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FEDERAL WILDLIFE LAW ACHIEVES ADOLESCENCE: DEVELOPMENTS IN THE 1970s

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I.	THE ORIGIN AND NATURE OF FEDERAL WILDLIFE LAW .	755
A.	<i>Premises of Federal Wildlife Law</i>	755
B.	<i>The Nature of Wildlife Population Problems</i>	758
C.	<i>Development of Federal Wildlife Law</i>	760
	1. <i>Prelude to the 1970s</i>	760
	2. <i>Introduction to Recent Developments in Federal Wildlife Law</i>	763
II.	THE MIGRATORY BIRD TREATY ACT	764
A.	<i>History of the Act</i>	764
B.	<i>Judicial Review of MBTA Implementing Regulations</i>	766
C.	<i>Wildlife Law Enforcement</i>	770
D.	<i>Indians and Federal Wildlife Law</i>	774
III.	THE WILD AND FREE-ROAMING HORSES AND BURROS ACT	778
A.	<i>Scope of the Act</i>	778
B.	<i>Federal Legislative Discretion: Kleppe v. New Mexico</i>	779
C.	<i>Federal Managerial Discretion: The Roundup Cases</i> ..	782
IV.	THE MARINE MAMMAL PROTECTION ACT.....	786

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW (Council on Environmental Quality, 1977) [hereinafter cited as BEAN];

Coggins & Hensley, *Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?*, 61 IOWA L. REV. 1099 (1976) [hereinafter cited as Coggins & Hensley].

A.	<i>Outline of the Marine Mammal Protection Act</i>	787
B.	<i>The Tuna/Porpoise Litigation</i>	790
C.	<i>International Impact of the Act</i>	796
1.	<i>Application of Criminal Sanctions to Acts in Foreign Territorial Waters</i>	797
2.	<i>Importation of Goods Taken in Violation of the Act</i>	800
3.	<i>Standing</i>	801
V.	THE ENDANGERED SPECIES ACT	802
A.	<i>Scope of the Act</i>	803
B.	<i>Snail Darters, Mississippi Sandhill Cranes, and Indiana Bats: Section 7 in the Courts</i>	806
1.	<i>Existing Case Law</i>	806
2.	<i>The Proper Approach Under Section 7</i>	810
3.	<i>Impact of Section 7 on Existing Government Regulations</i>	811
VI.	CONCLUSION: THE EMERGING LAW OF WILDLIFE	812
A.	<i>Impact on Economic Interests</i>	812
B.	<i>Impact on Ecological Well-being</i>	814
C.	<i>Impact on State Regulation</i>	814
D.	<i>Impact on Law</i>	816

A quiet legal revolution has taken place in the last decade. From seemingly unrelated statutes, treaties, judicial decisions and administrative regulations, a general federal law of wildlife has emerged. Stimulated by a newly aroused public conscience and renewed scholarly interest, this branch of environmental law has already brought about important practical consequences. If federal wildlife law continues to evolve in the directions now established, even more significant developments are likely in the foreseeable future.

Since federal wildlife law is still in its formative stages, its nature and extent are difficult to delineate precisely. In general, it is the regulation by law of the relationships between man and the non-domesticated lower orders on a national scale. Although there is as yet little uniformity in treatment of affected wildlife species by the new legislation or by courts interpreting it, some common attributes of the new federal wildlife population management approaches are discernable: trade in specimens of certain species is controlled strictly; commercial and sport hunting of many species is curtailed severely; federal administrative discretion in land management, especially when related to commercial and developmental activities, is circumscribed considerably; new legal emphasis on habitat quality maintenance, ecosystem

management, protection of formerly neglected or persecuted species and international systems of regulation is evident; and traditional state prerogatives are diminished in favor of new federal-state cooperative programs.¹ Together, these and other developments mark the beginnings of a federal system that accords rudimentary legal rights to creatures traditionally regarded as legally defenseless chattels.

This Article will attempt to explain the various elements which, in the aggregate, form the core of the emerging federal law of wildlife. The first section will set out some pertinent background information on why and how federal law has developed in this area. Premises on which recent legislation has proceeded, the causes of wildlife population problems attacked by the new legislation, and the historical development of federal wildlife law are initially examined. Thereafter, the more significant judicial developments under the main federal wildlife statutes will be recounted. The final section will attempt to put into perspective the continuing emphases and new directions of federal wildlife law.

I. THE ORIGIN AND NATURE OF FEDERAL WILDLIFE LAW

A. *Premises of Federal Wildlife Law.*

To evaluate any legal standard, certain premises, goals or philosophies must be accepted as a starting point. However, the gestation of wildlife law at all levels of government has been slowed by a lack of consistent legal theory. Philosophies toward wildlife espoused by the major interested groups have radically differing objectives and methods. The spectrum of attitudes toward wildlife regulation ranges from beliefs that all lower species exist only to serve man's various appetites² to equally rigid dogma that the killing or harassment of any species under any circumstance is inherently immoral.³ If there is a happy medium, it has not found general acceptance. Nonetheless, the following biological and other premises constitute a starting point for judgment.

1. The two most important contributions to the rationalization of wildlife law are BEAN; Guilbert, *Wildlife Preservation Under Federal Law*, in *FEDERAL ENVIRONMENTAL LAW* 550 (E. Dolgin & T. Guilbert eds. 1974). The expansion of legal literature in the area is chronicled in Coggins & Smith, *The Emerging Law of Wildlife: A Narrative Bibliography*, 6 ENV'T'L L. 583 (1976).

2. This, of course, has been the prevailing attitude for millennia. It goes back at least as far as the Book of Genesis, wherein God commanded man to assert dominion "over every thing that moves," perhaps the most widely followed Biblical injunction.

3. Leonardo da Vinci once commented that man would not be truly civilized until the killing of animals was regarded as murder; centuries later some individuals and groups again appear willing to make such a departure. See, e.g., C. AMORY, *MAN KIND? OUR INCREDIBLE WAR ON WILDLIFE* (1974); Herrington & Regenstein, *The Plight of Ocean Mammals*, 1 ENV'T'L AFF. 792 (1972).

Legislative histories of the major wildlife statutes enacted in 1971,⁴ 1972,⁵ and 1973⁶ reveal that these premises represent the prevalent views of the federal legislators most responsible for enacting federal wildlife law.

Wildlife is one major barometer of total environmental quality. Low or unnaturally declining populations of many species frequently indicate that something more basic is wrong in the ecosystem.⁷ For example, the disappearance of the peregrine falcon and other raptors was due in large measure to the accumulation of DDT residue in their tissues;⁸ DDT is of course a threat to other species, including man. Declining aquatic life in Lake Erie was a symptom, not the cause, of the near-death of that water body from pollution. Wildlife population densities are frequently dependent upon the basic productivity of the land,⁹ and severe population declines may portend even more basic problems. The obvious converse of this proposition is that healthy populations are indicative of a healthy, productive natural system, a major objective of modern legislative policy.¹⁰ If only as an economic matter, it makes good sense to preserve productive ecosystems; in the long run, the nation may be forced to rely increasingly on renewable resources as our finite supplies of inorganic fuels and minerals are depleted.¹¹

Legislators also agreed generally on the folly of encouraging or allowing the extinction of any species, however miniscule its seeming contribution to human welfare, if for no other reason than uncertainty. Many other reasons for protecting endangered species have been advanced, ranging from moral arguments to economic justification, from aesthetic considerations to biological rationales¹²—but in the end the telling factor has been a legislative recognition of human ignorance

4. Wild and Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331-1340 (1976). See section III *infra*.

5. Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1976). See section IV *infra*.

6. Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1976). See section V *infra*.

7. Populations of many species naturally rise and decline in predictable cycles. See D. ALLEN, OUR WILDLIFE LEGACY 44-60 (rev. ed. 1962).

8. Bureau of Land Management, U.S. Dep't of Interior, Technical Note No. 167, Habitat Management Series for Endangered Species, Report No. 1, American Peregrine Falcon and Arctic Peregrine Falcon (Nov. 11, 1972) (Filing Code 6601).

9. D. ALLEN, *supra* note 7, at 22.

10. See, e.g., 16 U.S.C. § 1361(6) (1976).

11. Lately, speculations on the use of wheat chaff to fuel boilers, the use of ethanol or wood alcohol to fuel automobiles, and similar exotic ideas are being taken seriously as substitutes for depleted inorganic resources such as oil. The interbreeding of buffalo—once nearly extinct—and cattle has produced a hybrid that may account for an increasing share of domestic meat supply insofar as the "beefalo" requires less management and less forage.

12. A classic exposition is Ehrenfeld, *The Conservation of Non-Resources*, 64 AM. SCI. 648 (1976).

concerning the intricacies of natural interrelationships. Many examples of the unforeseen consequences ensuing from the destruction of species' diversity have been cited: when Brazil tried to make its rivers safe by eradicating alligators, the deadlier pirahna, a prey of alligators, multiplied; China increased rather than decreased its grain loss when it wiped out sparrows because insects normally controlled by the sparrows ate even more grain than the birds.¹³

Congress realizes that a "hands-off" posture is no longer adequate to conserve our wildlife resources, much less to enhance them. There is strong evidence that private economic activity is often incompatible with sound wildlife management. The slaughter of the buffalo and the passing of the passenger pigeon are only the better known examples of the havoc that unfettered enterprise can wreak on a natural resource, even though the exploitative industry is itself destroyed by its own over-exploitation. More recently, hunters, at the behest of merchants and furriers, have driven nearly all spotted cats in the world to the brink of extinction¹⁴ and likely would pursue them over the precipice if not restrained by law. Such instances can be multiplied one hundred-fold to show that rational self-interest generally provides an inadequate protection of the environment.

From these premises, it was evident that society through its government should husband, manage and preserve its wildlife resources. The accomplishment of these goals necessarily requires that the relationship between man and wild animal become a matter of law. The law is developing on the federal level because of the national scope of the problem and because state regulation has been historically unresponsive to broader ecological concerns;¹⁵ state legislatures and state agencies have been more concerned with hunting promotion and with predator and pest control than with the problems of nongame species.¹⁶ Nonetheless, Congress has been careful to accord states a significant role in the implementation and enforcement of the federal legislation,¹⁷ although conflicting state law usually has been invalidated or pre-

13. *Wildlife in Danger*, NEWSWEEK, Jan. 6, 1975, at 36, 38.

14. See, e.g., Note, *Federal and State Protection Against Commercial Exploitation of Endangered Wildlife*, 17 CATH. LAW. 241, 247-49 (1971).

15. See, e.g., *Hearings Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 92d Cong., 1st Sess. 27 (1971) (remarks of Rep. Wolff); *American Horse Protection Ass'n v. Department of Interior*, 551 F.2d 432 (D.C. Cir. 1977) (discussing that facet of the legislative history behind the Wild and Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. §§ 1331-40 (1976)).

16. E.g., Comment, *Federal Protection of Endangered Species of Wildlife*, 22 STAN. L. REV. 1289, 1291 (1970).

17. E.g., Endangered Species Act of 1973, 16 U.S.C. § 1535 (1976).

empted in the process.¹⁸

Although these premises and conclusions sound simple and self-evident, once it is accepted that the federal government should act for the overall benefit of all wildlife species, potentially drastic consequences for a variety of interests can follow. In order to promote healthier ecosystems, the causes of wildlife declines must be identified and legal remedies created to combat or control them. The causes—and they vary greatly by species—can be generally defined, but fashioning remedies through legal means entails considerable uncertainty and a plethora of practical problems.

B. *The Nature of Wildlife Population Problems.*

Some species are naturally slated for extinction by reason of habitat alteration, climatic changes, or adaptation failure. Truly natural causation has been an almost insignificant factor in recent centuries, however, because man's technological dominance over facets of natural processes has greatly accelerated biological time. That is, extinctive processes that would have taken millions of years eons ago now can be almost instantaneous in geologic time when assisted by guns, poison, pollution and development.¹⁹ There are few, if any, instances of extinction or endangerment in this century where manmade causes were absent.²⁰ A few living fossils, such as the California condor, may be beyond any hope of recovery,²¹ but some cases once considered biologically hopeless, such as the whooping crane, have been reversed.²²

Commercial exploitation is one of the most significant but at the same time one of the most controllable causes of wildlife population problems. Many species of animals are now (or have been) at historical population lows because money can be made by killing them and marketing products made from their carcasses. The demand for furs, whale oil, skins, ivory, oil, feathers, and occasionally meat, generates a large volume of commerce—much of it now illegal. In addition, markets in live animals for zoos, circuses, roadside attractions, pets, medical research, and so forth, contribute to the diminution of many species, as does scientific collecting in some instances.²³

18. *E.g.*, Marine Mammal Protection Act of 1972, 16 U.S.C. § 1379(a)(1) (1976).

19. *See* J. FISHER, N. SIMON & J. VINCENT, *WILDLIFE IN DANGER* 11-20 (1969).

20. *See generally id.*

21. *See, e.g.*, U.S. FISH & WILDLIFE SERVICE, U.S. DEP'T. OF THE INTERIOR, *CONSERVING OUR FISH AND WILDLIFE HERITAGE: ANNUAL REPORT* 36 (1975).

22. *See* Phillips, *Whooping Crane Back from the Abyss*, *Kansas City Times*, Oct. 19, 1977, at 14C, col. 3.

23. The potential conflict between the philosophy and life work of some scientists has not yet received much scholarly attention. One prominent ornithologist refused to stop collecting the eggs

In theory, sport hunting is the least pernicious cause of endangerment because hunters are limited by extensive state regulation. Wildlife management theory holds that sport hunting is a valuable and valid tool for maintaining stable populations by harvesting excess animals that would die in the winter anyway.²⁴ The theory works well in practice for common game species because of the intensive management given them to ensure a good sport harvest.²⁵ As many hunters quickly concede, however, not all their brethren abide by all the rules all of the time. A consequence is that certain species, notably predators such as hawks, eagles, owls, wolves, mountain lions and coyotes, have been shot on sight for decades, within or without the law. Illegal shooting is still the largest cause of bald eagle mortality.²⁶ Sport hunting or its abuse has contributed to declines in species offering large targets, such as bighorn sheep, grizzly bears, polar bears, cranes, and some species of deer and geese.²⁷ Poaching is still a common occurrence. The rules themselves are sometimes detrimental to certain nongame species: many states authorize open seasons on "pest" species such as crows, raptors, bobcats, and coyotes.²⁸

The most important factor in the maintenance of healthy wildlife populations is quantity and quality of wildlife habitat. Habitat destruction in its many manifestations is widely regarded as the primary reason for the endangered status of several species. Habitat destruction includes suburban development, pesticide use, tree-clearing, swamp-draining, back country recreation, introduction of exotic species, destruction of prey or predator species, farming practices, overactive exploitation, and dam building. The extent to which human activities have rendered many areas uninhabitable for many species is obvious. Increases in human population threaten wildlife habitats far less than does our national appetite for such needs as energy, recreation and water.

Law cannot do much about natural wildlife declines. Congress obviously cannot govern evolutionary processes. The other causes are human in origin and thus are susceptible to regulation by human insti-

of the peregrine falcon, even though the subject of his study was close to extinction. *Kansas City Times*, July 18, 1974, at 9D, col. 3. The scientist has been punished for violation of several federal and state laws but reportedly remains unrepentant. That sort of conflict is bound to increase as protective legal mantles are laid over more species.

24. The classic expositions of wildlife management postulates are D. ALLEN, *supra* note 7; I. GABRIELSON, *WILDLIFE MANAGEMENT* (1951). See also J. TREFETHEN, *AN AMERICAN CRUSADE FOR WILDLIFE* (1975).

25. See authorities cited in note 24 *supra*.

26. 41 Fed. Reg. 28526 (1976) (report of Fish and Wildlife Service).

27. See, e.g., P. MATTHIESSEN, *WILDLIFE IN AMERICA* 144 (1959).

28. See Dickens, *The Law and Endangered Species of Wildlife*, 9 GONZAGA L. REV. 57 (1973).

tutions. That is in essence the task Congress has undertaken. The emerging federal law of wildlife is directed at regulation or prohibition of killing of wildlife, at controlling commerce in wildlife and wildlife products, and at regulation of habitat quality and acquisition of lands for wildlife uses. As the next section shows, the present plateau of federal wildlife regulation has been reached by means of a slow progression.

C. *Development of Federal Wildlife Law.*

1. *Prelude to the 1970s.* Before 1969, federal wildlife law existed only in unrelated bits and pieces. Most matters pertaining to wildlife regulation were generally thought to be the exclusive prerogative of the state.²⁹ Although that facet of states' rights had been progressively eroded as a constitutional tenet over the years,³⁰ its adherents remained passionate in its defense.³¹ Although the authority of states to control wildlife seldom has been challenged directly by federal legislators, federal involvement in wildlife regulation has grown steadily in the twentieth century.

The first major federal law in this area was the Lacey Act of 1900,³² forbidding interstate transportation of illegally taken game. Its passage was not adamantly resisted by states because its original purpose was to reinforce state game laws by reaching out-of-state malefactors.³³ The most controversial early federal wildlife statute was the Migratory Bird Treaty Act of 1918 (MBTA)³⁴ because it did usurp some state authority; however, time and federal deference to state opinion in implementation led to its general acceptance.³⁵ Under the MBTA, the Department of the Interior has primary responsibility for overall management of most migratory birds. The Department sets flyway quotas and seasons for the shooting of game birds in cooperation with regional councils and with state fish and game agencies. The

29. The legal concept of state hegemony over wildlife regulation stemmed from loose interpretations of the language in *Geer v. Connecticut*, 161 U.S. 519, 529 (1896).

30. See *Coggins & Hensley* 1109-12.

31. See, e.g., the sources cited and quoted in *id.* 1149-51.

32. The statute, as amended and expanded over the years, is now codified at 16 U.S.C. § 667e and 18 U.S.C. §§ 42-44 (1976).

33. See generally BEAN 20-22; J. TREFETHEN, *supra* note 24, at 122. Under the Lacey Act, an interesting development was threatened but has not yet occurred. The Act bans importation of "injurious" wildlife; for many years, a list of species meeting that criterion was compiled. In 1975, the Department of the Interior proposed to reverse the emphasis by banning importation of all live foreign wildlife unless found to be noninjurious. See 40 Fed. Reg. 7935 (1975). The ensuing uproar forced delays in consideration, and no further action has been taken.

34. 16 U.S.C. §§ 703-711 (1976).

35. See generally J. TREFETHEN, *supra* note 24.

latter then have primary responsibility for implementing the national regulations by setting individual state seasons and standards.³⁶

Although hunting has been forbidden in most national parks since the turn of the century,³⁷ state hunting and fishing laws apply in all other systems and categories of federal lands, including wildlife refuges.³⁸ This jealously guarded and economically important state privilege³⁹ has been buffeted occasionally but remains basically intact.⁴⁰ The only other pre-1969 federal legislation directly dealing with wildlife *qua* wildlife was the first version of a federal endangered species act,⁴¹ but it was totally innocuous.⁴²

Other "early" federal law affected wildlife less directly. The Department of the Interior for decades has administered the Pittman-Robertson⁴³ and Dingell-Johnson⁴⁴ wildlife restoration funds, accumulated through taxes on hunting and fishing equipment and disbursed to the states for wildlife-related projects.⁴⁵ The Pittman-Robertson program has had an immense influence in developing state wildlife programs because a prerequisite to receipt of federal funds is that state hunting and fishing license revenues be utilized exclusively by state fish

36. See generally Comment, *The Migratory Bird Treaty: Another Feather in the Environmentalist's Cap*, 19 S. DAKOTA L. REV. 307 (1974). The Department of the Interior also conducts a rudimentary permit program for the non-sport taking of covered migratory birds (the regulations are found at 50 C.F.R. §§ 21.21-.29 (1976)) and more recently has become heavily involved in "waterfowl production," all in close coordination with the states. Wetlands Loan Act of 1961, as amended by Act of Feb. 17, 1976, Pub. L. No. 94-215, 90 Stat. 189, 16 U.S.C. §§ 715k-3 to 715k-5 (1976). One particular bird, the bald eagle, was accorded special protective status for obvious reasons in 1940. Bald Eagle Protection Act, 16 U.S.C. § 668-668d (1976). Its relative, the golden eagle, was also granted a limited immunity from shooting in 1962 in order to protect bald eagles from instances of mistaken identity by hunters. Each species, however, can be killed legally under certain conditions, and the enforcement of the law has been at best lax. See *Predator Control and Related Problems: Hearings Before the Subcomm. on Agriculture, Environmental, and Consumer Protection of the Senate Comm. on Appropriations*, 92d Cong., 1st Sess. (1971).

37. Act of May 7, 1894, ch. 72, 28 Stat. 73 (1894).

38. National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. § 668dd (1976).

39. *Kleppe v. New Mexico*, 426 U.S. 529 (1976), confirms that federal power over federal lands overrides any other state interest thereon; state regulation of hunting and fishing on federal lands is therefore by sufferance only. See note 187 *infra* and text accompanying notes 186-87 *infra*.

40. See, e.g., Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1976). On the conflict over the meaning of that section in allocating federal and state powers, see *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977) (Alaska Wolf Hunt II).

41. Endangered Species Preservation Act of 1966, Act of Oct. 15, 1966, Pub. L. No. 89-669, 80 Stat. 926 (repealed 1973).

42. Palmer, *Endangered Species Protection: A History of Congressional Action*, 4 ENV'T'L AFF. 255, 258-62 (1975).

43. Federal Aid in Wildlife Restoration Act, 16 U.S.C. §§ 669-669i (1976).

44. Federal Aid in Fish Restoration Act, 16 U.S.C. §§ 777-777k (1976).

45. See BEAN 236-54; J. TREFETHEN, *supra* note 24, at 228, 275-76.

and game agencies.⁴⁶ One consequence of having hunters and fishermen bear the costs of state wildlife regulation is that many state agencies have been concerned almost solely with production of game, and have been committed to an approach more promotional than regulatory. Thus federal tax revenues have helped finance and shape the programs of the same state agencies that still deny any federal jurisdiction over wildlife regulation.⁴⁷

Moreover, the Departments of Agriculture and of the Interior have furnished both money and manpower to the states for predator control programs.⁴⁸ As with the state game and fish agencies, the states have historically enjoyed substantive control over the contents of the predator control programs. In recent years, state law and state regulatory emphases have changed drastically in response to federal preemption, federal innovation, and an increasing number of strings on the federal purse, all of which are engendering parallel state programs of wider focus.⁴⁹

Another and somewhat disjointed series of federal laws requires consideration of wildlife values in the planning of certain water resource projects. The Army Corps of Engineers and other water resource agencies are required to submit to Congress plans for mitigating wildlife habitat losses caused by dam construction.⁵⁰ The Federal Power Commission is required to analyze the migrating and spawning problems of anadromous fish when licensing hydroelectric projects.⁵¹ The Armed Services are directed to consider wildlife values in withdrawing land for military use.⁵² All in all, the federal government by 1969 had become involved in wildlife regulation, but that involvement was deferential to states, tangential to central problems of wildlife welfare, and internally unrelated or inconsistent.

46. 16 U.S.C. § 669 (1976).

47. This situation is changing rapidly, it should be noted, largely in response to the new federal programs explained below. A measure of the rate of change can be gleaned from WILDLIFE MANAGEMENT INSTITUTE, CURRENT INVESTMENTS, PROJECTED NEEDS & POTENTIAL NEW SOURCES OF INCOME FOR NONGAME FISH & WILDLIFE PROGRAMS IN THE UNITED STATES (1975).

48. See generally Comment, *Predator Control and the Federal Government*, 52 N. DAKOTA L. REV. 787 (1975). Cf. *Wyoming v. Hathaway*, 525 F.2d 66 (10th Cir. 1975).

49. See notes 449, 453, 455, 457 and text accompanying notes 448-60 *infra*. A limited degree of federal jurisdiction over wildlife was conceded by the states before 1970. It was recognized that marine fish and marine mammals could not be managed effectively by states and were appropriate subjects for national and international regulation.

50. Fish and Wildlife Coordination Act of 1958, 16 U.S.C. §§ 661-667e (1976). See *National Wildlife Fed'n v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977).

51. Anadromous Fish Conservation Act of 1965, 16 U.S.C. § 757b (1976). See generally Guilbert, *supra* note 1, at 553-63.

52. 43 U.S.C. §§ 155-157 (1970). See Guilbert, *supra* note 1, at 576.

2. *Introduction to Recent Developments in Federal Wildlife Law.* Two developments make the year 1969 a turning point in federal wildlife law: the endangered species legislation was significantly amended in that year,⁵³ and a statute was enacted which, although not specifically mentioning wildlife, has had a profound effect upon wildlife welfare. The National Environmental Policy Act of 1969 (NEPA),⁵⁴ is a broad command to all federal agencies, requiring them to assess in written form⁵⁵ the probable environmental consequences of their proposed actions. Although NEPA speaks only of the "human environment,"⁵⁶ its procedural and substantive requirements apply with equal force to proposals affecting all aspects of the natural environment, specifically including wildlife and its habitat.⁵⁷ A great number of the thousands of NEPA lawsuits have had the potential for preserving or improving some aspect of wildlife habitat.

But the most direct wildlife protection regulation has come from three federal statutes enacted since 1969. The Wild and Free-Roaming Horses and Burros Act of 1971,⁵⁸ the Marine Mammal Protection Act of 1972,⁵⁹ and the Endangered Species Act of 1973⁶⁰ form the foundation of the revolution in federal wildlife law. From financing state programs and administering unrelated, ad hoc wildlife legislative directives, the federal government through these laws has become heavily involved in wildlife management and protection.

Although recent developments have propelled it into prominence, federal wildlife law has not achieved anything approaching maturity. Courts have yet to give most provisions of the new wildlife statutes authoritative interpretations; the growth of a common law has just begun. Further statutory advances and retreats are predictable and probably inevitable. The relationships between state and federal programs need clarification, and the law may prove biologically infeasible in some cases. Scholarly analysis is still tentative and superficial. At this point, it is fair to conclude that the federal law of wildlife has passed through infancy but has not reached adulthood. This Article, focusing on the MBTA and the three recent federal wildlife statutes, will discuss

53. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (repealed 1973).

54. 42 U.S.C. §§ 4321-4347 (1970).

55. See generally F. ANDERSON, *NEPA IN THE COURTS* (1973); Coggins, *Some Suggestions for Future Plaintiffs on Extending the Scope of the National Environmental Policy Act*, 24 KAN. L. REV. 307 (1976).

56. 42 U.S.C. § 4332 (1970).

57. See *Minnesota Public Interest Research Group v. Butz*, 541 F.2d 1292 (8th Cir. 1976).

58. 16 U.S.C. §§ 1331-1340 (1976).

59. 16 U.S.C. §§ 1361-1407 (1976).

60. 16 U.S.C. §§ 1531-1543 (1976).

those recent developments indicating that wildlife law is in its flexible, cantankerous adolescence.

II. THE MIGRATORY BIRD TREATY ACT

A. *History of the Act.*

The origins of modern federal wildlife law may be traced back to the MBTA; it contained the seeds of revolutionary change for the structure of traditional wildlife management since its enactment, but only in recent years is that potential beginning to be realized. The Act authorizes and requires federal administrative action to conserve populations of migratory birds. The statute was used to promote recovery of endangered species as early as the 1930s, but the primary administrative emphasis has been on regulation of sport hunting to insure adequate harvests of birds. That emphasis is now shifting: courts recently have required the Department of the Interior to take a broader approach to bird population enhancement.⁶¹

The MBTA was enacted after an earlier federal act for bird protection was ruled unconstitutional.⁶² In the interim, a treaty had been negotiated with Great Britain (for Canada) in 1916 for the coordinated management of migratory birds.⁶³ The Canadian Treaty required an end to the "indiscriminate slaughter" of such birds "as are either useful to man or are harmless" by means of a "uniform system of protection."⁶⁴ The original treaty protected specified migratory game species, nongame species, and insectivorous species, with exceptions for birds injurious to man. The treaty declared a five and a half month totally closed season.⁶⁵ Two subsequent treaties, with Mexico in 1936⁶⁶ and with Japan in 1972,⁶⁷ were also negotiated for migratory bird conservation, although differences in their wording have caused commentators to speculate that confusion will ensue in trying to reconcile those differences.⁶⁸

61. See section II, B *infra*.

62. The Act of March 4, 1913, ch. 145, 37 Stat. 847 (1913) was struck down in *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915), and *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914). The Migratory Bird Act of 1918 (MBTA) was upheld in *Missouri v. Holland*, 252 U.S. 416 (1920).

63. Migratory Bird Agreement with Great Britain, Aug. 16, 1916, United States-Great Britain, 39 Stat. 1702 (1916), T.S. No. 628.

64. 39 Stat. 1702 (1916). The original list omitted many species, but nearly all native migratory birds subsequently have been added to the protected lists. See note 116 *infra*.

65. 39 Stat. 1703 (1916).

66. Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311 (1936), T.S. No. 912.

67. Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, Mar. 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 (1972).

68. BEAN 69-73, 88-91. In the treaties, different species were covered, different regulatory

The precise terms of the international treaties are certain to receive renewed attention in coming years, as several treaty articles appear broader and more stringent than domestic implementing statutes and regulations.⁶⁹ Several environmental litigants have unsuccessfully attempted to base claims for relief directly on treaty language.⁷⁰ While commentators have advocated that approach,⁷¹ the question whether private plaintiffs have standing to invoke the treaty provisions in domestic litigation remains unresolved.⁷² Until that preliminary question is answered, the more central issues concerning the meaning and application of the treaties in concrete situations will remain conjectural. Thus, while the Japanese Convention is of considerable importance in the international sphere, it has not yet directly affected the domestic law regulating migratory birds.

The MBTA has not been drastically amended to comport more closely with the broader language of the later treaties.⁷³ It was supplemented in 1929 by the Migratory Bird Conservation Act⁷⁴ and in 1934 by the Migratory Bird Hunting Stamp Act⁷⁵ which provide for habitat acquisition authority and for funding acquisitions, but the 1918 Act remains the chief source of regulatory authority. The MBTA begins with a flat prohibition against the chasing, killing, molestation, possession, or sale of any bird covered by the treaties, "except as permitted by regulations."⁷⁶ The Act thereafter authorizes the Secretary of the Interior to promulgate regulations governing "when, to what extent, if at all,

mechanisms were authorized, different exceptions to the general prohibitions were made, and semantically different purposes and objectives were stated. Nearly all birds in the United States are covered by the Canadian and Mexican Treaties, but only those common to and migrating between the signatory nations are protected by the Japanese Treaty. The latter goes beyond the former two in calling for measures to enhance general environmental quality only peripherally related to bird welfare, in addition to the now-standard articles authorizing seasons, sanctuaries, and so forth. See BEAN 70-73.

The Japanese Convention was the model for a similar treaty with Russia, signed in November, 1976, but not yet ratified by the Senate. BEAN 72 n.22. As treaty provisions are automatically incorporated into the MBTA, 16 U.S.C. § 704 (1976), the Secretary's authority or duty in particular situations could depend upon which treaty applies to the species in question.

69. The provisions of the Japanese Convention summarized in note 68 *supra*, for instance, have no counterparts in the MBTA.

70. See text accompanying notes 85-111 *infra* and authorities cited therein.

71. Guilbert, *Wilderness Preservation II: Bringing the Convention into Court*, 3 ENV'T L. REP. 50044 (1973); Comment, *supra* note 36.

72. The court in *Fund for Animals v. Frizzell*, 402 F. Supp. 35, 38 (D.D.C.), *aff'd*, 530 F.2d 982 (D.C. Cir. 1975), assumed standing for the sake of argument but declined to decide the point. See notes 98-100 *infra* and text accompanying notes 90-100 *infra*.

73. Appropriate references to the Mexican and Japanese Conventions have been added, but the regulatory authorization remains unchanged. 16 U.S.C. § 703 (1976).

74. *Id.* §§ 715-715s(g).

75. *Id.* §§ 718-718(h).

76. *Id.* § 703.

and by what means" hunting, other taking, or commerce shall be allowed; this power is limited only in that all determinations must be "compatible" with treaty provisions.⁷⁷ The MBTA also authorizes parallel (though no less strict) state legislation.⁷⁸

Administration of the MBTA has largely been confined to setting seasons and quotas for hunting, managing areas acquired for waterfowl production, and issuing permits for scientific and other collectors.⁷⁹ These are essentially negative or neutral functions, designed to prevent overexploitation by forbidding certain non-complying conduct. The language of the Act and the Treaties appears to contemplate use of broader and more positive approaches to bird population management. The developments under the MBTA since 1974, indicating that movement toward affirmative management has begun on several levels, will be reviewed in the next section. The subsequent two sections will discuss issues in the context of Migratory Bird Treaty Act enforcement that are important to all federal wildlife law.

B. *Judicial Review of MBTA Implementing Regulations.*

Federal courts are responsible for the most significant recent developments affecting protection of migratory birds. The MBTA has been highly controversial since its inception, and many legal challenges, all unsuccessful, have been mounted against the Act and regulations promulgated under it. Lately, new disputes generated in new quarters have sprung up, resulting in litigation intended more to benefit bird populations than to rectify alleged infringement upon private rights.

Courts quickly confirmed the constitutionality of the Act under the treaty⁸⁰ and commerce⁸¹ powers, and also upheld the Secretary's discretion to regulate the means as well as the times of bird hunting.⁸² Early challenges to the Secretary's authority frequently involved the impact of his decisions on private lands, usually hunting preserves.⁸³ After that authority was firmly established, the Secretary's virtually unrestricted discretion over migratory bird taking and management regulations was generally accepted; until recently, nearly all MBTA cases

77. *Id.* § 704.

78. *Id.* § 708.

79. Management activities are described generally in 1975 FWS REPORT, *supra* note 21, at 1-13.

80. *Missouri v. Holland*, 252 U.S. 416 (1920).

81. *Cerritos Gun Club v. Hall*, 96 F.2d 620, 624-27 (9th Cir. 1938).

82. *Id.* at 629; *Cochrane v. United States*, 92 F.2d 623 (7th Cir. 1937).

83. *See, e.g., Bailey v. Holland*, 126 F.2d 317 (4th Cir. 1942).

were criminal prosecutions for illegal taking or baiting.⁸⁴ This section will focus on four recent decisions that restrict administrative discretion under the MBTA and herald a new direction in federal migratory bird management.

In *Fund for Animals, Inc. v. Morton*,⁸⁵ a wildlife protective society sued the Interior Department, alleging that an environmental impact statement must be prepared on the effect of each season's migratory bird regulations before the regulations could become effective.⁸⁶ The case was settled out of court when the Secretary agreed to prepare an overall programmatic statement on the sport hunting of migratory birds, which was issued in June, 1975.⁸⁷ This little-known litigation, like its counterpart suit on the administration of the National Wildlife Refuge System,⁸⁸ had the immediate effect of opening up the administrative process to persons other than hunters and administrators. The Secretary's implicit concession that the nation's wildlife resources are of legitimate concern to a wide spectrum of interests is also significant: breaching the traditional insularity of wildlife management professionals has been a major goal pursued by non-traditional wildlife partisans.⁸⁹

The same organization brought another suit a year later on more comprehensive grounds to protect several species including the greater snow goose.⁹⁰ Yearly bird hunting seasons, quotas, and other regulations are issued by the Fish and Wildlife Service (FWS) pursuant to the notice-and-comment rulemaking procedures of the Administrative Procedure Act (APA)⁹¹ in consultation with state agencies and regional flyway councils. In August, 1975, the Secretary announced an intention to reopen seasons on the Atlantic brant and the greater snow goose in the Atlantic flyway, and gave interested parties ten days to comment.⁹² The Fund for Animals hurriedly submitted comments opposing the measure, and then sued to enjoin the newly-authorized hunting, alleg-

84. See, e.g., *United States v. Reese*, 27 F. Supp. 833 (W.D. Tenn. 1939).

85. Civ. No. 74-1581 (D.N.J. 1974).

86. Plaintiffs were concerned about a variety of hunting practices and regulations and their effect upon bird populations; they also desired a more direct role in developing the regulations. See 1975 FWS REPORT, *supra* note 21, at 4.

87. *Id.*

88. *Sierra Club v. Morton*, 395 F. Supp. 1187 (D.D.C. 1975), *rev'd in part sub. nom. Sierra Club v. Andrus*, No. 75-1871 (D.C. Cir. May 15, 1978).

89. J. TREFETHEN, *supra* note 24, is an object lesson: the book frequently seems to assume that all but hunters and administrators are ignorant and naive about wildlife matters, and implies that wildlife protective organizations such as Fund for Animals, Inc., Defenders of Wildlife, and the Sierra Club have less than a fully legitimate voice in wildlife management.

90. *Fund for Animals, Inc. v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1976).

91. 5 U.S.C. §§ 551-559 (1976).

92. 40 Fed. Reg. 34,361, 34,362-63 (1975).

ing that the new regulations were ridden with substantive and procedural deficiencies. The trial court denied plaintiff's motion for a preliminary injunction, holding that the abbreviated notice procedure did not violate the APA,⁹³ that plaintiff's claim under NEPA would not be considered as the former NEPA case was still pending,⁹⁴ that the treaties with Japan and Canada were not contravened,⁹⁵ and that plaintiff could show neither a likelihood of eventual success nor irreparable injury.⁹⁶ On appeal, the District of Columbia Circuit Court of Appeals did not discuss the treaties, but affirmed the denial of preliminary relief because of the plaintiff's failure to show irreparable injury and because of application of the doctrine of laches.⁹⁷ Both conclusions are questionable,⁹⁸ but the posture of the case was such that immediate relief was difficult to frame.⁹⁹ The court did express considerable concern over the shortness of notice and disavowed an opinion on the merits in remanding for further proceedings.¹⁰⁰ After the hunting season was over, the case was dismissed without prejudice.¹⁰¹

The foregoing litigation is of far more moment than its inconclusive result might indicate. It marked the first time that a court reviewed the substance and details of an administrative decision under the MBTA on behalf of parties other than the hunters. Prior litigation had been brought by self-interested landowners and hunters, and MBTA regulations traditionally had been promulgated by a small group of administrators with those interests in mind. Though the legal bases of the opinions are within the normal run of cases judicially reviewing administrative choices, the addition of new, non-professional characters to the decision-making cast in defense of the theretofore voiceless subject matter makes the case exceptional.

93. 402 F. Supp. 35, 38 (D.D.C. 1975).

94. *Id.* at 39.

95. *Id.* at 38-39.

96. *Id.* at 39-40.

97. *Fund for Animals, Inc. v. Frizzell*, 530 F.2d 982 (D.C. Cir. 1976).

98. The per curiam opinion in essence requires "irretrievab[le] damage [to] the species" as the touchstone of irreparable injury, rejecting contentions that the unnecessary death of any bird or number of birds is sufficient injury to warrant preliminary relief. 530 F.2d at 987. The holding seems rather harsh, especially since the MBTA applies to migratory birds individually as well as to species. Certainly the court did not mean to say that no judicial relief is available until the species teeters on the brink of extinction, but the unfortunately cursory treatment of the issue leaves that impression. The court's holding as to laches was at best gratuitous, because plaintiffs filed suit on the same day the final regulations were published. The court of appeals also agreed with the trial court's disposition of the NEPA claim. 530 F.2d at 988-89 n.15.

99. The hunting season to which the regulations applied was already underway.

100. "It is our view that in like circumstances in the future the agency should give firmer notice when it has similar matters under consideration and should set forth the general standards it intends to apply in making its decisions." 530 F.2d at 990.

101. *See* BEAN 88.

The snow goose case was followed shortly by two cases in the same circuit arising under the MBTA but decided according to the dictates of related, complementary federal statutes. In *National Rifle Association v. Kleppe*,¹⁰² the plaintiff organization sought to enjoin a new FWS requirement that steel rather than lead shot be used by hunters in selected areas where lead poisoning of ducks had been especially severe.¹⁰³ The plaintiff conceded the power of the FWS to regulate shot types under the MBTA but asserted that steel shot was dangerous and ineffective. The suit was premised on NEPA: it was alleged that the FWS environmental impact statement failed to give adequate consideration to the dangers and drawbacks posited by the Rifle Association. The court reviewed the available evidence and concluded that the FWS had compiled the relevant record, considered the requisite factors, and reached defensible, non-arbitrary conclusions.¹⁰⁴

The case illustrates that NEPA is a two-edged sword. It can serve as the litigation vehicle to promote hunting interests as well as environmental interests. The case also illustrates that an agency obeying NEPA's commands fully and ungrudgingly is in a secure position to face judicial review. More importantly, the case may indicate that federal wildlife administrators are becoming more attentive to habitat quality considerations as well as the desires of the hunting interests.

A major breakthrough occurred in *Defenders of Wildlife v. Andrus*,¹⁰⁵ the second case arising under the MBTA but decided on other grounds. Plaintiff sought invalidation of the regulations permitting waterfowl hunting one-half hour before sunrise and one-half hour before sunset¹⁰⁶ on the ground that hunter misidentification of species was likely in those periods. Plaintiff alleged that the threat created thereby would constitute a violation of the MBTA, the 1973 Endangered Species Act, the APA, and the migratory bird treaties.¹⁰⁷ Defendants countered that sufficient protection for endangered species existed, that misidentification would be minimal, and that the additional hunting time was necessary to "provide adequate opportunities for game hunters."¹⁰⁸ The court concluded that the Interior Department had af-

102. 425 F. Supp. 1101 (D.D.C. 1976), *aff'd mem. sub nom.* National Rifle Ass'n v. Andrus, 571 F.2d 674 (D.C. Cir. 1978).

103. 41 Fed. Reg. 31,386-89, 38,772-74 (1976) (now codified at 50 C.F.R. § 20.134 (1976)). The poisoning was a result of ingestion of lead shot by the ducks.

104. 425 F. Supp. at 1110-11. The circuit court affirmed without opinion. National Rifle Ass'n v. Andrus, 571 F.2d 674 (D.C. Cir. 1978).

105. 428 F. Supp. 167 (D.D.C. 1977).

106. 50 C.F.R. § 20 (1976), *as amended by* 41 Fed. Reg. 9177-82 (1973).

107. 428 F. Supp. at 168.

108. *Id.* at 169.

firmative duties under the Endangered Species Act to increase the populations of protected species and to consider the effect of all regulations on those species.¹⁰⁹ Since some shooting of endangered birds was likely and since the FWS had not sufficiently studied or considered the problem, the regulations were held arbitrary and unlawful.¹¹⁰ Plaintiff's claims under other statutes were not reached.

With this decision the migratory bird aspects of federal wildlife law have emerged from the exclusive enclave of professional discretion into the mainstream of more liberal judicial scrutiny of the professional product. As in so many other areas, this case indicates that the claim of esoteric expertise will no longer deter judges from deciding whether the wildlife managers have followed the law in following their professional instincts. The *Andrus* decision and the substantive changes in wildlife management that it augurs ultimately should benefit the managers who are presently resentful of interference in their private domain. Wildlife management decisions should be more objective and more effective as the NEPA process forces reexamination of underlying assumptions and consideration of alternative means. Requiring consideration of non-game species and of overall habitat quality in the administrative process will assist in maintaining adequate populations of harvestable birds; all species benefit from habitat improvement. One-sided political pressures on wildlife managers should be neutralized, if not reduced, as a third segment of the public voices its opinions and the courts move toward a balancing rationale. In addition to satisfying its traditional constituency, the Interior Department must now respond to the new spokesmen for wildlife interests and assess probable judicial reaction.

Legislators and managers can only create a legal framework for regulation. Achieving the purposes of reforming statutes ultimately depends upon the effectiveness of the enforcement mechanisms, administrative or judicial. Enforcement is a problem common to all federal wildlife law; the experiences under the MBTA highlight the general difficulties.

C. *Wildlife Law Enforcement.*

A central problem in wildlife law at all levels is adequate enforcement. Poachers, game hogs, smugglers and the like are difficult to apprehend. State game wardens are too few and far between; federal

109. The court cited 16 U.S.C. §§ 1531, 1532, 1533(d), 1536 (1976) in so concluding but did not indulge in detailed statutory analysis. The case is further discussed at note 434 *infra* and text accompanying notes 432-35 *infra*.

110. 428 F. Supp. at 170. The ruling came after the 1976-77 season was over, and directed new rulemaking to consider the matter in more depth.

enforcement officers are nearly non-existent.¹¹¹ Customs officials frequently cannot distinguish between species when seeing just a skin or a part.¹¹² While the mechanics of enforcement are difficult enough, attitudinal barriers sometimes seem insurmountable. Poachers are righteously unrepentant. Some importers, furriers, taxidermists, keepers and others deal in illegal wildlife products, and regard the occasional fine as just another cost of doing business. The rewards greatly outweigh the risks. Violators of all stripes often feel immune from dire consequences because judges and juries tend to treat offenses under wildlife statutes as petty misdemeanors. Seldom is the penalty imposed sufficient to deter others.¹¹³ Some harbingers of change are perceptible, but many legislative commands will remain empty words until the judiciary is willing to deal with these crimes as serious offenses.¹¹⁴

Implementation of the newer statutes has not yet reached the stage where enforcement can be realistically evaluated, but patterns of enforcement under a statute as old as the MBTA should be apparent. There is of course no way to determine how many illegal takings of protected birds occur each year, but the number of reported prosecutions in relation to the limited enforcement manpower indicates the number is substantial.¹¹⁵ Recent developments at the prosecution and appeal stages may indicate a stricter and more effective posture toward enforcement in the future.

In a series of recent cases, courts have rejected various defenses to charges of unpermitted shooting or sale of migratory birds and bald eagles. Three cases involved the sale of raptor specimens that may have

111. As of 1973, the federal government had only 158 game law enforcement officials. S. REP. NO. 307, 93d Cong., 1st Sess. 4 (1973).

112. See, e.g., Comment, *Federal and State Protection Against Commercial Exploitation of Endangered Wildlife*, 17 CATH. LAW. 241, 248 (1971).

113. In fiscal year 1975, 121 convictions for violations of the Endangered Species Act were obtained. The Act authorizes fines up to \$20,000 per violation, 16 U.S.C. § 1540(b) (1976); fines and costs actually levied averaged \$152 per case, 1975 FWS REPORT, *supra* note 21, at 38-39.

114. There are indications that this attitude is changing as wildlife problems are more widely perceived, but most wildlife conservationists would agree that failure to take wildlife offenses seriously, particularly in the rural areas where most violations occur, is the single most debilitating element of federal wildlife law. Interviews with Robert Hughes, Chairman, Sierra Club National Wildlife Committee, and Maxine McCloskey, Project Jonah Coordinator, and Member, California Nongame Species Advisory Board, San Francisco, California (Oct. 27, 1976). Hunters and their spokesmen frequently argue in favor of harsher penalties as well, because the excesses of a few are seen as giving the entire sport a bad reputation. See generally J. TREFETHAN, *supra* note 24, *passim*.

115. In fiscal year 1975, FWS opened 5918 cases under the MBTA, 496 under the Migratory Bird Stamp Act, and 374 under the Eagle Act. 1975 FWS REPORT, *supra* note 21, at 5. A generation after passage of the Bald Eagle Act, shooting remains the major cause of bald eagle mortality. Fish and Wildlife Service Rep., 41 Fed. Reg. 28,526 (1976).

been taken before such taking became illegal.¹¹⁶ In *United States v. Blanket*,¹¹⁷ the defendant was convicted of selling fans made from hawk feathers in spite of his contention that he gained possession of the feathers prior to the inclusion of hawks under MBTA protection.¹¹⁸ Similarly, in *United States v. Hamel*¹¹⁹ the Ninth Circuit held that an indictment of a taxidermist for offering to sell a stuffed snowy owl need not allege the date the owl was taken, disapproving venerable precedent to reach that result.¹²⁰ The court in *United States v. Gigstead*¹²¹ reached the same conclusion and further held that the defendant could not collaterally attack MBTA regulations on the ground that the species protected was now so abundant that no protection was necessary.¹²² These cases are of little interest individually, but in the aggregate they may reflect judicial acceptance of a more aggressive approach to enforcement.

Another series of cases has assisted enforcement officials by negating any scienter element in prosecutions for illegally taking, possessing, or selling protected birds, although one case is to the contrary.¹²³ *United States v. Jarman*¹²⁴ is a recent example: no scienter or knowledge need be shown to establish a violation of the new "ten day waiting period" MBTA baiting regulations.¹²⁵ Similarly, in *United States v.*

116. Only in 1972 were many species of hawks and owls added to the list of birds protected by the MBTA. The executive authority of the Mexican Convention, art. IV, was delegated to the Secretary of the Interior by Executive Order No. 11,629 of Oct. 26, 1971. Pursuant to that authority, the Secretary added to the list of protected birds many formerly not included, such as hawks and owls. 50 C.F.R. § 10.13 (1976).

117. 391 F. Supp. 15 (W.D. Okla. 1975).

118. The decision on appeal from the magistrate's ruling relied more heavily on the inherent improbability of defendant's testimony than on the distinction between taking and selling, but the court found no legal problem in the Secretary's unilateral addition of species to the protected lists. 391 F. Supp. at 18-20.

119. 534 F.2d 1354 (9th Cir. 1976).

120. *Id.* at 1356 (citing *United States v. Marks*, 4 F.2d 420 (S.D. Tex. 1925)); *In re Informations Under the Migratory Bird Treaty Act*, 281 F. 546 (D. Mont. 1922); *United States v. Fuld Store Co.*, 262 F. 836 (D. Mont. 1920).

121. 528 F.2d 314 (8th Cir. 1976).

122. *Id.* at 316-17.

123. *United States v. Hetzel*, 385 F. Supp. 1311 (W.D. Mo. 1974). The case involved a petty prosecution of a Boy Scout leader who picked up talons from a dead eagle. On an appeal from a one dollar fine levied by the magistrate, the district court held that possession of eagle artifacts before the 1972 amendments to the Bald Eagle Act, Act of Oct. 23, 1972, Pub. L. No. 92-535, (amending 16 U.S.C. § 668 (1970)), required willfulness in addition to knowledge to be punishable. Otherwise, the court reasoned, the jails would be filled with Boy Scouts, 385 F. Supp. at 1316. The court rejected the obvious analogy to decisions under the MBTA, *id.* at 1314, which have declined to require scienter allegations in indictments under that statute.

124. 491 F.2d 764 (4th Cir. 1974).

125. *Id.* at 766-67. The regulations are found at 50 C.F.R. § 10.21 (1976). *But cf.* *United States v. Jonas Bros.*, 368 F. Supp. 783 (D. Alas. 1974) (scienter required under Lacey Act).

Allard,¹²⁶ the court held that possession and sale of eagle parts is an offense irrespective of scienter.¹²⁷

Another very recent line of cases has gone beyond the hunting cases to hold that negligent or ultrahazardous activities causing the death of migratory birds subject the actor to criminal liability, even though he intended neither to kill birds nor to violate the law. In three unreported decisions, defendant oil companies were found guilty of violating the MBTA for having maintained uncovered, toxic oil sludge pits,¹²⁸ the birds died after landing in the pits and drinking the water. In *United States v. FMC Corporation*,¹²⁹ a chemical company was indicted on 36 counts of killing birds by allowing the discharge of a toxic pesticide residue into a settling pond on which at least 92 birds were killed by ingesting the poisoned water. The court's opinion refusing to quash the indictment did not deal with the scienter issues. Then, in *United States v. Corbin Farm Service*,¹³⁰ the district court considered the matter in some detail. It held that negligent pesticide applicators who by their negligence killed various migratory birds could be convicted under the MBTA even though knowledge and intent were lacking. All but one of the counts were dismissed because the court felt that one activity only gave rise to one violation, even if multiple deaths occurred,¹³¹ but all other defenses were rejected. Shortly thereafter, the Second Circuit affirmed the conviction of FMC Corporation on 18 counts of the indictment, but scienter was the only issue addressed in any depth; the holding was that liability ensued irrespective of intent or negligence if the deaths occurred in the course of a dangerous activity.¹³² The cases so far are unanimous, therefore, in extending the prohibitions of the MBTA to any activity that causes the death of migratory birds except the true, unforeseeable accident. Not only do these holdings presage the day when negligent activities of all kinds, from construction practices to oil spills, resulting in the foreseeable destruction of protected birds, will be outlawed, but they also provide a strongly analogous precedent for prosecutions under later statutes, also silent as to intent, that carry considerably higher penalties.¹³³

126. 397 F. Supp. 429 (D. Mont. 1975). This case is also highly relevant to wildlife issues involving Indians. See text accompanying note 165 *infra*.

127. 397 F. Supp. at 432. See also *United States v. Chew*, 540 F.2d 759 (4th Cir. 1976).

128. *United States v. Equity Corp.*, Cr. No. 75-51 (D. Utah, Dec. 8, 1975); *United States v. Union Texas Petroleum*, No. 73-CR-127 (D. Colo., July 11, 1973); *United States v. Stuarco Oil Co.*, No. 73-CR-129 (D. Colo., Aug. 17, 1973).

129. 428 F. Supp. 615 (W.D.N.Y. 1977), *aff'd*, 572 F.2d 902 (2d Cir. 1978).

130. 444 F. Supp. 510 (E.D. Cal. 1978).

131. *Id.*

132. *United States v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).

133. See, e.g., text accompanying note 386 *infra*.

Tentative developments in other wildlife law enforcement areas may be indicative of a judicial if not societal change in attitude. State enforcement powers were slightly expanded by the decision in *California v. Quechan Tribe*.¹³⁴ The court held that the state had the power to control hunting by non-Indians on tribal reservations. Intricacies of treaty wording and of treaty law may, however, narrow the applicability of the decision.¹³⁵ The case of *United States v. Sanford*¹³⁶ finally appears headed for a conclusion vindicating and strengthening the Lacey Act.¹³⁷ The litigation concerns the prosecution of guides accused of abetting illegal takings on a reservation and in a national park, and has reached the appellate level three times on preliminary motions.¹³⁸ In the latest decision, the Ninth Circuit upheld all seven counts of the indictment against jurisdictional, definitional, and other defenses.¹³⁹ An analogous extension of prosecutorial power was validated in *United States v. Plott*,¹⁴⁰ holding that poached alligators are stolen property within the meaning of the federal statute prohibiting the interstate transportation of stolen property and imposing heavy penalties.¹⁴¹

D. *Indians and Federal Wildlife Law.*

The applicability of federal wildlife laws to native American Indians is a related, though separate question. When the American Indians were subdued, the resulting treaties with the tribes typically granted—expressly or impliedly—the right to hunt and fish forever on the ancestral or other designated lands. Recent federal wildlife legislation contains blanket prohibitions on the taking of certain species. Thus, the treaty rights and the later statutory provisions appear to conflict directly with each other. The question whether Indians are subject to the prohibitions of federal wildlife law is significant because a different view of the exhaustibility of natural resources now prevails. Millions of acres are reserved to the tribes,¹⁴² and the remaining wildlife

134. 424 F. Supp. 969 (S.D. Cal. 1977).

135. The decision turned more on the wording of the Quechan Treaty than on generally applicable principles.

136. 547 F.2d 1085 (9th Cir. 1976).

137. The Lacey Act, 18 U.S.C. § 43 (1976), proscribes the transportation of wildlife killed in violation of state or federal laws. See text accompanying notes 32-33 *supra*.

138. The most recent opinion in the litigation is *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976), remanding the case for trial. From 1972, when the alleged offenses occurred, the case has been twice to the United States Supreme Court and three times to the Ninth Circuit Court of Appeals on preliminary questions. See *United States v. Sanford*, 503 F.2d 291 (9th Cir. 1974), *dismissal vacated*, 421 U.S. 996 (1975); 536 F.2d 871 (9th Cir.), *rev'd*, 429 U.S. 14 (1976).

139. 547 F.2d at 1087-92.

140. 345 F. Supp. 1229 (S.D.N.Y. 1972).

141. 18 U.S.C. § 2314 (1976).

142. In 1970, about 56 million acres were under the jurisdiction of the Bureau of Indian

resources are now far scarcer and more valuable.

States have fought with tribes in court and out for many years over similar problems involving state game regulations.¹⁴³ While patterns of decision are evident, the outstanding controversies are far from settled. The Supreme Court has decreed that states cannot abrogate the Indians' right to fish at the traditional places, but states may regulate the means of fishing and the numbers of fish taken "in the interest of conservation,"¹⁴⁴ if the conservation burden is fairly apportioned between Indians and others.¹⁴⁵ The law emerging from the state cases is not persuasive precedent in litigation over federal statutes: state regulation must yield to federal law in the form of statutes or treaties,¹⁴⁶ while Congress has the power to alter or amend the Indian treaty provisions. The question arising out of each new federal wildlife statute is whether Congress has chosen to do so in that instance.

The first migratory bird treaty and the 1972 Japanese Convention included exemptions allowing Indians and Eskimos to take certain birds for food, but the MBTA and the 1936 Mexican Treaty did not contain similar provisions.¹⁴⁷ The Bald Eagle Act allows killing or capture of bald eagles under permit for religious purposes of Indians.¹⁴⁸ The Wild and Free-Roaming Horses and Burros Act¹⁴⁹ does not contain any exemption for Indians. Both the Marine Mammal Protection Act¹⁵⁰ and the Endangered Species Act¹⁵¹ expressly exempt subsistence taking by Alaska Natives, but make no mention of Indians in the rest of the nation. No guidance for reconciling these treaties and statutes is to be found in the respective legislative histories.

In the absence of such guidance, courts must resort to canons of interpretation to resolve the issues as they arise. Policy arguments support either position. On the one hand, Indians entered (or were coerced) into agreements expressly guaranteeing them certain rights "forever." It has long been held that congressional intent to abrogate or

Affairs, DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 199 (1972) (Table 317).

143. See generally Hobbs, *Indian Hunting and Fishing Rights* II, 32 GEO. WASH. L. REV. 1251 (1969).

144. *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 398 (1968) (*Puyallup I*).

145. *Puyallup Tribe v. Department of Game*, 414 U.S. 44, 48 (1973) (*Puyallup II*). When reducing the Indians' catch, the burden of proof is on the state. *Antoine v. Washington*, 420 U.S. 194, 196, 199 (1975).

146. *Missouri v. Holland*, 252 U.S. 416 (1920).

147. See BEAN 69-72. Even so, current regulations expressly authorize limited taking of birds by Alaska Natives. 50 C.F.R. § 20.132 (1976).

148. 16 U.S.C. § 668a (1976).

149. 16 U.S.C. §§ 1331-1340 (1976).

150. 16 U.S.C. § 1371(b) (1976).

151. 16 U.S.C. § 1539(e) (1976).

modify those rights must be clearly demonstrated.¹⁵² The poor and backward condition of many tribes is a good reason for resolving difficult questions of interpretation in their favor. Wildlife is central to much Indian culture and religion and therefore any restrictions on their right to take animals as they please should be suspect as a matter of social policy. On the other hand, the whole trend of modern wildlife and environmental legal concern militates against exclusion of Indians from the effect of rules intended for the common good. Conditions have changed drastically since the nineteenth century, and each federal wildlife statute was enacted as a response to a perceived wildlife population crisis. Indians share the responsibility for wildlife declines and will benefit as much as anyone from healthier ecosystems and more abundant wildlife. Abrogation of longstanding Indian rights in order to increase the yields of white sportsmen is a far cry from equally applied regulations aimed at preserving and increasing wildlife populations. Two strong social policies are thus in seemingly irreconcilable conflict. One or the other must give way, and the courts will be forced into the unenviable task of making the choice.

There are surprisingly few judicial opinions on the question and, as one might expect, they are in conflict. In a 1941 case, *United States v. Cutler*,¹⁵³ the court decided that Indians were immune from prosecution under the MBTA because Congress lacked the power to change the terms of existing treaties unilaterally by subsequent enactment.¹⁵⁴ Although that principle was and still is of highly doubtful validity,¹⁵⁵ the federal government accepted the interpretation,¹⁵⁶ and the *Cutler* decision continues to be cited as good authority.¹⁵⁷ Three recent cases on somewhat similar facts were decided in three different ways. In *United States v. Blanket*,¹⁵⁸ the question was not raised even though it appeared from the caption and opinion that the defendant was Indian.¹⁵⁹ The Eighth Circuit, in a split decision, decided to follow the *Cutler* rationale in a case involving the shooting of a bald eagle on a reserva-

152. *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968).

153. 37 F. Supp. 724 (D. Idaho 1941).

154. *Id.* at 725.

155. *Menominee Tribe v. United States*, 391 U.S. 404 (1968), and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), clearly establish the power of Congress unilaterally to alter or abrogate Indian treaty terms, because treaties stand on no higher footing than ordinary federal legislation.

156. Memorandum of the Interior Department Solicitor, Apr. 26, 1962, *quoted in United States v. White*, 508 F.2d 453, 458 (8th Cir. 1974).

157. *California v. Quechan Tribe*, 424 F. Supp. 969, 974 n.4 (S.D. Cal. 1977).

158. 391 F. Supp. 15 (W.D. Okla. 1975).

159. Blanket's full name was Marvin Saddle Blanket, and the feathers were allegedly found on an "allotment." *Id.* at 20. *See also United States v. Rowe*, 565 F.2d 635 (10th Cir. 1977).

tion.¹⁶⁰ In *United States v. White*¹⁶¹ the court opined that where an area is traditionally left to tribal regulation, a general federal statute applying to the area was not necessarily intended to affect Indians,¹⁶² and that the exception in the Act for Indian religious purposes was vague and not meant to foreclose non-religious taking by the Indians; thus, Indians on the Red Lake Reservation could shoot bald eagles without fear of prosecution.¹⁶³ Judge Lay's dissent in *White* pointed out the fallacy of the majority position and reasoned that the drastic changes in natural and social conditions since the treaties were signed, the purposes of the Bald Eagle Act, and the statutory exemption procedure require a construction that the latter was intended to be the exclusive exemption.¹⁶⁴ The *White* dissent was adopted by the court in *United States v. Allard*,¹⁶⁵ although technically a different offense was involved. That court held that an Indian could be prosecuted for sale (as distinguished from taking or possession) of eagle feathers. While an off-reservation sale has little relation to an on-reservation shooting, the majority opinion in *White* would by its breadth immunize both acts.

To date, therefore, the question has been considered in relation to only two of the five major wildlife statutes, and the judicial results are inconclusive. The impasse is caused by lack of congressional vision or desire to confront the issue squarely. More conflicts in this area will inevitably arise. *Allard* appears to represent a better-reasoned view of the legal relationship between Indians and the Bald Eagle Act, but more explicit legislative action would be preferable to judicial resolution.

160. Oddly, the bald eagle cases seldom involve the provisions of the MBTA, even though the species otherwise qualifies. Protection under the Bald Eagle Act may appear more stringent than that accorded by the seemingly flexible MBTA, but that may not be the case in practice. In any event, overall legal protection for bald eagles has been so ineffective that the species has been listed as endangered under the Endangered Species Act. 43 Fed. Reg. 6230-33 (1978).

161. 508 F.2d 453 (8th Cir. 1974).

162. *Id.* at 455. But see *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 123 (1960).

163. The court also held that 18 U.S.C. § 1152 (1976) was "not germane to the controversy." 508 F.2d at 455. That statute provides that the general laws of the United States as to the punishment of offenses committed in any place within the exclusive jurisdiction of the United States shall extend to the Indian country, with certain express exceptions. The court concluded that the statute is limited to the application of federal enclave law, and was not intended to be a predicate for general federal criminal jurisdiction in Indian country. *Id.*

164. 508 F.2d at 461. Judge Lay made the further point that "a conservation statute will achieve its purpose only if it applies to everyone." *Id.* at n.4. While not necessarily indicative of congressional intent, the obvious truth of the observation is persuasive in giving a commonsense interpretation.

165. 397 F. Supp. 429 (D. Mont. 1975).

III. THE WILD AND FREE-ROAMING HORSES AND BURROS ACT

A. *Scope of the Act.*

The Wild and Free-Roaming Horses and Burros Act of 1971¹⁶⁶ has no close parallel in federal wildlife law. The affected species technically are feral (descended from escaped domesticated animals) rather than wild, and they are physically indistinguishable from their domesticated cousins. Wild horses and burros are considered important by Congress for their historical value in addition to ecological reasons.¹⁶⁷ Passage of the Act was prompted by congressional realization that the tattered remnants of Spanish exploration had suffered precipitous declines and might disappear. State protection—in the few instances where it was authorized—had not been enforced.¹⁶⁸ The Act limits the discretion of two federal land management agencies, the Forest Service and the Bureau of Land Management, with respect to those “species,”¹⁶⁹ and protects them from the depredations of all others.¹⁷⁰ Except by federal agencies in certain exceptional circumstances, the Act outlaws the capturing or killing of wild horses and burros¹⁷¹ and the sale of a specimen or its carcass.¹⁷² The statute applies only to unclaimed and unbranded horses and burros that have been at one time on Bureau of Land Management or Forest Service lands,¹⁷³ but an animal that has once been on those lands is protected wherever it goes.¹⁷⁴ Congress did not indicate how qualifying animals are to be determined, nor did it specify who is to make the determination.

Many professional biologists believe that the new Act will be over-successful to the point of becoming self-defeating. They assert that the high breeding success rate of these feral ungulates, coupled with a lack of natural predators, will result in rapid, unchecked population growth.¹⁷⁵ When this occurs, the overabundant horses and burros will monopolize scarce forage, damage fragile terrain, and drive out other wild species. Burros already have damaged certain desert areas,¹⁷⁶ but

166. 16 U.S.C. §§ 1331-1340 (1976).

167. *Id.* § 1331.

168. *See* S. REP. NO. 242, 92d Cong., 1st Sess. (1971).

169. 16 U.S.C. §§ 1333(a)-(c) (1976).

170. *Id.* § 1338.

171. *Id.* § 1334.

172. *Id.* § 1333(d).

173. *Id.* §§ 1332(b), (e).

174. *Id.* §§ 1333, 1334, 1338.

175. *E.g.*, Fernandez, *A Closer Look at Resolving the Wild Horse and Burro Problem*, II SERRA CLUB WILDLIFE INVOLVEMENT NEWS, Oct.-Nov. 1977, at 4.

176. Carothers, Stitt & Johnson, *Feral Asses on Public Lands: An Analysis of Biotic Impact, Legal Considerations and Management Alternatives*, 1976 TRANSACTIONS OF THE N. AM. WILDLIFE AND NAT. RES. CONF. 396.

the sharpest legal controversies have arisen where wild horses compete with sheep and cattle. The Act provides several mechanisms for coping with local overpopulation, including the wholesale shooting of excess animals,¹⁷⁷ which the Bureau of Land Management, the Forest Service, and the National Park Service have now begun to use.¹⁷⁸ Suits are now pending which challenge these drastic methods of control.¹⁷⁹ If wide-scale overpopulation of horses and burros actually occurs as a result of the Act, it will be unique among federal wildlife statutes. It will probably be many years before most of the conceivable interpretive problems under the Act are resolved. The main developments that have come to fruition since passage of the Act are the lawsuit questioning federal power over wild horses and burros and litigation over wild horse roundups.

B. *Federal Legislative Discretion: Kleppe v. New Mexico.*

Recently, when a rancher in New Mexico discovered a small herd of wild burros consuming forage and water intended for his cows, he requested assistance from the Bureau of Land Management in removing the offending animals. The Bureau refused to intervene, but the New Mexico Livestock Board captured and destroyed the offending "donkeys." Having previously renounced the cooperative management agreement¹⁸⁰ between the state and the Bureau that acknowledged federal jurisdiction, the state agency then sued for a declaration that the

177. 16 U.S.C. § 1333(c) (1976).

178. See Fernandez, *supra* note 175.

179. Humane Soc'y v. United States, Civ. No. 777-207 (D.D.C., filed Feb. 4, 1977) (reported in 3 U.S.D.C. Current Filings Alert 4, at 8 (April 1977)) (plaintiffs seek to enjoin proposed destruction of burros in Grand Canyon National Park).

Of course, overpopulation is not the intended result of the Act. It, like other federal wildlife statutes, was designed not to create ecosystems dominated by single species, 16 U.S.C. §§ 1333, 1333(a) (1976), but rather to prevent extinction and to maintain stable populations. The Act makes clear that the species protected are but two components of complex ecosystems, and management is to be directed at a "thriving natural ecological balance." *Id.* Other species have recovered from the brink of extinction under the aegis of federal and state legal protection. Marine mammals and some game species are examples: sea otters and North Pacific fur seals had almost completely disappeared seventy years ago, but early federal efforts at protection have allowed recovery over the years to the point where populations are somewhat stable although at far lower levels; the white tailed deer has made a comeback since 1900 to even higher population levels. However no known native nongame species has ever again reached its historical high population level. Yet, overpopulation is a relative term. An estimated two million wild horses sustained themselves in the West at the turn of the century. See, e.g., S. REP. NO. 242, 92d Cong., 1st Sess. 1 (1971). Opinions on whether recovery of the horse population to five or ten percent of that number under modern range conditions would constitute gross overpopulation seem to depend upon whether the critic is guided by economic or biological premises.

180. Cooperative agreements by which certain federal responsibilities over horses and burros may be delegated to state agencies are authorized but not well defined by 16 U.S.C. § 1336 (1976).

Wild Horses and Burros Act was unconstitutional.¹⁸¹ A three-judge federal district court invalidated the Act, holding that the federal government was not empowered to legislate for the benefit of wildlife on or off federal lands. Two enumerated constitutional powers were considered and rejected by the district court. Based on the premise that wildlife is the exclusive property of states where it is found, the court held that the property clause¹⁸² did not allow the federal government to regulate wildlife except to the extent necessary to protect the federal land itself.¹⁸³ as Congress intended to benefit the animals, not the land, the Act could not be justified by the property power. The court further opined that the commerce clause did not supply the requisite federal power because Congress did not cite it in its findings and because the burros in question did not cross state lines.¹⁸⁴ The court attached no importance to the fortuitous circumstance that the burros were removed from federal lands leased by the rancher.¹⁸⁵

The Supreme Court in *Kleppe v. New Mexico*¹⁸⁶ reversed unanimously. The Court did not reach the commerce clause issue, holding only that the federal power over federal lands is plenary, restricted only by the Constitution. Since the burros were found on federal lands, Congress could under the supremacy clause protect them even in contravention of state law.¹⁸⁷ The distinctions urged by New Mexico between categories of federal lands and between the land and the animals were summarily rejected. The holding in *Kleppe*, however, was expressly limited to the validity of the Act in its operation on federal land. Yet, more important to federal wildlife law in general are two questions that the Court specifically declined to decide: is wildlife the exclusive property of the several states, and is the Act effective on state and private lands?

The concept of ownership has limited utility in relation to untamed or uncaught animals, fish and birds.¹⁸⁸ The idea that states

181. *New Mexico v. Morton*, 406 F. Supp. 1237 (D.N.M. 1975), *rev'd sub nom. Kleppe v. New Mexico*, 426 U.S. 529 (1976).

182. U.S. CONST. art. IV, § 3, cl. 2.

183. 406 F. Supp. at 1239.

184. *Id.*

185. In New Mexico and the other western states where the animals roam, the federal government owns a substantial portion of the land area, and federal, state and private parcels are frequently interspersed. Had the removal occurred on private land, an arguably different case would have been presented. See note 187 *infra* and accompanying text.

186. 426 U.S. 529 (1976).

187. *Id.* at 543. The analysis of the scope of the property clause was unexceptional: the validation of federal power over wildlife on federal lands follows a series of decisions going back in time beyond *Hunt v. United States*, 278 U.S. 96 (1928). See *Coggins & Hensley* 1135-39.

188. See *Coggins & Hensley* 1138-39; cf. Etling, *Who Owns the Wildlife*, 3 ENV'T'L L. 23 (1973).

"own" wildlife stems from *Geer v. Connecticut*,¹⁸⁹ but no Supreme Court decision has ever flatly accorded to the states a sole, unfettered interest in wildlife ownership.¹⁹⁰ The *Kleppe* Court took pains to point out that even a preponderant interest by the states in wildlife is by no means a foregone constitutional conclusion.¹⁹¹ The question of ownership tends only to obscure the more fundamental issue of the jurisdictional allocation of the power to regulate and control uses of wildlife between levels of government.

A facet of that question—can the federal government regulate possession, taking or sale of wildlife outside federal lands—is of great importance for other recent wildlife legislation. None of the major federal wildlife statutes is confined in its operation to federal land, so the precise holding of *Kleppe* is to that extent inapposite. Unless some clause in the Constitution other than the property clause supplies the power to Congress over general wildlife regulation, the validity of parts of those statutes (including parts of the Wild Horses and Burros Act not considered in *Kleppe*) are in doubt.¹⁹²

It is probable that each of those statutes will be upheld. Several treaties in force provide for protection of wildlife.¹⁹³ If the federal wildlife statutes constitute measures for the domestic implementation of those treaties, the statutes are valid under the doctrine of *Missouri v. Holland*.¹⁹⁴ In addition, the commerce clause¹⁹⁵ provides a basis for upholding wildlife legislation at least to the extent that the species protected have commercial value¹⁹⁶ or cross state lines.¹⁹⁷ Even before the vast expansion of the reach of the commerce clause,¹⁹⁸ a court indicated that the Migratory Bird Treaty Act was constitutional as a measure directed at control of interstate movement.¹⁹⁹ The Marine Mammal Protection Act almost certainly qualifies under commerce clause tests; the Endangered Species Act and the Wild Horses and Burros Act are also arguably within the scope of the commerce clause.²⁰⁰ Doubts

189. 161 U.S. 519 (1896).

190. Coggins & Hensley 1109-11. See also BEAN 18-34.

191. 426 U.S. at 539.

192. Several lawsuits currently are pending that challenge the constitutionality of federal wildlife statutes. *Motor Vessels Theresa Ann v. Richardson*, Dkt. No. 76-963 (S.D. Cal., filed Oct. 9, 1976), *injunction stayed*, 548 F.2d 1382 (9th Cir. 1977); *Allard v. Frizzell*, Civ. No. 75-w-1000 (D. Colo., filed Sept. 19, 1975).

193. The treaties are cited and discussed in Coggins & Hensley 1126-30.

194. 252 U.S. 416 (1920).

195. U.S. CONST. art. I, § 8, cl. 3.

196. *E.g.*, *Perez v. United States*, 402 U.S. 146 (1971).

197. *Thornton v. United States*, 271 U.S. 414, 425 (1926).

198. See, *e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942).

199. *Cerritos Gun Club v. Hall*, 96 F.2d 620 (9th Cir. 1938).

200. See Coggins & Hensley 1130-35, 1144-45, 1147-48.

about the constitutionality of the Bald and Golden Eagle Act have been expressed,²⁰¹ but a case can be made for the proposition that Congress can protect the national symbol as a matter of inherent undelegated power.²⁰²

C. *Federal Managerial Discretion: The Roundup Cases.*

In *American Horse Protection Association v. Frizzell*,²⁰³ the Bureau of Land Management determined that a public range in Nevada, predominantly leased for cattle grazing, was being overgrazed. To remedy the situation, the Bureau ordered the roundup and removal of a large number of wild horses. A society dedicated to protection of wild horses filed suit, alleging that the proposed roundup would violate both the Wild Horses and Burros Act and NEPA.²⁰⁴ The plaintiff claimed that an environmental impact statement on the proposal was required and that the priority accorded wild horses by the Wild Horses and Burros Act required removal of cattle before horses when necessary to relieve range conditions.²⁰⁵ The United States District Court for the District of Nevada strained to uphold the Bureau procedures. The roundup proposal had been adopted locally before the agency prepared an Environmental Analysis Record, and the final decision was made in the absence of regulations to implement NEPA procedures.²⁰⁶ The court found no fault with those methods and concluded that no impact statement was necessary because the proposal, encompassing a 600 square mile area, would not be a major federal action having a significant effect on the environment.²⁰⁷ That the proposal was geographically extensive and that its purpose was to affect significantly environmental quality in that area were not persuasive to the trial judge.²⁰⁸

The court's analysis of the Wild Horses and Burros Act is also suspect. Section 3(b) of the Act allows the capture of wild horses only

201. Soper, *The Constitutional Framework of Environmental Law*, in *FEDERAL ENVIRONMENTAL LAW* 34-35 (E. Dolgin & T. Guilbert eds. 1974).

202. Coggins & Hensley 1139-43.

203. 403 F. Supp. 1206 (D. Nev. 1975).

204. *Id.* at 1215-16.

205. The Bureau had allotted 75% of the forage in the Valley to livestock and half of the remainder to wild horses. Plaintiff also argued that the cooperative agreement with Nevada was invalid, but that contention was rejected. *Id.* at 1221.

206. *Id.* at 1219.

207. *Id.* at 1218-19. The pending preparation by the Bureau of Land Management of an environmental impact statement for its overall grazing policy, as ordered in *National Resources Defense Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), was relied on by the court to justify the roundup as merely an interim measure. 403 F. Supp. at 1219 n.9.

208. The "significant effect" need not be negative. *See, e.g., National Resources Defense Council v. Grant*, 341 F. Supp. 356, 367 (E.D.N.C. 1972).

when an area "is found to be overpopulated" by the animals.²⁰⁹ Bureau of Land Management regulations, however, allow the Secretary to conduct roundups whenever he deems it necessary to "relieve overgrazed areas, . . . or achieve other purposes" of resource management.²¹⁰ The scope of the regulations cannot be squared with the narrow statutory standard,²¹¹ but the court failed to consider this discrepancy. Although the court found that the Act was the controlling law for purposes of judicial review, its analysis tended to slip away from that statute to the more general "arbitrary and capricious" standard of the APA.²¹² Employing the latter standard, the court held that a decision to remove horses could not be deemed any more arbitrary than a decision to remove cattle.²¹³

Finally, the court held that wild horses have no "exalted status" under the Wild Horses and Burros Act because the Classification and Multiple Use Act²¹⁴ (CMUA) decreed that equal consideration be accorded all potential uses of Bureau of Land Management lands. This conclusion is almost certainly erroneous. First, the Act did accord wild horses and burros a special status.²¹⁵ Ducks, bears, coyotes, and most other species can be shot on federal lands and their carcasses sold, but all private killing, molestation, or sale of horses and burros is forbidden.²¹⁶ The federal government can capture or kill the latter animals only in defined, exceptional circumstances.²¹⁷ All official management activities are to be kept to the "minimum feasible level."²¹⁸ Congress clearly intended these restrictions to change the usual way of treating wild horses and burros on the public domain. While the Act recognizes multiple use management,²¹⁹ it injects new priorities into traditional

209. 16 U.S.C. § 1333(b) (1976). Overpopulation in the statutory context must refer to overpopulation of horses, not overpopulation in general, or the Act would destroy itself by thus reinstituting total administrative discretion where it operates elsewhere to narrow and control it.

210. 43 C.F.R. § 4740.2(a) (1977).

211. The essence of the court's holding was that the power to remove and destroy was limited only by the requirement that it take place under "humane conditions."

212. 5 U.S.C. § 706(2)(A) (1976).

213. 403 F. Supp. at 1221.

214. 43 U.S.C. §§ 1411-18 (1970) (expired 1970). The court relied on pre-1971 Bureau of Land Management regulations, 43 C.F.R. §§ 1725.1-1, -2 (1970), promulgated under authority of the CMUA, which expired in 1970. While the multiple-use philosophy has been accepted as the proper standard for BLM land use decisions even in the absence of statutory authority, see Harvey, *Public Land Management Under the Classification and Multiple Use Act*, 2 NAT. RES. L. 238 (1969), it can hardly be contended that that general policy can override a later, more specific legislative mandate.

215. The point is discussed in BEAN 170.

216. Compare 16 U.S.C. § 1333 (1976) with *id.* § 668dd(d)(1).

217. *Id.* § 1333(c).

218. *Id.* § 1333(a).

219. *Id.* § 1332(c).

administrative choice patterns. The fundamental question presented in the case was whether cattle or wild horses should be removed first when the public land is being degraded. There is no warrant in the Wild Horses Act or its legislative history for concluding that cattle or sheep have preference over wild horses in a conflict over forage. If anything, the Act reflects a contrary congressional intention.²²⁰

Further, the court's reliance on the CMUA was wholly misplaced. That law expired years before the case arose,²²¹ and its replacement, the Bureau of Land Management Organic Act of 1976,²²² had not yet become law. Even assuming the CMUA was in force at the time of the roundup, its general validation of horse roundups as one facet of the multiple use concept would have been overridden by the later and more specific Wild Horses and Burros Act provisions.

In 1976, the American Horse Protection Association and the Humane Society sued the Bureau of Land Management in Washington, D.C. to enjoin a proposed Bureau roundup near Challis, Idaho.²²³ Although the facts were quite similar to the earlier case, the court came to a contrary result. The court found that the roundup would affect the environment significantly, that the statutory mandates regarding wild horse management were not followed by the agency, that Bureau population estimates were unreliable and its studies insufficient, and that alternatives to wholesale roundups were not considered.²²⁴ The district court concluded the roundup proposal violated both NEPA and the Wild Horses and Burros Act.²²⁵ The *Challis Roundup* opinion, like the earlier decision, does not prohibit all roundups, nor does it formally bestow an "exalted" status on wild horses. Unlike the *Frizzell* case, however, the later decision does accord wild horses first place among equal range users.

The third significant roundup case examined the allocation of responsibilities between federal and state agencies under the Wild Horses and Burros Act.²²⁶ An unauthorized private roundup of horses near Howe, Idaho, in 1973 resulted in the death of many of the animals. After the American Horse Protection Association filed a lawsuit to pro-

220. The Taylor Grazing Act, 43 U.S.C. §§ 315-315g (1970), and regulations promulgated thereunder, 43 C.F.R. § 4740.2 (1977), recognize a responsibility to reduce commercial grazing pressure when the range is overgrazed.

221. See note 214 *supra*.

222. Federal Land Policy and Management Act of 1976, 43 U.S.C.A. §§ 1701-1782 (1976).

223. American Horse Protection Ass'n v. Kleppe, 6 ENV'T'L L. REP. 20802 (D.D.C. Sept. 9, 1976).

224. *Id.* at 20804.

225. *Id.*

226. American Horse Protection Ass'n v. Department of the Interior, 551 F.2d 432 (D.C. Cir. 1977).

tect the remaining horses, the Idaho State Brand Inspector determined that none of the animals captured were in fact wild. His ruling was made despite a contrary determination by the state attorney general and despite a lack of supporting evidence.²²⁷ The Act provides that animals actually owned may be recovered by the owner²²⁸ and that ownership is to be decided according to state law.²²⁹ The issue presented was whether state or federal officials are to determine whether a claimant actually owns the animals in dispute. Deeming the ownership question as one to be decided solely by the proper state official, the district court dismissed the complaint.²³⁰ The District of Columbia Court of Appeals reversed and remanded.²³¹ Examination of the record revealed that the state officer's decision was probably motivated by an intent to circumvent the Act;²³² if states could capture and kill wild horses under cover of questionable status determinations, federal protection would be seriously impaired. Judge Robinson deemed that consideration significant because a main purpose of the Act was to overcome state hostility or apathy toward the feral populations.²³³ The court was convinced that ultimate federal approval of ownership determinations was contemplated by Congress for a variety of reasons, especially the relative ineffectiveness of the statute if such state circumvention were allowed.²³⁴

These decisions do not represent the last word on controversies involving wild horses and burros. Many still regard the animals as noxious pests and resist all protective efforts. Even conservation groups differ over the priorities to be assigned to the welfare of the animals versus the broader welfare of the land.²³⁵ It is likely that large burro populations in fragile areas will spark renewed controversy. Several difficult jurisdictional problems remain to be determined.²³⁶ There is a real possibility of illegal self-help by ranchers fearing a loss of grazing privi-

227. *Id.* at 435-37.

228. 16 U.S.C. § 1335 (1976).

229. *Id.*

230. The lower court opinion is unreported, but a summary may be located at DEP'TS OF INTERIOR AND AGRICULTURE, PROCEEDINGS NATIONAL ADVISORY BOARD FOR WILD FREE-ROAMING HORSES AND BURROS App. 4, at 1-2 (Sept. 4-5, 1975).

231. *American Horse Protection Ass'n v. Department of the Interior*, 551 F.2d 432 (D.C. Cir. 1977).

232. *Id.* at 435-37.

233. *Id.* at 438.

234. The court took note of illegal but widespread methods used by stockmen to obtain "title" to feral horses. *Id.* at 440 n.66.

235. The Sierra Club, for instance, has advocated stricter management controls on wild burros in desert areas, *SIERRA CLUB BULL.*, June, 1975, at 27, but it is unlikely that organizations such as the Fund for Animals would agree.

236. All litigation to date has concerned problems arising on the public lands. Controversy

lege.²³⁷ Programs to give away excess animals to private individuals have not been completely successful.²³⁸ If populations burgeon to the extent predicted, a minor crisis may occur.

Nevertheless, these real and potential problems should not obscure the basic truth that Congress through the Wild Horses and Burros Act is achieving its professed goals. If it is demonstrated that legislative directives can result in healthier populations of selected species, there is reason to be optimistic about the results under other federal legislation. Merely increasing wild horse and burro populations could be self-defeating if they crowd out other species and harm the carrying capacity of the ecosystem. What is needed is an approach directed at a balanced, healthy habitat where a strong diversity of species is sustainable. Professional wildlife biologists might argue that ill-informed legislative tinkering retards the goal of ecosystem enhancement by overemphasizing selected species to the detriment of all others. For over a century, however, the professionals looked to the betterment of only two categories of species—game and livestock—resulting in the disappearance or decline of many others, including wild horses and burros. Wildlife management needs—and is now accepting—an approach directed toward sustaining a strong diversity of species in a balanced, healthy habitat. The relative success of population enhancement under the Act augurs well for the more sophisticated systems of regulation decreed by the Marine Mammal Protection Act and the Endangered Species Act.

IV. THE MARINE MAMMAL PROTECTION ACT

The 1971 horses and burros legislation may be described as a fairly simple enactment directed at a domestic wildlife problem of limited dimensions. The statute passed by Congress the following year, the Marine Mammal Protection Act of 1972,²³⁹ is more ambitious: it represents a technical and complex effort to restore and to protect a variety of wildlife populations living in differing biological circumstances under a variety of legal conditions. "Marine mammal" is a convenient label for a group of different orders and species with the common attributes of being sea-dwelling, warm-blooded, air-breathing creatures. They range in diversity from whales to sea otters, from manatees to polar bears, from dolphins to elephant seals.²⁴⁰ Population declines

will intensify as the scope is broadened to state and private lands. See note 192 *supra* and text accompanying notes 192-202 *supra*.

237. The local ranchers in the Howe Roundup case took matters into their own hands.

238. See, e.g., Fernandez, *supra* note 175.

239. 16 U.S.C. §§ 1361-1407 (1976).

240. See Gaines & Schmidt, *Wildlife Population Management Under the Marine Mammal Protection Act of 1976*, 6 ENV'T'L L. REP. 50096, 50097 (1976); BEAN 11.

from historic high levels are common to each order, but the causes of declines and the present condition vary among the species. Their legal situation is more complex than other federally protected species because their living in the sea involves potential international complications. Although the United States government has engaged in forms of marine mammal regulation for nearly a century,²⁴¹ the Marine Mammal Protection Act represents a radical departure from prior efforts in all of federal wildlife law.

A. *Outline of the Marine Mammal Protection Act.*

The Act is a product of a legislative compromise between the philosophies espoused by the two main opposing groups of wildlife advocates—the “protectionists” and the “managers.”²⁴² Although the Act authorizes the use of many traditional wildlife population management techniques, it is more heavily weighted toward species protection than toward “yield” of valuable resources. Unlike earlier federal and state enactments, which generally authorized regulation of the time and manner of the wildlife harvest, the Marine Mammal Protection Act initially imposes a total, indefinite ban on all exploitation and places the burden on the hunter or merchant to justify any departure from that general moratorium. In addition, the Act contains highly detailed and procedurally complex provisions creating intensive, protection-oriented ecosystem management programs to benefit all marine mammal species. Because of the revolutionary emphasis of the Act and its use as a model for the later Endangered Species Act,²⁴³ analysis of its judicial interpretation, its administrative enforcement, and the legislative reaction to it may aid in predicting general future trends in federal wildlife law.

Federal jurisdiction is broadly extended by the Marine Mammal Protection Act. The Act imposes a total moratorium on the destruction, capture, or harassment of marine mammals,²⁴⁴ and prohibits their possession, sale, or transportation in interstate or international com-

241. Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENV'T L. 1, 3-10 (1975). The general structure of the Act and some interpretive problems of it have been discussed in BEAN 324-69 and Gaines & Schmidt, *supra* note 240. See also Nafziger & Armstrong, *The Porpoise-Tuna Controversy: Management of Marine Resources After Committee for Humane Legislation, Inc. v. Richardson*, 7 ENV'T L. 223 (1977).

242. Gaines & Schmidt, *supra* note 240, at 50103-06; Coggins, *supra* note 241, at 15-17.

243. 16 U.S.C. §§ 1531-1543 (1976). See section V *infra*.

244. 16 U.S.C. § 1371(a) (1976). The moratorium is unlimited and absolute on its face, but specific prohibitions are limited to acts done in the United States, the territorial sea or the high seas. It has been held that taking in the territory of a foreign country is not prohibited by the Act although Congress has the power to do so. See *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1976), discussed at text accompanying notes 321-43 *infra*.

merce.²⁴⁵ The "taking"²⁴⁶ of most marine mammals, except porpoises and North Pacific fur seals,²⁴⁷ is permitted under the Act only in a few limited instances: for scientific research or public display,²⁴⁸ for subsistence hunting by Alaskan Natives,²⁴⁹ or pursuant to a permit granted by the Secretary of the Interior.²⁵⁰ The Act established strict guidelines limiting the discretion of the Secretary in waiving a part of the moratorium and issuing permits.²⁵¹ Permits may be issued only pursuant to regulations promulgated by the Secretary after detailed scientific studies concerning the effect of the proposed permit upon the mammal population are completed.²⁵²

To ensure uniform approaches to enforcement, the federal law initially preempts state authority in the area.²⁵³ States may regain control over marine mammal management within their boundaries only after the Secretary has certified that the state program complies with the major substantive provisions of the federal Act.²⁵⁴

The Act also attempts to influence international regulation. No marine mammal or marine mammal product may be imported into the United States unless the Secretary is assured that the foreign law applicable to the original taking of the mammal is consistent with the Act.²⁵⁵ United States negotiators are directed to reach new agreements in harmony with the Act.²⁵⁶

The primary goal of the Act in marine mammal population management is "optimum sustainable population."²⁵⁷ This crucial term is defined as

the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of

245. 16 U.S.C. § 1372(a)(3) (1976).

246. "Take" includes hunting, pursuing, capturing, killing, harassing, or attempts thereat. 16 U.S.C. § 1362(13) (1976). Congress meant the term to be all-inclusive, encompassing negligent as well as knowing behavior. See Coggins, *supra* note 241, at 19-20.

247. Porpoise or dolphin taking incidental to commercial fishing operations is discussed at text accompanying notes 267-308 *infra*. The annual harvest of North Pacific fur seals by the United States is exempted because it is undertaken pursuant to an existing treaty, 16 U.S.C. § 1372(a)(2) (1976); and if the United States ever resumes whaling, it is arguable that it would be exempt for the same reasons. See BEAN 334-35 n.38.

248. 16 U.S.C. § 1371(a)(1) (1976).

249. *Id.* § 1371(b).

250. *Id.* § 1371(a)(3)(A).

251. *Id.* §§ 1373, 1374.

252. *Id.*

253. *Id.* § 1379(a)(1).

254. *Id.* § 1379(a)(2).

255. *Id.* § 1371(a)(3)(A).

256. *Id.* § 1378.

257. *Id.* § 1361(2).

which they form a constituent element.²⁵⁸

Although there is still some confusion as to the exact meaning of optimum sustainable population²⁵⁹ in the face of uncertain population dynamics knowledge and circularity of legislative definition, the better-reasoned view defines it as the largest species population which may be sustained within the normal fluctuations of the carrying capacity of the ocean ecosystem.²⁶⁰ Prior to the Act, maximum sustainable yield was often advocated as the proper population management guideline. This guideline heavily favors commercial interests by treating species as crops to be harvested; as long as an adequate breeding stock was left over, other considerations of ecosystem maintenance were frequently disregarded.²⁶¹ Optimum sustainable population, on the other hand, treats marine mammal population levels as important components of a complex system.²⁶² Population levels are to be maximized for overall betterment of the species and their habitat; commercial needs are, at most, a secondary consideration.

The altruistic goals embodied in the Act can be attained only through tough administrative enforcement by the responsible government agencies.²⁶³ Several recent court decisions have revealed a tendency in the Commerce Department to relax statutory standards for reasons of administrative convenience or commercial desires.²⁶⁴ But courts have demonstrated a willingness to pick up the slack in loose administrative practices and to enforce strictly the substantive provisions of the Act.²⁶⁵ These judicial decisions have prompted a flurry of congressional activity to reexamine some of the more controversial provisions of the legislation in response to a great outcry from affected industries.²⁶⁶ The Act has survived intact to date, but given the continuing pressures to dilute its more stringent provisions, the future of the Act's effectiveness as a wildlife regulatory mechanism is in question.

258. *Id.* § 1362(9).

259. BEAN 338; Gaines & Schmidt, *supra* note 240, at 50099.

260. *Id.*

261. See, e.g., *Hearings on Marine Mammals Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. 401 (1971).

262. 16 U.S.C. § 1361(a) (1976).

263. Likely points of friction where administrative discretion appeared inadequately bounded were identified in Coggins, *supra* note 241, at 39-40.

264. See text accompanying notes 275-84, 347-58 *infra*. Administrative duties are split between the Interior and Commerce Departments. The latter has jurisdiction over cetaceans and seals. 16 U.S.C. § 1362(12)(A) (1976).

265. See, e.g., *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141 (D.C. Cir. 1976), *discussed at* text accompanying notes 275-88 *infra*.

266. See text accompanying notes 305-07 *infra*. See also Comment, *Federal Courts and Congress Review Tuna-Porpoise Controversy*, 6 ENV'T L. REP. 10147 (1976).

B. *The Tuna/Porpoise Litigation.*

Since 1960, U.S. tuna fishermen have used the unexplained biological nexus between porpoises and the valuable yellowfin tuna to pinpoint the location of the tuna schools. The porpoises are visible from a surface vessel, so the tuna swimming underneath may be located with relative ease and captured with the "purse-seine" fishing net. The enormous net is deployed around the schools of porpoise and tuna, and then is drawn together at the bottom, entrapping the deeper swimming tuna. The oxygen-breathing porpoises are also often trapped in the net, however, and drown or suffer severe physical injury or shock in escaping from the net.²⁶⁷ It was estimated that before 1972, more than a quarter million dolphins and porpoises were killed annually by American boats,²⁶⁸ even with some technical advances in fishing methods.

The legislative history and the terms of the Act make it clear that one of its major purposes was to lower and then essentially to terminate the porpoise slaughter. An explicit goal is that the porpoise mortality caused by purse-seine fishing "on porpoise" be reduced to a point "approaching a zero mortality and serious injury rate."²⁶⁹ Some environmentalists argued for a blanket moratorium on the taking of all marine mammals, but commercial fishing interests were able to persuade Congress that further technical advancements in fishing gear would eradicate the problem in a short time.²⁷⁰ To accommodate all parties, Congress granted the industry a 24-month waiver of the general moratorium for the fishing industry to allow for further research and development in this area.²⁷¹ After October, 1974, however, the moratorium on killing went into effect and the industry was required to go through the permit process before any porpoises could be killed.²⁷² The procedures and substantive standards for the issuance of permits became the focus of the ensuing litigation.

The new technologies promised were not forthcoming in the in-

267. See, e.g., 40 C.F.R. § 216.24(d) (1975). See also Nafziger & Armstrong, *supra* note 241.

268. Testimony at congressional hearings estimated porpoise mortality by U.S. flag tuna boats yearly as follows:

1971—	312,000
1972—	305,000
1973—	175,000
1974—	98,000

Hearings on Marine Mammal Protection Before the Subcomm. on Fisheries & Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 23 (1975).

269. 16 U.S.C. § 1371(a)(2) (1976).

270. 1975 *House Hearings*, *supra* note 268, part 1, at 348.

271. 16 U.S.C. § 1371(a)(2) (1976).

272. *Id.* The 1974 porpoise regulations were issued only under the compulsion of litigation. *Project Jonah v. Dent*, Civ. No. 1255-73 (D.D.C., filed Sept. 12, 1973), *dismissed as moot*, (Feb. 4, 1974).

terim period, and porpoise mortality continued at a high level.²⁷³ After the interim period expired, the Secretary of Commerce issued a general permit to the industry permitting continuation of existing practices without any major limitations.²⁷⁴ In *Committee for Humane Legislation, Inc. v. Richardson*,²⁷⁵ fourteen environmental groups sought the invalidation of the general permit because of alleged noncompliance with several provisions of the Act by the Commerce Department in issuing the permit. The district court accepted nearly all contentions of plaintiffs, invalidated the permit, and issued an injunction (stayed on appeal) prohibiting further purse-seine fishing during the 1976 season.²⁷⁶ The detailed analysis of the district court was affirmed on appeal.²⁷⁷ Thereafter, some restrictions on tuna fishing eventually went into effect and other litigation was commenced. The controversy, still very much alive, is now shifting back and forth among Congress, courts and agencies.

Judge Richey—and later, the court of appeals—first rejected a contention of the fishing industry that the Act allowed the federal administrators to balance environmental and commercial interests when considering permit applications.²⁷⁸ The court held such a balancing standard to be inconsistent with the basic purpose of the Act to “provide marine mammals, especially porpoise, with necessary and extensive protection against man’s activities.”²⁷⁹ Second, the court strictly enforced the provisions of the Act²⁸⁰ requiring the Secretary to make detailed findings concerning the status of the marine mammal population prior to the issuance of any permits.²⁸¹ Large amounts of raw data must be collected and evaluated before the findings required by the Act could be made, a process thought to require months if not years. Accordingly, the fishing industry argued against a strict, literal interpretation of the Act and for adoption of a “best feasible technology” standard that would have allowed the immediate issuance of permits. The court rejected the flexible interpretation.²⁸² Third, the court held that permits must contain specific information concerning the species,

273. See note 268 *supra*.

274. 39 Fed. Reg. 38,403 (1974).

275. 414 F. Supp. 297 (D.D.C.), *aff'd*, 540 F.2d 1141 (D.C. Cir. 1976).

276. 414 F. Supp. at 314-15.

277. 540 F.2d 1141 (D.C. Cir. 1976).

278. 414 F. Supp. at 306.

279. *Id.*

280. 16 U.S.C. §§ 1373-74 (1976).

281. 414 F. Supp. at 311.

282. *Id.* at 309-11. The court relied on the statement by Representative Dingell, Chairman of the House Subcommittee that reported out the bill, that, under § 1373, “if [the Secretary] cannot make that finding, he cannot issue a permit. It is that simple.” 118 CONG. REC. 7686 (1972).

number, and kind of animals to be taken.²⁸³ The permit under scrutiny in *Humane Legislation* failed to enumerate the species of porpoise allowed to be taken, and thus was also invalid on this ground.²⁸⁴

After the substantive violations of the Act were established and the regulations invalidated, the court was faced with the problem of fashioning an appropriate remedy. Two types of injunctive relief were available: a total ban on all purse-seine fishing (since no other permits authorizing the taking of porpoise had been issued), or a judicially imposed quota. The latter remedy would have greatly reduced the harsh effect of the decision upon the fishing industry.²⁸⁵ Even though at least one environmental plaintiff agreed to the judicial quota as an interim resolution, Judge Richey felt constrained to issue a "total" injunction (temporarily stayed),²⁸⁶ which would have brought the tuna fishing industry to a halt when the stay expired.

On appeal, the District of Columbia Circuit upheld the strict construction of the Act but modified the terms of the injunction by staying the effect of the order until January 1, 1977, to allow the federal agencies to undertake the research necessary to promulgate new regulations.²⁸⁷ Congressional oversight hearings were initiated soon after the district court's decision was announced.²⁸⁸

While the *Humane Legislation* litigation was pending in Washington, San Diego tuna fishermen filed separate lawsuits in the local federal district court seeking to enjoin enforcement of the 1976 quota on taking,²⁸⁹ and challenging the constitutionality of the Act.²⁹⁰ The dis-

283. See 16 U.S.C. § 1374(b)(2) (1976).

284. 414 F. Supp. at 313.

285. To buttress their position, defendants relied heavily upon one quote from the legislative history: "It is not the intention of the Committee to shut down or significantly to curtail the activities of the tuna fleet so long as the Secretary is satisfied that the tuna fishermen are using economically and technologically practicable measures to assure minimal hazards to marine mammal populations." S. REP. NO. 92-863, 92d Cong., 2d Sess. 16 (1972). The court found this statement to be "isolated," with the weight of the legislative history to the contrary. 414 F. Supp. at 308.

286. 414 F. Supp. at 314.

287. *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141, 1151 (D.C. Cir. 1976).

288. *Hearings on H.R. Res. 923 [Marine Mammal Protection Act amendments] Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 2d Sess. 174-76 (1976).

289. *Motor Vessels Theresa Ann v. Richardson*, Civ. No. 76-963-E (S.D. Cal., filed Oct. 9, 1976); *Motor Vessels Theresa Ann v. Richardson*, 9 ERC 1726, 1728 n.3 (S.D. Cal. 1977); *American Tunaboat Ass'n v. Richardson*, Civ. No. 76-971-E, (S.D. Cal., filed Oct. 9, 1976). The two actions were consolidated for consideration of preliminary relief. The *Theresa Ann* litigation was filed because the permit which formed the basis of the lawsuit in the District of Columbia was about to expire by its own terms—before the fishing season ended.

290. See note 289 *supra*. Plaintiffs' complaint included contentions that the MMPA was unconstitutional because Congress did not find that porpoises affect commerce, that the right to fish

strict court initially granted a temporary restraining order to allow fishing to continue until November 5, but it later denied a preliminary injunction, finding that the requisites for interim relief had not been met.²⁹¹ Appellate courts refused further stays,²⁹² and fishing on porpoise halted. By early 1977, it had become apparent that the permit issuing process had bogged down and that no relief for the industry would be readily forthcoming. The scientific findings prerequisite to the grant of a permit had not been completed, in spite of a feverish effort by the Commerce Department.²⁹³ In its second decision, the San Diego district court again declined to consider the constitutional or statutory merits of plaintiff's case in depth, but enjoined enforcement of the Act on the equitable ground that the permit process could not be completed in time to prevent irreparable damage to the fishermen.²⁹⁴ The court ordered a quota plan, similar to the proposal rejected in *Humane Legislation*, in which an interim upper limit on the number of porpoise deaths, based on preliminary government estimates, was established.²⁹⁵ Since the two lawsuits had reached diametrically opposite results, the District of Columbia Circuit Court of Appeals issued a statement purporting to overrule the California district court, and the latter retorted that it need not accede to a foreign opinion.²⁹⁶ The interesting question whether district courts are bound to follow the mandate of a foreign circuit court was not pursued, unfortunately, because the Ninth Circuit promptly reversed the district court.²⁹⁷

Although the Ninth Circuit duly noted its concern for the plight of the fishing industry, the court based its decision on the Act's language "which we can neither amend nor ignore," and expressed doubts over

for tuna is a fundamental right reserved to the people by the ninth and tenth amendments, that the Act works an inverse condemnation of the purse-seine boats, and that it is an unlawful delegation of legislative power. See *Coggins & Hensley* 1130-35, 1147-48.

291. *Motor Vessels Theresa Ann v. Richardson*, 9 ERC 1510 (S.D. Cal. 1976).

292. *American Tunaboat Ass'n v. Richardson*, No. 76-3369 (9th Cir. Nov. 11, 1976), *emergency relief denied*, Nos. A-394, A-398 (Nov. 12 & Nov. 15, 1976) (Rehnquist, Circuit Justice).

293. Government sources estimated that three to seven years would be required to compile the necessary data. Brief for Federal Appellants at 21, *Committee for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141, 1157 (D.C. Cir. 1976). The events did not bear out the pessimistic prediction. See text accompanying note 300 *infra*.

294. *Motor Vessels Theresa Ann v. Richardson*, 9 ERC 1726 (S.D. Cal. 1977), *injunction stayed*, 9 ERC 2072 (9th Cir. 1977).

295. 9 ERC at 1727.

296. The incident is recounted in an Associated Press release of February 25, 1977. Judge Enright reportedly stated that to rescind his order would only compound an already confusing case.

297. *Motor Vessels Theresa Ann v. Kreps*, 9 ERC 1072 (9th Cir. 1977). The court admonished the lower court to "exercise its equitable powers in a manner that will not interfere with the complete and final disposition of the proceedings still pending in the District of Columbia." *Id.*

the merits of plaintiff's constitutional claims.²⁹⁸ In the meantime, the Commerce Department had come up with new regulations and a new quota and proposed to extend the 1976 permit to April 30, 1977, or until a new 1977 permit could be issued. On March 8, 1977, the District of Columbia Circuit Court of Appeals, on the government's motion for emergency relief, stayed its prior order and allowed purse-seine fishing to resume pursuant to the Commerce Department interim measure.²⁹⁹

The new regulations³⁰⁰ differed greatly from former versions. A key innovation was the recognition of the difference in dolphin species. Several species were declared to be depleted,³⁰¹ and, under the Act, all takings of depleted species are forbidden.³⁰² As the various dolphin and porpoise species are frequently found in intermixed schools, fishermen complained that a violation giving rise to criminal liability was virtually unavoidable—all species would be trapped in the net indiscriminately. For that reason, and in disagreement with the lower overall quota imposed for 1977, the tuna boat operators refused to leave harbor even though legally free to resume operations.³⁰³ For a while the industry talked ominously of the wholesale transfer of the fleet to a foreign flag,³⁰⁴ but the fishermen's pique apparently passed, and the latter half of 1977 went by with normal operations resumed.

A variety of bills intended to make the law more palatable to the fishing industry was introduced in the Congress. The proposed amendments to the Act would reduce the amount of research necessary before issuance of permits,³⁰⁵ establish by statute the number of animals that can be taken yearly,³⁰⁶ and reduce the prohibitions of the Act.³⁰⁷ These proposals to water down the original Act have made little headway to date. Moreover, although suit filed by the tuna fishermen is still pending, its constitutional challenges to the Act appear negligible.³⁰⁸

If *Humane Legislation* accurately precurses interpretational trends, its importance in federal wildlife law cannot be overstated. In

298. *Id.*

299. *Fund for Animals v. Kreps*, No. 76-2168, 9 ERC 1880 (D.C. Cir. 1977).

300. 42 Fed. Reg. 12,010 (1977).

301. *Id.* at 12012.

302. 16 U.S.C. § 1371(a)(3)(B) (1976).

303. Prother, *The All-Porpoise War*, NAT'L REV., Apr. 15, 1977, at 439.

304. *Id.*, quoting Rep. Leggett: "We're not going to let them leave the U.S. If they try, we'll just pass a law to stop them." Catches by foreign boats cannot be sold in the United States, the biggest market, if the taking methods do not approximate those mandated for U.S. flag fishermen. 16 U.S.C. §§ 1372(a)(2)(B), (a)(4), (c)(3) (1976).

305. 1976 MMPA Hearings, *supra* note 288, at 174.

306. S. 1550, 95th Cong., 1st Sess., 123 CONG. REC. S. 7734 (daily ed. May 17, 1977) (Magnuson, Pearson).

307. S. 373, 95th Cong., 1st Sess., 123 CONG. REC. S. 1082 (daily ed. Jan. 19, 1977).

308. Coggins & Hensley 1130-35, 1147-48.

litigation involving wild horses,³⁰⁹ migratory bird habitat,³¹⁰ wildlife habitat mitigation plans,³¹¹ endangered species of bats,³¹² and others, courts have shied away from literal application of wildlife statutes where conflicts with economic goals existed. Like the Sixth Circuit in a similar conundrum,³¹³ the District of Columbia Circuit chose not to make ameliorating policy but rather to require agency compliance with the legislative command. The importance of *Humane Legislation* lies in its emphasis on requiring the agency to carry out the legislative intention even when it is painful to do so, in its refusal to infuse the statute with notions of flexibility and administrative convenience when the task is difficult, and in its strict adherence to the statutory requirements. Whether the legislative command represents the highest wisdom can be debated endlessly, but an agency of government must refrain from superimposing its own policies over legislative mandates. If the courts enforce the provisions of present federal wildlife statutes as written, the chances for survival and population recovery of wildlife species in addition to marine mammals will be greatly enhanced.

The hue and cry over the shutdown of purse-seine tuna fishing demonstrates that the network of federal wildlife legislation forms an ecologically and economically important area of the law, but one important point of the controversy has been obscured. Purse-seining is a relatively new technology: tuna have been caught by other, simpler methods for centuries, and many other nations still fish with the older methods. As with many other technological advances, unforeseen deleterious side effects are a consequence. Purse-seining is not only responsible for the destruction of millions of marine mammals, but it may also be drastically depleting the tuna resources. Few have bothered to ask whether purse-seining should be outlawed altogether. The loss of efficiency might create more jobs and greatly reduce ecological damage. Although higher prices for tuna are probable, and United States fishermen would be at a competitive disadvantage for foreign markets against the advanced but destructive technologies used by Japan, the idea merits further study.

309. *American Horse Protection Ass'n v. Frizzell*, 403 F. Supp. 1206 (D. Nev. 1975). See text accompanying notes 203-22 *supra*.

310. *Sun Enterprises, Ltd. v. Train*, 394 F. Supp. 211 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 280 (2d Cir. 1976).

311. *Rank v. Krug*, 90 F. Supp. 773 (S.D. Cal. 1950).

312. *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976).

313. *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 98 S.Ct. 2279 (1978).

C. *International Impact of the Act.*

Since marine mammals are frequently found in international waters, marine mammal regulation necessarily entails potential international problems. Before enactment of the Act, the United States was a party to international agreements governing the population management of North Pacific fur seals³¹⁴ and whales;³¹⁵ a treaty with Russia and other nations for the conservation of polar bears was signed in 1973.³¹⁶ There will be considerable interpretive difficulty when the treaties and the Act appear to conflict. The Act's general moratorium does not extend to fur seals: the annual fur seal harvest in the Pribilofs went untouched by the Act³¹⁷ in the hope that a new treaty for a less yield-oriented approach could be negotiated.³¹⁸ The provision of the Act disavowing alteration of existing treaty obligations³¹⁹ has an uncertain effect on whaling. The United States prohibited whaling before

314. Convention for the Preservation and Protection of Fur Seals, July 7, 1911, 27 Stat. 1542 (1917), T.S. No. 564.

315. International Whaling Convention, Dec. 2, 1946, 62 Stat. 1716 (1949), T.I.A.S. No. 1849. A recent controversy revolves around the taking by Alaska Natives of the bowhead whale, an endangered marine mammal. Commercial whaling long ago nearly wiped out the bowhead as a species; whaling is now internationally forbidden, but Eskimos annually continue to kill up to 100 of the estimated remaining bowhead population of 600 to 2,000. See generally Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment*, (pts. I & 2), 6 *ECOLOGY* L.Q. 323, 571 (1977). The 1977 decision of the International Whaling Commission to impose a total moratorium on bowhead killing (United States abstaining), *Kansas City Times*, Oct. 24, 1977, at 14A, col. 1, put the United States in a delicate position. If the United States refused to accede to the new ban and permitted some bowhead taking by its nationals, Japan and Russia, the major remaining whaling nations, would have an excuse to disavow other limitations, and the moral position of the U.S. in the Whaling Commission would be considerably lessened. *Id.* (quoting P. Mink, Assistant Secretary of State). On the other hand, it would seem callous to deny an economic resource to the poverty-stricken Eskimos, and domestic law recognizes special interests of Alaska Natives in species of marine mammals. Marine Mammal Protection Act of 1972, 16 U.S.C. § 1371(c) (1976); Endangered Species Act of 1973, 16 U.S.C. § 1539(e) (1976). In October 1977 the Commerce Department bit the bullet: it prohibited all bowhead taking by anyone in the United States. *Kansas City Times*, Oct. 21, 1977, at 8A, col. 4. Litigation was immediate and self-help looms on the horizon. In perhaps an unprecedented decision, Judge Sirica of the District of Columbia preliminarily enjoined the State Department to reject the new bowhead moratorium on the theory that a refusal to accede could later be withdrawn. *Kansas City Times*, Oct. 25, 1977, at 15, col. 1. The District of Columbia Court of Appeals reversed, *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1978), allowing the government to accept the new restriction, and the Supreme Court refused to review. *Kansas City Times*, Oct. 25, 1977, at 15, col. 1. Spokesmen for the Eskimos vowed to continue the killing in spite of the decision, *Kansas City Star*, Sept. 25, 1977, at 4B, col. 1, and a long, bitter battle appeared likely, but the International Whaling Commission later allowed some bowhead taking by Alaskans while increasing overall quotas. *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1978).

316. Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 13 INT'L LEGAL MATERIALS 13-18 (1974).

317. S. REP. NO. 863, 92d Cong., 2d Sess. 3, 5 (1972).

318. 16 U.S.C. § 1378(b) (1976).

319. *Id.* § 1372(a)(2).

enactment of the Marine Mammal Protection Act, and it is widely accepted that United States participation on the International Whaling Commission does not affect the domestic ban on importation of whale products.³²⁰ An unresolved question, however, is whether the United States can prohibit all whaling in the new 200 mile offshore conservation zone.

Reconciliation of treaty articles with the Act is just one of numerous possible inter-jurisdictional disputes. Five-or six-cornered controversies are possible among the federal government, states, foreign countries, and private interests, commercial and otherwise. Several such disputes have already resulted in litigation, and, as the discussion below indicates, the few judicial opinions are mixed in relation to the future of marine mammal regulation at international intersections.

1. *Application of Criminal Sanctions to Acts in Foreign Territorial Waters.* The first reported criminal prosecution for a violation of the Marine Mammal Protection Act clarified the international reach of the Act's criminal sanctions. In *United States v. Mitchell*,³²¹ the Fifth Circuit invalidated regulations promulgated by the Secretary³²² and held that the Act was inapplicable to activities of a United States citizen occurring within the territorial waters of a foreign nation. Mitchell, operating under a valid Bahamian work permit, was employed by a Bahamian businessman to capture porpoises in Bahamian territorial waters.³²³ Upon his return to the United States, Mitchell was charged with 32 violations of the Act and its supplementing regulations, including one count of conspiracy. A jury found Mitchell guilty of 23 counts, and he was sentenced to 90 days imprisonment on the conspiracy charge.³²⁴ The appellate opinion reversing his conviction focused on an apparent conflict between two sections of the Act. Section 1371 establishes the general moratorium on the taking and importation of marine mammals.³²⁵ The provision does not limit the geographic scope of the

320. Interview with Dr. Robert White, National Oceanic and Atmospheric Agency Administrator, Washington, D.C., Mar. 5, 1976. See also Comment, *The 200-Mile Exclusive Economic Zone: Death Knell for the American Tuna Industry*, 13 SAN DIEGO L. REV. 707 (1976). Another potential conflict involves the polar bear treaty. If Alaska's application for management jurisdiction over polar bears is granted, see 41 Fed. Reg. 15,174 (1976), some sport hunting may resume, and a serious potential conflict with the polar bear treaty would thus be created. The difficulty in interpreting and applying the polar bear treaty language is briefly summarized in BEAN 310-11. See also Larson, *Progress in Polar Bear Research and Conservation in the Arctic Nations*, 4 ENV'T'L AFF. 295 (1975).

321. 553 F.2d 996 (5th Cir. 1977).

322. 50 C.F.R. § 216 (1974).

323. 553 F.2d at 997.

324. *Id.* at 999.

325. 16 U.S.C. § 1371 (1976).

moratorium.³²⁶ In section 1372, however, the only acts specifically prohibited are those occurring on United States territory, in territorial waters, or by United States citizens or American-flag vessels operating on the high seas.³²⁷ A literal reading of the statute would indicate that Congress intended the two sections to have differing geographical application—the moratorium is world-wide in scope, while the specific prohibitions are operative against citizens only to the limits of the high seas, thus excluding the territorial seas of other nations. The regulations that Mitchell violated were a hybrid of provisions taken from separate sections in the Act. They adopted the general moratorium concept of Section 1371, added the citizenship provision of Section 1372, but dropped the geographical limitation of the high seas. In short, the regulations prohibited an American citizen from violating the moratorium anywhere in the world.³²⁸

The district court rejected Mitchell's argument that the regulations were invalid because the criminal prohibitions of the Act did not apply to conduct occurring wholly within another sovereignty.³²⁹ The lower court reasoned that Congress clearly had the power to extend United States criminal jurisdiction to encompass the activities of American citizens in foreign nations under the doctrine of objective territorial jurisdiction.³³⁰ The crucial question was whether Congress had intended to exercise this power in the Act. Relying primarily on a single sentence in the legislative history of the Act, the district court found that Congress did so intend.³³¹

The Fifth Circuit concluded that foreign sovereignty should not be abridged by applying the Act in foreign territorial waters in the absence of a clear congressional mandate to do so.³³² In support of its holding, the court noted that although the language of the moratorium provision indicates that it applies internationally, the practical ability of the Secretary to enforce it in areas beyond United States territorial waters fa-

326. "There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this Act" *Id.*

327. 16 U.S.C. § 1372(a)(1) (1976). The section is qualified by "[e]xcept as provided in [section 1371]"

328. 50 C.F.R. § 216.12 (1974).

329. *United States v. Mitchell*, 6 ENV'T'L L. REP. 20683 (S.D. Fla. 1976), *rev'd*, 553 F.2d 996 (5th Cir. 1977).

330. The court relied upon *Strassheim v. Daily*, 221 U.S. 280 (1911), and *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975).

331. 6 ENV'T'L L. REP. at 20683.

332. "It is no small matter when, in effect, this nation countermands a permit of another nation allowing the permittee to work in the territorial waters of the foreign country." 553 F.2d at 1004.

vors a more limited interpretation.³³³ The court presumed that Congress intended to respect the balance struck in resource exploitation by other nations.³³⁴ It also noted that Congress directed the State Department to seek the negotiation of new treaties as a means of international enforcement.³³⁵

The validity of the Fifth Circuit's interpretation in *Mitchell* is not free from doubt because the court's initial premises are questionable and because the practical effect of the decision is to open a sizable loophole in the enforcement of the moratorium. The court cited canons of construction³³⁶ and a series of presumptions³³⁷ that appear less persuasive than the statutory purpose and language.³³⁸ Arguably, it accorded too little weight to the literal wording calling for a "complete cessation."³³⁹ The balancing by the court of our national interest in conservation against the Bahamian national interest in tourism is not the same weighing undertaken by Congress in 1972. The court's discussion of priorities in international relations largely ignored the welfare of the animals Congress sought to protect. While the result reached by the Fifth Circuit is supported by the geographic limitation in section 1372³⁴⁰ and by the lack of congressional discussion of so important a consideration, a good argument can be made that the purpose of the Act requires extraterritorial application.

The holding in *Mitchell* would have been of little consequence a few years ago when most nations claimed only a three to twelve mile territorial sea. The Fifth Circuit concluded that its decision "would not greatly curtail the scope and usefulness of the statute."³⁴¹ But in view of the surge toward national 200-mile offshore jurisdictions,³⁴² *Mitchell* will exempt from the Act's prohibitions the activities of United States citizens on a very large portion of the ocean's surface. The *Mitchell* decision does not grant carte blanche to United States citizens to evade

333. *Id.*

334. *Id.* at 1002.

335. *Id.* at 1003 (citing 16 U.S.C. § 1378(a)(1) (1976)). According to the court, "[c]onservation [under the Act] in other states is left to diplomatic negotiations." 533 F.2d at 1003. In fact, the Act attempts to influence practices in other states in a variety of ways. *Cf.* 16 U.S.C. § 1372(b)(4) (1976) (moratorium on importation of marine mammal products taken in an inhumane manner).

336. 553 F.2d at 1002.

337. *Id.*

338. The overriding purpose of the Act is conservation of marine mammals, 16 U.S.C. § 1361(6) (1976), and it mandates a "complete cessation," without limitation, on all taking and importation, *id.* §§ 1362(7), 1371(a).

339. *Id.* § 1362(7).

340. *Id.* § 1372(a).

341. 553 F.2d at 1003.

342. *See generally* S. REP. NO. 416, 94th Cong., 1st Sess. app. II (1976).

the Act. But the decision does offer them a means of doing what Congress decided should not be done. Marine mammals caught in foreign waters still cannot be imported into the United States without a permit,³⁴³ but *Mitchell* nevertheless leaves a large gap in the international scope of the Act.

2. *Importation of Goods Taken in Violation of the Act.* Several provisions of the Act empower the Secretary to embargo the importation of animals and animal products taken in violation of restrictions imposed by the statute on United States citizens.³⁴⁴ Although the Secretary has yet to invoke this power, it obviously is a powerful tool in light of the large volume of American trade.³⁴⁵ All importation must be pursuant to a permit, and permits can be granted only if the importer demonstrates that the foreign taking was in compliance with the Act's guidelines.³⁴⁶ In *Animal Welfare Institute v. Kreps*,³⁴⁷ environmental groups successfully challenged the validity of a permit issued by the Secretary for the importation of sealskins from South Africa. Even after the moratorium on importation of a marine mammal species is lifted, the Act bans all importation of marine mammals less than eight months old,³⁴⁸ animals still nursing their young,³⁴⁹ those taken in an inhumane manner,³⁵⁰ or those taken by a country whose program for taking marine mammals is inconsistent with the Act.³⁵¹ Plaintiffs alleged that the permit for the importation of South African sealskins was invalid because the importers violated each of these requirements. The court agreed, setting aside both the waiver permitting the importation of the sealskins and the regulations³⁵² issued by the Commerce Department, which allowed over half of the sealskins imported to be taken from underage animals.³⁵³ Similarly, the regulations drew an ar-

343. 16 U.S.C. §§ 1372(c), 1374(a) (1976).

344. *Id.* §§ 1371(a)(3)(A), 1372(b). See also Fishermen's Protective Act of 1967, 22 U.S.C. § 1978 (1976) (Pelly Amendment).

345. See Comment, *Not Saving the Whales: President Ford Refuses to Ban Fish Imports from Nations Which Have Violated International Whaling Quotas*, 5 ENV'T'L L. REP. 10044 (1975). The question whether the statute compels an embargo on all products from a non-complying nation is discussed in Coggins, *supra* note 241, at 55-57.

346. 16 U.S.C. §§ 1371(a)(3)(A) (1976).

347. 561 F.2d 1002 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978). An earlier lawsuit against the same practice on the ground of United Nations Charter violation failed as "non-justiciable." *Diggs v. Dent*, Civ. No. 74-1292 (D.D.C. 1975).

348. 16 U.S.C. § 1372(b)(2) (1976).

349. *Id.*

350. *Id.* § 1372(b)(4).

351. *Id.* § 1372(c)(1)(A).

352. 50 C.F.R. § 216.32 (1976).

353. *Id.* § 216.32(d)(2).

tificial distinction between obligatory nursing, necessary for the health of the mammal, and convenience nursing, a period during which the animals could have been weaned from their mothers.³⁵⁴ The government contended that its formula regarding age was reasonable and that only the taking of animals during the obligatory nursing period was prohibited by the statute, allowing the harvest of seals while nursing only for convenience.³⁵⁵

The court summarily invalidated the regulation as being "so far from meeting the statutory standard that it must be rejected."³⁵⁶ While the court admitted the difficulty of determining the actual age of the animal for the eight-month age limitation, it suggested that the government could have adopted a formula based upon the known breeding habits of seals.³⁵⁷ The court also completely rejected the concept of convenience nursing. Those rulings necessitated the further holding that the South African practices were inconsistent with the Act, thus barring all importation.³⁵⁸

The court refused, however, to find that the South African taking program was inhumane because of the killing methods used. Using the traditional substantial evidence test for judicial review of administrative action, the court ruled that it could not overturn the finding of the federal administrator on this factual point.³⁵⁹

3. *Standing.* One interesting passage of the *American Welfare Institute* decision concerns the issue of standing of environmental groups to bring such actions. Although the court found that the plaintiff in this instance had standing under traditional analyses,³⁶⁰ it also stated that since the purpose of the Act is to protect marine mammals, the concept of standing in suits brought under the statute should be broadened:

Where an act is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute.³⁶¹

354. *Id.* § 216.32(d)(4).

355. 561 F.2d at 1011-12.

356. *Id.* at 1011.

357. The court indicated that adoption of a date which would insure that about 95% of the seals had reached the required age would be substantial compliance with the statute. 561 F.2d at 1011 n.52. The Marine Mammal Protection Act makes no such percentage distinction.

358. *Id.* at 1013-14.

359. *Id.* at 1013.

360. *Id.* at 1006-10.

361. *Id.* at 1007. *But cf.* *Allard v. Frizzell*, 536 F.2d 1332 (10th Cir. 1976) (intervention denied).

Since standing in environmental cases has become more a matter of procedural form than substance in recent years,³⁶² the passage will probably be useful to litigants only in cases where the statute is silent as to judicial review and where plaintiff's connection with the species is tenuous.³⁶³ It is significant, however, in that it demonstrates the willingness of the judiciary to accord to wildlife the protection Congress intended it to have.

Whales, dolphins and fur seals have sparked most of the international problems under the Act to date. Those controversies will continue because the management of those species is a continuing process. Courts have established some definite standards for the resolution of future problems, but the potential for new controversies less susceptible to judicial resolution is considerable. The United States government has been loathe to invoke legal sanctions against other nations whose practices do not measure up to United States conservation standards. Little progress in negotiating new international agreements for marine mammal conservation has been reported. International arrangements for fish and wildlife exploitation within the new 200-mile off-shore conservation zones are lacking. Nonetheless, the Marine Mammal Protection Act has been liberally construed to achieve its stated purposes for the most part; continued judicial oversight of administrative practices as they affect national and international transactions vis-a-vis marine mammals will be the key to the Act's continued vitality and effectiveness.

V. THE ENDANGERED SPECIES ACT

The Endangered Species Act of 1973³⁶⁴ is similar to the Marine Mammal Protection Act in many respects but more extensive in others. The new Act extends legal protection to a far wider spectrum of species, attempts to achieve biological recovery in addition to regulation of taking and of commerce, gives a higher degree of authority to state programs, and has a far greater potential effect upon domestic land use. The 1973 Act was the culmination of seven years frustration with deficiencies in prior federal legislation and of impatience with a lack of state action to preserve declining species. It represents a response to international initiatives as it implements domestically the Convention

362. The "injury in fact" requirement of *Association of Data Processing Serv. Organization, Inc. v. Camp*, 397 U.S. 150 (1970), was reduced to a formality by *United States v. SCRAP*, 412 U.S. 669, 686 (1973).

363. The notion bears a resemblance to Stone's argument that inanimate objects should have standing. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

364. 16 U.S.C. §§ 1531-1543 (1976).

of International Trade in Endangered Species of Fauna and Flora and other treaties.³⁶⁵

The true significance of the Act perhaps has yet to be realized. Federal administrative implementation was slow in starting and is only now gaining momentum. For the most part, state programs are inchoate. The scope of the new Act has not been judicially defined. Whether the biological recovery efforts under the Act will be effective is unknown. While the Act promises to be far more effective than its predecessors in stemming the tide of species' attrition, future legislative alterations are not unlikely.

A. *Scope of the Act.*

The 1966³⁶⁶ and 1969³⁶⁷ endangered species acts applied only to species in imminent danger of extinction. The Mammal Protection Act is limited to protection of just four orders of species. The scope of the 1973 Endangered Species Act is far broader: conceivably, it could apply to every non-domesticated, non-human species or subspecies of fauna and flora in the world.³⁶⁸ A species is not entitled to protection, however, until it has been officially listed by the Secretary of the Interior as "endangered" or "threatened."³⁶⁹

A species is "endangered" when it is in danger of extinction,³⁷⁰ and "threatened" when it is likely to become endangered.³⁷¹ Also, a species may qualify for listing if it is similar in physical appearance to a listed species.³⁷² Unlike prior law, the listing process under the 1973 Act may be initiated by any person,³⁷³ the resulting administrative de-

365. See the Convention of International Trade in Endangered Species of Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. No. 8249 (Mar. 3, 1973), reprinted in INT'L LEGAL METHODS 1085 (1973). The other treaties are listed at 16 U.S.C. § 1531 (a)(4) (1976). See Lachenmeier, *The Endangered Species Act of 1973: Preservation or Pandemonium?*, 5 ENV'T L. 29 (1974); Palmer, *supra* note 42, at 256-68; Note, *Obligations of Federal Agencies Under Section 7 of the Endangered Species Act of 1973*, 28 STAN. L. REV. 1247 (1976). The Act implements various environmental treaties. 16 U.S.C. § 1531(a)(4) (1976).

366. Endangered Species Preservation Act of 1966, 80 Stat. 926 (1966) (repealed 1973).

367. Endangered Species Conservation Act of 1969, 83 Stat. 275 (1969) (repealed 1973).

368. 16 U.S.C. §§ 1532(5), (9), (11) (1976). Although insects with the exception of those classified as pests, *id.* § 1532(4), are clearly covered by the Act, it seems unlikely that Congress meant to include protection for microscopic life forms even though they were not expressly excluded.

369. *Id.* § 1533.

370. *Id.* § 1532(4).

371. *Id.* § 1532(15). The determination may be limited geographically, that is, a species may be eligible for listing if endangered or threatened only in a significant portion of its range. *Id.* §§ 1532(4), (15), 1533(c)(1).

372. *Id.* § 1533(e).

373. *Id.* § 1533(c)(2).

cision is subject to judicial review.³⁷⁴ The Secretary is to be guided by five criteria in deciding whether to list or delist.³⁷⁵ Whether he has a duty to list a species when the criteria are met has not been determined.

After a slow beginning, the listing process is now moving ahead, prompted in large measure by the initiative of interested private organizations.³⁷⁶ Petitions by conservation groups have resulted in the domestic listing of approximately 150 species on Appendix I of the international convention,³⁷⁷ and of the grizzly bear,³⁷⁸ among others. Further, the Fish and Wildlife Service is embarking on a program to designate areas of "critical habitat" for listed species.³⁷⁹ This process is still embryonic, but the few attempted designations show that exercise of this power will be highly controversial.³⁸⁰

Once a species of wildlife is listed as endangered, members of that species cannot be killed, harmed, pursued or harassed by anyone subject to the jurisdiction of the United States.³⁸¹ All importation and exportation, interstate commerce, and commercial sales and transportation of listed species, carcasses, or parts are also banned.³⁸² Some exceptions are made for Alaskan Natives,³⁸³ and permits allowing taking or transfer for scientific purposes can be granted if certain conditions are met.³⁸⁴ The narrow exemptions do not appreciably

374. See Coggins, *Conserving Wildlife Resources: An Overview of the Endangered Species Act of 1973*, 51 N. DAKOTA L. REV. 315, 336-37 (1974).

375. 16 U.S.C. § 1533(a) (1976). The criteria are:

- (1) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) overutilization for commercial, sporting, scientific, or educational purposes;
- (3) disease or predation;
- (4) the inadequacy of existing regulatory mechanisms; or
- (5) other natural or manmade factors affecting its continued existence.

376. The flexibility allowed in the listing process is being utilized. For example, the American alligator has been downlisted from endangered to threatened in several Louisiana parishes where it was becoming a nuisance. 50 C.F.R. § 17.42(a)(i)(E) (1976); 42 Fed. Reg. 2071 (1977) (to be codified in 50 C.F.R. §§ 17.11, 17.42).

377. 41 Fed. Reg. 24,062 (1976), *codified in* 50 C.F.R. § 17.11 (1976).

378. 41 Fed. Reg. 48,757 (1976) (to be codified in 50 C.F.R. § 17.60b). Many species of creatures less glamorous than peregrine falcons or grizzly bears—such as bats, mussels, rats and snails—have been listed or are being considered. See generally Ramsay, *Priorities in Species Preservation*, 5 ENV'T'L AFF. 595 (1976). The status of rare plants is receiving increased attention. A list of some 1700 plants that may qualify for listing has been developed. SECRETARY, SMITHSONIAN INST., REPORT ON ENDANGERED AND THREATENED PLANT SPECIES OF THE UNITED STATES, H.R. DOC. NO. 51, 94th Cong., 1st Sess. (1975). The preliminary Interior Department list is at 41 Fed. Reg. 24,526-72 (1976).

379. 16 U.S.C. § 1536 (1976). See text accompanying notes 398-404 *infra*.

380. E.g., Schreiner, *Critical Habitat: What It Is—and Is Not*, 1 ENDANGERED SPECIES TECH. BULL. NO. 3, at 1 (1976).

381. 16 U.S.C. §§ 1532(14), 1538(a)(1)(B) (1976).

382. *Id.* §§ 1538(a)(1)(D), (E), (F).

383. *Id.* § 1539(e).

384. *Id.* §§ 1539(a), (d).

detract from the otherwise absolute nature of the Act's prohibitions. Threatened species of wildlife and plants are to be protected to the extent that the Secretary by regulation determines appropriate.³⁸⁵ Violations of the Act or the regulations may be punished by criminal penalties up to \$20,000 and a year in jail per violation. Civil liability ranges up to \$10,000 per violation.³⁸⁶

Even though enforcement of the Act has had questionable success to date,³⁸⁷ the decision in *Delbay Pharmaceuticals, Inc. v. Department of Commerce*³⁸⁸ provides federal administrators with a remedy of considerable impact. Plaintiff was the successor in interest to the importer of a large stock of spermacetti, a product made from endangered whales. No permit was obtained for subsequent transfer or for further disposition of the spermacetti. Federal agents seized the stock of spermacetti. The court upheld that drastic remedy in the face of Delbay's constitutional and other challenges.³⁸⁹ Because regulation of wildlife is far more efficacious at the level of commerce than at the level of initial taking, the stringent controls on possession and sale authorized by *Delbay* may result in more efficient enforcement of the Act than the ban on taking.

States are accorded more authority and discretion in conducting programs for endangered species conservation than under the Marine Mammal Protection Act.³⁹⁰ The Act encourages states to collaborate with the federal agency by entering into cooperative agreements³⁹¹ that provide for parallel state programs to be partially federally funded.³⁹² Potential state-federal conflicts abound because the terms and conditions of such agreements are not delineated.³⁹³ State laws on import-export and interstate commerce are voided when in conflict with the Act.³⁹⁴ State laws on taking must be as restrictive as federal law,³⁹⁵ except perhaps when a cooperative agreement is in force.³⁹⁶ The inter-

385. *Id.* §§ 1533(d), 1538(a)(1)(G) (wildlife); *id.* § 1538(a)(2)(D) (plants).

386. *Id.* §§ 1540(a), (b).

387. See note 113 *supra*.

388. 409 F. Supp. 637 (D.D.C. 1976).

389. *Id.* at 641-43. Delbay claimed that the 1973 Act did not apply to products legally held on the effective date of the Act, that Delbay was exempt because it was the successor in interest to the holder of an economic hardship permit issued under the 1969 Act, *id.* at 640, and that the Act violated the due process clause of the fifth amendment. *Id.* at 643.

390. Compare 16 U.S.C. § 1535 (1976) (Endangered Species Act) with *id.* § 1379 (Marine Mammal Protection Act).

391. *Id.* §§ 1535(c), (d).

392. *Id.*

393. Coggins, *supra* note 374, at 333-35.

394. 16 U.S.C. § 1535(f) (1976).

395. *Id.*

396. *Id.* §§ 1533(d), 1535(g)(2).

pretive difficulties inherent in the Act's treatment of the state-federal relationship lends credence to the charge that the Act is an "attorney's dream."³⁹⁷ Courts have not yet been required to sort out the statutory complexity, but they have interpreted the most controversial section of the Act.

B. *Snail Darters, Mississippi Sandhill Cranes and Indiana Bats: Section 7 in the Courts.*

1. *Existing Case Law.* Section 7 of the Act received little attention in the debates preceding passage.³⁹⁸ The provision is innocuously headed "Interagency Cooperation" and states:

The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal departments and agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1553 of this title and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.³⁹⁹

Section 7 appears to create a series of related duties. The Secretary of the Interior is required by the first sentence to adapt his other programs to further endangered species conservation. He must also consult with and assist other agencies in adapting their preexisting programs to the same conservation ends. He is further authorized to determine "critical habitat" for listed species.

The controversial aspect is the extent to which duties are imposed on all other federal agencies. Section 7 appears to impose three distinct obligations on every federal agency, all to be carried out in consultation with the Fish and Wildlife Service. First, each agency must utilize its authority to carry out conservation programs—and conservation is very broadly defined.⁴⁰⁰ Second, each agency must take action to "insure" that its programs do not "jeopardize the continued existence" of pro-

397. J. TREFETHEN, *supra* note 24, at 297.

398. The best treatment of the Act's legislative history in this respect is in Note, *supra* note 365, at 1254-56. See also Wood, *Section 7 of the Endangered Species Act of 1973: A Significant Restriction for all Federal Activities*, 5 ENV'T L. REP. 50189 (1975).

399. 16 U.S.C. § 1536 (1976).

400. *Id.* § 1532(2) ("all methods and procedures which are necessary to bring any endangered . . . or threatened species to the point at which the measures . . . [of the Act] are no longer necessary").

tected species. Finally, each agency is forbidden to take any action that would destroy or modify officially designated critical habitat. All of these duties are phrased in mandatory language and are not otherwise qualified. While some congressmen indicated that the role of the Fish and Wildlife Service under the Act would not give it an absolute veto over the projects of other agencies,⁴⁰¹ the sponsors of the bill that became law and the supporters of less stringent versions made it clear that the section was intended to create enforceable substantive standards.⁴⁰² If the condition of "jeopardization" is met, an absolute prohibition on destructive projects is imposed.⁴⁰³ Moreover, section 7 requires affirmative corrective action when necessary.⁴⁰⁴

Congress failed to anticipate the particular problems that have actually arisen in the implementation of section 7. Three different interpretations have resulted from the three cases which have examined the section's application to ongoing federal projects.

In *Sierra Club v. Froehlke*,⁴⁰⁵ plaintiffs sought an injunction against further work on the Merramec Dam project in Missouri. The suit was initially premised on the inadequacy of the impact statement. Later, plaintiffs claimed that inundation of caves behind the dam would violate sections 7 and 9 of the 1973 Act because it would destroy some of the critical habitat of the endangered Indiana bat. Evidence at the trial indicated that some bats might be killed and that some bat caves probably would be flooded at times by dam closure, but that no threat to the entire species' existence was posed.⁴⁰⁶ The trial court found no violation of NEPA or of the Endangered Species Act.⁴⁰⁷

On appeal, plaintiff's section 7 claim was summarily dismissed by the Eighth Circuit. It held in essence that section 7 is merely a "consultation" requirement and not an absolute bar to projects which threaten endangered species. Thus, the developing agency is free to disregard the suggestions of the consultant agency.⁴⁰⁸ As to section 9, forbidding

401. 119 CONG. REC. 25,689-90 (1973) (remarks of Senator Tunney).

402. The relevant statements are quoted in Note, *supra* note 365, at 1254-56.

403. "All other Federal . . . agencies *shall* . . . utilize their authorities . . . by taking such action *necessary to insure* that actions . . . carried out by them do not jeopardize the continued existence of such endangered . . . or threatened species" 16 U.S.C. § 1536 (1976) (emphasis added).

404. While fulfillment of all duties requires consultation with the Fish & Wildlife Services, a literal reading indicates that only the third (destruction of habitat) is conditioned on a determination of critical habitat.

405. 534 F.2d 1289 (8th Cir. 1976).

406. *Id.* at 1303.

407. 392 F. Supp. 130 (E.D. Mo. 1975), *aff'd*, 534 F.2d 1289 (8th Cir. 1976).

408. 534 F.2d at 1303-04.

the harming or harassing of protected species,⁴⁰⁹ the court could not locate a violation despite the conceded potential harm to thousands of bats.⁴¹⁰ The *Froehlke* court equated its review function with the limited substantive review it deemed proper in NEPA cases⁴¹¹ and impliedly interpreted sections 7 and 9 to prohibit only activities jeopardizing the continued existence of an entire species.⁴¹²

The Eighth Circuit partially relied upon a case decided a month earlier by the Fifth Circuit, *National Wildlife Federation v. Coleman*.⁴¹³ Although some of the language in the two cases is similar, the holdings and results cannot easily be reconciled. Some forty-odd remaining Mississippi sandhill cranes, an endangered species, all nest in the area through which the Federal Highway Administration proposed to build a segment of interstate highway. The Fish and Wildlife Service requested rerouting or modification of the planned highway, but the Highway Administration refused to make significant changes. The plaintiff sued to enjoin the highway project. On the eve of the trial, the Fish and Wildlife Service published an emergency declaration that the area in question was critical habitat for the crane.⁴¹⁴ The evidence at the trial was conflicting but indicated that construction activities, highway traffic, and private development in the wake of construction would not be immediately lethal. The trial court refused to grant preliminary relief, finding that the asserted threat to the continued existence of the crane was merely speculative.⁴¹⁵ It construed section 7 as a "consideration" statute and since the Highway Administration had considered the matter, the court held that section 7 was satisfied.⁴¹⁶ In effect, the trial

409. Section 9, 16 U.S.C. § 1538(a)(1)(B) (1976), prohibits "taking" endangered species of wildlife; "take" is defined in *id.* § 1532(14) to include various methods by which an animal can be taken or molested, such as "harm" or "harass."

410. 534 F.2d at 1304.

411. *Id.* (citing *Environmental Defense Fund v. Corps of Eng'rs*, 470 F.2d 289, 300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973)).

412. 534 F.2d at 1305. The Corps of Engineers, in defending the project, contended that the Sierra Club had failed to meet its burden of "showing that the action of the Corps had jeopardized or would jeopardize the continued existence of the Indiana bat." *Id.* The *Froehlke* court upheld the Corps' actions, implicitly endorsing their contention that the plaintiff must show that the continued existence of the species would be directly in jeopardy to satisfy its burden in attacking the project.

413. 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

414. 529 F.2d at 367. This action was taken in accordance with section 4(f) of the Endangered Species Act of 1973, 16 U.S.C. § 1533(f)(2)(B) (1976).

415. *National Wildlife Fed'n v. Coleman*, 400 F. Supp. 705, 711-12 (S.D. Miss. 1975), *rev'd*, 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976).

416. 400 F. Supp. at 712. The district court specifically cited the defendant's environmental impact statement as having shown proper consideration for the sandhill crane by choosing a route for the highway which passed through the smallest part of the nesting area, and requiring the contractor to take steps to lessen the impact of construction on the area. *Id.*

court subsumed the section 7 standards into the more general and more procedural NEPA requirements.

The Fifth Circuit reversed. According to the court, the agency must not only consider the dangers posed, but also fulfill its mandatory duty to insure no jeopardization.⁴¹⁷ As to the relationship of the Fish and Wildlife Service and the Highway Administration under section 7, the court evinced a curious duality. It first clearly held that the Service's power of consultation did not give it a veto over the highway project. Thereafter, however, the court enjoined further work on the project until the Service determined that the necessary project modifications were made and that no jeopardy to the sandhill crane would result from the highway.⁴¹⁸

While the Fifth Circuit's analysis of section 7 in the Mississippi sandhill crane case was inconclusive, the Sixth Circuit's analysis in *Hill v. TVA* was not.⁴¹⁹ The snail darter is an obscure species of perch inhabiting only one river, the Little Tennessee. The Tellico Dam being constructed on that river will, when completed, inundate the area, retard the stream flow, silt up spawning sites, and very likely extirpate the species. Prolonged litigation under NEPA delayed but did not halt progress of the dam.⁴²⁰ In *Hill* it was contended that closure of the dam, already four-fifths or more completed, would violate the Endangered Species Act.⁴²¹ The lower court recognized the incompatibility of the dam and the literal commands of section 7.⁴²² Relying on equitable considerations and on the ongoing nature of the project, however, the trial court refused to grant any relief.

In January, 1977, the Sixth Circuit reversed and entered a permanent injunction against further dam construction.⁴²³ The *Hill* court found that closure of the dam would violate section 7 because it would jeopardize the continued existence of the snail darter, a point conceded by all parties.⁴²⁴ TVA had argued that closure was not an "action" within the meaning of the statute, but the court rejected this argument and merely looked to the plain meaning of the words in section 7 and

417. 529 F.2d at 373.

418. *Id.* at 375.

419. *Hill v. TVA*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 98 S.Ct. 2279 (1978). Congress, unhappy with this decision, has begun action on a bill to provide exemptions to the Act. The bill, S. 2899, has cleared a Senate committee. See 36 Cong. Q. 1875 (July 22, 1978).

420. *Environmental Defense Fund v. TVA*, 492 F.2d 466 (6th Cir. 1974); *Environmental Defense Fund v. TVA*, 468 F.2d 1164 (6th Cir. 1972).

421. *Hill v. TVA*, 549 F.2d 1064, 1069 (6th Cir. 1977), *aff'd*, 98 S.Ct. 2279 (1978).

422. *Hill v. TVA*, 419 F. Supp. 753, 757 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 98 S.Ct. 2279 (1978).

423. 549 F.2d at 1075.

424. *Id.* at 1070.

to NEPA precedent.⁴²⁵ Significantly, the court disagreed with TVA that stopping a dam to protect a fish is simply unthinkable. It further held that congressional funding of a project does not immunize it from other provisions of law, and that the ongoing nature of a project does not require a different standard or result.⁴²⁶ In essence, the court held that the dam closure was a clear breach of governing law, and equitable factors or the "reasonableness" of the relief were irrelevant. The permanent injunction granted is subject only to congressional intervention to exempt the project from compliance with the Act.⁴²⁷ The Supreme Court affirmed the circuit court decision, recognizing that in light of the absolute nature of section 7, any balancing of equitable considerations was beyond the scope of judicial authority.⁴²⁸

2. *The Proper Approach Under Section 7.* The particular facts of each of those three cases offer a means of reconciling the different results reached, but the differing interpretations of section 7 by the three circuit courts cannot be easily reconciled. The Merremac Dam would only adversely affect a part of the overall Indiana bat population; the construction of an interstate highway might have eventually contributed to the extinction of the Mississippi sandhill crane; and the Tellico Dam would likely wipe out the snail darter in short order. In this regard, the outcomes of the three cases are consonant with the population situations of the species: the species not in immediate danger was denied relief while the species in grave peril of extinction were accorded drastic judicial protection.

None of the circuit courts devoted much attention to a detailed examination of section 7 or its legislative history. It is submitted that such an analysis would reveal that the *Hill* court was correct in reading the section as an absolute bar in the situation presented.⁴²⁹ The wisdom of listing a species has no relevance after the official determination to list becomes final. The inquiry must resolve itself into whether a listed species is threatened with jeopardy by a federal project, or whether a designated critical habitat is being destroyed or adversely modified. The statute is absolute: if these conditions are found, the project violates section 7. The expressed purposes of the Act as well as the language of section 7 require such a ruling.⁴³⁰

425. *Id.* at 1070-71.

426. *Id.* at 1074.

427. *Id.* at 1075. See note 419 *supra*.

428. 98 S.Ct. 2279 (1978).

429. That conclusion is based upon the exhaustive recitation of pertinent legislative history and the incisive analysis of Note, *supra* note 365.

430. 16 U.S.C. §§ 1531(b), 1536 (1976); Note, *supra* note 365.

Despite the advanced stage of the Tellico Dam and the recent discovery of the snail darter, the Supreme Court affirmed the Sixth Circuit's *Hill* decision. However, the Supreme Court's action does not necessarily mean that the courts will be the final arbiters in such controversies. Only after the expert agency, the Fish and Wildlife Service, has acted by listing and by designating a critical habitat is there any basis for judicial action. Even then, the controversy will not ripen until consultation between the Service and developing agency has occurred and the latter has rejected the Service's advice.⁴³¹ Finally, imposition of a permanent injunction is not necessarily the end of the matter. Ultimately, the relative merits of cranes and highways is a political matter, and Congress can always undo what the courts have done. The *Snail Darter* court, for instance, in effect remanded the fate of the Tellico Dam to Congress, which is probably the body that should decide whether fish or dams should have priority in the circumstances.

Section 7 has the potential to become an important litigating tool for various environmental organizations and causes, particularly with respect to localized, obscure species such as the snail darter or rare, wide-ranging species like peregrine falcons. But assessment of the impact of the section on future federal projects will have to await congressional reaction to the *Hill* decision.

3. *Impact of Section 7 on Existing Government Regulations.*

The three cases recounted above focus on but one aspect of section 7: the duty of another agency when its project threatens the critical habitat of a species. Other ramifications of the section are foreseeable, and one has come to fruition in *Defenders of Wildlife v. Andrus*.⁴³² At the behest of a wildlife protective association, the district court for the District of Columbia found that the Department of the Interior's regulations allowing hunting of migratory birds at times of less than optimum light conditions violated section 7 and other sections of the Act.⁴³³ The opinion in the case was conclusory, but the implicit basis of the decision is fairly clear.⁴³⁴ Because section 7 requires the Secretary of the Interior to "utilize" the Department's programs "in furtherance of the purposes of this Act,"⁴³⁵ the Department must assess all of its

431. In fact, out of the 4500-odd consultations between the Fish and Wildlife Service and other agencies, in only three instances did the interested parties fail to reach an accommodation. Conversation with Cecil Andrus, Secretary of the Interior, in Lawrence, Kansas (Nov. 16, 1977).

432. 428 F. Supp. 167 (D.D.C. 1977). See text accompanying notes 105-10 *supra*.

433. 428 F. Supp. at 170.

434. "Under the Endangered Species Act of 1973, the agency has an affirmative duty to increase the population of protected species." *Id.*

435. 16 U.S.C. § 1536 (1976).

programs and actions in light of the mandates and prohibitions of the Act. If it either fails to evaluate the consequences for endangered species or proposes to act contrary to their best interests, the program or action can be enjoined.

All agencies are under the same duty to utilize their programs for endangered species conservation.⁴³⁶ The important point, of course, is that a duty to conserve is a positive obligation, while by contrast the command not to jeopardize is a negative injunction. It can now be argued that when an agency acts in a manner that is merely neutral toward a species' chance for survival, it fails to satisfy the requirements of section 7 and that the agency must take affirmative steps to enhance the survival and recovery chances of the affected species. For example, if it were established that the Department of Agriculture fostered practices that had the effect of eradicating prairie dog towns, thereby eliminating endangered black-footed ferrets (which prey on prairie dogs) it could be contended that the Department now has an obligation to reestablish prairie dogs in the few areas where the ferrets still reside. That sort of example can be extended to any situation in which the activities, actual or potential, of a federal agency have had or could have a bearing on the population status of an endangered or threatened species. Whether the courts will be willing to enforce such a revolutionary concept against agencies whose mission appears unrelated to conservation is uncertain.⁴³⁷ Although *Andrus* will be valuable precedent in such situations, other courts have denied other claims by private litigants asserting the Act as a ground for relief.⁴³⁸

VI. CONCLUSION: THE EMERGING LAW OF WILDLIFE

A. *Impact on Economic Interests.*

Federal wildlife law has become in the past few years a force of economic, biological, social, and legal consequence. Economically, wildlife is the raw material for a large volume of business, directly and indirectly. Fish, deer, fowl and other species provide food, and parts of other species are components of a wide variety of products, from medicines to perfume to clothing. In the aggregate, these are billion-dollar industries. These and other immediate economic considerations

436. *Id.*

437. It may be noted by way of analogy that the impact statement requirement of NEPA has been extended into several regulatory areas not ordinarily considered environmental. *E.g.*, *Natural Resources Defense Council v. SEC*, 389 F. Supp. 689 (D.D.C. 1974). See Coggins, *supra* note 55, at 341-44.

438. *E.g.*, *Sun Enterprises, Ltd. v. Train*, 394 F. Supp. 211 (S.D.N.Y., 1975), *aff'd*, 532 F.2d 280 (2d Cir. 1976).

now are taking a back seat to a broader concern for species' long-range welfare.

Federal wildlife law already has drastically affected many economic interests, and wider impacts are foreseeable. The sandhill crane case forced relocation of a highway at considerable expense.⁴³⁹ The snail darter case frustrated construction of a dam intended to provide a variety of economic benefits to a large region.⁴⁴⁰ Statutes have deprived hunters of targets,⁴⁴¹ and litigation has deprived them of time in the field.⁴⁴² The tuna-porpoise litigation caused the temporary shutdown of an entire industry⁴⁴³—a result that has never occurred under the supposedly strict pollution laws. A great many species of commercial value can no longer be taken or sold. All commercial operations involving wildlife are now far more closely regulated.⁴⁴⁴

Limits on the economic impact of federal wildlife law are not in sight. As causes of wildlife declines are more clearly perceived, it is probable that new mechanisms will be promulgated and new limitations on economic activity will be imposed. An example is the recent proposal by the Endangered Species Scientific Authority to forbid exportation of bobcat and lynx skins.⁴⁴⁵ When spotted cat coats became illegal or unfashionable, the resulting demand for substitute furs raised the prices for bobcats, coyotes and other lesser furbearers. The rise in price caused intensive trapping, with the result that bobcat populations have declined precipitously in many areas, leading to the proposed ban. If the prohibition becomes effective, trapping pressure on coyotes, beaver, raccoons and skunks likely will increase. It is far too early to predict the demise of the fur industry in the United States, but some straws are in the wind.

439. *See* National Wildlife Fed'n v. Coleman, 529 F.2d 359 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976). *See* text accompanying notes 413-18 *supra*.

440. *See* Hill v. TVA, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 98 S.Ct. 2279 (1978). *See* text accompanying notes 419-28 *supra*.

441. Polar bears, grizzly bears, wild horses (for sport?), mountain lions, wolves, some species of bighorn sheep, dozens of bird species, and other popular targets have been placed off-limits to hunters by recent enactments.

442. *See* Defenders of Wildlife v. Andrus, 428 F. Supp. 167 (D.D.C. 1977). *See* text accompanying notes 105-10 *supra*.

443. *See* Committee for Humane Legislation, Inc. v. Richardson, 540 F.2d 1141 (D.C. Cir. 1976). *See* text accompanying notes 267-313 *supra*.

444. Endangered Species Act of 1973, 16 U.S.C. § 1538(d) (1976) (all wildlife importers required to obtain a permit).

445. 42 Fed. Reg. 43,729 (1977). Whether and to what extent the prohibition on bobcat pelt exports will apply is still up in the air at this writing. After proposing a total ban, the ESSA then announced a quota of 33,670 pelts and then sought reexamination of the status of bobcats. *See* Dean, *The Bobcat Continues to Tread a Tightrope*, II SIERRA CLUB WILDLIFE INVOLVEMENT NEWS #14, at 5 (Mar. 1978).

B. *Impact on Ecological Well-being.*

Biologically, federal wildlife law is aimed at the reconstruction of a natural diversity. Man has recognized that long-term stability of natural systems may serve him far better than short-term over-exploitation. In a world of declining resources, to argue that conservation is needed before crises force far more drastic remedies is persuasive to many, but the pressures from those citing the need for immediate relief from economic problems frequently overwhelm legislators and administrators. Congress has acted boldly and innovatively with respect to many wildlife problems, albeit in piecemeal fashion. All of the statutes discussed were the products of perceived crisis conditions. In general, each imposes drastic remedies, but only so long as the crisis is determined to exist. All of these statutes refer to the need for total ecosystem enhancement in which man's intrusion, even for protection, will be required less often as recovery accelerates.

The limited evidence available indicates that moderate successes in achieving new wildlife goals have been accomplished. Many species thought to be extinct or nearly so have recovered under legal protection since the last century.⁴⁴⁶ The whooping crane is finally recovering, but the California condor is not.⁴⁴⁷ Porpoise kills are down. Other species of marine mammals are increasing their populations, as are wild horses and burros. Use of harmful pesticides has been reduced. These trends are encouraging but by no means conclusive. It remains to be seen whether legislation can help to reestablish a more natural order. Rhetoric about total ecosystem management will not move it closer to reality, however, unless further federal legislation closes the gaps in the present piecemeal approach.

C. *Impact on State Regulation.*

Almost forgotten in the spate of new legislation is the Migratory Bird Treaty Act regulatory system,⁴⁴⁸ which could have been used as a model for the later laws. Its implementation has been narrow in some aspects, but the Act has several advantages over the more modern statutes. It seeks to maintain optimum populations at all times, not just in time of perceived crisis. That approach could be adapted to the endangered species and other preservation programs: by monitoring populations of a broader variety of species on a national and international scale, steps could be taken in advance to avert the crisis of endangerment. Through national regulation, local parochialism as to competing

446. See generally J. TREFETHEN, *supra* note 24.

447. See text accompanying notes 19-22 *supra*.

448. 16 U.S.C. §§ 703-711 (1976). See section II *supra*.

species such as mountain lions, coyotes or hawks could be diminished.⁴⁴⁹ Major wildlife population problems have become national problems.

Wildlife regulation is still primarily a state function. Several developments, however, indicate a trend toward federalization of the field. The independent state game agency, concerned only with local game species, is now practically a thing of the past. Professional wildlife biologists have been moving in the direction of habitat-based approaches to wildlife management. Ecological knowledge increases and is being disseminated; predator control becomes more selective, sophisticated and effective. Nongame species receive more attention and a larger share of the budget; innovative new financing experiments are being tried. Nonhunting wildlife partisans are becoming more involved in state administrative processes. Similar to the dealings of state agencies with pollution, transportation and welfare problems, the integration of state agencies into a national system appears to be an inevitable consequence of growing biological awareness. In view of recent developments, the process has begun.

State administrative discretion has been progressively narrowed as federal law preempts state law in some instances and federal funds may be granted to states only upon compliance with federal guidelines in others. State laws inconsistent with the Wild Horses and Burros Act,⁴⁵⁰ the Marine Mammal Protection Act,⁴⁵¹ and the Endangered Species Act⁴⁵² were invalidated by those statutes; state laws inconsistent with the MBTA and the Bald Eagle Act should be preempted by operation of the supremacy clause.⁴⁵³ Cooperative programs are authorized under recent statutes, but, to qualify for available grants, each state must conform its practices to federal requirements. In several states, statutory amendments will be necessary as some authorize the killing of federally protected species, most notably predatory raptors and predatory mammals.

449. A proposal of that general nature, called the Nongame Fish and Wildlife Conservation Act, is now pending in Congress. H.R. 10255 & H.R. 10915, 95th Cong., 2d Sess. (1978).

450. *Kleppe v. New Mexico*, 426 U.S. 529 (1976).

451. 16 U.S.C. § 1379(a)(1) (1976). See text accompanying notes 253-54 *supra*.

452. *Id.* § 1535(f). See text accompanying notes 390-96 *supra*.

453. See *Kleppe v. New Mexico*, 426 U.S. 529 (1976); *Missouri v. Holland*, 252 U.S. 416 (1920). While the new federal statutes expressly allow state regulation of a more rigorous nature than that provided by federal law, a court has held that Maryland's attempted prohibition of sealskin imports was preempted by the Marine Mammal Protection Act. *Foulke Co. v. Mandel*, 386 F. Supp. 1341 (D. Md. 1974). The holding is arguably inconsistent with somewhat similar cases arising out of New York's regulation of commerce in endangered species. *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1319 (2d Cir. 1971); see Note, *Federal Preemption: A New Method for Invalidating State Laws Designed to Protect Endangered Species*, 47 U. Colo. L. Rev. 261 (1976). See also 16 U.S.C. §§ 1379, 1535 (1976).

Recent cases involving aspects of federal-state relations also indicate that wildlife law is being federalized. *Kleppe v. New Mexico*⁴⁵⁴ clearly requires preemption of state law wherever it conflicts with federal standards on federal lands, because federal power over federal land management is plenary and unrestricted irrespective of wildlife "ownership."⁴⁵⁵ State agencies have long received monies from the Pittman-Robertson program⁴⁵⁶ with few strings attached. After years of strife over wolf kills in Alaska, wildlife partisans finally succeeded in forcing NEPA evaluations of programs conducted by states with Pittman-Robertson funds.⁴⁵⁷ Subsequently, a federal court held that the Bureau of Land Management had authority to prohibit the wolf hunts on Bureau lands in Alaska⁴⁵⁸ and that the Bureau had to withhold permission until an environmental impact statement was completed.⁴⁵⁹

In another recent case, federal wildlife law created new property law in the states. If the federal government purchases a conservation easement for the benefit of wildlife that restricts the use of the land, it retains an enforceable conservation easement even if the state does not recognize such an interest.⁴⁶⁰

D. *Impact on Law.*

As a social matter, federal wildlife law is the product of public awareness and aroused public conscience. In other areas, such public concern has produced NEPA, pollution control laws, land planning mechanisms and other statutory innovations giving increasing importance to noneconomic considerations affecting what is generically termed "the quality of life." The environmental movement is not a fad. Environmental law has been woven into the fabric of society, and only the most fearful rending could now remove it. Wildlife law, an off-

454. 426 U.S. 529 (1976). See text accompanying notes 180-91 *supra*.

455. See text accompanying notes 180-91 *supra*. Another facet of the preemption problem has been presented but not yet resolved in *People of Togliak v. United States*, 3 U.S.C. Current Filings Alert #4 (April 1977). Alaska Natives in that case have protested that the specific exemption granted to them in the MMPA to continue subsistence hunting of marine mammals was revoked by the State of Alaska when control over the marine mammal regulatory program was returned to the state by the federal authorities, 41 Fed. Reg. 15,173-80 (1976) (proposed rules for return of control).

456. Federal Aid in Wildlife Restoration Act, 16 U.S.C. §§ 669-669i (1976).

457. *Defenders of Wildlife v. Alaska Dep't of Fish and Game*, Civ. No. A76-13 (D. Alas. Mar. 8, 1976). Preparation of a programmatic environmental impact statement on the Pittman-Robertson program is reportedly underway. BEAN 245 n.40.

458. Federal Land Policy and Management Act of 1976 § 302(b), 43 U.S.C.A. § 1732(b) (1976).

459. *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977).

460. *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974).

shoot, has been slower to develop, but it too is now firmly grounded in statutes, regulations and the public consciousness.

Wildlife law is unique in some ways and yet unexceptional in others. Creation of legal rules for the benefit of creatures unable to vote surely must be recorded as one of the more selfless legislative acts of the age; the new statutes are clearly intended to assist and give rights to wildlife as wildlife, independent of man's interest in its continued exploitation. That the subjects of these new statutes are by definition unresponsive to legal dictates is also remarkable. Still, in common with all other law, the federal law of wildlife focuses on regulation of human activities. The federal legislature has found it necessary to extend traditional game law by regulating the killing of certain species on a national basis. To protect selected species, both native and foreign, it has placed strict constraints on the transportation, possession and selling of them. Such secondary controls on commerce may be more effective in the long run than primary taking restrictions; the incentive for the latter tends to dry up as the market disappears. The new statutes also require administrative consideration of the fate of species, usually in conjunction with NEPA assessments of federal proposals. Unlike NEPA, they frequently create strict substantive standards that the agency or applicant contravene at their peril. Both of those attributes will have a significant effect upon federal land management.

Federal wildlife law has achieved a robust, inconsistent adolescence. Many problems of interpretation, implementation and enforcement have not yet been resolved, and further legislation may be desirable as unforeseen dilemmas occur. Those problems should not obscure the main point that federal wildlife law appears to be accomplishing some of its legislative goals.