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Strength From Weakness: How Legalizing Sport Hunting of Endangered Species Could Provide the Conservation Effort Its Greatest Weapon

Patrick T. Smith

INTRODUCTION

Famed author and philosopher Ralph Waldo Emerson once wrote “[o]ur strength grows out of our weaknesses”.¹ Emerson’s belief that in recognizing weakness one becomes stronger echoes throughout human history. In the Book of Exodus, the Bible provides that during their first conversation, Moses confesses to God that he is an unskilled public speaker.² Moses’ lack of persuasive ability in the public forum was enough for God to appoint Aaron, Moses’ older brother³, as his *nabi*, or public speaker.⁴ Yet by the end of Moses’ life, perched on the banks of the Jordan River, Moses stood before his people and delivered three eloquent sermons surveying all that God had said and all that the Israelites had suffered.⁵ These sermons would serve as Moses final speeches before his death. During his forty years wandering the desert, Moses had turned his greatest weakness, the ability to speak in public, into one of his greatest strengths. And the repercussions of this change are still felt in today’s society. [A bit grandiose for a paper on hunting antelope]

¹ Ralph Waldo Emerson, *Essays: First Series*, Essay III Compensation, 2011 (1841).

² *Exodus* 6:30 (King James).

³ *Id* at 6:16-20.

⁴ *Id* at 7:1.

⁵ *Deuteronomy* 1-34 (King James).

American history is no stranger to this principal. American schoolchildren are taught that during the American Revolution, General George Washington defeated the British Army with a collection of farmers, lumberjacks and hunters. As history notes, Washington commanded an untrained civilian army, knowledgeable only in hunting techniques and local terrain conditions and using these perceived weaknesses to his advantage, he did so by devising a hit and run strategy that the immobile British Army could not defeat.⁶ Like Moses, Washington took what the British Army perceived a weakness and turned it into strength.⁷

It is with the insight of such gifted? men that we approach a major issue: the preservation and propagation of the earth's endangered species. Since life first crawled from the primordial ocean, vast numbers of species have become extinct. From dinosaurs to the dodo bird?, the earth has seen countless species disappear for a myriad of reasons. Chief among them is the existence of human beings. The earth is currently in the midst of the sixth great extinction event.⁸ Human beings have hastened the departure of other species in a number of ways: destruction of habitats through domestication, pollution of ecologically fragile areas, and global warming.⁹ But these causes emerged well after the first action to threaten the existence of other species; hunting.¹⁰

⁶David Hackett Fischer, *Washington's Crossing*, 367 (Oxford University Press) (2004).

⁷ This principal is widely known, especially in competitive arenas. See, e.g. Michael Jordan, "My attitude is that if you push me towards something that you think is a weakness, than I will turn that perceived weakness into a strength." http://en.wikiquote.org/wiki/Talk:Michael_Jordan.

⁸ Kira Johnson, *The Sixth Great Extinction and its Effects on Humanity*, IZILWANE, Dec. 1, 2010, <http://www.izilwane.org/the-sixth-great-extinction.html> (The article maintains that we are currently in the midst of the sixth great extinction event., and that the earth will lose half of its population of diverse species by 2100. Furthermore, the article contends "[n]ever before has a major extinction event been caused by a single species, but this one is driven almost exclusively by human actions".

⁹ *Id.*

¹⁰ *Id.* ("Developed by Paul Martin, the theory of over-hunting (or the *kills* or *Blitzkrieg* theory) considers the possibility that as humans arrived in new places, they took advantage of the fact that native species did not perceive humans as a threat, which enabled humans to hunt them with relative ease.")

Hunting for one's food predates the advent of man. During the Mesozoic Era, carnivorous dinosaurs hunted the jungles of Pangaea for their meals.¹¹ Paleogenic mammals evolved into packs of hunters.¹² Humans later made spears from sharpened tree branches as a form of protection and sustenance as evolution took root.¹³ In the modern world, hunting has become more of a sport than a means of life. The invention of the rifle has transformed hunting's chief purpose from a family's weekly nourishment to a trophy piece on the wall of a hobbyist's den. Sport hunting has been a contributing factor to the recent extinction of a number of species.

Since 1939, sport hunting has become a 5.6 billion dollar industry.¹⁴ Sport hunters contribute to preservation efforts through taxes and permit fees.¹⁵ In Texas, sport hunting generates \$1.75 billion dollars in sales annually and employs 14,000 people.¹⁶ Sport hunting ranches import exotic animals from throughout the world to roam the vast Texas wilderness.¹⁷ Amongst those alien beasts hunted for sport are three species of African antelope; the scimitar-horned oryx, dama gazelle, and addax.¹⁸ Apart from their notable horns, these antelope are note-worthy in another fashion. They are the only species deemed endangered by the U.S. Fish and Wildlife Service that can be legally hunted without a permit in the United States.¹⁹

¹¹ Paul Upchurch, Craig A. Hunn & David B. Norman, *An Analysis of Dinosaurian Biogeography: Evidence for the Existence of Vicariance and Dispersal Patterns Caused by Geological Events*, Proc. R. Soc. Lond. B 269, 613 (2002).

¹² H.M McHenry, "Human Evolution". In *EVOLUTION: THE FIRST FOUR BILLION YEARS*, 265 (Michael Ruse & Joseph Travis, eds., 2009).

¹³ *Id.*

¹⁴ United States Fish & Wildlife Serv., 2001 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation 4 (2001).

¹⁵ *Id.*

¹⁶ Liz Kilmas, *Could TX Hunting Actually Help Save These Endangered Species*, TheBlaze.com, January 20, 2012, available at <http://www.theblaze.com/stories/could-hunting-actually-help-save-these-endangered-species-in-tx/>.

¹⁷ *Id.*

¹⁸ 16 U.S.C.A. § 1539(a)(1)(A).

¹⁹ *Id.*

Due to the antelope's popularity with sport hunters, Texas ranchers can charge lofty price tags for hunting? such trophy animals.²⁰ The economic incentive provided by sport hunting has led to a massive undertaking by sport hunt ranchers to breed the three species of antelope. Using the profits generated from trophy seeking hunters, Texas ranchers have exponentially increased the populations of these endangered species.²¹ In short, the economic incentive of breeding these animals for commercial hunting purposes has been massively successful in taking appropriate steps²² towards conserving endangered and threatened species.²³

Recognizing the per se rejection of sport hunting by animal rights activists, this paper proposes that through the commercialization of endangered species sport hunting, what was once a catalyst in adoption of the Endangered Species Act could be transformed into one of its greatest strengths. The success of sport hunting in Texas provides proof that a state regulated endangered species hunting industry could provide a powerful tool in the fight to maintain populations of endangered species. The first part of the paper addresses legislation concerning endangered species and sport hunting. A brief summation of the Endangered Species Act is followed by a detailed discussion of U.S. Fish and Wildlife Regulation 17.21(h). Regulation 17.21(h) is the provision adopted in 2005 which allows sport hunting of the three endangered antelopes. The next section analyzes the judicial and administrative decisions involved in the regulation and the current predicament of breeders specializing in these captive-bred endangered species. The following section addresses the current permit process' shortcomings regarding sport hunting of endangered species. The paper then offers a number of reasons why expanding the legality of hunting captive bred endangered species within the United States would greatly benefit the

²⁰ Molly Hennessy-Fiske, *Texas Ranchers Fight to Breed, Hunt Endangered Antelope*, L.A. TIMES, April 3, 2012, available at <http://articles.latimes.com/2012/apr/03/nation/la-na-nn-texas-antelope20120403>.

²¹ *Supra* note 14.

²² 16 U.S.C.A. § 1531(b).

²³ *Id.*

intentions of the Endangered Species Act. Finally, possible resolutions are debated and a final legislative solution is offered.

THE ENDANGERED SPECIES ACT

A. INTENT AND STRUCTURE OF THE ENDANGERED SPECIES ACT

With the emergence of *Homo sapiens* approximately 100,000 years ago, the extinction rate of non-human species began an unnatural increase.²⁴ Through migration, pollution, deforestation and domestication of natural habitats, hunting and the commercial use of animal species, human beings are considered the main catalyst in the latest round of species extinction.²⁵ In partial recognition of these developments, the United States Congress in 1973 enacted the Endangered Species Act²⁶ (“the Act”), with the purpose “to provide 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, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions”.²⁷ The Supreme Court has held that “the plain intent of Congress in enacting this statute [is] to halt and reverse the trend toward species extinction, *whatever the cost*.”²⁸

²⁴The Center for Biological Diversity, http://www.biologicaldiversity.org/programs/biodiversity/elements_of_biodiversity/extinction_crisis/index.html (last visited Nov. 18, 2012) (“Although extinction is a natural phenomenon, it occurs at a natural “background” rate of about one to five species per year. Scientists estimate we’re now losing species at 1,000 to 10,000 times the background rate, with literally dozens going extinct every day.”) (according to the IUCN Red List, a list of worldwide threatened, endangered and extinct animals, there are 737 known extinct animal species, including over 115 mammals, <http://www.iucnredlist.org/search> (last visited December 20, 2012).

²⁵ *Id.* (“Unlike past mass extinctions, caused by events like asteroid strikes, volcanic eruptions, and natural climate shifts, the current crisis is almost entirely caused by *us* — humans. In fact, 99 percent of currently threatened species are at risk from human activities”).

²⁶ Endangered Species Act of 1973, 16 U.S.C.A. § 1531-1544.

²⁷ *Supra* note 22).

²⁸ *Tenn. Valley Auth. v. Hill*, 437 U.S. 180, 184 (1978). (emphasis added)

The Endangered Species Act has been called the *Magna Carte* of the environmental movement.²⁹ The Act applies to species affirmatively listed³⁰ by the U.S. Fish and Wildlife Service as either threatened³¹ or endangered³². The Secretary of the Interior (“Secretary”) is delegated a nondiscretionary duty to list qualified species according to the “best scientific and commercial data available”.³³ In making that determination the Secretary takes into consideration five criteria established by Congress.³⁴ Any one criterion may be cited as reason for labeling a species either threatened or endangered.³⁵ Congress’ criteria include: (1) the present or threatened destruction, modification, or curtailment of its habitat or range;³⁶ (2) overutilization for commercial, recreational, scientific, or educational purposes;³⁷ (3) disease or predation;³⁸ (4) the inadequacy of existing regulatory mechanisms;³⁹ and (5) other natural or manmade factors affecting its continued existence.⁴⁰

The Secretary may list or delist a species through either personal initiative or in response to a written petition by an “interested person”.⁴¹ After giving notice⁴² and receiving public input,⁴³ the Secretary publishes a final ruling categorizing the species as either threatened or

²⁹ Kevin Starr in *Water on the Edge* KVIE-Sacramento public television documentary (DVD) hosted by Lisa McRae. The Water Education Foundation, 2005.

³⁰ 16 U.S.C.A. § 1533.

³¹ A “threatened species” is defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” § 1532(20).

³² An “endangered species” means “any species which is in danger of extinction throughout all or a significant portion of its range.” § 1532(6).

³³ 16 Supra note 30..

³⁴ 16 U.S.C.A § 1533(b)(1)(A).

³⁵ 16 U.S.C.A. § 1533(a)(1).

³⁶ 16 U.S.C.A. § 1533(a)(1)(A).

³⁷ 16 U.S.C.A. § 1533(a)(1)(B).

³⁸ 16 U.S.C.A. § 1533(a)(1)(C).

³⁹ 16 U.S.C.A. § 1533(a)(1)(D).

⁴⁰ 16 U.S.C.A. § 1533(a)(1)(E).

⁴¹ 16 U.S.C.A. § 1533(b)(3)(A).

⁴² 50 C.F.R. § 424.16(c)(1)(ii)

⁴³ 50 C.F.R. § 424.16(c)(2)

endangered.⁴⁴ Once placed on a list, the species inherits a myriad of protections. The most potent protections are located in §9 of the Act.⁴⁵ Section 9 prohibits the “taking” of endangered species within the territorial bounds of the United States.⁴⁶ “Taking “is defined as an action “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁴⁷ Any “taking of an endangered species without permission from the US Fish and Wildlife Service is punishable under § 11 of the Act.⁴⁸

During its almost forty years of existence, the Endangered Species Act has had only? limited success in removing species from protected status through breeding and preservation efforts. Currently, the U.S. Fish and Wildlife Service has listed 1232 animal species as either threatened or endangered.⁴⁹ Of the 1232 listed species in need of protection, only 472 species are currently within active recovery plans.⁵⁰ Since the Act’s inception, only fifty-five species have been delisted: twenty-eight due to recovery, ten due to extinction, ten due to classification practices, six due to discovery of new populations, one due to an error and one due to an amendment specifically removing it from the list.⁵¹ After four decades of a one percent success rate, it has become apparent that more creative and productive ideas must be developed to ensure the survival and promulgation of endangered species.

B. THE EXEMPTIONS: THE PERMIT PROCESS AND INCIDENTAL TAKINGS

Under the Endangered Species Act, there are two ways one can legally violate §9’s takings prohibition. The original legislation passed by Congress in 1973 included a permit application

⁴⁴ 50 C.F.R. §424.17(a)(1).

⁴⁵ 16 U.S.C.A. § 1538.

⁴⁶ Id.

⁴⁷ 16 U.S.C.A. § 1532(19).

⁴⁸ 16 U.S.C.A. § 1540.

⁴⁹ U.S. Fish and Wildlife Service Delisting Report, http://ecos.fws.gov/tess_public/DelistingReport.do (last visited December 22, 2012).

⁵⁰ Id.

⁵¹ Id.

process.⁵² The Act offers two types of permits. The first is an “incidental take” permit which allows “any taking otherwise prohibited.... if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”⁵³ Congress amended the Act in 1982 to allow permits for landowners who may have violated the “taking” provision unknowingly through the regular use of their property.⁵⁴ The second type of permit is termed the “enhancement of survival” permit. This permit legalizes the taking of an endangered animal “for scientific purposes or to enhance the propagation or survival of the effected species, including, but not limited to, acts necessary for the establishment and maintenance” of reintroduced populations.⁵⁵ Though the Act does not define the term, Congress provided how it intended to “enhance the propagation or survival” of “wildlife in captivity”:

Enhance the propagation or survival, when used in reference to wildlife in captivity, includes but is not limited to the following activities when it can be shown that such activities would not be detrimental to the survival of wild or captive populations of the affected species:

(a) Provision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible;

(b) Accumulation and holding of living wildlife that is not immediately needed or suitable for propagative or scientific purposes, and the transfer of such wildlife between persons in order to relieve crowding or other problems hindering the propagation or survival of the captive population at the location from which the wildlife would be removed; and

(c) Exhibition of living wildlife in a manner designed to educate the public about the ecological role and conservation needs of the affected species.⁵⁶

The second legal means of taking an endangered species under the Endangered Species Act was added in September 2005. The US Fish and Wildlife Service added three species of African antelope to the endangered species list; the scimitar-horned oryx (“oryx”), the addax, and the

⁵² 16 U.S.C.A. § 1539.

⁵³ 16 U.S.C.A. § 1539(a)(1)(B).

⁵⁴ H.R. Rep. No. 97-567, at 30-31 (1982).

⁵⁵ Supra note 18. Not proper cite.

⁵⁶ 50 C.F.R. § 17.3 (2006).

dama gazelle.⁵⁷ Along with their placement under protected status, the Fish and Wildlife Service took the extraordinary step of exempting any members of the three African antelope species held in captivity from §9's ban on takings.⁵⁸ The Service had never previously exempted an endangered species from the Act's hunting ban. Hence, through an administrative ruling, the US Fish and Wildlife Service legally permitted the hunting of three endangered species as long as the species were bred and kept in captivity for sport hunting activities.⁵⁹

The Endangered Species Act allows limited exemptions to its takings rule. The Act's limited hunting exemptions are understandable when juxtaposed against the contextually?? against the lack of a sport hunting industry in 1973. When Congress passed the Endangered Species Act, the idea that commercialized hunting could benefit conservation efforts was years away. The permit process' intention was to ensure takings occurred only for reasons beneficial to the species' survival.⁶⁰ Though the 1982 amendment allows takings for reasons separate from preservation efforts, it requires the taking to be "incidental" to a lawful activity.⁶¹ In other words, the taking cannot be intentional. Within this context, 17.21(h)'s sport hunting exemption may appear incongruent with Congress' intent. However, upon further inspection, the fact emerges that the exemption was the government's way adopting the belief that sport hunting could greatly benefit efforts to conserve threatened and endangered species.

17.21(H) IN VIOLATION OF THE ENDANGERED SPECIES ACT

A. ADMINISTRATIVE INTERPRETATIONS AND THE D.C. DISTRICT COURT

⁵⁷ Endangered and Threatened Wildlife and Plants; Exclusion of U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 70 FR 52310-01 (Sept. 2, 2005).

⁵⁸ 50 C.F.R. § 17.21(h) (2006) (Section 17.21(h) is the first and only exemption to the prohibition on the hunting of endangered species in the Endangered Species Act).

⁵⁹ *Id.*

⁶⁰ *Supra* note 58.

⁶¹ *Supra* note 53.

In 2005, the U.S. Fish and Wildlife Service published its decision on the exclusion of the U.S. captive bred scimitar-horned oryx, addax, and dama gazelle from the endangered Species Act's hunting prohibition.⁶² The provision permitted captive-bred hunting of the captive-bred oryx, addax and dama gazelle for commercial profit. The dama gazelle, oryx and addax are members of the antelope family native to Northern Africa. It has been twenty years since a wild oryx has been sighted in its native Saharan Desert. The World Conservation Union has categorized the oryx as extinct in the wild.⁶³ Likewise, the addax's wild population continues to dwindle. Estimates place the number of wild addax at 600. The addax is found in the remote desert regions of Niger, Chad and Mali. The dama gazelle is also endangered, scientists estimating a current wild population of only 700.⁶⁴

In adding provision 17.21(h), the U.S. Fish and Wildlife Service stated that the sport hunting exemption for these species was intended to enhance the propagation and survival of the species.⁶⁵ In its 2005 ruling, the Fish and Wildlife Service stated “[s]port hunting of surplus captive-bred animals generates revenue that supports these captive breeding operations and may relieve hunting pressure on wild populations.”⁶⁶ A few years later, 17.21(h) was challenged in court by animal rights activists.⁶⁷ A significant challenge was brought in the D.C. district court in 2009 by the animal rights group, Friends of Animals. The suit filed against Ken Salazar and the Department of the Interior challenged whether the taking exemption violated the Endangered Species Act's notice and review provision.⁶⁸ The suit implicates Section 10, which instructs the

⁶² U.S. Fish and Wildlife Service, *supra* note 57.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Supra* note 57. Not proper cites

⁶⁶ *Id.*

⁶⁷ *Friends of Animals v. Kempthorne*, 452 F. Supp. 2d 64, 66 (D.D.C. 2006).

⁶⁸ *Friends of Animals v. Salazar*, 626 F. Supp. 2d 102 (D.D.C. 2009).

Secretary fulfill two requirements in considering requests for permits and exemptions.

Subsections 10(c) and (d) state:

(c) Notice and Review. The Secretary shall publish notice in the Federal Register of each application for an exemption or permit which is made under this section. Each notice shall invite the submission from interested parties, within thirty days after the date of the notice, of written data, views, or arguments with respect to the application.... Information received by the Secretary as part of any application shall be available to the public as a matter of public record at every stage of the proceeding.⁶⁹

Friends of Animals argued that the Fish and Wildlife Service violated subsection 10(c) by issuing “a blanket exemption for *all* persons who breed the antelope species in captivity in the United States without any requirement for an application and case-by-case assessment of that application.”⁷⁰ Friends of Animals pointed to the plain language of subsection 10(c), specifically that “*each* application for an exemption or permit” must be published by the Secretary before becoming a final rule. The D.C. District Court held that “the text, context, purpose and legislative history of the statute make clear that Congress intended permits for the enhancement of propagation or survival of an endangered species to be issued on a case-by-case basis following an application and public consideration of that application.”⁷¹ The court’s decision invalidated the blanket exemption for the scimitar horned oryx, addax and dama gazelle under the Endangered Species Act. Without 17.21(h), sport hunting farms must now obtain federal permits to legally hunt these species under §10 of the Act.

B. REPERCUSSIONS OF 17.21(H)’S REMOVAL FROM THE ENDANGERED SPECIES ACT

In response to the court’s decision in *Friends of Animals v. Salazar*, the U.S. Fish and Wildlife Service removed 17.21(h), citing the court’s decision as the rationale for its action.⁷²

⁶⁹ 16 U.S.C. § 1531(c)(d).

⁷⁰ *Salazar*, *supra* note 57.

⁷¹ *Id.*

⁷² *Endangered and Threatened Wildlife and Plants; Removal of the Regulation That Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions*, 77 FR 431-01 (Jan. 5, 2012)

Issues raised by animal rights groups and other member of the public were addressed in the 2012 ruling. One issue addressed the US Fish and Wildlife Service's failure to create a separate permit process for captive-bred hunting of endangered species. The Fish and Wildlife Service side-stepped the issue, citing the district court's decision as support in maintaining that the Service had no choice but to use the permit process. A separate issue raised by concerned parties was the elimination of an economic incentive for sport hunting ranches to maintain large populations of endangered species. The Service claimed that because the activities performed under 17.21(h) were otherwise permitted under the Endangered Species Act, no revenue should be lost on account of the permit process.⁷³ In the Service's view, the court's decision merely required sport-hunting farms harboring the endangered African antelope to undergo the same permit process required for the hunting of other endangered animals.⁷⁴

Safari Club International is an organization dedicated to the enhancement of hunter's rights as well as the continued protection and propagation of the earth's endangered species.⁷⁵ Following 17.21(h)'s removal, the Safari Club brought suit in federal court challenging the Service's action. Safari Club argued that farmers ranchers? would suffer irreparable harm on account of the final ruling.⁷⁶ The Court upheld the Service's conclusion, holding that "the balance of equities tips towards the [Fish and Wildlife Service]."⁷⁷ Safari Club also challenged the Fish and Wildlife Service's decision not to differentiate between captive- bred species and

⁷³ Id.

⁷⁴ Id.

⁷⁵ Safari Club International Homepage, <http://www.scifirstforhunters.org/> (last visited December 22, 2012) (Safari Club International is often at odds with animal rights groups over their advocated course of action in preserving animal life. Most animal rights groups do not join the Safari Club in their support for sport hunting).

⁷⁶ Safari Club Int'l v. Salazar, 852 F. Supp. 2d 102, 112-113 (D.D.C. 2012).

⁷⁷ Id at 125.

wild members of the species.⁷⁸ The court again held in favor of the Service, finding that the decision not to differentiate between captive and non-captive bred species was not “arbitrary and capricious”.⁷⁹

The Court’s decision in Safari concentrated on the issues of whether sport hunting ranches would be irreparably harmed by the removal of 17.21(h). Both the district court and the Fish and Wildlife Service claim that through the permit application process, ranchers will be able “to continue raising the animals from the three Antelope species.”⁸⁰ The D.C. Circuit court and Service’s reasoning completely ignores the destruction of financial incentives responsible for 17.21(h)’s success in the first place. Under the current permit system, any progress made through 17.21(h) will evaporate and the prospects for success will decline substantially. [It ignores what you said, but the court basically says that that is what the law enacted by Congress requires, right?]

The current permit process is tailored for applicants conducting scientific research and does not consider the needs of economically induced breeders. Section 9 of the Endangered Species Act requires that each permit be granted for a taking that is “incidental”.⁸¹ The “incidental” nature of the taking refers to the primary goal of maintaining and propagating endangered species. It does not consider the possibility that an American citizen who is primarily concerned with economic profit may develop a plan that has the “incidental” benefit of assisting in the fight against a certain species’ extinction. Though the Fish and Wildlife Service has

⁷⁸ Id at 112-113.

⁷⁹ Id at 113.

⁸⁰ Id at 121., also see Endangered and Threatened Wildlife and Plants; Removal of the Regulation That Excludes U.S. Captive-Bred Scimitar-Horned Oryx, Addax, and Dama Gazelle From Certain Prohibitions, 77 FR 431-01 (Jan. 5, 2012).

⁸¹ 16 U.S.C.A. § 1539.

praised the use of hunting as a way to maintain populations of endangered species,⁸² the language of the Act makes the hunting aspect incidental to the scientific research and maintenance. In short, the permit process requires that ranchers who wish to maintain populations of endangered species on their land become scientists and cultivators dependant on federal funds to maintain their herds.

The reliance? on federal regulators focused on the growth of the endangered population rather than the ranchers' economic incentive to maintain the population may lead to a decrease in the overall profitability of sport hunting. The attraction for many ranchers to breeding and maintaining endangered species resides in the high fees established? for trophy hunts.⁸³ Each year, the federal government collects \$2.4 billion dollars in federal income taxes related to hunting.⁸⁴ The state of Texas alone generates \$1.75 billion dollars in retail hunting sales annually.⁸⁵ The hunting industry employs approximately 14,000 people in the State of Texas.⁸⁶ A popular attraction in Texas is the legally sanctioned hunting of these three endangered African antelope. Hunting of the dama gazelle can command a price of \$5500.⁸⁷ Hunting of Other exotic animals generate similar price tags on sport hunting ranches.⁸⁸

Federal Fish and Wildlife regulators allow hunting when an endangered population reaches an excess. However, below that maximum threshold, hunting is not allowed. Congress made this point clear when it stated:

[i]n extreme circumstances, as where a given species exceeds the carrying capacity of its particular ecosystem and where this pressure can be relieved in no other feasible way, this

⁸² Supra note 57.

⁸³ Supra note 20.

⁸⁴ *Economic Importance of Hunting in America*, U.S. Fish and Wildlife Service, (2002), http://www.fishwildlife.org/files/Hunting_Economic_Impact.pdf.

⁸⁵ Supra note 16.

⁸⁶ *Id.*

⁸⁷ Supra note 20.

⁸⁸ *Supra* note 16. (Article includes hunting prices of \$4,000 for a scimitar-horned oryx, \$5,500 for the addax \$3,500 for a male zebra, \$15,000 for a male sable antelope, and \$50,000 for a cape buffalo.)

“conservation” might include authority for carefully controlled taking of surplus members of the species. To state that this possibility exists, however, in no way is intended to suggest that this extreme situation is likely to occur--it is just to say that the authority exists in the unlikely event that it ever becomes needed.⁸⁹

The valid time period is dependent on the Secretary of the Department of the Interior’s subjective whim.⁹⁰ Time restrained permits create liability due to the possible revocation under new presidential administrations. The fear that a new administration will adopt views contradictory to the previous administration’s interpretation of the Endangered Species Act is not without merit. Political uncertainty may dissuade breeders who might otherwise consider maintaining a population of endangered animals for personal profit.⁹¹

Additionally, the permit requirements could hinder ranchers’ abilities to attract clients. U.S. Fish and Wildlife Service Form 3/200-37 is an application for activities involving interstate commerce and endangered species. Prominently displayed at the top of the six page application is the following language.⁹²

Interstate Commerce permits authorize the sale of endangered and threatened species across State lines, but only for activities that will contribute to enhancing the propagation or survival of that species. Captive-breeding alone will not generally meet this requirement. Scientific research must be related to the species to be permitted. Interstate commerce activities with wildlife require the buyer to obtain a permit prior to the sale.

This language vastly limits the economic freedoms of the sport-hunt rancher looking to maintain and profit from endangered species sport hunting.

The current permit process’ uncertainty naturally leads to the conclusion that continuing to do business in the area of endangered species sport hunting may not be? worth the risk. The

⁸⁹ Cong. Research Serv., 97th Cong., Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980, p 448 (Comm. Print 1982) [hereinafter Legislative History].

⁹⁰ 50 C.F.R. § 17.22

⁹¹ Hennessy-Fiske, supra note 55.

⁹² Federal Fish and Wildlife Permit Application Form 3-200-37, Export/Import/Interstate and Foreign Commerce/Take of Animals (2/28/2013-2/28/2014)

current permit process was written with a heavy emphasis on scientific research. Without 17.21(h), a rancher must transform his hunting grounds into a scientific research center before addressing the side business of sport hunting. Additionally, the permit renewal process' uncertainty with future presidential administrations makes such a business plan much riskier. Finally, other regulations may greatly affect the ability of ranchers to attract customers. Thus 17.21(h) makes the otherwise successful and profitable business of captive-bred endangered-species sport hunting an economic gamble.

As a consequence {transition language is helpful!} sport-hunt ranchers in Texas responsible for the breeding and maintenance of the endangered African antelope have already begun disposing of their stock.⁹³ Few ranchers are willing to go through the arduous permit application process required to maintain their livestock.⁹⁴ One huge? deterrent for ranchers is the involvement of the federal government.⁹⁵ Aside from the ever-present possibility of changed hunting laws, many Texas ranchers are principally against federal intervention. Rodger Jones, a Dallas Morning News blogger, exemplified the ranchers' distrust of federal intervention when he wrote "[t]he feds couldn't leave that alone, though, and so they nosed their way into control of private exotic antelope hunts, a Texas industry that deserves credit for species preservation. But now that's in jeopardy, because the effort needed the revenue from trophy hunters. You'd think even the feds could figure that out."⁹⁶ The second reason for disposing of the stock is

⁹³ Rodger Jones, *Feds Squish Texas Exotics Hunting Like a Bug*, THE DALLAS MORNING NEWS, April 4, 2012, at Opinion Page.

⁹⁴ Maria Recio, *Can Protected Species be Saved by Hunting Them? That's the Quandary Being Played Out on a Ranch in Texas*, PITTSBURGH POST GAZETTE, April 5, 2012, at A6.

⁹⁵ Id.

⁹⁶ Supra note 93.

economical. “Right now, you couldn’t give away a scimitar-horned oryx. They’re nothing but an economic burden” states one Texas sport hunt rancher.⁹⁷

Texas’ endangered species hunting experience offers a proven option for animal rights activists in their fight against extinction of endangered species. The previous discussion does not proffer that the D.C. Circuit's decision was wrong on legal grounds. The court's finding that 17.21(h) violated the Endangered Species Act's notice and review provision is legally sound GOOD! Instead, the intention was to show that commercialization of endangered species hunting could be successful in bringing endangered species back from the brink of extinction. Based on the reaction by Texas ranchers to the new permit requirement, it becomes evident that a state by state approach to the legalization of hunting endangered species is required. The means by which this can be accomplished is addressed in the final section.

But it would be criminal to suggest such an option without addressing the underlying concern of animal rights activists; a moral objection to hunting in general. Advocates of animal rights largely oppose hunting in any form. This belief is succinctly expressed by Priscilla Feral, president of Friends of Animals. Asked about the possibility that the antelopes could become permanently extinct, she stated "It’s a canned hunt, and to call it an act of conservation is ridiculous. I’d rather see them extinct in Texas than shot by trophy hunters."⁹⁸ Such opposition must be addressed before legislative solutions can be discussed.

HOW SPORT HUNTING CAN BENEFIT THE EFFORT TO SAVE ENDANGERED SPECIES

⁹⁷ Supra note 94.

⁹⁸ Supra note 94.

A. WHY ANIMAL RIGHTS ACTIVISTS SHOULD RECOGNIZE SPORT HUNTING AS A VIABLE WEAPON IN THE FIGHT AGAINST EXTINCTION

It is submitted that the animal rights community should adopt sport hunting as a tenable solution in the continuing battle to save the planet's endangered species for three reasons. First, the hunting of endangered species, if beneficial to their survival, is compatible with the intent of the Endangered Species Act. Second, any self-funding solution to the endangered species epidemic should be given serious consideration. And third, ignoring the successful experiences of hunting the addax, oryx and dama gazelle would be a travesty in the fight to preserve the earth's remaining species.

Ironically, opposition to hunting by animal rights activists perverts the interpretation of the Endangered Species Act. The Endangered Species Act is not an anti-hunting statute, nor is it an animal cruelty law. The Endangered Species Act addresses the accelerated rate of species extinction occurring on earth and seeks to reverse that trend "whatever the cost". Local and state laws address animal cruelty. The Endangered Species Act was not intended to remedy the ills of sport hunting.⁹⁹ The Act addresses an end goal; preservation of endangered species. It provides very little as to the proper means to achieve those ends. Section 1 of the Endangered Species Act provides¹⁰⁰:

The purposes of this chapter are to provide 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, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

⁹⁹ 16 U.S.C.A. § 1531, (As previously noted, Congress enacted the Endangered Species Act to conserve the ecosystems of threatened species and develop conservation programs. The hunting ban is but one of many attempts to achieve these goals, and one which may be amended as new programs and approaches are developed).

¹⁰⁰ 16 U.S.C.A. § 1531(b)

Hence, the Endangered Species Act's purpose is conserving endangered species through innovative ideas and programs.

Animal rights activists often argue, in this author's view incorrectly, that the hunting of endangered species does not comply with Congress' intent in passing the Endangered Species Act. In 2007, the George Washington Law Review published an article written by law student Elizabeth Moore entitled "*I'll Take Two Endangered Species Please*": *Is the Commercialization of Endangered Species a Valid Activity that should be permitted under the Endangered Species Act to Enhance the Survival of the Species?*¹⁰¹ Her argument centers on two central points. Throughout the article, Ms. Moore claims that hunting endangered species violates the Act's purpose to conserve endangered species for their "[a]esthetic, ecological, educational, historical, recreational, and scientific (but not commercial) value."¹⁰² It appears that Ms. Moore takes a very narrow view of Congress' intent in asserting her viewpoint. Chief Justice Berger apparently disagrees. "The plain intent of Congress in enacting [the Endangered Species Act] was to halt and reverse the trend toward species extinction, whatever the cost."¹⁰³ Ms. Moore confuses the "purpose" of the Act with Congress' intent in passing it.

Ms. Moore also suggests that the commercialization of endangered species is itself a per se violation of the Act. She bases her argument on the Act's lacking any mention of commercialization.¹⁰⁴ Her argument assumes that in 1973, Congress could anticipate the possibility of a multi-billion dollar hunting industry developing with its focal point in the desert steppes of Texas. But Congress could not have been expected to foresee the most remote

¹⁰¹ Elizabeth A. Moore, "I'll Take Two Endangered Species, Please": Is the Commercialization of Endangered Species a Valid Activity That Should Be Permitted Under the Endangered Species Act to Enhance the Survival of the Species?, 75 Geo. Wash. L. Rev. 627 (2007)

¹⁰² Id at 1, quoting 16 U.S.C. § 1531(a)(3).

¹⁰³ Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184 (1978).

¹⁰⁴ Moore at 6-7, supra note 101.

possibilities when debating legislation. For this very reason, American laws are written in a contextually general manner and interpreted by the judiciary. The idea that hunting could benefit the existence of endangered species was absurd for much of civilization?. Yet considering Congress' words, circumstances unforeseeable by Congress forty years ago now may fall within the greater scope of Congress' intent. Though it may seem paradoxical, commercially beneficial sport hunting of endangered species falls within Congress' intent.

Given out current economical circumstances, any self-financing solution possessing only minimal chance of negative repercussions should be given serious consideration in light of public policy. In 2007, the United States spent over \$1.5 billion dollars in efforts to save endangered species.¹⁰⁵ Alleviating any portion of that burden through private investment would benefit both the taxpayer and the future of endangered species. Sport hunting is a multi-billion dollar industry.¹⁰⁶ Endangered species attract especially high price tags from trophy hunters.¹⁰⁷ By expanding the exemptions beyond the three African antelope, the fee to hunt these three? endangered species could provide funding to promulgate an additional 100 members of the same species at no additional cost to the American taxpayer.

Additionally, the expansion of legal hunting of endangered species could reduce the illegal overseas endangered hunting trade. In 2005, the U.S. Fish and Wildlife Service stated “[s]port hunting of U.S. captive-bred specimens may reduce the threat of extinction of wild populations by providing an alternative to legal and illegal hunting of wild specimens in range countries.”¹⁰⁸ The overseas hunting industry has become a major threat to species in danger of

¹⁰⁵ Jon R. Platt, *How Much did the U.S. Spend in 2007 to Protect Endangered Species*, *The Scientific American*, October 13, 2009, <http://blogs.scientificamerican.com/extinction-countdown/2009/10/13/how-much-did-the-u-s-spend-in-2007-to-protect-endangered-species/> (last visited December 28, 2012).

¹⁰⁶ *Supra* note 84.

¹⁰⁷ *Supra* note 20.

¹⁰⁸ *Supra* note 57.

extinction. Both poachers and sport hunters threaten endangered and threatened species in Africa.¹⁰⁹ Endangered species hunting safaris specifically geared towards wealthy Americans and Europeans also threaten the preservation of species beyond the reach of the American government.¹¹⁰ Legalizing these hunts within U.S. borders would benefit conservation efforts in two ways. First, it would produce incentive for private breeders to invest in producing and maintaining these populations. Second, legalization could make the illegal hunting of endangered species in foreign countries prohibitively unattractive to potential clientele. An American interested in hunting an endangered rhino would be more likely to opt for a legally sanctioned trip to Texas than confront the legal and personal dangers of a trip to the jungles of sub-Saharan Africa.

Finally, the trial experiment involving the scimitar horned oryx, addax and dama gazelle has been more successful than other preservation attempts. To illustrate, the population of captive-bred scimitar horned oryx in Texas increased from 32 specimens in 1979 to 2,145 in 1996. The captive population of addax increased from 2 in 1971 to 1,824 in 1996. And the dama gazelle, population total of 9 in 1979, grew at a rate greater than 350% to 369 in 2003.¹¹¹ Such success should not be ignored. Critics may point to the fact that many endangered species do not fit in the category of traditionally “hunnable” animals. While this may be true of certain smaller species, it is no excuse not to attempt to save those who would generate an interest in hunters.

It should be conceded that attempts to use hunting grounds to generate specimens for reintroduction of endangered animals into their native habitats have, in *some* circumstances,

¹⁰⁹ United Nations News Centre, *UN-backed report finds that elephant poaching levels are worst in a decade*, <http://www.un.org/apps/news/story.asp?NewsID=42295&Cr=endangered+species&Cr1=#.UNTlv6z4J8E> (last visited December 24, 2012).

¹¹⁰ Rebecca Dana, *Call of the Wild: Why the Rich Have Fallen for Big-Game Hunting*, NEWSWEEK, April 19, 2012 at 13 (article discusses the attraction of wealthy persons of developed nations to big game hunting safaris, specifically the sons of real estate magnate Donald Trump).

¹¹¹ *Id* at 4.

proven to be successful. Captive-breeding programs taking place in the United States largely occur in zoos. These breeding attempts often fail because the mostly urban zoos are unable to successfully replicate the specimen's native breeding grounds.¹¹² On the other hand, ranchers who facilitate hunting are often able to privately purchase expansive tracts of land in different climates that mirror the species' native breeding grounds.¹¹³ Many spor- hunting grounds attract clientele with expansive natural habitats.

The U.S. Fish and Wildlife Service has declared their support for the initiative. In its 2005 ruling, the Service stated¹¹⁴:

Given the cost of establishing and maintaining a large captive breeding operation and the large amount of land that is required to maintain bachelor herds or surplus animals, it is difficult for many private landowners to participate in such endeavors. One incentive to facilitate such captive breeding operations and ensure that genetically viable populations are available for future reintroduction programs is to allow the limited sport hunting of captive-bred specimens of these species to generate needed operational funds. Such an activity, therefore, reduces the threat of the species' extinction.

Such unequivocal language makes the federal government's position clear; commercially incentivizing private parties to maintain endangered species is a viable option in the ongoing effort to preserve earth's species.

THE SOLUTION: AMENDING THE ENDANGERED SPECIES ACT TO LEGALIZE THE REGULATED HUNTING OF ENDANGERED SPECIES

The final unresolved issue remains the manner in which to organize and regulate the hunting of endangered species. Industry regulation could be accomplished through laws and

¹¹² Niamh Scallan, *Cubs' Deaths at Toronto Zoo Highlights Difficulties of Polar Bear Breeding*, The Toronto Star, December 11, 2012, available at <http://www.thestar.com/news/gta/article/1300954--cubs-deaths-at-toronto-zoo-highlights-difficulties-of-polar-bear-breeding>.

¹¹³ *Supra* note 16 (article lists non-endangered or threatened species of buffalo, zebra and antelope as "hunting trophies" available on Texas ranches.)

¹¹⁴ *Id.*

procedure on either the state or federal level. A state-regulated endangered species hunting industry would benefit both state and federal concerns. First, regulation on the local level would allow a state-by-state determination whether to legalize the hunting industry at all. Second, a more localized regulatory mechanism is better suited to respond to issues and concerned parties. Finally, state regulation allows federal authorities the ability reducing cost so as to benefit by redirecting resources towards species in need of better protection through separate federal conservation programs.?

A state-based approach allows state legislatures the option in whether or not to adopt a hunt-based approach to endangered species conservation. Different states view hunting in many diverse ways. As previously discussed, the state of Texas strongly supports endangered species sport hunting.¹¹⁵ Similarly, there still exist four states without endangered species laws passed by their state legislature.¹¹⁶ Other states, such as New Jersey, have chosen to adopt endangered species preservation laws in addition to the federal Endangered Species Act.¹¹⁷ State regulation of the industry would allow state populations with strong? moral objections to hunting (or hunting of endangered animals) the option to vote against legalizing the industry.

Additionally, regulation on the state level would allow for more detailed control of the industry. State legislatures, more knowledgeable of local weather and terrain conditions, are better informed to make decisions regarding those types of animals whose populations can be maintained and propagated successfully within the state's borders. For instance, the state of Texas could then legalize the hunting of the oryx (while banning the hunting of other species

¹¹⁵ Supra note 57.

¹¹⁶ Animal Legal and Historical Center, *Map of State Endangered Species Laws*, available at <http://www.animallaw.info/articles/armpstateesa.htm>, last visited December 26, 2012).

¹¹⁷ Id (in fact, only four states, West Virginia, Wyoming, North Dakota and Alabama have not adopted supplementary endangered species laws through state legislation).

such as polar bears) while Alaska could permit legislation permitting and banning just the opposite.

States are already better positioned to handle developing and implementing such an industry. Virtually all hunting laws in the United States are currently regulated on the state level. States approve seasonal hunting permits, employ hunting enforcement officials to check for hunting licenses, and establish hunting seasons for certain animal populations. States possess a greater ability to monitor legal hunting venues, inspect breeding facilities and punish violators. Federal law enforcement authorities, considering the size of their jurisdiction, can become stretched thin. State laws and law enforcement personnel are better suited in legislating and enforcing the laws legalizing endangered species hunting.

The alternative/ approach to legalizing endangered species hunting is through federal legislation. Congress could create and regulate hunting of endangered species in one of two ways. The first would involve amendments to the Endangered Species Act's "takings" provision and passage of specific Congressional hunting regulations. The second approach would involve similar amendments to the Act's takings clause, but would place regulatory power in the hands of the U.S. Fish and Wildlife Service. The Service could then be tasked with developing and implementing rules concerning endangered species hunting throughout the United States.

Federal regulation of such an industry fails in many aspects. As previously noted, federal laws would lack the specificity required the proper maintenance of such an industry. Additionally, the blanket legalization of endangered species sport hunting would in all likelihood result in negative backlash from certain regions? of the country. The two procedural alternatives also exhibit problems not present in a state regulated industry. Were Congress to propagate its own rules, constant changes would make the law a legislative nightmare. Thus it seems that

certain areas of law, as has been demonstrated, may be better handled at the state level. The proffered industry is one of those areas, exhibited by the current state regulation of the non-endangered animal hunting industry.

Finally, it must be again emphasized that state regulation of such hunting activities would allow the federal government, and specifically the Fish and Wildlife Service, to place greater attention on a select group of endangered species that really need special protection?. Reliance on the hunting industry would not only provide a cost free avenue of species preservation for those species being hunted, but would additionally provide funding for species not popular with hunters or capable of being hunted. Time not spent regulating the migratory patterns of African antelope can be spent on other species whose propagation requires greater time and detail. Additional time and resources may be the determining factors in saving those species who have taken permanent residence on the endangered and threatened species lists.

The cost benefit analysis is strikingly beneficial. The costs of endangered species hunting, aside from moral objections, are non-existent. Neither states nor the federal government would have to commit additional funds to such a program. The benefits could be astounding. Not only would more funding be provided through federal and state permits, but the number of species those resources are dedicated to would diminish. As species are added to the lists of populations living and breeding on private hunting grounds, the federal government could narrow their efforts from species promulgation to species reintroduction. The hunting industry, if it chooses to in any way remain a successful business venture, would assure the promulgation of those hunted species under state regulations. The result, by virtue of a combination of additional funding and a decrease in the number of species with which the Fish and Wildlife Service would

be obliged to concern itself, suggest that adoption of a state regulated endangered species hunting industry a valid and strong option for animal preservationists.

CONCLUSION

Ralph Waldo Emerson is misquoted as saying “build a better mousetrap, and the world will beat down your door.” Though his actual words were different, Emerson’s point continues to be clear. The key to success is constant improvement of the status quo. Today’s belief is that the threat of extinction is dangerous not only for human beings but for the planet as a whole, and that sport hunting is a leading cause of that problem. If the United States were able to transform a former leading cause of extinction into a weapon through legalization and regulation, it would build a better mousetrap, one that may cause the world to beat down the door of species extinction.

Your final draft is better, and well-argued. I have tried to show you how to improve your written communications to make your argument more clear, more accurate, more crisp.

Final Grade: A-