

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. CR-18-227-SLP
)	
JOSEPH MALDONADO-PASSAGE,)	
)	
Defendant.)	

ORDER

Before the Court is Defendant’s Motion to Dismiss Counts 3-11 [Doc. No. 41]. The motion is at issue. *See Resp.*, Doc. No. 45. Defendant seeks to dismiss five counts alleging criminal violations of the Endangered Species Act (the “ESA”) through “taking” tigers by killing them, one count alleging a criminal violation of the ESA through the unlawful offering for sale of tiger cubs in interstate commerce, and three counts alleging criminal violations of the ESA through unlawful sale of tiger cubs in interstate commerce. *See* Superseding Indictment, Doc. No. 24. Defendant argues that these ESA counts violate the nondelegation doctrine derived from Article I, Section 1 of the U.S. Constitution, as well as the U.S. Constitution’s Ex Post Facto Clause.

I. Background

The ESA was enacted by Congress “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 [certain] treaties

and conventions.” 16 U.S.C. § 1531(b). The ESA imposes criminal punishment on a person who “take[s] any . . . endangered species of fish or wildlife listed pursuant to section 1533 . . . within the United States” or who “sell[s] or offer[s] for sale in interstate or foreign commerce any . . . endangered species of fish or wildlife listed pursuant to section 1533 . . . within the United States” and without a permit issued pursuant to 16 U.S.C. § 1539. *Id.* § 1538(a)(1); *see id.* § 1540(b).

The ESA does not indicate which species are endangered except to define “endangered species” to “mean[] any species which is in danger of extinction throughout all or a significant portion of its range other than [certain insects not at issue in this case].” *Id.* § 1532(6). Instead, the ESA instructs the Secretary of the Interior¹ to determine which species are endangered via regulation, based on five factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence

Id. § 1533(a)(1).

These determinations are to be made “solely on the basis of the best scientific and commercial data available” based on a review of efforts already underway to protect a potentially endangered species. *Id.* § 1533(b)(1)(A). The list of those species identified as

¹ Other departments and members of the President’s Cabinet also play important roles in implementation of the Endangered Species Act. However, their roles are not relevant to the issues in this case, so references herein are to the Secretary of the Interior only.

“endangered” by the Government is published in the Code of Federal Regulations. *See* 50 C.F.R. § 17.11(h).

II. Discussion and analysis

Defendant first asserts that the ESA conflicts with the nondelegation doctrine that “is rooted in the principle of separation of powers that underlies our tripartite system of Government.” *Mistretta v. United States*, 488 U.S. 361, 371 (1989). “In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency [because] Article 1, § 1 of the Constitution vests all legislative Powers [t]herein granted in a Congress of the United States.” *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 472 (2001) (quotation marks and citation omitted). To avoid violating the nondelegation doctrine while still “confer[ring] decisionmaking authority upon agencies,” the U.S. Supreme Court has held that “Congress must lay down by legislative act an intelligible principle by which the person or body authorized to act is directed to conform.” *Id.* (emphasis, quotation marks, and citation omitted). “[T]he degree of agency discretion that is acceptable [without violating the nondelegation doctrine] varies according to the scope of the power congressionally conferred” on the agency. *Id.* at 475.

Here, Defendant argues that subsections (a) and (b) of 16 U.S.C. § 1533 violate the nondelegation doctrine because they “fail to set forth discernable objective criteria by which the Secretary [of the Interior] is to exercise his delegated authority to determine which species are entitled to protection under the ESA.” Mot. 3, Doc. No. 41. According to Defendant, “Congress failed to define with particularity what renders a species

endangered” and “did not provide a sufficient definition to determine at what point . . . a species’ population render[s] it in danger of becoming extinct.” *Id.*

The Court disagrees. Section 1533(a)(1) establishes criteria for the Secretary of the Interior to use in making determinations regarding which animal species are included on the endangered species list, and section 1533(b)(1)(A) requires that such determinations be made “solely on the basis of the best scientific and commercial data available” based on a review of efforts already underway to protect the potentially endangered species. These statutory parameters and directions are more demanding than the controlled-substance-scheduling procedures and limited-factors-consideration found acceptable in *Touby v. United States*, 500 U.S. 160, 162-64, 166-67 (1991). And the ESA’s provisions are sufficient to provide the “intelligible principle” required for a statute to avoid violating the nondelegation doctrine. *Whitman*, 531 U.S. at 472; *see United States v. Hill*, 896 F. Supp. 1057, 1060-62 (D. Colo. 1995) (rejecting a nondelegation-doctrine-based challenge to the ESA like that asserted by Defendant).

In addition, Congress’s choice to allow the Secretary of the Interior to designate species as endangered matches the policies furthered by the U.S. Supreme Court’s nondelegation-doctrine precedent. The high court’s “jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Mistretta*, 488 U.S. at 372. And the Supreme Court has also recognized that “[t]he task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal

province of Congress.” *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995). Thus, the ESA addresses the very situation where judgment by an agency has been found to be necessary without violating the nondelegation doctrine. Defendant’s nondelegation-doctrine challenge to the ESA counts alleged against him cannot prevail.²

Defendant next asserts that the ESA counts violate the Ex Post Facto Clause of the U.S. Constitution. *See* U.S. Const. art. I, § 9, cl. 3.³ Defendant asserts that *Panthera tigris*—the species of tigers at issue in the ESA counts—was not declared an endangered species pursuant to the ESA via regulation until March 2016. And Defendant asserts that because he possessed the tigers at issue prior to March 2016, the Government’s ESA counts violate the prohibition on ex post facto laws (and regulations). *See Boutwell v. Keating*, 399 F.3d 1203, 1215 (10th Cir. 2005) (indicating that the ex post facto analysis applies to “agency regulations that are legislative in nature”).

There generally are four types of prohibited ex post facto laws/regulations:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different,

² Because the Court finds that the ESA does not offend the nondelegation doctrine, the Court need not (and does not) address the doctrine’s contemporary vitality, which some courts and academic commentators have questioned. *See United States v. Cottons*, 633 F. App’x 501, 505-06 (10th Cir. 2016) (unpublished) (collecting cases).

³ Defendant cites Article I, Section 10, of the U.S. Constitution, which applies to the States. The Court assumes that Defendant intended to reference the Ex Post Facto Clause of Article I, Section 9, which applies to the federal government.

testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Carmell v. Texas, 529 U.S. 513, 522 (2000) (emphasis omitted) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)); *see also id.* at 532 (describing, in brief, ex post facto laws as those in which “the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption [of innocence]”).

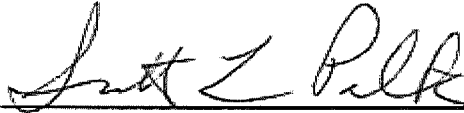
Here, Defendant argues that the ESA counts alleged against him fall into the first category. But Defendant misapplies the ex post facto prohibition. The acts which the Government says violated the ESA in the Superseding Indictment are alleged to have occurred from November 2016 to March 2018. *See* Superseding Indictment ¶¶ 34-40, Doc. No. 24. None of the acts on which the ESA counts rest are alleged to have occurred prior to March 2016.

That Defendant possessed the animals prior to March 2016 does not—for an ex post facto analysis—affect whether his alleged “taking” by killing, offering for sale, and selling of the animals after March 2016 can be punished. Were the Government alleging Defendant’s pre-March 2016 possession of the animals to be criminal, Defendant’s argument might succeed. But that is not what is alleged by the Government. *See id.* Defendant’s ex post facto challenge to the ESA counts alleged against him cannot prevail.

III. Conclusion

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Counts 3-11 [Doc. No. 41] is DENIED as indicated herein.

IT IS SO ORDERED this 3rd day of January, 2019.



SCOTT L. PALK
UNITED STATES DISTRICT JUDGE