. FISH & WILDLIFE SERV. ET AL. *supra* note 40, at 21-22 (arguing that the implementation of a conservation plan to protect sagebrush lizard will lower the negative impact on Texas economy); see also GOODSTEIN, *supra* note 3.

<sup>50</sup> See Newby, *supra* note 10; see also Manning, *supra* note 23; May, *supra* note 23.

<sup>51</sup> Rene Romo, *Lizard Listing at Center of Debate*, ABQ JOURNAL (Apr. 27, 2011), <http://www.abqjournal.com/news/state/27231871475newsstate04-27-11.htm>.

<sup>52</sup> May, *supra* note 23.

<sup>53</sup> Mella McEwan, *Cornyn Talks Sagebrush Lizards, Government Intrusion at Midland Appearance*, MYWESTTEXAS.COM (Aug. 24, 2011), [http://www.mywesttexas.com/top\\_stories/article\\_d82c2cec-ecf5-575d-9207-8102671f1d2d8.html](http://www.mywesttexas.com/top_stories/article_d82c2cec-ecf5-575d-9207-8102671f1d2d8.html).

<sup>54</sup> See, e.g., S. 782, 112th Cong SA 397; Simonich, *supra* note 25.

<sup>55</sup> Mella McEwan, *Comptroller Proposes Conservation Plan for Lizard Habitat*, MYWESTTEXAS.COM (Oct. 10, 2011, 10:13am), [http://www.mywesttexas.com/business/oil/top\\_stories/article\\_60a38efe-f352-11e0-96ba-001cc4c002e0.html](http://www.mywesttexas.com/business/oil/top_stories/article_60a38efe-f352-11e0-96ba-001cc4c002e0.html).

<sup>56</sup> See JAY C. LININGER & CURT BRADLEY, CTR. FOR BIOLOGICAL DIVERSITY, IMPACT OF DUNES SAGEBRUSH LIZARD ON OIL AND GAS ACTIVITIES IN NEW MEXICO: ANALYSIS OF BUREAU OF LAND MANAGEMENT OFFERINGS AND NOMINATIONS IN 2010-2011, 1-13 (2011), [http://www.biologicaldiversity.org/species/reptiles/dunes\\_sagebrush\\_lizard/pdfs/Oil&Gas\\_DSL\\_Report\\_v1.5\\_final.pdf](http://www.biologicaldiversity.org/species/reptiles/dunes_sagebrush_lizard/pdfs/Oil&Gas_DSL_Report_v1.5_final.pdf); JAY C. LININGER, CURT BRADLEY & TAYLOR MCKINNON, IMPACT OF DUNES SAGEBRUSH LIZARD PROTECTION ON OIL AND GAS PRODUCTION IN WEST TEXAS 6 (2011), [http://www.biologicaldiversity.org/species/reptiles/dunes\\_sagebrush\\_lizard/pdfs/Texas\\_DSL\\_habitat\\_report.pdf](http://www.biologicaldiversity.org/species/reptiles/dunes_sagebrush_lizard/pdfs/Texas_DSL_habitat_report.pdf); cf. GOODSTEIN, *supra* note 3, at 1, 2 (concluding generally that environmental regulations have little real effect job numbers).

<sup>57</sup> LININGER & BRADLEY, *supra* note 56, at 1-13.

<sup>58</sup> See Endangered Status for Dunes Sagebrush Lizard, 75 Fed. Reg. 77803 (Dec. 14, 2010) (to be codified at 50 C.F.R. pt. 70) (representing a forty percent loss since 1982); see also LININGER & BRADLEY, *supra* note 56, at 1.

<sup>59</sup> LININGER & BRADLEY, *supra* note 56, at 1-2.

<sup>60</sup> See LININGER & BRADLEY, *supra* note 56, at 14 (concluding that protecting the dunes sagebrush lizard would have no effect on oil and gas leasing opportunities).

<sup>61</sup> *Id.* at 2.

<sup>62</sup> *Id.* at 2.

<sup>63</sup> See May, *supra* note 23 (quoting Ben Shepperd, president of Permian Basin Petroleum Association).

<sup>64</sup> LININGER & BRADLEY, *supra* note 56, at 2.

<sup>65</sup> *Id.* at 2.

<sup>66</sup> See U.S. FISH & WILDLIFE SERV. ET AL., *supra* note 40, at 56 (referring to Fig. 1-2); see also LININGER, BRADLEY & MCKINNON, *supra* note 57, at 6 (concluding that the limited area of dunes sagebrush lizard habitat in Texas would have only minimal effect, if any, on oil and gas activity in west Texas).

<sup>67</sup> See, e.g., LININGER & BRADLEY, *supra* note 56, at 14.

<sup>68</sup> *Id.* at 14.

<sup>69</sup> See U.S. FISH & WILDLIFE SERV., CANDIDATE CONSERVATION AGREEMENTS WITH ASSURANCES HANDBOOK (DRAFT) 1, 5 (2003), [http://library.fws.gov/ES/handbook\\_draft.pdf](http://library.fws.gov/ES/handbook_draft.pdf) [hereinafter U.S. FISH & WILDLIFE SERV. HANDBOOK]; see also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-803, ENDANGERED SPECIES: FISH AND WILDLIFE SERVICE USES BEST AVAILABLE SCIENCE TO MAKE LISTING DECISIONS, BUT ADDITIONAL GUIDANCE NEEDED FOR CRITICAL HABITAT DESIGNATIONS (2003), <http://www.gao.gov/new.items/d03803.pdf>.

<sup>70</sup> 16 U.S.C. § 1533(a)-(b) (2006).

<sup>71</sup> 16 U.S.C. § 1536 (2006).

<sup>72</sup> 16 U.S.C. § 1533(f) (2006).

<sup>73</sup> 16 U.S.C. §§ 1538-39 (2006).

<sup>74</sup> 16 U.S.C. § 1532(19) (2006).

<sup>75</sup> 16 U.S.C. § 1533(b)(1)(A) (2006).

<sup>76</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 69, at 14 (explaining that peer review, a routine component of science, is considered the most reliable tool to ensure that quality science will prevail over political considerations).

<sup>77</sup> See *id.* at 11 (depicting the complex review process that the FWS must go through before publishing a final rule).

<sup>78</sup> 16 U.S.C. § 1533(b)(1)(A) (2006).

<sup>79</sup> See Dennis D. Murphy & Paul S. Weiland, *The Route to Best Science in Implementation of the Endangered Species Act's Consultation Mandate: The Benefits of Structured Effects Analysis*, ENVTL. MGMT. 1, 3 (2010), [http://www.vision.ca.gov/docs/Route\\_to\\_Best\\_Science.pdf](http://www.vision.ca.gov/docs/Route_to_Best_Science.pdf) (describing the importance of transparency in decision making to allow affected individuals and reviewing courts to determine whether a federal agency made a well informed decision).

<sup>80</sup> 16 U.S.C. § 1535(a) (2006).

<sup>81</sup> 50 C.F.R. § 424.12 (2011).

<sup>82</sup> 50 C.F.R. § 424.16 (2011).

<sup>83</sup> See generally U.S. FISH & WILDLIFE SERV. HANDBOOK, *supra* note 69, at 22 (explaining the process to create a final rule, including the importance of addressing formal written comments from the public and modifying or revising the draft to reflect the public comments).

<sup>84</sup> See 50 C.F.R. § 246.16 (2011); see also U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 69, at 3 (concluding that the FWS' internal decision-making process and external peer review ensures that it considers the best available science when making listing decisions under the ESA).

<sup>85</sup> See 16 U.S.C. § 1533(a)-(b) (2006).

<sup>86</sup> 16 U.S.C. § 1533(b)(2) (2006); see also Home Builders Ass'n of N. Cal. V. U.S. Fish & Wildlife Serv., 616 F.3d 983, 991-92 (discussing economic impact considerations).

<sup>87</sup> 16 U.S.C. § 1533(b)(2) (2006).

<sup>88</sup> See generally U.S. FISH & WILDLIFE SERV. HANDBOOK, *supra* note 69 (describing how "Candidate Conservation Agreements with Assurances ('CCAAs') for private property owners promote conservation of unlisted species on non-federal lands and provide property owners with the regulatory certainty that they desired.").

<sup>89</sup> See generally *id.*

<sup>90</sup> See generally *id.*

<sup>91</sup> See generally *id.*

<sup>92</sup> See generally *id.*

<sup>93</sup> See generally *id.*

<sup>94</sup> Cf. NIEMI ET AL., *supra* note 11 (recounting the similar propaganda advanced by the timber industry after a 1991 court ruling banned logging on 24 million acres of national forest land in the Pacific Northwest).

<sup>95</sup> See, e.g., Newby, *supra* note 10; see also Manning, *supra* note 23.

<sup>96</sup> See generally LAWRENCE MISHEL, ECON. POLICY INST., REGULATORY UNCERTAINTY: A PHONY EXPLANATION FOR OUR JOBS PROBLEM 2-6 (Sept. 2011), <http://w3.epi-data.org/temp2011/EPIBriefingPaper330.pdf>.

<sup>97</sup> See e.g., MISHEL, *supra* note 96, at 2-3 (finding that the lack of job growth is simply the continuing result of the financial collapse and a lack of demand and explaining that Republicans' delay of the rulemaking process actually prolongs any uncertainty for businesses); Jan Eberly, *Is Regulatory Uncertainty a Major Impediment to Job Growth*, U.S. DEPT. OF TREAS. (Oct. 24, 2011), <http://www.treasury.gov/connect/blog/Pages/Is-Regulatory-Uncertainty-a-Major-Impediment-to-Job-Growth.aspx> (concluding also that slow economic growth has more to do with lack of demand as opposed to alleged regulatory uncertainty); Phill Izzo, *Dearth of Demand Seen Behind Weak Hiring*, WALL ST. J. (July 18, 2011), <http://online.wsj.com/article/SB10001424052702303661904576452181063763332.html> (reporting that a survey of economists also found that minimal demand is the primary reason businesses are not hiring).

<sup>98</sup> See Senator John Cornyn, MAPLIGHT.ORG, <http://maplight.org/us-congress/legislator/553-john-cornyn> (last visited Oct. 31, 2011).

<sup>99</sup> See Representative Steve Pearce, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/politicians/summary.php?cycle=2012&cid=N00012672&type=I> (last visited Oct. 17, 2011) (showing that Oil and Gas contributors put forth \$52,000 towards Pearce's campaign).

<sup>100</sup> *Id.*

<sup>101</sup> See Senator John Cornyn, *supra* note 98.



<sup>102</sup> See *id.* (revealing ExxonMobil's contribution of \$70,600 to Sen. Cornyn's campaign).

<sup>103</sup> S. 782, 112th Cong SA 429 (proposing exclude listing of the lesser prairie chicken); S. 782, 112th Cong SA 397 (proposing exclude listing of the sagebrush chicken).

<sup>104</sup> See, e.g., DEFENDERS OF WILDLIFE, *INVESTING IN NATURE: THE ECONOMIC BENEFITS OF CONSERVING NATURAL AREAS IN NORTHEAST FLORIDA* (2004), [http://www.defenders.org/resources/publications/programs\\_and\\_policy/science\\_and\\_economics/conservation\\_economics/valuation/investing\\_in\\_nature.pdf](http://www.defenders.org/resources/publications/programs_and_policy/science_and_economics/conservation_economics/valuation/investing_in_nature.pdf) (detailing the economic benefits of resource conservation in northeast Florida, including benefits flowing from increased tourism, recreation opportunities and quality of life); ECONORTHWEST, *COALITION FOR SONORAN DESERT PROTECTION, ECONOMIC BENEFITS OF PROTECTING NATURAL RESOURCES IN THE SONORAN DESERT* 1, 27 (2002), <http://www.sonorandesert.org/uploads/files/economicreport.pdf> (discussing the economic benefits of protecting resources in the Sonoran Desert); NIEMI ET AL., *supra* note 11 (describing the economic benefits that resulted from forest protection in the Pacific Northwest).

<sup>105</sup> See generally Thomas M. Power, *Public Timber Supply, Market Adjustments, and Local Economies: Economic Assumptions of the Northwest Forest Plan*, 20 *CONSERVATION BIOLOGY* 341 (2006) (deconstructing the Northwest Forest Plan in the Pacific Northwest to stabilize local economies).

<sup>106</sup> See NIEMI ET AL., *supra* note 11, at 3 (describing the widespread economic fears that were plaguing community members after Judge Dwyer instituted an injunction on timber sales).

<sup>107</sup> See *id.*

<sup>108</sup> See *id.* at 16 (recalling timber industry groups' predictions that owl protection would reduce total employment in Oregon by 102,000 and 150,000 jobs).

<sup>109</sup> See *id.* at 14-15 (commentating on public expressions of the economic fears associated with declines in timber sales).

<sup>110</sup> Power, *supra* note 104, at 348-9.

<sup>111</sup> See NIEMI ET AL., *supra* note 11, at 21-33. Ironically, Representative Pearce refers to the logging ban in the Pacific Northwest as being emblematic of the way in which wildlife protection causes economic distress. See Simonich, *supra* note 25.

<sup>112</sup> See ECONORTHWEST, *supra* note 103, at 1, 27 (concluding that the benefits of resource conservation in the Sonoran Desert are increasing relative to the costs of that conservation).

<sup>113</sup> See, e.g., *id.* at 38 (reporting that preservation of natural resources can lead to an economic stimulus in the local economy).

<sup>114</sup> Cf. U.S. FISH & WILDLIFE SERV. ET AL., *supra* note 40, at 22 (explaining that if certain soils are removed can result in active erosion or "blowouts" causing damage to the landscape).

<sup>115</sup> Cf. DAVIS ET AL., *supra* note 29, at 1, 14, 49 (stating that the Lesser Prairie Chicken's diet consists primarily of insects).

## Endnotes: CUBAN OFFSHORE DRILLING: PREPARATION AND PREVENTION WITHIN THE FRAMEWORK OF THE UNITED STATES' EMBARGO

*continued from page 39*

<sup>1</sup> See Shasta Darlington, *Cuban Offshore Oil Plans Gain Momentum*, CNN (Sept. 1, 2010), [http://articles.cnn.com/2010-09-01/world/cuba.oil\\_1\\_rig-cupet-drilling-companies?\\_s=PM:WORLD](http://articles.cnn.com/2010-09-01/world/cuba.oil_1_rig-cupet-drilling-companies?_s=PM:WORLD) (reporting that if drilling began in mid-year 2011, the exploratory wells would be completed by 2014). But see Jeff Franks, *Arrival of Cuba Offshore Oil Rig Delayed Again*, REUTERS (Oct. 12, 2011), <http://www.reuters.com/article/2011/10/12/cuba-oil-idUSN1E7930U020111012> (stating that the arrival of the oil rig has been delayed until December 2011).

<sup>2</sup> See Thomas Omestad, *Cuba Plans New Offshore Drilling in Search for Big Oil Finds in the Gulf of Mexico*, U.S. NEWS & WORLD REP. (Feb. 3, 2009), <http://www.usnews.com/news/energy/articles/2009/02/03/cuba-plans-new-offshore-drilling-in-search-for-big-oil-finds-in-the-gulf-of-mexico/> (noting that foreign firms have signed exploration and production agreements for 21 of the 59 blocks, are discussing contracts over the 23 additional blocks, and that some commentators foresee Cuban offshore drilling increasing the cost of the U.S. embargo policy).

<sup>3</sup> See *id.* (stating that some U.S. law makers have "urged that an exception be made in the embargo to permit energy cooperation").

<sup>4</sup> See, e.g., Press Release, The U.S. Attorney's Office, Dist. of Colo., Boulder Company Sentenced for "Trading with the Enemy" (Sept. 17, 2009), available at [http://www.justice.gov/usao/co/press\\_releases/archive/2009/September09/9\\_17\\_09.html](http://www.justice.gov/usao/co/press_releases/archive/2009/September09/9_17_09.html).

<sup>5</sup> H.R. Res. 372, 112th Cong. (2011) (permitting the U.S. Secretary of the Interior to deny drilling leases to foreign companies that deal with countries under U.S. trade sanctions, including Cuba).

<sup>6</sup> Sean Thomas, *50 Years of Sanctions: Time for a Cuban Healing*, RT POLITICS (edited Oct. 22, 2010, 05:09), <http://rt.com/politics/russian/us-cuba-economic-embargo/> ("In 1960, President Eisenhower enacted the first serious embargo against Cuba, halting all sugar purchases from the country, ending all oil deliveries and continuing arms embargos that were in place during the revolutionary period, starting in 1958.").

<sup>7</sup> See *id.* (noting that the embargo and the mobilization of Cuban exiles was an attempt to overthrow Fidel Castro and reestablish U.S. influence); See also John Sweeny, *Why the Cuban Trade Embargo Should Be Maintained*, HERITAGE FOUND. BACKGROUNDER, Nov 10, 1994, at 4, available at [http://thf\\_media.s3.amazonaws.com/1994/pdf/bg1010.pdf](http://thf_media.s3.amazonaws.com/1994/pdf/bg1010.pdf) (noting that the original goals of the embargo were to "compel Castro to open Cuba's economy and establish democracy, to weaken Cuba's communist regime, and to force Castro to relinquish power").

<sup>8</sup> 22 U.S.C. § 2370(a)(1) (2006).

<sup>9</sup> Proclamation No. 3447, 27 Fed. Reg. 1085 (Feb. 7, 1962).

<sup>10</sup> See Thom Woodroffe, *Time to Bring Cuba in from the Cold*, SYDNEY MORNING HERALD (Nov. 3, 2010) <http://www.smh.com.au/opinion/politics/time-to-bring-cuba-in-from-the-cold-20101103-17do3.html> (describing how President Kennedy signed the executive order implementing the Cuban embargo).

<sup>11</sup> These regulations prohibit United States Citizens and corporations from conducting business transactions with Cuba or Cuban nationals. The statute includes transactions involving property in Cuba or belonging to Cuban nationals unless the transaction occurs under license. See Cuban Assets Control Regulations, 31 C.F.R. § 515.201 (2011).

<sup>12</sup> The TWEA empowers the president to control or prevent trade with a foreign country at a time of war. See 50 U.S.C. § 1702 (2006).

<sup>13</sup> Helms-Burton Act of 1996, 22 U.S.C. §§ 6021-6091 (2006).

<sup>14</sup> Woodroffe, *supra* note 8.

<sup>15</sup> 22 U.S.C. § 6064 (2006).

<sup>16</sup> John W. Boscaroli et al., *Export Controls and Economic Sanctions*, 44 INT'L LAW. 25, 33 (2010) (noting that the Omnibus Act lightens restrictions on travel and remittances to Cuba); 31 C.F.R. § 515.561.

<sup>17</sup> A January 14, 2011 press release announced changes to policies governing "(1) purposeful travel; (2) non-family remittances; and (3) U.S. airports supporting licensed charter flights to and from Cuba." The measures are said to "increase people-to-people contact; support civil society in Cuba; enhance the free flow of information to, from, and among the Cuban people; and help promote their independence from Cuban authorities." Press Release, The White House Office of the Press Secretary, *Reaching Out to the Cuban People* (Jan. 14, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/14/reaching-out-cuban-people>.

<sup>18</sup> See Daniel Hernandez, *U.S. Opens the Door Further on Travel to Cuba*, L.A. TIMES (Jan. 25, 2010), <http://latimesblogs.latimes.com/laplaza/2011/01/cuba-travel-restrictions-obama-white-house-.html> (discussing loosening restrictions on Cuba under Obama and the Cuban government's response).

<sup>19</sup> See Nelson Acosta, *Cuba Says U.S. embargo has Toughened Under Obama*, REUTERS (Sept. 15, 2010), <http://www.reuters.com/article/idUSTRE68E4FS20100915> (quoting the Cuban Foreign Minister stating "[t]he embargo policy in the last two years, that is to say under the government of President Obama, has not changed at all . . . [i]n some aspects it has even hardened").

<sup>20</sup> See Howard LaFranchi, *Obama Eases Cuba Travel, but Embargo Remains*, CHRISTIAN SCI. MONITOR, Apr. 13, 2009, <http://www.csmonitor.com/USA/Foreign-Policy/2009/0413/p90s01-usfp.html> (stating the actual easing of sanctions is merely due to keeping family connections but really does nothing to change the economic sanctions placed on Cuba or better the Cuban-US relationship).

<sup>21</sup> It is important to note that the President alone cannot end the embargo; an act of Congress is required. PATRICK J. HANEY & WALT VANDERBUSH, *THE CUBAN EMBARGO: THE DOMESTIC POLITICS OF AN AMERICAN FOREIGN POLICY* 162 (2005).

<sup>22</sup> See Rachel D. Solomon, Note, *Cuban Baseball Players, the Unlucky Ones: United States-Cuban Professional Baseball Relations Should Be an Integral Part of the United States-Cuba Relationship*, 10 J. INT'L BUS. & L. 153, 169 (2011) ("The United States' embargo against Cuba stems from the 1917 Trad-