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# CONSERVING WILDLIFE RESOURCES: AN OVERVIEW OF THE ENDANGERED SPECIES ACT OF 1973

GEORGE CAMERON COGGINS\*

## I. INTRODUCTION

In order to conserve those species of fauna and flora that are or may be in danger of extinction, Congress recently passed the Endangered Species Act of 1973 (1973 ESA).<sup>1</sup> Earlier federal legislation, notably the Endangered Species Conservation Act of 1969,<sup>2</sup> and some recent state statutes,<sup>3</sup> had attempted to deal with the problem of disappearing wildlife, but their ineffectiveness led to the more pervasive regulatory approach exemplified in the 1973 Act. This article will attempt to explain in broad outline the aims of the new statute and the means chosen by Congress to accomplish those aims. The 1973 ESA is not a paragon of legislative drafting; in this overview, however, only passing reference will be made to underlying problems of interpretation and implementation.

There is no question that many forms of wildlife<sup>4</sup> have disappeared or have been substantially diminished in the United States and world-wide during the past several centuries. Commercial hunting, urbanization, agricultural practices, and misuse of public lands, among other exploitive and developmental phenomena, have been responsible for much of the damage. World-wide, as of 1966, the authoritative Red Data Books listed 277 mammals and over 300 birds

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1. The Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. §§ 1531-43 (Supp. III, 1973).

2. Endangered Species Conservation Act of 1969, 83 Stat. 282, 16 U.S.C. §§ 668aa-dd (1970), *repealed* 87 Stat. 903 (1973) [hereinafter referred to as 1969 ESCA]. Sections aa-cc were repealed by passage of the 1973 ESA. It had superceded a 1966 version. Act of Oct. 15, 1966, 80 Stat. 926. The evolution of these statutes is discussed at § I, B of text, *infra*.

3. *E.g.*, CAL. FISH & GAME CODE §§ 2050 *et seq.* (West Supp. 1974). See § I, B of text, *infra*.

4. The term "wildlife" will be used herein as shorthand for all undomesticated living creatures save man, plants, and microscopic species. *Cf.* 87 Stat. 884, 885, 16 U.S.C. § 1532(5) (Supp. III, 1973).

as endangered, *i.e.*, threatened with total extinction of the species.<sup>5</sup> Even with the limited legal protection enacted and private programs undertaken in recent years, many estimate that one or two species a year still become extinct.<sup>6</sup> There is now general recognition that the non-economic values inherent in wildlife make it eminently worthy of preservation, protection, and maintenance, apart from the obvious economic benefits that may be derived from its use and pursuit. Adjectives such as "scientific", "educational", and "ecological" are frequently used to describe those non-economic values, but it would be as accurate to say that man — even civilized, urbanized, nature-destroying man — feels instinctively that wildlife is not only of immense interest and wonder, but is also an integral part of himself and his heritage. Wildlife is an important natural resource, which, like many other renewable resources, has been depleted to the point where intelligent conservation measures are necessary to avoid permanent losses. It will therefore be assumed that protection of endangered and threatened species is a widely, if not universally, shared goal.

The 1973 ESA is not without a legislative background at the federal level. While the federal government has never developed a coherent, overall regulatory process for protection of all fish and wildlife,<sup>7</sup> awareness of particular problems has led Congress to enact unrelated legislative measures aimed at those problems. The legislation of the 1970's has had a somewhat broader scope than prior statutes,<sup>8</sup> but the overall picture is still a patchwork of inadequate and sometimes conflicting laws scattered throughout the United States Code.<sup>9</sup> All such statutes cannot be analyzed here; the following introductory sections will briefly discuss only prior federal legislation directed toward preservation of endangered species and the immediate impetus for the 1973 Act, the multinational Convention on International Trade in Endangered Species of Wild Fauna and Flora of March 3, 1973.<sup>10</sup>

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5. INTERNATIONAL UNION FOR CONSERVATION OF NATURE & NATURAL RESOURCES, SURVIVAL SERVICE COM'N, RED DATA BOOKS, VOLS. I (MAMMALIA) & II (AVES) (1966). See generally Dickens, *The Law and Endangered Species of Wildlife*, 9 GONZAGA L. REV. 57, 58-61 (1973).

6. See S. REP. No. 93-307, 93d Cong., 1st Sess. 2990 (1973).

7. There is little question that Congress, under the Treaty, Commerce, and Territorial clauses of the Constitution, has the power to enact legislation affecting wildlife, see Note, *Federal Protection of Endangered Wildlife Species*, 22 STAN. L. REV. 1289 (1970), in spite of the oft-misunderstood dictum in *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), indicating that wildlife belonged in a property sense to the several states.

8. *E.g.*, The Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-62, 1371-84, 1401-07 (Supp. III, 1973).

9. See generally, Dickens, *supra* note 5; T. GUILBERT, WILDLIFE PRESERVATION UNDER FEDERAL LAW 550-94 (1974).

10. The Convention [hereinafter cited as 1973 CONVENTION] is reprinted verbatim at —U.S.T.—, T.I.A.S. No.—, together with documents relating to domestic ratification and implementation. [reprinted in 12 INT'L LEGAL MATERIALS 1085 (1973)].

## A. PRIOR FEDERAL ENDANGERED SPECIES LEGISLATION

One of the earliest federal forerunners of the 1973 ESA was the Lacey Act, passed in 1900.<sup>11</sup> Although prohibiting the import, transport, sale, receipt, acquisition or purchase of wildlife (but not fish or plants) which had been taken in violation of any state, federal, or foreign law, the effect of the act was negligible because at that time there were few laws which prohibited taking. The Lacey Act, as later amended, also gave the Department of Agriculture the authority to assist in the preservation and restoration of wild birds, and authorized the Secretary of Treasury to regulate and grant permits to insure that wildlife was transported under humane conditions.<sup>12</sup>

Endangered species legislation as such began in 1966 with a statute that authorized purchase of land for conservation and propagation purposes.<sup>13</sup> The immediate precursor of the 1973 ESA was the Endangered Species Conservation Act of 1969 (1969 ESCA).<sup>14</sup> Under this statute, the Secretary of Interior has published two lists, one of resident and one of foreign endangered species.<sup>15</sup> The purposes of the Act were "to provide a program for the conservation, protection, restoration, and propagation of selected species of *native* fish and wildlife, including migratory birds, that are threatened with extinction,"<sup>16</sup> and it placed upon the Secretaries of Interior, Agriculture, and Defense the obligation to protect endangered native fish and wildlife and to preserve the habitats of such species on lands within their respective jurisdictions.<sup>17</sup> This habitat provision was greatly limited, however, by the qualification that such preservation of habitat need be carried out only to the extent that it was practicable and consistent with the primary purposes of those Departments. Moreover, although the grant of authority to set up conservation programs for resident species was broad, the implementation remained narrow with only importation and trade in endangered species being regulated.<sup>18</sup> Foreign species had to be threatened with worldwide extinction in order to be placed on the endangered list; once listed, their importation was forbidden.<sup>19</sup> The taking of resident endangered species was prohibited on Federal lands; however,

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11. Lacey Act, ch. 553, §§ 1-5, 31 Stat. 187, 16 U.S.C. § 668(e) (1970).

12. 16 U.S.C. § 667(e) (1970). See T. GULBERT, *supra* note 9, at 592-93; Dickins, *supra* note 5, at 64.

13. Endangered Species Act of 1966, 80 Stat. 926, *repealed* 87 Stat. 903 (1973). Note, *Federal and State Protection Against Commercial Exploitation of Endangered Wildlife*, 17 CATH. LAW. 241, 244 (1971).

14. 1969 ESCA, 16 U.S.C. §§ 668aa-ee (1970), *repealed* 87 Stat. 903 (1973).

15. The lists, recently republished at 39 Fed. Reg. 1172-75 (1974); see also 50 C.F.R. Ch. I, App. A for list for foreign endangered species (1973).

16. 1969 ESCA, 16 U.S.C. § 668aa(a) (1970), *repealed* 87 Stat. 903 (1973) (emphasis added).

17. *Id.* § 668aa(b) (1970), *repealed* 87 Stat. 903 (1973).

18. See T. GULBERT, *supra* note 9, at 578.

19. 1969 ESCA, 16 U.S.C. § 668cc-2 (1970), *repealed* 87 Stat. 903 (1973).

the Secretary of Interior had the discretion to permit such taking, even on lands included within the National Wildlife Refuge system, and wildlife regulations in effect on Federal lands were to be consistent with State hunting laws "to the extent practicable."<sup>20</sup> The Act provided funds for the acquisition of habitat, although a ceiling of \$17.5 million was placed on this authority.<sup>21</sup>

Since the passage of the 1969 ESCA a number of states have enacted legislation for the protection of endangered species.<sup>22</sup> The leader has been the State of New York, which passed both the Mason Act<sup>23</sup> forbidding the sale of certain animals, mainly those used in clothing; and the Harris Act,<sup>24</sup> forbidding importation, transportation, possession, or sale without a permit of all species listed on the Federal Endangered Species lists.<sup>25</sup> Although the Harris Act does not limit protection to the species on the federal lists, to date only species so listed have been covered. The Mason Act, on the other hand, because of the zoological classifications used, contains a broader range of animals than the federal lists. Both the Mason and Harris Acts have been upheld in litigation,<sup>26</sup> and have been used as models by other state legislatures. Most of the other states do not prohibit taking, as does New York, but there are a few states which in addition to the commercial restrictions also forbid the taking of endangered animals.<sup>27</sup>

#### B. THE CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA OF MARCH 3, 1973

The foregoing history was not the only background for the Endangered Species Act of 1973. Earlier in that year, delegates from eighty-plus nations preliminarily agreed upon the Convention on International Trade in Endangered Species of Wild Fauna and Flora.<sup>28</sup> Although the ten requisite ratifications have not been obtained to bring the convention into force, the United States<sup>29</sup> was the first nation to ratify it.<sup>30</sup> Implementation of the Convention is a main feature of the 1973 ESA. The Convention establishes three categories of fish and wildlife: (1) species whose survival is in a critical state;

20. *Id.* § 668dd(c) (1970), as amended 87 Stat. 902 § 13(a) (1973).

21. 16 U.S.C. § 668bb (1970), repealed 87 Stat. 903 (1973).

22. Those statutes are listed and discussed in Dickins, *supra* note 5, at 76-84. MINN. STAT. § 97.488 (1974); NEB. REV. STAT. § 37-105 (1971).

23. Mason Act, N.Y. AGRIC. & MTS. LAW § 358-a (McKinney 1972), as amended § 358-a (1974).

24. Harris Act, N.Y. ECL. LAW § 11-0535 (McKinney 1972).

25. 89 Fed. Reg. 1172-75 (1974).

26. A.E. Nettleton Co. v. Diamond, 63 Misc. 2d 885, 313 N.Y.S.2d 893 (Sup. Ct. 1970), *rev'd*, 27 N.Y.2d 182, 264 N.E.2d 118, 315 N.Y.S.2d 625 (1970) *appeal denied*, 401 U.S. 969 (1971); Palladio, Inc. v. Diamond, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd* 440 F.2d 1319 (2d Cir. 1971).

27. See Dickins, *supra* note 5, at 76-84.

28. 1973 CONVENTION, *supra* note 10.

29. *Id.* On September 13, 1973, the United States ratified the convention.

30. 12 INT'L LEGAL MATERIALS 1085 (1973).

(2) potentially endangered species; and (3) species which each nation protects in its own territory.<sup>31</sup> For each category, a system of controls and prohibitions in the international trade and international commerce of the species included is set out.

Trade in species of the first category requires that both an export permit and an import permit be obtained. The export permit is to be granted only if such export is not detrimental to the survival of the species, an import permit has already been granted, the specimen was not obtained in contravention of the laws of the exporting State, and, if living, the specimen will be transported in a safe and humane manner. The import permit, a prerequisite to obtaining the export permit, is to be granted only if the import will not be for purposes detrimental to the species, the specimen is not to be used for primarily commercial purposes, and, if the specimen is living, the recipient is able to provide suitable living conditions.<sup>32</sup>

In contrast to these provisions, which totally forbid commercial trade in species of the first category and which hedge with a considerable thicket of international red tape trade for non-commercial purposes, the provisions regulating trade in species of the second category are somewhat less restrictive. Only an export permit is required, and this may be obtained even though the specimen is going to be put to a primarily commercial use. However, an export permit for these species cannot be granted unless all the requirements to be used for primarily commercial purposes, and, if the specimen of the first category, with the exception of the requirement of an import permit.<sup>33</sup>

Trade in species of the third category requires an export permit only in those cases where the specimen is coming from a foreign country which placed that species on the protected list. The export permit is to be granted if two conditions have been met: (1) the specimen was legally obtained, and (2) the specimen will be transported in safe and humane conditions. If coming from a country that did not list the species, only a certificate of origin is required.<sup>34</sup> A caveat to all of the foregoing is that any party to the Convention may make a specific reservation with regard to species of any category; and, for purposes of trade in that species, the party will be treated as a non-party with respect to that species. However, even in trade with non-parties, comparable documentation which substantially conforms to the requirements of the Convention is required.<sup>35</sup>

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31. For a listing of species within the categories, see 1973 CONVENTION, *supra* note 10, App. I-III. Species placed in category 1 are listed in App. I, species placed in category 2 are listed in App. II, etc.

32. 1973 CONVENTION, *supra* note 10, at art. III.

33. *Id.* at art. IV.

34. *Id.* at art. V.

35. *Id.* at arts. X & XXIII.

## II. THE BROAD OUTLINES: EXPANDING THE COVERAGE OF THE NEW SYSTEM

The 1973 ESA builds upon former law to create in essence a new system of regulation for wildlife conservation. The new Act is generally consistent with the regulatory trends established in other recent federal environmental legislation, which, like the 1973 ESA, was prompted by Congressional recognition of the dual facts that the subject, whether air, water or wildlife, was greatly in need of protection and enhancement, and that prior laws and administrative implementation were far too feeble to get the job done. The Clean Air Act of 1970,<sup>86</sup> and the Federal Water Pollution Control Act of 1972,<sup>87</sup> among other such laws, assumed for the federal government the role of primary standard-setter and overseer of state enforcement, a pattern repeated in the 1973 ESA. Those statutes provided a carrot-and-stick approach to the state role in the new system. The state received federal funds for its implementation program if that program met the minimum federal standards, and if it did not, the state lost those funds and jurisdiction over enforcement. This, too, is the scheme of the 1973 ESA. As in the earlier legislation, it abandons neutrality and adopts a pro-environmental stance, provides for increased public participation to the point of explicitly allowing citizen suits, increases the scope of civil and criminal violations and the amount of penalties, and extends its coverage in terms both of objects protected and activities regulated. Significantly, Congress also took a page from the National Environmental Policy Act of 1969,<sup>88</sup> and placed certain duties with respect to wildlife conservation on all federal agencies, although no procedure as specific as the impact statement requirement was imposed.<sup>89</sup> The 1973 ESA largely manifests a tougher and more realistic Congressional attitude.

It, however, does not uniformly follow in the tracks of that earlier environmental legislation, and the significant differences raise important questions as to its potential effectiveness. First, the degree of federal supervision over state enforcement activity appears to be less than that required by the air or water pollution laws. Similarly, more confusion is encountered in determining state duties under the Act. The 1973 ESA omits explicit provision for judicial review, and treats the question of citizen suits differently than did the earlier statutes. Most significantly, it includes few deadlines and fewer mandatory and clear commands to the implementing administrators.

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86. 42 U.S.C. §§ 1857 *et seq.*, 49 U.S.C. §§ 1421, 1430 (Supp. III, 1973).

87. 33 U.S.C. §§ 1251 *et seq.* (Supp. III, 1973).

88. 42 U.S.C. §§ 4321 *et seq.* (1970).

89. 87 Stat. 884, 892 (1973) 16 U.S.C. § 1586 (Supp. III, 1973). *See* § II, B *infra*.

In spite of those differences, pointed out in more detail below, Congress obviously intended to turn a new page in the annals of wildlife conservation. The Congressional intent to do more than deplore is nowhere so evident as in those sections expanding greatly the regulatory scope of the new legislation.

#### A. THE BASIC INTENT OF CONGRESS IS CLEAR

The dominant theme pervading all Congressional discussion of the proposed Act was the overriding need to devote whatever effort and resources were necessary to avoid further diminution of national and worldwide wildlife resources. Much of the testimony at the hearings and much debate was devoted to the biological problem of extinction. Senators and Congressmen uniformly deplored the irreplaceable loss to aesthetics, science, ecology, and the national heritage should more species disappear.<sup>40</sup> It was also the consensus that while increased federal participation was vitally necessary to the fight for conservation, the primary enforcement task should properly be left to the states if their programs were consistent with federal purposes. Congress noted that state fish and wildlife agencies provided an existing regulatory mechanism substantially larger than the responsible federal agency, and the subject was traditionally within the power and jurisdiction of the states.<sup>41</sup> The methodology best suited to do the job was not as amenable to unanimity. The original Senate bill contained provisions, later dropped in conference, which would have imposed somewhat stricter standards for approving agreements with states, expressly allowed a form of general judicial review, required audits of fund recipients, and spelled out the consequences if states failed to conform.<sup>42</sup> The Conference Committee adopted the House version<sup>43</sup> in large part but retained certain features of the Senate bill.<sup>44</sup> The Conference substitute was thereafter passed by both Houses without amendment, and was signed into law on December 28, 1973.<sup>45</sup>

The enacted version did not vary greatly from the 1969 Act in terms of stated purposes and policies. The Congressional findings set out in section 1531(a) generally parallel the findings in the 1969 Act, but a new finding was added declaring that encouraging states to develop programs to meet national standards is "a key"

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40. See H.R. REP. NO. 93-412, 93d. Cong., 1st Sess. (1973); S. REP. NO. 93-307, 93d Cong., 1st Sess. (1973).

41. H.R. REP. NO. 93-412, 93d Cong., 1st Sess. 7 (1973); 119 CONG. REC. S14515 (daily ed., July 24, 1973) (remarks of Senator Tunney); S. REP. NO. 93-307, 93d Cong., 1st Sess. 2993 (1973).

42. S. 1983, 93d Cong., 1st Sess. §§ 6(c), 9(c), 9(d), 16 (1973).

43. H.R. 37, 93d Cong., 1st Sess. (1973).

44. See CONFERENCE REP. NO. 93-740, 93d Cong., 1st Sess. 3001-07 (1973).

45. 87 Stat. 906.

to wildlife conservation.<sup>46</sup> Also of some interest is the 1973 addition of the adjectives "aesthetic" and "ecological" to describe the values inherent in wildlife. The purposes of the 1973 Act, stated in section 1531(b), expanded upon the equivalent 1969 provision in that Congress indicated that it wished to provide means and actually take action toward wildlife preservation, while the prior Act merely created a "program."<sup>47</sup> Finally in section 1531(c), Congress declared a policy that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter."<sup>48</sup> The 1969 purpose provision imposed only hedged duties on three departments;<sup>49</sup> the 1973 language is an unqualified command to the entire Executive Branch.<sup>50</sup>

## B. THE RANGE OF PROTECTION IS BROADENED: THE DEFINITIONS OF §§ 1532 & 1533(e)

### 1. *Fish and Wildlife*

The definitions in section 1532 make it clear that the coverage of the 1973 Act in terms of species protected is far broader than the scope of the 1969 ESCA. That Act related only to species "threatened with extinction,"<sup>51</sup> and defined only four terms, none of which was of importance. Perhaps as a consequence of this definitional lack, the Secretary did not list as endangered all or nearly all of the species considered endangered by authoritative biological references.<sup>52</sup> The 1973 Act, on the other hand, made explicit its coverage by way of a broad definition. "Fish and wildlife" includes every member of the animal kingdom and its eggs, parts, or body.<sup>53</sup> A species, which includes subspecies and interbreeding species,<sup>54</sup> is endangered when "in danger of extinction throughout all or a significant portion of its range,"<sup>55</sup> and is deemed threatened if in the foreseeable future it is "likely" to become endangered—again, even if on just a significant portion of its range.<sup>56</sup> Thus,

46. 87 Stat. 884, 885, 16 U.S.C. § 1531(a)(5) (Supp. III, 1973). Cf. 1969 ESCA, 16 U.S.C. § 668aa(a) (1970), *repealed* 87 Stat. 903 (1973).

47. *Id.* 16 U.S.C. § 1531(b) (Supp. III, 1973). Cf. 1969 ESCA, 16 U.S.C. § 668aa(a) (1970), *repealed* 87 Stat. 903 (1973).

48. *Id.* 16 U.S.C. § 1531(c) (Supp. III, 1973).

49. 1969 ESCA, 16 U.S.C. § 668aa(b) (1970), *repealed* 87 Stat. 903 (1973).

50. States, too, are expected to conform to the "purposes and policies" of the Act, 16 U.S.C. § 1535(c) (Supp. III, 1973), but the purposes are nebulous and the policies are expressly directed to federal agencies. See 16 U.S.C. §§ 1531(b), (c) (Supp. III, 1973).

51. 1969 ESCA, 16 U.S.C. § 668aa(c) (1970), *repealed* 87 Stat. 903 (1973).

52. See Dickins, *supra*, note 5, at 67 n.63.

53. 87 Stat. 884, 16 U.S.C. § 1532(5) (Supp. III, 1973).

54. *Id.*, 16 U.S.C. § 1532(11) (Supp. III, 1973).

55. *Id.*, 16 U.S.C. § 1532(4) (Supp. III, 1973) (emphasis added).

56. *Id.*, 16 U.S.C. § 1532(15) (Supp. III, 1973).

for example, grizzly bears in the lower 48 states might well be considered endangered or threatened even though a substantial population exists in Alaska. The Secretary of the Interior is currently considering just that situation on petition by the Fund for Animals.<sup>57</sup> The "threatened" classification was created to "give effect to the Secretary's ability to forecast population trends" and to head off future crises;<sup>58</sup> if wisely implemented by careful scientific study, this definition may be very significant in halting trends toward extinction.<sup>59</sup> Section 1533(e) further broadens the scope of the Act's umbrella as it provides that the Secretary may by regulation protect species so similar in appearance to the listed species that mistaken identity would create an additional threat to the latter.<sup>60</sup> This provision will tend to guard against the possibility that a hunter may kill a member of the protected species while believing it to be unprotected.

## 2. PLANTS

Species of plants are now, for the first time, entitled to protection under the Act; "plant" is also defined broadly.<sup>61</sup> However, flora is distinguished from fauna in the rest of the Act. Provisions and penalties in relation to plants are different in kind and degree from those relating to fish and wildlife.<sup>62</sup> Habitat acquisition is limited to those plants "which are concluded [sic] in Appendices to the Convention."<sup>63</sup> Plant conservation need not be considered by state agencies for the most part.<sup>64</sup> The Act's protection of endangered and threatened species of plants is tentative—prohibitions relate only to import and export situations—as may be seen in section 1541, authorizing and directing the Secretary of the Smithsonian Institution to study the plant situation and recommend new legislation before 1975.<sup>65</sup>

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57. A "Notice of Review of Status" was published early in 1974, but no formal action on the petition has yet been taken. 39 Fed. Reg. 11611 (1974).

58. S. REP. No. 93-307, 93d Cong., 1st Sess. 2992 (1973).

59. Less sanguine possibilities inhere in potential confusion that may be caused by the new classification system. For example, it is possible now for members of the same species to be in three different classes, depending on geographical location. This concern is more than academic: the Governor of Louisiana has petitioned to have the alligator, now an endangered species, be listed as threatened in some areas and wholly delisted in others. 39 Fed. Reg. 26050 (1974). As alligators are devoid of place-of-origin labels, enforcement of prohibitions on importation and commerce in that species would be immeasurably more difficult. Again, the problem is more than academic: it was recently reported that five men had been arrested in New Orleans on charges of possessing 258 alligator hides "worth \$12 a foot on the black market." Kansas City Times, Aug. 20, 1974, at 2, col. 3 (A.P.).

60. 87 Stat. 884, 888, 16 U.S.C. § 1533(e) (Supp. III, 1973).

61. *Id.* at 886, 16 U.S.C. § 1532(9) (Supp. III, 1973).

62. *Id.* at 894, 16 U.S.C. § 1538(a)(2) (Supp. III, 1973).

63. *Id.* at 889, 16 U.S.C. § 1534 (Supp. III, 1973).

64. *Id.*, 16 U.S.C. § 1535(c) (Supp. III, 1973).

65. *Id.* at 901, 16 U.S.C. § 1541 (Supp. III, 1973).

### 3. Conservation and Taking

The definitions in the 1973 Act, considered together with the later implementing and authorizing provisions, also extend the power of the Secretary of the Interior and increase the number of prohibited acts. "Conservation" or "to conserve," terms used throughout the Act, mean:

the use of *all methods and procedures* which are necessary to bring any endangered species or threatened species to the point at which [such] measures . . . are no longer necessary. Such measures . . . include, but are not limited to, *all activities* associated with scientific resources management such as . . . law enforcement [,] . . . propagation, . . .

and so forth.<sup>66</sup>

It is difficult to conceive of a broader definition. This was intended to and does bring to bear the "full spectrum" of possible conservation measures.<sup>67</sup> Where the Secretary is authorized to conserve, his literal authority is virtually boundless, because later provisions only add specific powers to his arsenal and do not limit the quoted definition. However, a minor question of scope remains: Does the phrase "which are necessary" in the definition include broader concepts such as "which may be necessary" or "which tend to" accomplish the goal? The precise point was not considered by Congress. While the literal language appears somewhat limiting, a reasonable interpretation must include some room for the flexibility inherent in the suggested phrases because use of the measures mentioned inevitably involves fallible human forecasting.

One measure, among those specifically authorized, is a prohibition against taking.<sup>68</sup> Congress used a similarly broad definition of "take"; in addition to actual killing and capture, the word also includes harassing, harming, wounding, pursuing, and collecting or attempting to do any of those things.<sup>69</sup> Congress achieved its definitional goal of defining it "in the broadest possible manner to include every conceivable way."<sup>70</sup>

### 4. Commerce and Persons

The Act is also expressly intended to reach all possible entities and activities subject to the jurisdiction of the United States. The "persons" referred to include state, federal, and foreign govern-

66. *Id.* at 885, 16 U.S.C. § 1532(2) (Supp. III, 1973) (emphasis added).

67. CONFERENCE REP. NO. 93-740, 93d Cong., 1st Sess. 3002 (1973).

68. 87 Stat. 884, 893, 16 U.S.C. § 1538(a)(1)(B) (Supp. III, 1973).

69. *Id.* at 886, 16 U.S.C. § 1532(14) (Supp. III, 1973).

70. S. REP. NO. 93-307, 93d Cong., 1st Sess. 2995 (1973).

ments as well as all private entities.<sup>71</sup> While it is not clear to what extent or whether foreign governments are subject to the jurisdiction of the United States courts or other governmental processes,<sup>72</sup> the intent to include everyone who could possibly be reached is clear.

The range of those persons' activities which are covered by the Act is less definite. "Export" is not defined, but the definition of "import" is more comprehensive than in the customs laws.<sup>73</sup> The term "commercial activity"<sup>74</sup> is a somewhat limiting factor with respect to certain interstate commerce prohibitions as it relates only to profit-oriented transactions. The term was added by the Conference Committee to refer to "activities which would qualify for special treatment,"<sup>75</sup> i.e., to distinguish between real commerce and activities such as specimen acquisition for non-profit zoos, a theme carried out in section 1538(a) (1) (E). "Foreign commerce" is not so limited.<sup>76</sup>

The definitions as a whole are significant because they evince a clear Congressional intent to attack the problem of disappearing wildlife on all fronts and in every way possible. The new Act brings under its umbrella all wildlife and plants which are or may become in danger of extinction either worldwide or in just one significant geographical area. It adopts the concept that the "full spectrum" of measures should be used to protect those species; and it is made applicable to nearly all activities of nearly all entities which heretofore contributed to the diminution and disappearance of wildlife.

### C. THE PROHIBITIONS AND PENALTIES ARE STRENGTHENED: §§ 1538 & 1540

The Congressional intent to put into effect a workable system for the conservation of wildlife with real teeth is manifest in the Congressional treatment of acts prohibited and penalties authorized by the new statute. The 1969 ESCA outlawed only importation of endangered species of fish or wildlife without a permit.<sup>77</sup> Willful violation of that predecessor law was a crime punishable by a fine of up to \$10,000 or up to a year in jail, or both.<sup>78</sup> Other, i.e., less-than-willful, violations rendered the violator liable for a civil

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71. 87 Stat. 884, 886, 16 U.S.C. § 1532(8) (Supp. III, 1973).

72. See generally W. BISHOP, INTERNATIONAL LAW, CASES AND MATERIALS 659-700 (3d Ed. 1971).

73. 87 Stat. 884, 885, 16 U.S.C. § 1532(7) (Supp. III, 1973). See S. REP. NO. 93-307, 93d Cong., 1st Sess. 2995 (1973).

74. 87 Stat. 884, 885, 16 U.S.C. § 1532(1) (Supp. III, 1973).

75. CONFERENCE REP. NO. 93-740, 93d Cong., 1st Sess. (1973). H 563-20.

76. 87 Stat. 884, 885, 16 U.S.C. § 1532(6) (Supp. III, 1973).

77. 1969 ESCA, 16 U.S.C. § 668cc-4(a)(1) (1970), repealed 87 Stat. 903 (1973).

78. *Id.* § 668cc-4(b) (1970), repealed 87 Stat. 903 (1973).

penalty of up to \$5,000 which could be assessed by the Secretary.<sup>79</sup> To collect that civil penalty, the United States had to bring suit, and the court could then review *de novo* the Secretary's action.<sup>80</sup> The acts prohibited were increased and the penalties imposed were strengthened in the 1973 ESA.

### 1. Prohibited Acts

The classification of the species as endangered or threatened determines whether certain acts in relation to such species are prohibited. With respect to threatened species of plants or wildlife, it is unlawful only to violate a regulation promulgated by the Secretary under the authority of section 1533 (d).<sup>81</sup> As no species have yet been so designated, and no regulations have been promulgated or proposed, no violations are possible at this time.

With respect to endangered species of plants, it is unlawful to export or import such species,<sup>82</sup> to have any substantial connection with interstate or foreign commerce in such species,<sup>83</sup> or to violate a regulation promulgated to protect such species.<sup>84</sup> Again, no plants have been listed, and no regulations have been promulgated.

The most comprehensive system of prohibitions is reserved for endangered species of fish or wildlife. With some limited exceptions, section 1538 makes illegal virtually all acts which tend to diminish a listed species. It is unlawful without qualification to import or export such species.<sup>85</sup> "Taking" is a federal crime in the United States, where the federal government has "retained management power,"<sup>86</sup> and on the high seas.<sup>87</sup> Whether such "taking" is prohibited where the federal government has ceded management power to a state is less certain.<sup>88</sup> Any kind of commerce in or transportation of domestic specimens illegally taken is also a criminal violation.<sup>89</sup> Sale in interstate or foreign commerce of endangered species is absolutely forbidden,<sup>90</sup> but other activities associated with such commerce are illegal only if done in "the course of a commercial activity."<sup>91</sup> The restriction to commercial activity is significant only in the area of foreign trade in endangered species as American

79. *Id.* § 668cc-4 (a) (1) (1970), *repealed* 87 Stat. 903 (1973).

80. *Id.*

81. 87 Stat. 884, 893-94, 16 U.S.C. § 1538(a) (1) (G), (a) (2) (D) (Supp. III, 1973).

82. *Id.* at 893, 16 U.S.C. § 1538(a) (2) (A) (Supp. III, 1973).

83. *Id.*, 16 U.S.C. § 1538(a) (2) (B), (C) (Supp. III, 1973).

84. *Id.* at 894, § 1538(a) (2) (D) Supp. III, 1973).

85. *Id.* at 893, 16 U.S.C. § 1538(a) (1) (A) (Supp. III, 1973).

86. *Id.*, 16 U.S.C. § 1538(a) (1) (B) (Supp. III, 1973). *See* S. REP. No. 93-347, 93d Cong., 1st Sess. 2992 (1973).

87. 87 Stat. 884, 893, 16 U.S.C. § 1538(a) (1) (C) (Supp. III, 1973).

88. *See* note 163, *infra*.

89. 87 Stat. 884, 894, 16 U.S.C. § 1538(a) (1) (D) (Supp. III, 1973).

90. *Id.*, 16 U.S.C. § 1538(a) (1) (F) (Supp. III, 1973).

91. *Id.*, 16 U.S.C. § 1538(a) (1) (E) (Supp. III, 1973).

citizens involved in such trade are for the first time engaging in illegal activity. Violations of regulations promulgated for the protection of either threatened or endangered species are also unlawful.<sup>92</sup>

Other subsections of section 1538 incorporate other more general prohibitions. Possession of or trade in specimens contrary to the Convention are unlawful under section 1538 (c).<sup>93</sup> A limited exception to that prohibition is allowed for species listed in the second category under certain circumstances.<sup>94</sup> Whether this provision is effective prior to ratification of the Convention, which has not yet occurred, was not dealt with. Subsection (d) requires all importers and exporters of fish, wildlife, or plants to obtain a permit from the Secretary and keep certain records under penalty of law,<sup>95</sup> and subsection (f) commands that all such trade be carried on only in designated ports.<sup>96</sup> The final category of offenses is the catchall of subsection 1538 (g) by which soliciting, attempting, or causing any of the above listed offenses is also a violation.<sup>97</sup>

## 2. Criminal Penalties

Four varieties of criminal penalties are offered in the 1973 Act. For willful commission of an act that violates any specific provision of the law, regulations issued with respect to section 1538 (a) prohibitions, or the terms of a permit, the violator may be fined up to \$20,000 and imprisoned for a year.<sup>98</sup> Violations of other regulations implementing the act are punishable by a \$10,000 fine and six months in the slammer, or both, if committed willfully.<sup>99</sup> If one found guilty of a criminal violation is a lessee of federal lands, the lessor agency may without liability revoke or suspend such lease, seemingly without notice or hearing.<sup>100</sup> A defendant convicted of a crime under the Act must be deprived of his federal hunting or fishing permit for up to a year.<sup>101</sup> Informers may receive half of any fine or civil penalty collected, up to a ceiling of \$2500.<sup>102</sup>

## 3. Civil Penalties

Three tiers of penalties exactible (but not collectible) by the Secretary alone are authorized in section 1540 (a). The same acts constituting crimes if done willfully are civil violations if committed

92. *Id.*, 16 U.S.C. § 1538 (a) (1) (G) (Supp. III, 1973).

93. *Id.*, 16 U.S.C. § 1538 (c) (1) (Supp. III, 1973).

94. *Id.*, 16 U.S.C. § 1538 (c) (2) (Supp. III, 1973).

95. *Id.* at 895, 16 U.S.C. § 1538 (d) (Supp. III, 1973).

96. *Id.*, 16 U.S.C. § 1538 (f) (Supp. III, 1973).

97. *Id.*, 16 U.S.C. § 1538 (g) (Supp. III, 1973).

98. *Id.* at 898, 16 U.S.C. § 1540 (b) (1) (Supp. III, 1973).

99. *Id.*

100. *Id.*, 16 U.S.C. § 1540 (b) (2) (Supp. III, 1973).

101. *Id.*

102. *Id.* at 899, 16 U.S.C. § 1540 (d) (Supp. III, 1973).

knowingly, including violation of regulations other than those implementing section 1538. The first category of violations can lead to a \$10,000 penalty, and "other" violations may result in an assessment of up to \$5,000.<sup>103</sup> The third tier encompasses any non-knowing violation of a provision or regulation; such violations may lead to a \$1,000 penalty.<sup>104</sup> Notice and opportunity for a hearing are prerequisites to penalty assessment, and all such penalties can be remitted by the Secretary.<sup>105</sup> Suit in federal court is necessary for collection, but judicial review is now limited to a determination whether the action was supported by substantial evidence in the record made before the Secretary.<sup>106</sup>

All in all, the new prohibitions tend to carry out the desire of Congress to do more than just talk about conserving disappearing wildlife. Commerce in endangered species is almost entirely prohibited, and commerce in all species is now to be closely regulated. The next section will discuss the federal structure and duties in the implementation of that commercial and other regulation.

### III. THE FEDERAL ADMINISTRATIVE DUTIES AND POWERS ARE EXPANDED

The implementation of the 1969 ESCA was almost entirely in the hands of the Secretary of the Interior. The primary duties of the Secretary involved only the promulgating of foreign and native endangered species lists, acquiring land, preventing the importation of listed species, and cooperating with other governments and organizations.<sup>107</sup> He also had a vague duty to consult with other federal agencies, and was to receive the assistance of the Department of the Treasury in the enforcement of the Act.<sup>108</sup> The 1973 ESA expands greatly the number and kind of administrative duties imposed on the Secretary and on other federal agencies, and also broadens the Interior Secretary's discretion in performing those duties.

#### A. THE OVERALL FEDERAL ADMINISTRATIVE STRUCTURE

The main responsibility for the 1973 Act's effectuation remains with the Secretary of Interior, but is shared with Commerce to the extent that Commerce has jurisdiction over marine species and commercial fishing. Enforcement actions relating to exportation or importation of plants remain in the Department of Agriculture,<sup>109</sup>

103. *Id.* at 897-98, 16 U.S.C. § 1540(a) (Supp. III, 1973).

104. *Id.*

105. *Id.*

106. *Id.*

107. 1969 ESCA, 16 U.S.C. §§ 668aa-cc (1970), *repealed* 87 Stat. 903 (1973).

108. *Id.* § 668cc-4(a)(2) (1970), *repealed* 87 Stat. 903 (1973).

109. 87 Stat. 884, 886, 16 U.S.C. § 1532(10) (Supp. III, 1973).

as do responsibilities related to animal quarantine laws.<sup>110</sup> The Secretary of the Treasury is directed to pay informers' fees,<sup>111</sup> to promulgate enforcement regulations,<sup>112</sup> and to enforce the Act by seizure of contraband species and otherwise.<sup>113</sup> The Coast Guard has a similar enforcement role.<sup>114</sup> The Smithsonian Institution, in conjunction with affected agencies, is to study endangered plants and to report to Congress before December 28, 1974,<sup>115</sup> and the Department of State is to be consulted regarding international cooperation.<sup>116</sup> The President is directed to appoint agencies to serve as Management and Scientific Authorities for implementation of the Convention, and to allocate foreign assistance funds.<sup>117</sup> Finally, in a provision of great potential significance, Congress imposed on all federal agencies affirmative duties to protect endangered or threatened species of wildlife and their habitats.<sup>118</sup> The duty to preserve habitat is contingent on a finding by the Secretary of the Interior that the "destruction or modification of habitat of such species . . . [is] critical." The command to take action is less than specific, but this provision should become a strong arguing point for defenders of wildlife in many situations where federal actions or licenses pose a threat to listed species.

## B. ADMINISTRATIVE DUTIES IMPOSED

Federal implementation of the 1973 ESA requires basically that a continuing listing process be established, that protective regulations for threatened species and other implementing regulations be promulgated, that a permit system be established, that state programs be certified, and that the Act be enforced.

### 1. Listing and delisting Species

Both the Secretary of Interior and the Secretary of Commerce have responsibilities with respect to creating and maintaining the lists of endangered and threatened species. For most species, the Secretary of Interior shall by regulation determine, after appropriate notice and consultation, whether it is endangered or threatened on the basis of the presence or absence of five factors which he

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110. *Id.* at 901, 16 U.S.C. § 1540(h) (Supp. III, 1973).

111. *Id.* at 899, 16 U.S.C. § 1540(d) (Supp. III, 1973).

112. *Id.*, 16 U.S.C. § 1540(d)(3) (Supp. III, 1973).

113. *Id.*, 16 U.S.C. § 1540(e) (Supp. III, 1973).

114. *Id.*

115. *Id.* at 901-02, 16 U.S.C. § 1541 (Supp. III, 1973).

116. *Id.* at 892-93, 16 U.S.C. § 1537 (Supp. III, 1973).

117. *Id.*, 16 U.S.C. §§ 1537(a) & (e) (Supp. III, 1973).

118. *Id.* at 892, 16 U.S.C. § 1536 (Supp. III, 1973). The resemblance of this section to NEPA is in many ways striking. Each on its face commands certain actions if not results from all federal entities. While 1536 does not include an "action-forcing" written statement requirement, there is no reason to believe that its mandatory language will not give rise to court-enforceable duties, as does NEPA.

may consider as posing a threat to the continued existence of a species.<sup>119</sup> Those factors are very broadly defined and include "the inadequacy of existing regulatory mechanisms" as well as a catchall factor.<sup>120</sup> For species under the jurisdiction of Commerce, the Secretary of Commerce may add to the lists, but he cannot subtract from them without the prior concurrence of the Secretary of the Interior.<sup>121</sup> As an extra safeguard, it is provided that the Secretary of the Interior cannot remove those species from the lists without a prior favorable determination by the Secretary of Commerce.<sup>122</sup>

Some provision is made for outside participation in the process. Scientific information must be garnered,<sup>123</sup> and notices soliciting comments must be sent to governors of the states in which the species being considered is known to reside.<sup>124</sup> Further, any interested person may petition the Secretary to list or delist a species. If the Secretary finds that substantial evidence has been presented to support the proposed action, he is to publish the finding and conduct a review of that species' status.<sup>125</sup>

## 2. *Promulgating Protective and Other Regulations*

Species listed as endangered are automatically protected by the full range of prohibitions set out in section 1538 (a).<sup>126</sup> For threatened species, however, the Secretary of the Interior is accorded great latitude in creating and applying protective measures. He must issue protective regulations for each such species, but no necessary regulation content is imposed.<sup>127</sup> The Secretary may apply the section 1538 prohibitions; he may utilize the full spectrum of methods and measures inherent in "conservation;" or, seemingly, he may do any or none of these.

The Secretary may also promulgate other implementing regulations: he can by regulation protect species similar to endangered or threatened species;<sup>128</sup> he can issue regulations governing financial assistance allotments;<sup>129</sup> he can prescribe regulations for import-export licensing and record-keeping;<sup>130</sup> he may designate ports;<sup>131</sup> he may by regulation determine whether taking by Alaska natives

119. *Id.* at 886, 16 U.S.C. § 1533(a) (1) (Supp. III, 1973).

120. *Id.*, 16 U.S.C. § 1533(a) (1) (4) & (5) (Supp. III, 1973).

121. *Id.* at 887, 16 U.S.C. § 1533(a) (2) (C) (Supp. III, 1973).

122. *Id.*

123. *Id.*, 16 U.S.C. § 1533(b) (1) (Supp. III, 1973).

124. *Id.*, 16 U.S.C. § 1533(b) (1) (A) (Supp. III, 1973).

125. *Id.* at 888, 16 U.S.C. § 1533(c) (2) (Supp. III, 1973).

126. *Id.* at 893-94, 16 U.S.C. § 1533(a) (Supp. III, 1973).

127. *Id.* at 888, 16 U.S.C. § 1533(d) (Supp. III, 1973).

128. *Id.*, 16 U.S.C. § 1533(e) (Supp. III, 1973).

129. *Id.* at 892, 16 U.S.C. § 1535(h) (Supp. III, 1973).

130. *Id.* at 895, 16 U.S.C. § 1533(d) (3) (Supp. III, 1973).

131. *Id.*, 16 U.S.C. § 1533(f) (1) (Supp. III, 1973).

should be prohibited;<sup>132</sup> and he may promulgate enforcement regulations.<sup>133</sup>

Procedures for such regulation issuance are governed by section 1533(f). In essence, the Secretary is to follow the rule-making procedures of the Administrative Procedure Act (APA),<sup>134</sup> except that 60 days notice by publication is required, and a hearing is dispensed with, except at the Secretary's discretion.<sup>135</sup> Regulations promulgated under the authority of the 1969 ESCA carry over,<sup>136</sup> and emergency regulations of 120 days maximum duration may be made effective more quickly.<sup>137</sup>

### 3. Acquiring Habitat

Authority under prior law to utilize various funds to acquire land is continued in section 1534, and the old ceiling on use of monies from the Land and Water Conservation Fund is now removed.<sup>138</sup> However, the guarantee of priority on that fund was also removed, and the net result is a reduction in funding.<sup>139</sup> The Secretary must consult states before acquiring interests in land located within them.<sup>140</sup>

### 4. Administering the Permit System

Sections 1538(d)-(f) and 1539 require the Secretary to license all importers and exporters of fish, wildlife and plants, and to consider exemptions in individual cases from the Act's requirements.<sup>141</sup> No procedural or substantive standards are enumerated for licensing. It appears that such permits are to be granted freely, with recordkeeping, reporting, and inspection requirements imposed to detect illegal activity.<sup>142</sup>

Exceptions to and exemptions from the Act's prohibitions fall into three main categories. First, the Secretary may allow what is otherwise prohibited where the activities have a scientific purpose, or enhance the propagation or survival of the species.<sup>143</sup> Second,

132.. *Id.* at 897, 16 U.S.C. § 1539(e)(4) (Supp. III, 1973).

133. *Id.* at 900, 16 U.S.C. § 1540(f) (Supp. III, 1973). While not explicitly authorized elsewhere, section 1538(a)(1)(G) recognizes the power of the Secretary to issue regulations for protection of endangered as well as threatened species.

134. Administrative Procedure Act § 553, 5 U.S.C. § 553 (1970).

135. 87 Stat. 884, 888, 16 U.S.C. § 1533(f) (Supp. III, 1973).

136. *Id.* at 889, 16 U.S.C. § 1533(f)(2)(B)(i) (Supp. III, 1973).

137. *Id.*, 16 U.S.C. § 1533(f)(2)(B)(ii) (Supp. III, 1973). During the transition period, it is unclear whether there is a 120 day limit, since the section referred to is § 1535(g)(2)(B)(ii).

138. *Id.*, 16 U.S.C. § 1534 (Supp. III, 1973). *Cf.* 1969 ESCA, 16 U.S.C. §§ 668bb(b) & (C) (1970), repealed 87 Stat. 903 (1973).

139. *Hearings on H.R. 37 Before the Subcomm. on the Dept. of the Interior of the House Comm. on Appropriations*, 93d Cong., 1st Sess., pt. 5, at 112 (1973) (testimony of Audubon Society).

140. 87 Stat. 884, 889, 16 U.S.C. § 1535(a) (Supp. III, 1973).

141. *Id.* at 894, 896, 16 U.S.C. §§ 1538(d)-(f) & 1539 (Supp. III, 1973).

142. *Id.* at 85, 16 U.S.C. § 1538(d)(2) (Supp. III, 1973).

143. *Id.* at 896, 16 U.S.C. § 1539(a) (Supp. III, 1973).

hardship exemptions are available to subsistence hunters and merchants having stocks of species subsequently listed, but such exemptions, if granted, are tightly restricted.<sup>144</sup> For either of these types of exceptions, the Secretary must find that the species in question will not be disadvantaged, and that the action will be consistent with the purposes and policy of the Act.<sup>145</sup> Finally, subsistence taking by Alaska natives is exempt except to the extent the Secretary determines otherwise.<sup>146</sup>

### 5. Continuing International Cooperation

The 1969 ESCA in part led to the 1973 Convention which in part led to the 1973 ESA. The latter in section 1537 attempts to ensure that that process will continue. The 1969 ESCA contained language "encouraging" international cooperation and authorized \$200,000 for the convening of an international conference.<sup>147</sup> That Conference came up with the 1973 Convention, a surprisingly concrete albeit belated result. The parallel 1973 provision retains the encouragement language but omits funds for future conventions.<sup>148</sup>

New provisions are more definite. For the first time, as a "demonstration of [our] commitment," the President may use counterpart and other funds to provide direct financial assistance to foreign countries for wildlife protection, including habitat acquisition.<sup>149</sup> Use of personnel for cooperative endeavors and new educational grants is also authorized.<sup>150</sup> Finally, to implement the 1973 Convention, the President is directed to designate agencies to serve as the Management and Scientific Authorities required by the Convention, and those agencies are empowered to carry out the duties thereunder.<sup>151</sup>

### C. THE POWERS OF THE SECRETARY

The foregoing recitation of new and continued administrative duties illustrates the expanded range of powers now conferred upon the Secretary of the Interior. The lack of precise standards for the performance of his assigned tasks has the effect of broadening his discretion. In some instances, such as listing species and allocating monies to states, even though factors are set out in the Act, they are sufficiently ambiguous that the Secretary could reasonably decide either way on any questions raised thereunder. Even in provisions seemingly mandatory, such as 1533(d) and 1534, later lan-

144. *Id.*, 16 U.S.C. § 1539(b) (Supp. III, 1973).

145. *Id.* at 896-97, 16 U.S.C. § 1539(d) (Supp. III, 1973).

146. *Id.* at 897, 16 U.S.C. § 1539(e) (Supp. III, 1973).

147. 1969 ESCA, 16 U.S.C. § 668cc-5 (1970), *repealed* 87 Stat. 908 (1973).

148. 87 Stat. 884, 893, 16 U.S.C. § 1537(b) (Supp. III, 1973).

149. *Id.* at 892-93, 16 U.S.C. § 1537(a) (Supp. III, 1973).

150. *Id.* at 893, 16 U.S.C. §§ 1537(c)-(d) (Supp. III, 1973).

151. *Id.*, 16 U.S.C. § 1537(e) (Supp. III, 1973).

guage clearly indicates the discretionary, empowering nature of the command. To briefly list the Secretary's basic powers under the new Act: (1) he may or may not list any particular species; (2) he may or may not adopt any particular conservation measure for a threatened species; (3) he may or may not issue other regulations; (4) he may or may not acquire land; (5) he may or may not approve state programs or financial assistance grants; (6) he may or may not assess a civil penalty against a violator; and (7) he may or may not remit penalties assessed.

#### IV. THE NEW STATE-FEDERAL COOPERATIVE SYSTEM

One of the most important duties of the Secretary will be approving or disapproving "cooperative" enforcement agreements with states. The 1973 ESA embodies the concept of using the states to implement and enforce national standards.<sup>152</sup> Whether the Act will succeed in conserving disappearing wildlife will depend largely on the stringency and foresight of the Secretary in entering into and policing state-federal agreements. If he allows states to disregard or circumvent required conservation measures in their proposals, or if he ignores a lack of enforcement, much of the new statute will be a dead letter. Unfortunately, the 1973 ESA appears to give the Secretary a great deal of discretion in those matters, and the history of environmental regulation is replete with instances where administrative discretion results in inaction or surrender to the regulated. No complete exposition of the problems likely to be encountered in the interpretation of this section or the implementation of this system is possible in this skeletal overview, although some of the major ambiguities and inconsistencies will be noted.

The 1973 ESA retains the provisions directing the Secretary to consult and cooperate generally with states<sup>153</sup> and to continue making "management" agreements whereby the Secretary will agree to administer state habitat land for a fee, or vice versa.<sup>154</sup>

New section 1535(c), authorizing "cooperative agreements," is both the carrot and stick for encouraging states to adopt and administer their own programs for the conservation of endangered and threatened species.<sup>155</sup> If a state enters into such an agreement with the Secretary, it will receive from him up to two-thirds of the cost of its program.<sup>156</sup> If it does not, the federal government will assume regulatory power within the state.

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152. *Id.* at 884-85, 16 U.S.C. § 1531(a)(5) (Supp. III, 1973).

153. *Id.* at 889, 16 U.S.C. § 1535(a) (Supp. III, 1973).

154. *Id.* at 889-90, 16 U.S.C. § 1535(b) (Supp. III, 1973).

155. *Id.* at 890, 16 U.S.C. § 1535(c) (Supp. III, 1973).

156. *Id.* at 891, 16 U.S.C. § 1535(d)(2)(D)(1) (Supp. III, 1973). No administrative procedure for making the determination is specified in the Act, and section 1535(c) seems in-

The procedure specified in section 1535(c) for entering into such an agreement is relatively simple. The state merely submits a certified copy of its proposed program to the Secretary, who must then decide within 120 days whether the program meets the requisite standards. If the program is adequate and active,<sup>157</sup> which means that it meets five stated criteria, and is in accordance with the purposes of the Act, the Secretary must approve it.<sup>158</sup> In sum, the state legislation must authorize the state agency to conserve resident species, to conduct investigations to find out the status of those species, and to establish programs to conserve. Such programs must be consistent with the purposes and policies of the federal Act, and must provide for public participation in the designation process.<sup>159</sup> The actual agreement resulting merely has to state what actions are to be taken by which contracting party and to give a form of cost/benefit analysis of those actions.<sup>160</sup>

Allocation of funds by state, or cutting the available federal pie, is to be governed by five relative factors, whose relativity leaves the allocation decisions primarily within the Secretary's discretion.<sup>161</sup> The agreements and allocations are to be reviewed and reconfirmed at least yearly.<sup>162</sup>

Section 1535(f) adds greatly to the strength and importance of

ternally inconsistent on the question of which party bears the burden of showing compliance or noncompliance.

157. Terms such as "adequate and active" are not defined; the criteria are vague and ambiguous; and the standards to apply must be garnered from the Act as a whole.

158. *Id.* at 890, 16 U.S.C. § 1535(c)(1)-(5) (Supp. III, 1973). The criteria which the state must meet are:

- (1) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened;
- (2) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this chapter, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;
- (3) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife;
- (4) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered species or threatened species; and
- (5) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened.

*Id.*

159. 87 Stat. 884, 890, 16 U.S.C. § 1535(c) (Supp. III, 1973).

160. *Id.* at 891, 16 U.S.C. § 1535(d)(2) (Supp. III, 1973).

161. *Id.* at 890-91, 16 U.S.C. § 1535(d) (Supp. III, 1973). The five factors are:

- (1) the international commitments of the United States to protect endangered species or threatened species;
- (2) the readiness of a State to proceed with a conservation program consistent with the objective and purposes of this chapter;
- (3) the number of endangered species and threatened species within a State;
- (4) the potential for restoring endangered species and threatened species within a State; and
- (5) the relative urgency to initiate a program to restore and protect an endangered species or threatened species in terms of survival of the species.

*Id.*

162. *Id.* at 891, 16 U.S.C. § 1535(c) (Supp. III, 1973).

interpretational difficulty. It in essence provides that the federal law of endangered and threatened species is supreme and preemptive with respect to certain categories of state laws: as to import-export activities and interstate commerce, state laws are voided where they conflict directly with federal law; as to intrastate sales, state laws are not voided; and as to taking, state law, if any, must be as or more restrictive than federal law.<sup>163</sup>

When this scheme is implemented and the wrinkles ironed out, the resulting system should parallel although not track the systems now implementing the air and water pollution statutes. The federal entity will serve as initial standard-setter, system overseer, and banker. To obtain federal monies, the states will create mini-ESA's and direct their state fish and wildlife agencies to carry out conservation programs in cooperation with the Department of the Interior. The new system will differ in several important respects, however, from that in force under the other statutes. First, even if all states enter into such agreements, the federal entities will have a larger direct role in enforcement. Unlike air and water pollution, federal agencies must police interstate and foreign commerce to protect alien as well as resident species. Second, it would appear that states retain a larger degree of discretion under the 1973 ESA than under the others. The requirements governing cooperative agreements are nowhere near as detailed or stringent as those for air or water pollution implementation plans. Third, the extent to which the federal government must oversee and must or can assume enforcement duties within a state when that state does not or cannot enter into a cooperative agreement is open to serious question.

#### V. CITIZEN PARTICIPATION IS INCREASED TO A LIMITED EXTENT

The 1969 ESCA did not define any role for the private citizen or organization in the implementation or enforcement of that Act. The 1973 ESA allows for a limited degree of citizen participation, but not nearly to as great an extent as of other environmental legislation. Interested citizens are now allowed to submit comments on proposed regulations, to petition for the listing or delisting of species,<sup>164</sup> to collect fees for informing on violators,<sup>165</sup> and, in some

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163. *Id.*, 16 U.S.C. § 1535(f) (Supp. III, 1973). Interpretational difficulty with the question of which entity regulates taking in what circumstances and under what requirements is nearly insuperable. The legislative history is not conclusive. Compare *id.* §§ 1535(c) and (f), 1532(2) and § 1531(a)(5) with *id.* §§ 1533(d), 1535(d) and (g), and 1538(a), and 16 U.S.C. § 668dd(c). The boundaries of the respective jurisdictions over trade in listed species are nearly as confused.

164. *Id.* at 888, 16 U.S.C. § 1533(c)(2) (Supp. III, 1973).

165. *Id.* at 899, 16 U.S.C. § 1540(d) (Supp. III, 1973).

situations, to bring suit.<sup>166</sup> Whether citizens can obtain judicial review generally is not clear. Unfortunately, the Act does not require hearings at which views can be aired and rebutted, and does not in other ways allow, guarantee, or institutionalize an important role for citizens.

#### A. CITIZEN SUITS UNDER THE 1973 ESA

The citizen suit provision contains two main grants of standing to "any person." First, he may sue "to enjoin any person, including the United States and any other governmental instrumentality . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof."<sup>167</sup> Second, a citizen may sue to compel the Secretary of the Interior to apply the prohibitions authorized by the Act relating to the taking of resident endangered or threatened species in an "emergency" situation.<sup>168</sup> The first grant of authority is qualified by a provision requiring 60 days written notice to the Secretary and to the alleged violator and by a prohibition against such suit if a civil or criminal action is already pending.<sup>169</sup> The second grant of authority for emergency action is similarly restricted.<sup>170</sup>

For either type of citizen suit, there need not be either \$10,000 in controversy or diversity of citizenship.<sup>171</sup> Such suits must be brought in the judicial district in which the violation occurs.<sup>172</sup> This may pose some slight problem with respect to a violation committed by the Department of Interior generally, but such suits would likely be proper in the District Court for the District of Columbia. Congress followed the precedent established in the air<sup>173</sup> and water pollution Acts<sup>174</sup> by providing that a court may award the costs of litigation, including attorneys' and experts' fees, to any party whenever the court determines that such an award is appropriate.<sup>175</sup> As several such awards have already been made,<sup>176</sup> citizens groups may well be encouraged to take aggressive action under the Act.

#### B. JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS UNDER THE ACT

It is foreseeable that a variety of parties may wish to challenge particular decisions of the Secretary of the Interior (or those of

166. *Id.* at 900-01, 16 U.S.C. § 1540(g) (Supp. III, 1973).

167. *Id.* at 900, 16 U.S.C. § 1540(g)(1)(A) (Supp. III, 1973).

168. *Id.*, 16 U.S.C. § 1540(g)(1)(B) (Supp. III, 1973).

169. *Id.*, 16 U.S.C. § 1540(g)(2)(A) (Supp. III, 1973).

170. *Id.* at 901, 16 U.S.C. § 1540(g)(2)(B) (Supp. III, 1973).

171. *Id.* at 900, 16 U.S.C. § 1540(g)(1) (Supp. III, 1973).

172. *Id.* at 901, 16 U.S.C. § 1540(g)(3)(A) (Supp. III, 1973).

173. Clean Air Act of 1970 § 304, 84 Stat. 1706, 42 U.S.C. § 1857h-2 (Supp. III, 1973).

174. Federal Water Pollution Control Act of 1972 § 506, 86 Stat. 888, 33 U.S.C. § 1365 (Supp. III, 1973).

175. 87 Stat. 882, 901, 16 U.S.C. § 1540(g)(4) (Supp. III, 1973).

176. *E.g.*, *Wilderness Soc'y v. Morton*, 479 F.2d 842 (D.C. Cir. 1973).

other Secretaries, where appropriate) under the Act. In addition, the general command and admonition of section 1536 will likely lead to litigation in a wide variety of governmental situations. Even though the Senate Bill in its section 9(c) authorized limited judicial review of determinations by the Secretary,<sup>177</sup> the Act as passed contains no such explicit provision. Instead, Section 1540(c) provides that "District Courts . . . shall have jurisdiction over any actions arising under this chapter."<sup>178</sup> Other than the provision for citizen suits<sup>179</sup> and the general provision stating that the rulemaking section of the Administrative Procedure Act will apply where not overridden by specific provisions in the 1973 ESA,<sup>180</sup> there is silence on the question of judicial review. Any reasonable analysis must conclude that some review by courts is available and appropriate in every situation likely to engender litigation, but that the scope of such review will vary depending on the question presented.

## VI. CONCLUSION

The Endangered Species Act of 1973 embodies a significant potential for halting the march toward extinction of more wildlife. The Act applies to a broader range of species, persons, and activities than did its predecessors, and it carries sufficient penalties to deter violators. It creates a new implementation and enforcement system, brings the state enforcement mechanisms into prominence, and allows interested citizens to get into the act.

In providing these tools, however, Congress was slipshod in its drafting. The net result appears to be the grant of an unwarranted degree of discretion to the bureaucrats, state and federal, who must translate the legislative language into affirmative action. Most of the important actions to be taken under the Act are not accompanied by deadlines. The inescapable consequence has been that, in the first nine months that the new Act has been effective, no additions to the existing endangered species lists have been made; no threatened species list has been published; no protective (or any other) regulations have been promulgated; no standards relating to state-federal agreements have been issued; no petitions have been processed; and so forth.

Eventually some or all of these things will be done. Then the more basic and more important questions will have to be faced. The resolution of those questions will answer the ultimate question: Can we as a society successfully regulate our immediate greed for the benefit of our posterity?

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177. S. 1983, 93d Cong., 1st Sess. § 9(c) (1973).

178. 87 Stat. 884, 899, 16 U.S.C. § 1540(c) (Supp. III, 1973).

179. *Id.* at 900-01, 16 U.S.C. § 1540(g) (Supp. III, 1973).

180. *Id.* at 888-89, 16 U.S.C. § 1533(f) (Supp. III, 1973).

## APPENDIX\*

This chart is a listing of species and subspecies whose existence is apparently threatened in the Upper Great Plains or which have already become totally extinct. Three publications were consulted in preparing the list: 1) Bureau of Sportfisheries and Wildlife, Dept. of Interior, *Threatened Wildlife of the United States* (1973); 2) Endangered Native Wildlife, 39 Fed. Reg. 1175 (1974); and 3) 1973 Convention, Appendices I & II (Refer to notes 28-31 and accompanying text).

The first source denominates subject creatures as Extinct (E), Threatened (T), Peripheral (P), or Undetermined (U). Peripheral indicates that the creature is extinct or threatened with extinction within the United States but not throughout its entire range. Undetermined status indicates that the creature has been suggested as possibly facing extinction, but insufficient data exists to determine its status. The second source is the official listing of species or subspecies which the Secretary of the Interior has determined to be threatened with extinction in the United States. The third source lists those species threatened with extinction and those which may be put in that position unless trade in the species is regulated.

CREATURES	1	2	3
<b>FISH</b>			
Arctic Grayling	T <sup>1</sup>	No	No
<i>Thymallus arcticus</i>			
Blackfin Cisco	T	No	No
<i>Coregonous n. nigripinnus</i>			
Harelip Sucker	E	—	—
<i>Lagochila lacera</i>			
Lake Sturgeon	T	No	Yes
<i>Acipenser fulvescens</i>			
Montana Westslope Cutthroat Trout	U	Yes	No
<i>Salmo clarki</i> subspecies			
Pallid Sturgeon	U	No	No
<i>Scaphirhynchus albus</i>			
<b>BIRDS</b>			
American Peregrine Falcon	T	Yes	
<i>Falco peregrinus anatum</i>			Yes <sup>2</sup>
Attwater's Greater Prairie Chicken	T	Yes	Yes
<i>Tympanuchus cupido attwateri</i>			

\* By editors.

1. The arctic grayling is not endangered in Alaska. The Threatened classification refers to the Montana form of the species. BUREAU OF SPORTFISHERIES & WILDLIFE, DEPT. OF INTERIOR, THREATENED WILDLIFE OF THE UNITED STATES 14 (1973).

	1	2	3
Eastern Pigeon Hawk <i>Falco c. columbarius</i>	U	No	Yes <sup>2</sup>
Eskimo Curlew <i>Numenius borealis</i>	T	Yes	Yes
Lesser Prairie Chicken <i>Tympanuchus pullidicinctus</i>	T	No	No
Mountain Plover <i>Eupoda montana</i>	U	No	No
Northern Greater Prairie Chicken <i>Tympanuchus cupido pinnatus</i>	T	No	Yes
Northern Long-billed Curlew <i>Numenius Americanus Parvus</i>	U	No	No
Northern White-tailed Ptarmigan <i>Lagopus l. leucurus</i>	P	No	No
Passenger Pigeon <i>Ectopistes migratorius</i>	E	—	—
Prairie Falcon <i>Falco mexicanus</i>	T	No	Yes <sup>2</sup>
Prairie Pigeon Hawk <i>Falco columbarius richardsonii</i>	U	No	Yes <sup>2</sup>
Richardson Blue Grouse <i>Dendragapus obscurus richardsonii</i>	P	No	No
Tule White-fronted Goose <i>Anser albifrons gambelli</i>	T	No	No
Whooping Crane <i>Grus americana</i>	T	Yes	Yes
<b>MAMMALS</b>			
Black Footed Ferret <i>Mustela nigripes</i>	T	Yes	Yes
Badlands Bighorn <i>Ovis canadensis auduboni</i>	E	—	— <sup>3</sup>
Canadian Lynx <i>Lynx canadensis</i>	U	No	No
Eastern Timber Wolf <i>Canis lupus lycaon</i>	T <sup>4</sup>	Yes	No
Fisher <i>Martes pennanti</i>	U	No	No
Grizzly Bear <i>Ursus arctos horribilis</i>	T	No <sup>5</sup>	Yes <sup>6</sup>

2. The 1973 Convention lists all members of the Family *Falconidae* as threatened with danger of extinction unless international trade in such creatures is controlled. 12 INT'L LEGAL MATERIALS 1085, 1101 (1973).

3. The 1973 Convention lists all members of the species *Ovis canadensis* as threatened with danger of extinction unless international trade in such creatures is controlled. *Id.*

4. "Minnesota State Officials do not believe wolves are endangered." BUREAU OF SPORT-FISHERIES & WILDLIFE, DEPT. OF INTERIOR, THREATENED WILDLIFE OF THE UNITED STATES 237 (1973).

5. On Feb. 14, 1974, th Fund For Animals, Washington, D.C., petitioned for review of the status of the grizzly bear within the coterminus United States. 39 Fed. Reg. 11611-12 (1974). The petition is still pending.

6. The 1973 Convention lists all members of the species *Ursus arctus* as in danger of extinction or threatened with such unless international trade in such creatures is controlled. 12 INT'L LEGAL MATERIALS 1085, 1097 & 1100 (1973).

	1	2	3
Mountain Lion subspecies <i>Felis concolor missoulensis</i>	No	No	Yes
Northern Rocky Mountain Wolf <i>Canis lupus irremmotus</i>	T	Yes	Yes
Northern Swift Fox <i>Vulpes velcox hebes</i>	U	No	Yes
Pine Marten <i>Martes americana</i>	U	No	No
Plains Wolf <i>Canis lupus nubilus</i>	E	—	—
Spotted Bat <i>Euderma maculatum</i>	T	No	No
Wolverine <i>Gulo luscus</i>	U	No	No