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ENDANGERED SPECIES PROTECTION: A HISTORY OF CONGRESSIONAL ACTION

*By William D. Palmer**

INTRODUCTION

The slogan "Extinct is forever"¹ emphasizes the unique and serious nature of the problem facing the world's endangered species. Unlike some problems which can be remedied once the damage becomes intolerable, the process of extinction is irreversible. Once a species vanishes, it can never be brought back. The loss is not merely aesthetic. Scientific,² economic,³ and ethical⁴ problems are also involved.

Man cannot claim disinterest in the process since his presence has increased the rate of animal extinction one-thousandfold.⁵ The rate of increase has been particularly drastic during recent years due to the development of a modern technological society.⁶

The United States has been a major contributor to the problem. Between the years 1600 and 1850, only five domestic species became extinct.⁷ By contrast, fifty-seven such species have become extinct since 1850.⁸ This twenty-two fold increase in the rate of extinction in the United States has been countered by Congressional passage of four major legislative acts which have been utilized to protect the welfare of endangered species: The Lacey Act,⁹ the Endangered Species Preservation Act of 1966¹⁰ (hereinafter cited as the 1966 Act), the Endangered Species Conservation Act of 1969¹¹ (hereinafter cited as the 1969 Act), and the Endangered Species Protection Act of 1973¹² (hereinafter cited as the 1973 Act). All of these acts deal with the problems of endangered species in general, as opposed to several other laws which deal with a specific group of endangered species.¹³

This article will discuss the four acts mentioned above, focusing in each case on (1) its basic provisions, (2) its approach to the problem of endangered species, (3) its judicial construction, and (4) its effectiveness and deficiencies. Primary emphasis will be placed

on the Lacey Act and the 1973 Act, both of which are still fully in effect, and on the sections of the 1966 Act which have not been superseded by the 1973 Act. Administrative difficulties in the implementation of the 1973 Act will be discussed, and possible solutions to these difficulties will be suggested.

I. THE LACEY ACT

A. *Provisions of the Act*

The Lacey Act, as originally passed in 1900, contained a provision prohibiting the transportation in interstate commerce of animals killed in violation of state law.¹⁴ In 1935, the law was expanded to prohibit the interstate transportation of animals taken in violation of *foreign* laws.¹⁵ This provision of the Act contributes significantly to the protection of endangered species. State and foreign laws which provide such protection are supplemented by federal penalties and enforcement, if the animals or their by-products are moved in interstate commerce.¹⁶ The potential violator must either expose himself to additional federal liability by moving his illegally taken goods in interstate commerce, or choose to remain in one state, subject only to local enforcement. If he decides to remain in only one state, he will considerably restrict the available market for his goods, thereby reducing the demand to be filled and lessening the incentive for further violations of the law. The major deficiency of this provision is that its effectiveness is dependent upon the existence of adequate state and foreign laws for the protection of endangered species.

Other provisions of the Lacey Act may also be used to deter animal extinction, but to a lesser extent. As originally enacted, the law required that a permit be obtained from the Department of Agriculture before any wild animal or bird could be imported into the United States.¹⁷ This permit system was dropped in 1949, since no discretion had been given to the Secretary of Agriculture for issuing or denying such permits.¹⁸ The result of this lack of agency discretion was a compilation of statistics on wildlife importation, but no control over it, since no permits were ever refused.¹⁹ Since no administrative adjudication ever occurred under this provision, no judicial construction or review of the section was possible. In place of the originally extensive permit system, a more limited system was established. The new system required that a permit be obtained before importation of an animal which the Department of Agriculture had declared to be "injurious to the interests of agriculture or horticulture."²⁰ Importation was permitted for zoological, educational,

medical, and scientific purposes, following a proper showing of responsibility and continued protection of the public interest and health.²¹ In addition, exemptions were provided for federal agencies,²² dead natural-history specimens for museums or for scientific collection,²³ and for certain species of cage birds.²⁴

The regulation of "injurious" wildlife under this section might contribute to the protection of endangered species, if animals listed as "injurious" also happened to be endangered. The importation of such animals would be subject to government regulation through the permit system. If as a result of the establishment of such a regulation such animals were excluded from the country, or allowed to be imported in fewer numbers, the market demand for such animals would decrease, and fewer animals would have to be removed from the wild to meet that demand.²⁵ However, it is clear that the intent of the Lacey Act prohibition was to prevent the entry into the country of "pests" which could directly affect crops, and to avoid the establishment of populations of injurious wildlife in the ecosystem.²⁶ It was not aimed at any injuries which might result indirectly from the failure to protect or regulate an endangered species.²⁷ Thus any benefit to endangered species stemming from this section is purely incidental—indeed, unintended.

One additional section of the Lacey Act may be used to protect endangered species, although to a far lesser extent than other sections already discussed. In 1949, the Lacey Act was amended to require that wild birds and animals be shipped under humane conditions.²⁸ This section may protect individual members of an endangered species, which might otherwise perish due to poor shipping conditions. However, the overall beneficial effect of this requirement is miniscule, since inadequate shipping conditions are not normally a major factor contributing to species extinction.²⁹ The legislative history of this section indicates that Congress was primarily concerned with situations where a large percentage of animals within a given shipment died during transport, rather than with the loss of a very small number of animals, even though they were endangered animals.³⁰

B. Judicial Construction

Enactment of the Lacey Act raised questions concerning the extent to which states could pass laws protecting wildlife without conflicting with the Commerce Clause of the Federal Constitution.³¹ It has been recognized that a police measure otherwise within the constitutional power of the state will not be held unconstitutional

under the Commerce Clause because it incidentally and remotely affects interstate commerce.³² In *Geer v. Connecticut*,³³ the regulation of game was recognized as part of a state's police power: "The right to preserve game flows from the undoubted existence, in the State, of a police power to that end, which may be none the less efficiently called into play, because, by doing so, interstate commerce may be remotely and indirectly affected."³⁴ In *People v. Bootman*³⁵ (hereinafter cited as *Bootman*), the New York Court of Appeals held that:

The action of Congress [passage of the Lacey Act] has taken away all questions of interstate commerce, so that the state can act with entire freedom and can prevent the shipment of game into or out of its own territory; and if game is imported, it can regulate or prohibit the sale thereof. Such provisions are warranted by the police power, and are not in conflict with either the state or Federal Constitution.³⁶

A number of other cases have also concluded that the Lacey Act *expanded* the power of the states to regulate transportation of animals, rather than preempting the field and *removing* that power from the states.³⁷

Although the Lacey Act was recognized as early as 1910 as an act designed to protect endangered species,³⁸ it suffers from a major deficiency in that it is dependent upon local and foreign laws for its usefulness, rather than embodying a substantive federal program designed to insure the conservation of endangered species. Such a program was not established until the 1966 Act was passed.

II. THE 1966 ACT

The 1966 Act has been described as ". . . the first United States domestic law exclusively concerned with the welfare of all endangered species."³⁹

In passing the 1966 Act, Congress recognized four causes of extinction: habitat destruction, exploitation, disease, and predation.⁴⁰ Although *mentioning* all of these causes, the legislation specifically addresses only the problem of habitat destruction, and then only with respect to native wildlife.

A. Provisions of the Act

Section 1 of the Act declared that its purposes were to:

. . . provide a program for the conservation, protection, restoration, and propagation of selected species of native fish and wildlife, including migratory birds, that are threatened with extinction, and to consolidate,

restate, and modify the present authorities relating to administration by the Secretary of the Interior of the National Wildlife Refuge System.⁴¹

Section 2a directed the Secretary to use his previously authorized land acquisition authority to effectuate the purposes of the Act stated in Section 1.⁴² The Secretary was therefore specifically required to give cognizance to the endangered species problem for the first time.

Section 2b authorized the purchase or donation of land not covered by previous acts to “. . . carry out the purposes of this Act.”⁴³ Thus the 1966 Act expanded the Federal government's role in the protection of endangered species from merely one of criminal enforcement actions to one of policy consideration during implementation of programs and financial assistance aimed directly at the problem of vanishing species.

These initial sections deal exclusively with problems relating to the destruction of habitat, which was recognized at the time of enactment as a primary cause of extinction.⁴⁴ Subsequent legislative history of related acts confirms that habitat destruction is still considered a foremost factor in animal extinction.⁴⁵

Section 2d was the one section of the Act which could have been used to attack the other causes of extinction previously mentioned. That section directed the Secretary of the Interior to utilize programs under his control in furtherance of the purposes of the Act, as well as to encourage other federal agencies to do the same.⁴⁶ Although the enumerated causes of extinction are not directly addressed by this section, the wording was drafted in sufficiently general terms so as to allow action to be taken pursuant to it which would relate to these other causes. An argument can be made that the vagueness of the section, combined with the overall emphasis of the statute on habitat preservation, indicates that the real impact of the section was only on programs which might affect habitat. This construction, however, is not confirmed by the legislative history of the Act, which refers to programs designed to conserve *both* the species and their habitat.⁴⁷ Section 2d provided no specific guidelines on how such programs could be implemented to further the purposes of the Act. Since the legislation concentrated primarily on land acquisition and protection, no clear-cut standards were established for attacking the other causes of extinction mentioned.

Section 4 of the 1966 Act is the only section which is still in effect, the other sections having been superseded by the 1973 Act. Section 4a established a National Wildlife Refuge System (hereinafter referred to as the System), which consists of all land areas adminis-

tered by the Secretary of the Interior for conservation of fish and wildlife.⁴⁸

Section 4b relates to the administration of the System, authorizing the Secretary to accept donations of funds for use in acquiring and managing such lands,⁴⁹ and also “. . . to acquire lands or interests therein by exchange for acquired lands or public lands under his jurisdiction which he finds suitable for disposition.”⁵⁰

Section 4c is the only section of the Act which contains any specific *prohibitions*, rather than requiring *affirmative* actions to be taken for the protection of endangered species. Forbidden activities include: (1) disturbing, injuring, cutting, burning, removing, destroying, or possessing any property of the United States within the System;⁵¹ (2) taking or possessing any animal or its parts, nests, or eggs from within the System;⁵² and (3) entering, using, or occupying any part of the System, unless specific exemptions apply.⁵³

B. *Judicial Construction*

The power of the Secretary to freely exchange land from within the System has withstood one court challenge. In *Sierra Club v. Hickel*,⁵⁴ (hereinafter cited as *Sierra Club*), the plaintiffs challenged an exchange of land which had been made by the United States Government, through the Secretary of the Interior, and a utility company, pursuant to Section 4b of the 1966 Act. The United States gave up a marshland which was part of the System in exchange for marshland privately owned by the utility. In addition, the utility agreed to lease back to the government, rent-free, for a period of 50 years, 455 acres of the exchanged land. Certain other adjacent land was also leased to the government for 25 years, subject to some reserved rights, to be used as a wildlife refuge. The utility also agreed to make certain improvements on the land, including the construction of dikes. The net result of the exchange was that the United States received a wildlife refuge twice as large as it had originally owned, plus various improvements, and the utility received lands needed for the construction of a nuclear power plant.

The plaintiffs sought a declaratory judgment, contending that the transfer of the land was an arbitrary and capricious act and an abuse of discretion by the Secretary of the Interior. The Sierra Club also sought an order directing re-vestiture of title to the land in the United States. The court rejected the request, observing that invalidation of the exchange would necessarily require the return of all lands to their original owners. In effect, such a result would be a court-ordered disposition of government property, barred by the

sovereign immunity doctrine. The court held that the Administrative Procedure Act⁵⁵ did not waive sovereign immunity in an action involving the Secretary of the Interior.

The Secretary was recognized to have broad discretion, under the statute, to determine whether to enter into an agreement for the exchange of land. Since the Act vested broad discretion in the Secretary in reaching a decision involving land acquisition, without any requirement that he consider the particular environmental factors involved, the court held the Secretary's action to be non-reviewable. Moreover, the court held that resort to the Administrative Procedure Act was unwarranted because the Secretary's action was one of the type "committed to agency discretion by law."⁵⁶

In a dissenting opinion, Judge Feikens argued that this interpretation of the Administrative Procedure Act was too narrow; an agency may not exercise uncontrolled discretion, and actions taken under however broad a grant of authority are still subject to review for abuse of discretion.⁵⁷

The court was concerned with practical, as well as legal, considerations, as indicated by its fear that ". . . [i]f a third person is allowed to litigate the validity of an exchange of land made by the Secretary of Interior, whenever he believes that the Secretary acted improperly, there will be no more exchanges and the action of Congress providing for them will be frustrated."⁵⁸ The court concluded unequivocally that "[T]here is no question but that the Secretary of Interior was empowered by [16 U.S.C.] §668dd(b)(3) to make the exchange."⁵⁹

The dissent rejected defendant's contention that Section 668dd gives the Secretary total discretion to dispose of any land, regardless of the harmful effect which such transfer might have on the system being administered. The intent of Congress, expressed in 16 U.S.C. 668aa, was seen by the dissent as requiring the Secretary to protect endangered species and to consider the effect that an exchange of land would have on such species.

The dissent also rejected the contention that the purposes clause of the Act imposes no legal duty upon the Secretary, since, if it did not, the Act would be infirm as an unconstitutional delegation of authority. If there are no standards by which it is possible to determine ". . . whether the will of the Congress has been obliged," the delegation is too vague.⁶⁰ The power of an agency, in the view of the dissent, is circumscribed by the authority granted in the empowering act. The dissent noted that since the administrative regulations do not detail the purposes for which the exchange may be made, the court must turn to the only guidelines available, which are the

general purposes for which the various environmental statutes were enacted. With regard to the 1966 Act, the dissent concluded that the language of the statute “. . . imposes a duty on the Secretary to consider environmental effects and the effect on the wildlife system as a whole before he transfers land out of the system. If he has not done so, his action is *ultra vires*.”⁶¹

The effect of the *Sierra Club* decision was to drastically reduce the importance of the sections of the 1966 Act dealing with the System. Since the majority decided that land exchanges could be made without any consideration of the environmental factors addressed by the legislation, the court in effect read the statute as providing no guarantees of protection for endangered species at all. Arguably, the dissent more closely aligns itself with the intention of Congress, which was to require federal agencies to take measures to protect endangered fish and wildlife.

The 1966 Act was inadequate both as an act compelling positive actions and as a prohibitive measure. The Act confined its prohibitions to actions within the System, allowing hunting, capture, and exploitation of endangered species to continue unhindered outside of the System, absent applicable local laws. In addition to confining its attention to the destruction of habitat, the 1966 Act also limited itself to the protection of native wildlife, ignoring the international aspects of the endangered species problem.

III. THE 1969 ACT

To assist in the international effort to preserve endangered species, as well as to attack the problem of over-commercialization of endangered species, Congress passed the 1969 Act, which, while amending the 1966 Act in part, added several significant provisions. During discussion of the Act, over-commercialization was recognized as a major cause of extinction,⁶² although attempts to de-emphasize the importance of this factor were made.⁶³

A. Provisions of the Act

The major addition under the 1969 Act was a provision which required the Secretary of the Interior to develop a list of endangered species and sub-species.⁶⁴ The importation of such animals or their by-products was forbidden without a permit.⁶⁵ A permit could be granted if the importation was for zoological, educational, scientific, or propagational purposes.⁶⁶ This exemption was granted because of the valuable role that zoological, educational, and other institutions had played in the preservation of endangered species.⁶⁷ Although

zoos had taken the initiative in the past to protect endangered species,⁶⁸ some government control was desired because of the fear that the appetite of zoos and circuses for rare animals would cause the disappearance of certain species from their native habitat.⁶⁹

Regulations were promulgated to implement the permit system.⁷⁰ These regulations focused primarily on the effect on the wild population which would occur if the permit were granted, the desirability of the project involved, the availability of the animals from non-wild sources, the adequacy of the shipping arrangements, and the quality of the personnel and facilities at the destination. Under this permit system, approximately one-half of all applications were denied,⁷¹ indicating that what was considered proper for importation by zoological and educational institutions did not always correspond with what the Department of the Interior considered necessary or appropriate.

In addition to zoological and educational permits, importation was also allowed to avoid "undue economic hardship."⁷² Under this exemption, an executory contract entered into for the importation of an animal prior to the listing of its species as endangered could be completed, under special permit from the Secretary of the Interior.⁷³ The "hardship" exemption was not motivated by concerns that such activities may be beneficial to the continued survival of the species, as the zoological exemption was, but only to avoid inflicting undue economic hardship upon the particular parties involved. A test balancing the effects of such importation on the wild population against the severity of the economic hardship was required to be met before a "hardship" exemption would be granted.⁷⁴ The purpose behind the prohibitions of the 1969 Act was to reduce the market both for the endangered species themselves and for the goods which are manufactured from such animals, thereby reducing the incentive to slaughter them, and thus, decreasing the strain on the wild population.⁷⁵

In addition to import controls, the 1969 Act addressed the international aspects of the extinction problem in another way. The Secretary of the Interior was directed to seek the convening of an international ministerial meeting on fish and wildlife, to aid the worldwide conservation of endangered species as well as to prevent competitive harm to United States industry which was affected by the 1969 Act.⁷⁶

Such a meeting was held in February, 1973, attended by eighty nations.⁷⁷ A wildlife treaty was adopted which banned trade in the animals and their by-products, absent compliance with strict per-

mit requirements. The agreement, known as the Convention on International Trade in Endangered Wild Fauna and Flora,⁷⁸ (hereinafter cited as the Convention), was signed in Washington on March 2, 1973.⁷⁹ The Convention establishes a cooperative effort, within the United Nations framework, to save endangered species by controlling their transportation between nations. It classifies animals into three categories, and provides separate schemes of regulation for each. Appendix I of the Convention lists all species threatened with extinction which are or may be affected by trade.⁸⁰ In order to ship an animal listed in this appendix from one country to another, both an import permit and an export permit must be obtained.⁸¹ An export permit will only be granted if such export will not be detrimental to the survival of the species, the specimen was not obtained in violation of law, preparation and shipment are done so as to minimize the risk of injury or cruel treatment, and proof has been given that an import permit has been granted.⁸² An import permit will only be granted if such import will not be detrimental to the survival of the species, the importer is suitably equipped to house and care for the animal, and the specimen is not to be used primarily for commercial purposes.⁸³ To introduce a sea animal on the list into the country, the same criteria must be met which are required for receiving an import permit.⁸⁴

Although this set of regulations seems to provide thorough protection for endangered species, one major weakness exists. No definition is given for the phrase "commercial purposes", and without such a definition, the true impact of these requirements cannot be known. If "commercial" means purely for display, exhibition, or entertainment for profit, with no consideration of scientific or educational factors contributing to continued survival, then the restriction on importation is appropriate. However, if the phrase simply means that money is involved in the transaction, or that admission is charged when the animal is put on display, then the restriction is too broad and might actually work to the detriment of an endangered species. A scientific institution might perform valuable research aimed at protecting endangered species, but might also purchase its specimens for money, or put them on display part-time to raise money to continue their research. In such a situation, classifying such activities as "commercial", thus denying such institutions specimens with which to work, would be unfortunate. The narrower definition, besides being the more desirable, is also the one which is the most logical in the present context, since the Convention speaks of specimens which are used "*primarily* for commercial

purposes.”⁸⁵ The word “primarily” should not be defined quantitatively, such as by deciding that a specimen cannot be used for commercial purposes more than 50% of the time, but instead should be defined qualitatively by balancing the benefits that are derived during the non-commercial use of the specimen against the detriment to the animal or its species which may occur during the commercial use of that specimen.

A second Appendix lists animals which, although not now necessarily threatened with extinction, may become so unless trade is subject to strict regulation in order to avoid utilization incompatible with their survival. Other species which must be regulated in order that threatened species may be brought under effective control are also included in Appendix II.⁸⁶ In order to trade in animals listed in this appendix, an export permit must be received. In order to obtain such a permit, the exporter must meet the same criteria which exist for receipt of a permit pertaining to an animal in Appendix I.⁸⁷

A third Appendix lists animals which are subject to regulation within a country to prevent or restrict exploitation, and which can only be effectively controlled with the cooperation of other countries.⁸⁸ Animals listed in this appendix are also subject to export controls, although the restrictions are somewhat less stringent than for Appendix II animals.⁸⁹

The response of the United States to the adoption of the Convention was passage of the 1973 Act, which was patterned after the Convention and implemented many of its provisions. The 1973 Act will be discussed in depth following a review of other aspects of the 1969 Act.

In addition to addressing international issues, the 1969 Act also strengthened laws for the protection of native wildlife. The Lacey Act was expanded to prohibit the sale or purchase of reptiles, amphibians, mollusks, and crustaceans taken in violation of foreign or state laws, adding to the previously existing prohibitions concerning fish, mammals, and birds.⁹⁰ This expansion is important because it recognizes that the extinction of an animal in one of the newly added groups can affect the balance of nature just as much as the extinction of a fish, mammal, or bird.

The 1969 Act also provided added protection for domestic species, expanding the habitat protection authority beyond that of the 1966 Act by authorizing the acquisition of privately owned lands within any area administered by the Secretary of the Interior “. . . for the purpose of conserving, protecting, restoring, or propagating native species.”⁹¹ This provision is particularly vital for the protection of domestic endangered species with little commercial importance,

since the other provisions of the 1969 Act have their greatest impact in protecting species which are threatened because of their economic value.⁹²

B. *Judicial Construction*

An important legal issue raised by the 1969 Act was the extent to which the federal legislation preempted state laws. The fundamental doctrine of preemption is derived from the Supremacy Clause of the U.S. Constitution, and holds that a state measure which conflicts with a federal requirement must be invalidated.⁹³

In the case of *A.E. Nettleton v. Diamond*,⁹⁴ (hereinafter cited as *Nettleton*), a New York manufacturer of alligator shoes sought a declaratory judgment that New York's Mason Act⁹⁵ and Harris Act,⁹⁶ which prohibited the sale within the state of animals of certain species, as well as products made from their skins or bodies, were unconstitutional. Plaintiff's contention that the 1969 Act was an elaborate, comprehensive and pervasive scheme of federal regulation that curtailed state power in the field of wildlife protection was rejected by the New York Court of Appeals in light of *Florida Lime and Avocado Growers v. Paul*.⁹⁷ In that case the Supreme Court sustained the constitutionality of a California statute which prohibited the marketing in the state of avocados which were marketable under federal standards. Preemption did not occur because neither of two criteria was met: there was not ". . . such actual conflict between the two schemes of regulation that both cannot stand in the same area,"⁹⁸ and there was no evidence of ". . . a congressional design to preempt the field."⁹⁹

In *Nettleton*, the court found that the laws involved were not in conflict, even though the Mason Act listed certain species as endangered which were not included on the federal list. Because the state list contained a larger number of endangered species than the federal list, compliance with the state law would necessarily entail compliance with the federal law. The plaintiff was unable to show that the enforcement of the state act would in any way impair the effectiveness of the federal law.

The court also recognized that the 1969 Act sanctioned the continued validity of state laws by specifically providing federal enforcement for the sale or transportation of wildlife taken in violation of such state laws.¹⁰⁰ Regulations promulgated pursuant to the 1969 Act also recognized that preemption did not occur by stating that nothing in the regulations should relieve any person from any provision of any other law of a state or the United States.¹⁰¹

A state's police power, recognized as the least limited of all governmental powers,¹⁰² has been construed to include the conservation of fish and wildlife.¹⁰³ The displacement of this historic police power is not to be presumed unless ". . . that was the clear and manifest purpose of Congress."¹⁰⁴ The exercise of a state's police power is reasonable and valid if there is a ". . . fair, just, and reasonable connection between [the exercise of the police power] and the promotion of the health, comfort, safety, and welfare of society."¹⁰⁵ The court recognized the benefit to the welfare of society played by the protection of endangered species, because of their key role in the maintenance of the life cycle. Therefore, the court held that the Mason and Harris Acts were valid exercises of New York's police power, and were not preempted by the passage of the 1969 Act.

The court did, however, modify the application of the Mason Act by exempting the sale of skins taken prior to the passage of that Act, if the seller could satisfactorily document the time of taking.¹⁰⁶ The court's rationale for this interpretation was that the sale of such skins could in no way work contrary to the purposes of the Mason Act, since such a ban could not protect animals already destroyed.

The court rejected contentions by the plaintiff that the New York laws violated the Commerce Clause. The decision of the same court in *Bootman*,¹⁰⁷ interpreting the Lacey Act, provided a precedent for rejecting such a contention. Additionally, the Mason and Harris Acts merely prohibited the sale or offer for sale of animal products within the state, thus rendering the Commerce Clause arguments meritless.

The conclusion of the *Nettleton* court, that the Mason and Harris Acts were valid exercises of the state's police powers and not preempted by the federal legislation, was supported in a Federal decision rendered by the United States District Court for the Southern District of New York. In *Palladio v. Diamond*,¹⁰⁸ (hereinafter cited as *Palladio*), the district court accepted the *Nettleton* arguments on preemption, finding no inconsistency or conflict between the state and federal legislation, and noting that the federal legislation invited state action.¹⁰⁹

The plaintiff in *Palladio* was a Massachusetts corporation which sold shoes within New York state which were made of alligator, caiman, and crocodile skin. As in the *Nettleton* case, plaintiff sought a declaration that the Mason and Harris Acts were unconstitutional. The court rejected arguments that the state legislation was objectionable because it interfered with interstate commerce for solely esthetic purposes. The court noted that the Acts were supported by non-esthetic interests, thereby justifying the exercise of

broad police powers.¹¹⁰ Additionally, the court recognized that a state may minimally affect interstate commerce even when the purposes involved are of an esthetic nature.¹¹¹ The court found no interference with congressional power to regulate commerce, make treaties, or control foreign affairs. Nor was the Supremacy Clause violated by the New York legislation.

The court accepted the state's right to promulgate a list of endangered species which differed from the federal list because the list promulgated by the Secretary was nowhere indicated to be definitive. The court recognized that "[t]he state's list may be broader than the federal list simply because the State Legislature did not see fit to wait until only a handful of species remained before it passed a law affording protection."¹¹² The court similarly rejected contentions that the dealer involved was deprived of property without due process of law by the New York legislation, merely because he would lose money as a result of its enactment. The court observed that the plaintiff had no property rights in wildlife of a foreign country.

Two major deficiencies of the 1969 Act were the lack of control over activities occurring *within* the United States for the protection of endangered species¹¹³ and the inability of the Secretary of the Interior to become involved in the problem until a species had become so endangered that the chances of assisting in its continued survival were severely limited.¹¹⁴ Limiting the Secretary's jurisdiction to activities involving animals which were already endangered prevented him from taking steps to assure that an animal which was on the verge of becoming endangered would be protected and thereby saved from joining the ranks of the "endangered." In order to address these and other criticisms of the 1969 Act, the 1973 Act was passed.

IV. THE 1973 ACT

Finding that "the inadequacy of existing regulatory measures" was one of several factors contributing to the continuing problem of animal extinction,¹¹⁵ Congress passed the 1973 Act, totally replacing the 1969 Act, and superseding all of the 1966 Act except for the provisions relating to the National Wildlife Refuge System.

A. *Provisions of the Act*

Section 4 of the 1973 Act directs the Secretary of the Interior to compile a list of "threatened species", to supplement the list of "endangered species" required by the 1969 Act.¹¹⁶ An "endangered

species" is defined as ". . . any species which is in danger of extinction throughout all or a significant portion of its range . . ." ^{116.1} Although this definition is particularized by the requirement that animals be listed as endangered ". . . on the basis of the best scientific and commercial data available," ^{116.2} the term still lacks specificity. An alternative definition would be a quantitative one which established a threshold level for each species. When the number of animals within a species dropped below that threshold level, the species would automatically be listed as endangered. Such a system is impractical because the determination of a different threshold level for each species or group of species would be unduly burdensome, and the use of a single rigid level for all species is inadvisable due to the diverse characteristics of various species. The term "threatened species" is defined to include ". . . any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." ¹¹⁷ The Secretary is empowered to issue ". . . such regulations as he deems necessary and advisable for the conservation of such species." ¹¹⁸ These regulations may prohibit any activity which is forbidden with respect to endangered species in other sections of the Act, although the regulations also may be more lenient. ¹¹⁹ No regulations have yet been promulgated under this section, and no animals are presently listed as "threatened", although such regulations are expected in 1975. ¹²⁰ The new classification ("threatened") was established because one of the reasons cited for the continuing extinction problem, notwithstanding the passage of the 1966 and 1969 Acts, was that the previous legislation did not provide ". . . the kind of management tools needed to act early enough to save a vanishing species." ¹²¹ Now the Department of the Interior has the power to act to protect animals before they actually become endangered.

Section 6 of the Act directs the Secretary to cooperate economically, administratively, and managerially with states that establish conservation programs which are determined to be in accordance with the Act. ¹²² Furthermore, Section 6 specifically states the relationship of the 1973 Act to similar state legislation, thereby obviating the preemption problems which were arguably present under the 1969 Act. ¹²³ Under the 1973 Act, state laws and regulations dealing with importation, exportation, and interstate or foreign commerce in endangered or threatened species are declared void if they permit what is prohibited by the Act or if they prohibit what is authorized under an exemption or permit in the Act. ¹²⁴ However, the 1973 Act specifically provides that no *other* state law or regulation intended

as a conservation measure should be construed as void, because of the 1973 Act.¹²⁵ State laws relating to the *taking* of endangered or threatened species may be more restrictive than the permits or exemptions included in the Act, but not less restrictive.¹²⁶

Section 8 extends the aid program of Section 6 to foreign countries and urges international cooperation in establishing programs to protect endangered species.¹²⁷ This provision is especially vital for underdeveloped countries which lack the financial capability or technical expertise needed to manage an effective wildlife conservation program. Financial assistance (including the acquisition of lands, waters, or interests therein) and technical assistance (including consultation with government agencies knowledgeable in the field) are authorized by the Act.¹²⁸

In Section 9a, the 1973 Act expands the list of prohibited activities far beyond any of the previous acts.¹²⁹ In addition to prohibitions against importation (included in the 1969 Act) and prohibitions against the movement in interstate commerce of animals taken in violation of local laws (included in the Lacey Act), this section bans exporting, taking within the United States or on the high seas, possessing or transporting any endangered species illegally taken, transporting any endangered species in interstate or foreign commerce for commercial purposes, or offering to sell or selling such animals in interstate or foreign commerce.¹³⁰ Finally, protection was afforded for the first time to endangered species of plants.¹³¹

Although Congress recognized that hunting and destruction of natural habitat are the major causes of extinction,¹³² most of the prohibitions of the 1973 Act address another cause of extinction: over-commercialization. Even the prohibition against "taking" (which is arguably the only prohibition in the Act directly dealing with the problem of hunting) also addresses the over-commercialization issue, since "taking" is defined to include capture or collection.¹³³

The prohibitions contained in the 1973 Act go beyond the scope of federal power encompassed in the Commerce Clause of the Federal Constitution, even though the definition of "interstate commerce" has been expanded to include activity which is only minimally related to such commerce.¹³⁴ The taking of an animal within a state for purely private use within that state, and the capture and possession within a state of an endangered animal (with no intention of leaving the state), are two examples of activities which are prohibited by the 1973 Act, but which are arguably beyond the power of Congress to regulate by reliance on the Commerce Clause. Instead of relying on the Commerce Clause, the Congress based its

authority to establish such prohibitions on its treaty-making powers.¹³⁵ Reliance on this authority is shown by the assertion that one of the purposes of the Act is to “. . . take all appropriate steps to implement the Nation’s international commitments.”¹³⁶ Several of the international commitments are listed in Section 2 of the Act, including the Convention.¹³⁷

The extent to which congressional power can be expanded by a treaty was addressed by the Supreme Court in *Missouri v. Holland*¹³⁸ (hereinafter cited as *Holland*). The United States and Great Britain had concluded a treaty in 1916 protecting migratory birds traveling between Canada and the United States. In 1918, Congress passed the Migratory Bird Treaty Act, forbidding the sale of migratory birds and authorizing the establishment of regulations by the Department of Agriculture to implement the Act. The State of Missouri brought a bill in equity to stop enforcement of the Act, asserting a violation of the Tenth Amendment regarding the rights reserved to the states, and also claiming an infringement of its property rights, as owner of the wild birds within its borders. The district court held the statute unconstitutional on the theory that the federal government could not legislate in the area since the birds belonged to the state for the benefit of its citizens. In so ruling, the lower court followed the reasoning set out in *State v. McCullagh*,¹³⁹ (hereinafter cited as *McCullagh*), which invalidated a 1913 enactment of Congress that attempted to protect all migratory birds and provide federal penalties for killing them. Overruling the lower court in *Holland*, the Supreme Court noted a significant distinction from the earlier *McCullagh* case. Without overruling the *McCullagh* decision, the Court distinguished this case because the 1918 legislation was not merely the enactment of a federal statute, as the 1913 Act had been, but dealt instead with a statute implementing a treaty. Article Four, Section Two of the Constitution expressly delegates the treaty-making power to the Congress, and Article Six indicates that such treaties, along with the Constitution and laws of the United States, are the supreme law of the land. The Court proceeded from the assumption that if the treaty was valid, then the statute would necessarily be valid under Article One, Section Eight as a necessary and proper means to execute the powers of the government. The Court then concluded that the treaty was valid. Examining the extent of the government’s treaty-making power, the Court concluded that what Congress could not accomplish on its own, it might be able to do when acting pursuant to a legally concluded treaty. The Court emphasized the differences between treaty

power and statute-making power by noting that “. . . [a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.”¹⁴⁰ Limitations on the treaty-making power, therefore, must be ascertained in a different way than for the statute-making power, recognizing the possibility that there may exist “. . . matters of the sharpest exigency for the national well-being that an Act of Congress could not deal with, but that a treaty followed by such an act could.”¹⁴¹ The limitation placed on the treaty-making power by the Court forbids the implementation of a treaty which contravenes *specific* prohibitive words in the Constitution, but not a treaty which infringes only on *general* clauses, such as the general grant of powers to the states under the Tenth Amendment.

The Court's reasoning in *Holland* relates more to practical considerations than to legal ones. The Court recognized the existence of a national interest (the protection of migratory birds) which could be protected effectively only by action taken at a national level, in concert with another national power. Since state control (or the lack of control) would not adequately protect the national interest, the federal government had to have authority to become involved and protect its interests through its treaty-making power. *Holland* clearly establishes a precedent for sustaining the validity of the 1973 Act under the treaty-making powers. A problem of national interest is involved, recognized as such both in earlier congressional actions and in international agreements, and one which arguably cannot be adequately protected by the states, since an endangered species which is located in only one state may be destroyed by state inaction. Since the United States has concluded treaties addressing the extinction problem, the enactment of the 1973 Act to carry out the purposes of such treaties is analogous to the congressional enactment of 1918 which was sustained by the Court in *Holland*.

B. Exempted Activities

Section 9b of the 1973 Act provides exemptions for persons engaged in otherwise prohibited activities, if the fish or wildlife involved in that activity were held in captivity or in a controlled environment on the effective date of the statute (December 28, 1973).¹⁴² The exemption does not apply if the holding occurred as part of a commercial activity or if the holding is contrary to the general purposes of the Act (reducing animal extinction).¹⁴³ Commercial activities have been defined to include direct sales, trades,

and barter, but not gifts, even if a similar gift is later sent by the donee to the donor.¹⁴⁴ An exchange of gifts is permitted if two *separate* transactions are involved, and each gift is made without assurance of any gain or profit by barter, credit, or any other form of compensation. This exemption arguably opens a loophole which allows institutions to barter without losing their exemption. A transaction which is really a barter can be disguised as a series of separate gifts by not revealing that obligations are incurred by each party. This loophole, however, is acceptable since gifts between institutions should be encouraged. The benefits derived from free exchange of gifts for non-commercial purposes outweigh whatever detriment may result from allowing a few institutions to conduct barter under the guise of gifts. Endangered species held by commercial zoos (as distinguished from non-profit institutions) are ineligible for this exemption, as are all progeny of animals held in captivity, if born after the effective date of the legislation, regardless of whether the holder is a commercial or non-profit entity.¹⁴⁵

Arguments can be advanced that the exemption is drawn both too narrowly and too broadly. Proponents of a wider exemption can claim that no animal in captivity need be subject to interstate regulation because other controls, already available, sufficiently handle the situation. Foreign endangered species are regulated upon entry into the country,¹⁴⁶ and importation permits would not have been granted if such importation would endanger the chances of survival for the species. Once the animal is in captivity, so the argument goes, its subsequent movement in commerce can have no effect on the wild population. Therefore, no animal in captivity would need to be regulated. This reasoning would eliminate the distinction between commercial and non-commercial activities, since the nature of the transaction would not affect the wild population, thus making a distinction based on economic considerations illogical. Similarly, offspring born in captivity would remain unregulated, since, once again, there would be no effect on the wild population.

With respect to domestic endangered species, proponents of the wider exemption can argue that the only way such an animal can be brought into captivity from the wild is through an exemption from the "taking" ban included in the Act.¹⁴⁷ The permit process for receiving such an exemption will presumably assure that the animal will not be removed from the wild if such an action will be detrimental to the continued survival of the species.¹⁴⁸ As above, the conclusion to this argument is that once an animal is in captivity, any subsequent transaction involving that captive animal cannot possi-

bly affect the wild population. The major fallacy in this line of argument is the implicit assumption that all animals in captivity were obtained through *legal* importation or taking. Such an assumption fails to recognize the widespread existence of smuggling in the endangered species industry.¹⁴⁹ The possession by the Department of Interior of two million dollars worth of smuggled wildlife products is indicative of the widespread existence of such smuggling.¹⁵⁰ The judiciary has also failed to appreciate the widespread existence of the smuggling industry. In *Fur Information and Fashion Counsel, Inc. v. E.F. Timme and Son, Inc.*,¹⁵¹ furriers challenged the validity of an advertisement which claimed that the purchase of fake furs would help to save endangered animals. The court concluded:

The net effect of the statutes [the 1969 Act and the Lacey Act] and regulations promulgated thereunder by the Secretary of the Interior is that no plaintiff, and no member of the purported class, may cut, manufacture, or sell furs of such endangered species, nor may any apparel be made or sold therefrom in the United States. The Government, by diligent enforcement, has obtained full compliance. It would be impossible as a practical matter for such high fashion apparel . . . to be cut, manufactured, or sold in the United States, even clandestinely. To do so would require the joint conspiratorial activities of too many persons . . . and the risks are simply too great. . . . Defendant suggests that it is possible in some of the backward areas of the world to purchase such a coat and for the customer to wear or carry it into the United States as personal clothing. No evidence was received in support of this unlikely suggestion, and the hypothesis is so far fetched that it may be disregarded.¹⁵²

If importation controls were perfect, perhaps no internal controls over foreign endangered species would be necessary, but the system is presently not at that stage. Animals are brought into the country on forged documents,¹⁵³ hidden in false-bottomed crates,¹⁵⁴ listed under fictitious names,¹⁵⁵ and mixed in with non-endangered species to avoid detection.¹⁵⁶ If no internal controls existed, a smuggler would have an unregulated market to trade in as soon as he was able to bypass the importation screen. An unscrupulous animal dealer or institution could obtain illegally imported animals and dispose of them with other such animals legally obtained, with virtually no scrutiny of its actions. The 1973 Act was designed to regulate traffic in endangered species at every step in the distribution chain,¹⁵⁷ thus providing additional opportunities to detect illegally imported animals, even after the initial regulatory control of customs inspection has been evaded.

Those who favor *narrowing* or even eliminating the exemption

altogether may argue that the exemption creates a loophole which allows the movement of animals without a permit, by falsely claiming that the animal was held in captivity on the effective date. However, the effect of this argument is greatly lessened because the 1973 Act provides that anyone attempting to transact business in endangered species more than 180 days after the effective date of the legislation must overcome a rebuttable presumption that the animal involved was *not* held in captivity on the required date.¹⁵⁸ Such a burden on the actor subjects the transaction to some governmental scrutiny, even though a permit is not required. This allocation of the burden of proof also places the responsibility upon the person who is closer to the situation, has better access to relevant records, and generally is in a better position to provide any relevant information on the situation. The importance of the national interest involved (protection of wildlife for the public welfare) supports the principle that the private party attempting to avoid the regulatory scheme should accept a greater burden than the government.

Proponents of a narrower exemption could find the distinction drawn between exempt animals (those held in captivity prior to December 28, 1973) and their non-exempt progeny (those born after the enactment date) to be illogical and unacceptable. The basic premise behind the argument for narrower exemptions is that increased transactions lead to increased demand, thereby causing a larger drain on the wild population, assuming that many of the newly captured animals can be smuggled into the country. If such reasoning is accepted, the conclusion must be reached that transactions in exempted animals will increase demand as much as transactions in their non-exempt offspring will. Thus the conclusion that both groups should be covered by the same set of regulations.

Whether one argues in favor of broadening the current exemptions, or narrowing them, one conclusion is the same: the distinction made by the legislation between animals in captivity and their progeny is inconsistent. Either both groups should be covered by the same exemption or neither of them should. The reason for the distinction is not based on science or logic. Rather, it is political in origin. The distinction was a compromise aimed at assuring passage of the Act.¹⁵⁹ The reasoning behind the exemption was that the number of animals involved was small, and would eventually decrease to zero, at which time all captive animals of endangered species would be regulated.¹⁶⁰ Looking at the 1973 Act logically, rather than politically, the distinction between captive animals and their progeny should be eliminated. Recognizing the possibility of smuggling as a reality, the better alternative is to do away with the

exemption, requiring *all* captive endangered animals to be subject to permit procedures.

Another questionable distinction the exemption draws is that between commercial and non-commercial activities. No commercial activities are exempt from the permit requirements, while non-commercial activities are exempt, if the animals involved in the transaction were being held on the effective date of the Act.¹⁶¹ The flaw in such a distinction results from the definition of "commercial activity" in the statute as ". . . all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling."¹⁶² Under administrative construction, this phrase has been more explicitly defined to include any dealings involving money or other things of value, even if done by non-profit institutions.¹⁶³ The basis for the distinction is unsound. The important factor to be considered when distinguishing between different activities which involve endangered species is not whether money is involved in the transaction, but rather what effect the transaction will have on the species' chance for survival. Some of the best breeding programs in the country are conducted by commercial, profit-making organizations.¹⁶⁴ The "commercial" nature of such activities does not detract from their beneficial results. Therefore, they should not be subject to stricter regulations simply because money is involved in the transaction. A zoological institution, known for its contributions to research for endangered species, is no less effective as a researcher if it obtains its specimens through commercial dealings, rather than by donation. Arguably, its effectiveness as a research institution is increased if it can plan for the future systematically, based on its ability to buy specimens as needed, rather than having to rely on the unpredictability of possible donations. It has been argued that a commercial organization actually has a greater interest in the continuation of a species than a non-commercial organization does, since the loss of a species results in an economic loss to the commercial organization which would not be incurred by a non-commercial entity involved in the same research programs.¹⁶⁵

It is submitted that the distinction the statute seeks to make can be more rationally approached. Some distinction should be made between a commercial organization with a history of concern and scientific expertise relating to endangered species and a small traveling circus or show, whose only concern is profit, and which has never contributed anything to the continued survival of any species except its owners. Under the present regulations, no distinction is

made between these two organizations when considering exemptions. Both are considered "commercial" and therefore ineligible for exemption. A better system would be to assign a "commercialization factor" to each institution which applies for an exemption. This factor would balance an institution's contribution to the plight of endangered species against the damage which might result to the species because of that institution's dealings in that species. Consideration might be given to the extent to which the display of an animal detracts from its ability to breed, the expertise of the personnel handling the animals, and the contributions which the institution has made toward educating people concerning the plight of endangered species. The use of such a factor would be more rational than the straight money-related test which is now employed, and would give cognizance to contributions directed toward the alleviation of the plight of endangered species which have been made by many commercial organizations.¹⁶⁶

C. Permits

In addition to the exemptions provided for captive animals, other exemptions are also available under the 1973 Act. Section 10 of the Act establishes guidelines for the granting of permits to engage in activities normally prohibited by the Act.¹⁶⁷ Permits may be granted for "scientific purposes or to enhance the propagation or survival of the affected species."¹⁶⁸ This exemption is narrower than a similar one provided in the 1969 Act, which included zoological, educational, scientific, and propagational purposes.¹⁶⁹

A second basis for receiving a permit is based on undue economic hardship.¹⁷⁰ This exemption is also narrower than a similar exemption in the 1969 Act, since the legislation now provides that no permit may be issued which will operate to the disadvantage of the endangered species involved,¹⁷¹ while the 1969 Act merely required that a balancing test be made between the economic hardship involved and the amount of detriment to the species which would occur.¹⁷² The requirement under the 1973 Act (that *no* detriment to the species be allowed) is superior to the balancing test required under the 1969 Act, since the survival of the species should outweigh even severe economic hardship. The test set up under the 1973 Act is difficult, but not impossible, to meet. If an importer can show that no animal will be removed from the wild to replace the one being imported, then the test is probably satisfied. If the exporting country has *effectively enforced* laws prohibiting the taking of endangered animals, the importer has a stronger argument that no

animal will be removed from the wild to replace the one being imported. The importer may also show that the animal he is importing was not removed from the wild for the purpose of importation, but was in captivity for a different reason. Acceptable reasons might be that the animal was born in captivity in the foreign country, that it has been in a zoo or similar institution in a foreign country prior to the enactment of importation controls, or that it was removed from the wild because it was in danger of being destroyed if it was left there. One additional factor which the importer might be asked to prove is that the animal is not scheduled for re-introduction into the wild if not imported.

In deciding whether an "economic hardship" permit should be granted for the importation of a by-product of an endangered species, the administrator should consider the same criteria which are applicable to the exemption for the importation of live animals. Namely, what effect will the importation have on the species' continued survival? An importer may be able to justify a proposed transaction by showing that the product involved is unique, perhaps because of its historic or artistic quality, and therefore could not be replaced by the taking of a similar animal from the wild. For example, if an importer wanted to import a scrimshaw masterpiece done by a famous artist of the past, or if he wanted to import a leopard skin robe worn by an African chief one hundred years ago, there is little danger that the article to be imported will be replaced by the taking of another endangered animal from the wild concurrent with the importation of the article. The uniqueness of the article imported assures that its replacement will not be achieved by the slaughter of more animals. The burden placed on the importer to obtain an economic hardship exemption is a hard one to meet, but justifiably so, considering the irreversibility of the extinction process.

One additional exemption is provided in the 1973 Act to permanent residents of native Alaskan villages, when their taking of an endangered species is primarily for subsistence purposes.¹⁷³ The number of persons involved in this exemption and the potential detrimental effect on endangered species are both minimal,¹⁷⁴ but added safeguards are available since the Secretary may regulate such taking if it materially and negatively affects the species involved.¹⁷⁵

The administration of the permit system under Section 10 has been severely criticized. The major criticism leveled at the administrator is that long delays occur between application for a permit and

its approval or rejection.¹⁷⁶ All permit requests are subject to a minimum amount of delay due to the notice requirements contained in the Act. Notice of all permit applications must be published in the *Federal Register*, inviting comments to be submitted within thirty days.¹⁷⁷ Since it takes at least six days to get a notice published in the *Federal Register*, and another six days are allowed at the end of the period to consider late comments, a minimum of 42 days are necessary for consideration of any permit application.¹⁷⁸ The delay period has been characterized as a "good delay" since it insures that permits will not be hastily granted without due consideration being given to relevant factors.¹⁷⁹ The solicitation of divergent public opinion should decrease the probability that detrimental effects from the granting of such permits will go unnoticed. Delays of longer than 42 days have been the object of the most criticism, and can lead to an accumulation of animals awaiting processing. In October of 1974, 40 tiger cubs were awaiting clearance for trade or purchase, allegedly due to bureaucratic delays.¹⁸⁰

Delays in the administration of the permit system have resulted in actions which work contrary to the intent of the Act. Due to the difficulty of obtaining specimens from other sources, some zoos have been forced to in-breed animal families, leading to a higher percentage of defective or diseased offspring.¹⁸¹ Zoos which have fulfilled their own needs with respect to an endangered species may separate their breeders and prevent future propagation if the delays continue.¹⁸² Otherwise, such facilities will become overcrowded while waiting to see if permits for sale or trade of such animals will be granted. It is illogical for a zoo to continue to propagate a species once its facilities are full, if it cannot be assured that it will be allowed to distribute surplus animals to other facilities. The discouragement of breeding is directly contrary to the intended purpose of the Act which is to ". . . encourage zoos to pool their stocks of endangered species into cooperative breeding programs in the hopes of providing some of the legitimate zoo and research needs for species from captive stock, rather than from wild populations."¹⁸³ Some increases in breeding programs have admittedly taken place because of the 1973 Act. The Bronx Zoo, for example, bred 663 animals during 1974, as compared with 185 purchased from other zoos or animal dealers.¹⁸⁴

Delays in acting on permits have also resulted in the maintenance of endangered animals in inadequate or overcrowded facilities. The experience of the Brookfield Zoo in Illinois illustrates how delays can force animals to live in less than adequate facilities.¹⁸⁵ The zoo received five Nile crocodiles from the United States government

which had confiscated them from parties who had taken them in violation of law. Although the animals remained the property of the government, the zoo was issued a permit to possess them on April 24, 1973. The permit contained a provision prohibiting the zoo from transferring or selling the animals or their progeny without the permission of the Department of the Interior. As the animals began to outgrow their facilities at the Brookfield Zoo, a permit was requested on December 12, 1973 for transfer of the animals to the Crandon Park Zoo in Miami. When this request went unanswered, a new request was made on March 19, 1974. The second letter was not answered, and a third request was sent on August 16, 1974. After some disagreement as to whether a permit was actually needed for the transfer, authorization was finally given at the end of September, 1974. Almost ten months had gone by since the zoo first requested a transfer. During the delay, the animals continued to grow and continued to be maintained in overcrowded facilities in the zoo. Although the 1973 Act was eventually held inapplicable to the situation, its possible application played a role in the delay. Additionally, the permit procedures involved in this example were administered through the same department which handles endangered species permits and is therefore demonstrative of the difficulties which can be encountered when administering such a system. Delays of this magnitude may discourage zoos from breeding endangered animals, especially if their facilities are only adequate for maintaining such animals for a short time or while they are very small. With no assurances that they will be able to dispose of such animals for several months, the incentive to breed them is diminished.

One major reason for the delays which have occurred in the issuance of permits has been the lack of preparation time provided for the establishment of a permit system. The Act became effective immediately upon being signed into law, and permits for engaging in otherwise prohibited acts were immediately required, even though permit procedures had not yet been established. Even the Office of Endangered Species has admitted that the processing of some permits was "abominable", although they also claim that the delay problems have now been essentially corrected.¹⁸⁶ The accuracy of this contention is hard to ascertain since the *Federal Register* does not publish information concerning the disposition of permit applications, and such information is not readily available to the general public.¹⁸⁷

Another factor causing delay in the processing of applications by the administrator, even after permit procedures have been estab-

lished, is the requirement that every transaction involving an endangered species must be approved in a separate permit. Even an institution with a superb reputation for aiding endangered species must go through the entire permit process before engaging in *any* activity covered by the permit system. No short cuts are allowed, even for an institution with a proven record of protecting endangered species.

D. Proposed Solutions

One possible solution to reduce delays in receiving a permit is available within the framework of the statute as it is now written. Section 10a of the Act allows the Secretary to permit, under conditions and terms prescribed by him, acts which are otherwise prohibited, for scientific or propagational purposes.¹⁸⁸ Nothing in this section requires that a separate permit be issued for *each* transaction involving an endangered species, although the present permit system is based on that principle. A feasible alternative would be to issue temporal permits, perhaps valid for one year at a time, to organizations that could demonstrate: (1) good faith attempts to help endangered species; and (2) non-involvement in any transactions which have injuriously affected the survival of endangered species.¹⁸⁹ A suggested method of implementing such a system is through a bill now pending in the House of Representatives which would establish a Zoo Accreditation Board.¹⁹⁰ The duties of this board would include the establishment of standards of operations for zoological institutions, and the certification of zoos which complied with such standards.¹⁹¹ This bill could be modified so that certification by the Board would give the institution so certified an exemption from the permit requirements of the 1973 Act. The standards guiding the accreditation process would have to be written so as to take into consideration the institution's past dealings with endangered species and its ability to possess and handle such animals without detrimental effect. Certification of an institution would presuppose that it would act in good faith to protect endangered species, at least until the institution acted in such a way as to rebut that presumption. The exemptions allowed to the institutions could be restricted, perhaps including only transactions involving animals which are already held in captivity within the country, while still requiring permits for the importation or removal from the wild of endangered species. A zoological institution would be deterred from conducting activities which might endanger a species, since such activities would strip the zoo of its accreditation and

might also give the government the power to compel the zoo to cease operation.¹⁹²

Another way of accomplishing the same objective might be through industry self-regulation, rather than through government control.¹⁹³ An organization like the American Association of Zoological Parks and Aquariums¹⁹⁴ could establish guidelines for the protection of endangered species, with each member institution that complied with such standards being eligible to obtain a blanket permit valid for a specified time period. Regulations establishing such a system should include a provision allowing the government to oversee its operation, and to step in if the guidelines were inadequate or not being enforced. The major argument against this proposal is that zoological institutions may be subject to a potential conflict of interest in attempting to preserve endangered species in the wild, while also attempting to maintain adequate exhibits of animals in captivity. Another criticism of this proposal is that government supervision might become so excessive as to be even less efficient than direct control by the government.

The Department of the Interior has proposed new regulations which might also result in fewer delays in obtaining permits.¹⁹⁵ Certain species of animals, particularly certain cats, would be designated "threatened species" rather than "endangered species," if already held in captivity in the United States. Animals would be so designated once they were determined to be a "captive self-sustaining population"¹⁹⁶ (i.e., that sufficient breeding programs are being carried out to assure that the species will continue to exist in captivity, even though transactions involving such animals are permitted). The implementation of such regulations would encourage zoos to increase breeding programs. Once animals were being bred in sufficient numbers to be designated "self-sustaining", controls over such animals could theoretically be removed, and the zoos could more easily transfer such animals from one institution to another. The legal basis for distinguishing between animals of a given species held in captivity in the United States and animals of the same species in the wild is found in the definition of "species" contained in the 1973 Act.¹⁹⁷ A "species" is defined to include ". . . any subspecies of fish or wildlife or plants and any other group of fish or wildlife of the same species or smaller taxa in *common spatial arrangement* that interbreed when mature."¹⁹⁸ The use of the phrase "common spatial arrangement" has been advanced as a legal justification for classifying an endangered species within the United States differently from the same species in a foreign country.¹⁹⁹ The movement of a species from the "endangered" list to the "threat-

ened" list is important because less restrictive controls could then be applied to transactions in such animals. The 1973 Act specifically sets out controls for endangered species, and also provides that the Secretary can issue whatever regulations he considers necessary and advisable for the protection of threatened species.²⁰⁰ Therefore, this proposed regulation could be implemented within the present statutory framework.

E. Judicial Construction

The 1973 Act has been construed by one court to restrict the activities in which an individual can engage on his own property, if such actions will affect, even indirectly, the survival of an endangered species. In *U.S. v. Cappaert*,²⁰¹ the United States sought a declaratory judgment of its rights to the use of water appurtenant to land in Death Valley National Monument, necessary to maintain a pool for the desert pupfish (an endangered species). The evidence established that the defendants' pumping of underground water for commercial purposes had drawn water from underground sources which supplied the pool, threatening the survival of the pupfish. The court issued an injunction restraining adjacent landowners from pumping underground water from their land, except as was necessary for domestic purposes. The court recognized a public interest in the preservation of the pupfish and declared that the water rights of the United States were superior in time and right to those of the private landowners. In addition, the court found that the United States would have no adequate remedy at law in the event that the pupfish were rendered extinct by the pumping. Therefore the defendants were enjoined so as to limit their pumping to achieve and maintain a stated daily mean water level in the pool.

The significance of this case is the importance which was attached to the protection of an endangered species, ranking it superior to private property rights. The case also illustrates the use of equitable powers by a court in effectively contributing to the survival of an endangered species. The court did not address the question of whether the same results would have been obtained had the pool whose sources were being drained been located on private land, rather than in a national park. However, such an extension would seem warranted by the opinion, since the court recognized a national interest in protecting endangered species in general, and not merely in protecting endangered species located on federal property. Such a conclusion would also support the clearly expressed federal policy of protecting endangered species through the preservation of their natural habitat.

CONCLUSIONS

Protection for endangered species has become increasingly comprehensive over the years. The 1973 Act regulates virtually all transactions involving endangered species, with exceptions allowed when considered appropriate. This all-encompassing authority has led to the administrative difficulties described above. A streamlining of the permit system is needed. This can be accomplished by either (1) allowing blanket permits for reputable organizations, or (2) imposing less restrictive controls on animals held in captivity. The exemptions contained in the 1973 Act are inconsistent. Differentiation between animals in captivity and their progeny is unnecessary and should be eliminated. The distinction between commercial and non-commercial transactions should be modified. The present distinction is too simplistic, and therefore unworkable. The degree of regulation imposed should be based on the potential harm or good which might result from a given transaction involving an endangered species, rather than simply on whether monetary considerations are involved. Protection of endangered species is vital for the general welfare of the public, but such protection should not be based on the premise that more regulation necessarily leads to more effective protection.



FOOTNOTES

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¹ Bumper sticker distributed by the International Society for the Protection of Animals, Jamaica Plain, Massachusetts, 02130.

² In addition to the unbalancing of an ecosystem which can occur because of the loss of certain members of that system, a species' distinctive gene matter is also lost, which possibly could have been used to improve domestic animals or increase resistance to disease or environmental contaminants. S. REP. No. 91-526, 91st Cong., 1st Sess. (1969) in UNITED STATES CODE CONG. AND ADMIN. NEWS 1415 (1969) (hereinafter cited as S. REP. No. 91-526).

³ The protection of an endangered species with some commercial value may lead to regeneration of the species to a level where controlled exploitation can resume, allowing marketing of the species for an indefinite number of years, rather than eliminating its potential commercial use forever. *Id.*

⁴ “. . . [I]n hastening the destruction of different forms of life merely because they cannot compete in our common environment

upon man's terms, mankind. . . has abrogated to itself the determination of which species shall live and which shall die." *Id.*

⁵ During the 1,000,000 years prior to the appearance of man on the earth, geologists estimate that approximately one thousand species disappeared (a rate of one species per thousand years). 115 CONG. REC. 6245 (1969). The present annual rate of animal extinction is estimated to be between one and two species. S. REP. NO. 91-526, *supra* n. 2, at 1414.

⁶ *Id.*

⁷ 120 CONG. REC. E2681 (daily ed. May 1, 1974).

⁸ *Id.*

⁹ 18 U.S.C. §§41 *et seq.* (1970).

¹⁰ Pub. L. No. 89-669, 80 Stat. 926.

¹¹ Pub. L. No. 91-135, 83 Stat. 275.

¹² 16 U.S.C.A. §§ 1531 *et seq.* (1974).

¹³ *E.g.*, 16 U.S.C. §668 (1970) (Bald and Golden Eagles); 16 U.S.C. §§1151-87 (1970) (Fur Seals and Sea Otters; and 16 U.S.C. §§701-18 (1970) (Game and Wild Birds).

¹⁴ Act of May 25, 1900, 31 Stat. 188, § 3.

¹⁵ Act of June 15, 1935, 49 Stat. 380, § 242 amending 31 Stat. 188, § 3.

¹⁶ 18 U.S.C. § 42(5) (1970).

¹⁷ Act of May 25, 1900, 31 Stat. 188, § 2.

¹⁸ H. REP. NO. 2333, 80th Cong., 2d Sess. (1948), in *Comments of the American Association of Zoological Parks and Aquariums on Proposed Importation Requirements, Injurious Wildlife*, July 22, 1974, at 4 (hereinafter cited as AAZPA).

¹⁹ *Id.*

²⁰ Act of May 24, 1949 c. 139, § 42(a), 63 Stat. 89.

²¹ 18 U.S.C. § 42(a)(3) (1970).

²² 18 U.S.C. § 42(a)(3) (1970).

²³ 18 U.S.C. § 42(a)(4) (1970).

²⁴ 18 U.S.C. § 42(a)(4) (1970).

²⁵ Just such reasoning led to the establishment of an importation permit system under the 1969 Act and the further expansion of that system in the 1973 Act.

²⁵ Contentions have been made that the Act only allows the listing of a species as "injurious" if it meets a majority of the following criteria: (1) ability to survive under the climatic conditions of the United States; (2) ability to locate and utilize available food supplies; (3) ability to reproduce in sufficient numbers to establish wild populations; (4) ability to escape detection and control through

mobility and seclusiveness; and (5) ability to expand its range in a short period of time. *AAZPA*, *supra* n. 18, at 8-9.

²⁷ All of the animals *specifically* listed in the Act (mongoose, fruitbat, English sparrow, and starling) were of the "pest" variety when listed, rather than being endangered. Act of May 24, 1949, c. 139 § 42(a), 63 Stat. 89.

²⁸ 18 U.S.C. § 42(c) (1970).

²⁹ Except in the rare case when the number of surviving animals in a given species is so small that the loss of even one such animal threatens the survival of the species.

³⁰ *Hearings on S. 1447 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 80th Cong., 2d Sess. (1948) in *U.S. v. State Marine Lines, Inc.*, 334 F. Supp. 84, 89 (S.D.N.Y. 1971). Examples given include shipment losses of 100% involving elephants, camels, and turtles, 88% losses for birds, and 85% losses for penguins. *Id.*

³¹ U.S. CONST. Art. I, §8(3).

³² *Plumley v. Massachusetts*, 155 U.S. 461 (1894).

³³ 161 U.S. 519 (1896).

³⁴ *Id.* at 534.

³⁵ 180 N.Y. 1, 72 N.E. 505 (1904).

³⁶ 180 N.Y. at 10, 72 N.E. at 508.

³⁷ *See*, *Cohen v. Gould*, 177 Minn. 398, 225 N.W. 435 (1929); *State v. Shattuck*, 96 Minn. 45, 104 N.W. 719 (1905); *People v. Fargo*, 137 App. Div. 727, 122 N.Y.S. 553 (1910).

³⁸ *Rupert v. United States*, 181 F. 87, 89 (8th Cir. 1910).

³⁹ 120 CONG. REC. E1860 (daily ed. March 27, 1974); (remarks of Rep. Dingell).

⁴⁰ Pub. L. No. 89-669, §1(c), 80 Stat. 926.

⁴¹ Pub. L. No. 89-669, §1(a), 80 Stat. 926.

⁴² Pub. L. No. 89-669, §2(a), 80 Stat. 926.

⁴³ Pub. L. No. 89-669, §2(b), 80 Stat. 927.

⁴⁴ *Hearings on H.R. 9424 and H.R. 9493 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 89th Cong., 1st Sess. (1965) at 175.

⁴⁵ During the debate on the 1969 Act, Rep. Keith made reference to the destruction of natural habitats by noting that "[t]he population explosion—with its accompanying requirements for feeding, transporting and generally accomodating the millions of people who inhabit this earth—has been taking its toll on our wildlife and fish." 115 CONG. REC. 20172 (1969). Similarly, during debate on the 1973 Act, Senator Tunney remarked that ". . . most endangered species are threatened primarily by destruction of their natural

habitat." 119 CONG. REC. S14515 (daily ed. July 24, 1973). See also the remarks of Rep. Sullivan, 119 CONG. REC. H8018 (daily ed. September 18, 1973) and Rep. Lehman, 119 CONG. REC. E5892 (daily ed. September 19, 1973).

⁴⁶ The Secretary shall review other programs administered by him and, to the extent practicable, utilize such programs in furtherance of the purposes of this Act. The Secretary shall also encourage other Federal agencies to utilize, where practicable, their authorities in furtherance of the purposes of the Act and shall consult with and assist such agencies in carrying out endangered species programs. Pub. L. No. 89-669, §2(d), 80 Stat. 927.

⁴⁷ S. REP. No. 1463, 89th Cong., 2d Sess. (1966) in UNITED STATES CODE CONG. AND ADMIN. NEWS 3344 (1966).

⁴⁸ Pub. L. No. 89-669, §4(a), 80 Stat. 927.

⁴⁹ Pub. L. No. 89-669, §4(b), 80 Stat. 927.

⁵⁰ Pub. L. No. 89-669, §4(b), 80 Stat. 927.

⁵¹ Pub. L. No. 89-669, §4(c), 80 Stat. 928.

⁵² Pub. L. No. 89-669, §4(c), 80 Stat. 928.

⁵³ Easements and public use of the land may be permitted if compatible with the purposes for which these areas have been established. In addition, prohibitions do not apply to persons authorized to manage such areas. Pub. L. No. 89-669, §4(c), 4(d), 80 Stat. 928.

⁵⁴ 467 F.2d 1048 (6th Cir. 1972).

⁵⁵ 5 U.S.C. §§701 *et seq.* (1970).

⁵⁶ 5 U.S.C. §701 (a)(2) (1970).

⁵⁷ 467 F.2d 1048, 1059 (6th Cir. 1972).

⁵⁸ *Id.* at 1053.

⁵⁹ *Id.* at 1054.

⁶⁰ *Id.* at 1058.

⁶¹ *Id.* at 1060.

⁶² "The other danger facing so many animals, birds and other land creatures is man's vanity and desire for profits. The commercial exploitation of rare species has reached alarming proportions." 1115 CONG. REC. 20170 (1969) (remarks of Rep. Pelly).

⁶³ "[T]he commercial species has been replaced on the endangered species list by the 'predators and pests.' . . . The American Alligator is the last North American creature whose decline is still attributable to commercial greed. For the rest, the most severe threat is the loss of habitat."

Nature Our Vanishing Wildlife: Mystery, Wildness Is Dying, Los Angeles Herald Examiner, January 26, 1969, in 115 CONG. REC. 5239 (1969). The emphasis of this article on North American species ignores the role played by the United States in destroying the world's endangered species through over-commercialization. For

example, exotic pets peddled by pet stores in the United States are creating an increasing menace to wild animal populations. *Our Endangered Wildlife; Odd Pets Usually Die*, *Deseret News*, January 30, 1969, in 115 CONG. REC. 6246 (1969).

⁶⁴ Pub. L. No. 91-135, §3(a), 83 Stat. 275.

⁶⁵ Pub. L. No. 91-135, §3(b), 3(c), 83 Stat. 275.

⁶⁶ Pub. L. No. 91-135, §3(c), 83 Stat. 276.

⁶⁷ It has been asserted that one of the functions of a zoo is the protection of endangered species. 115 CONG. REC. 25276 (1969). More importantly, the contention has been advanced that some species near extinction can be *better* preserved in captivity than in their natural habitat. Remarks of Wymberly Der Coerr, Special Advisor on Environmental Affairs to the State Department, *N.Y. Times*, February 11, 1973, at 16, col. 3.

⁶⁸ Zoos have aided in the suppression of illegal trade in orangutans by refusing to purchase them without evidence of legal origins, recognizing that zoo purchases can add to the danger of extinction. 115 CONG. REC. 20171 (1969).

⁶⁹ Greatest concern has been expressed concerning the possible extinction of gorillas due to excessive use in zoos and circuses. *Id.*

⁷⁰ Permit regulations were first promulgated at 50 C.F.R. 17.12 (1973). A revised set of regulations were published in 39 Fed. Reg. 1176 (1974).

⁷¹ NATIONAL WILDLIFE, October-November, 1973 at 42.

⁷² Pub. L. No. 91-135, §3(b), 83 Stat. 275.

⁷³ Pub. L. No. 91-135, §3(b), 83 Stat. 275.

⁷⁴ 50 C.F.R. 17.22(c)(1), (2).

⁷⁵ Telephone conversation with Mr. Wayne Sanders, Department of Law Enforcement, Boston Regional Office of the Department of the Interior, October, 1974 (hereinafter cited as Sanders).

⁷⁶ Pub. L. No. 91-135, §5(b), 83 Stat. 278.

⁷⁷ *N.Y. Times*, March 3, 1973, at 8, col. 4.

⁷⁸ Full text of the Convention may be found at 3 ENVIRONMENTAL L. REP. 40336 (1973).

⁷⁹ 3 ENVIRONMENTAL L. REP. 1350 (1973).

⁸⁰ Convention, Art. II(1), 3 ENVIRONMENTAL L. REP. 40336.

⁸¹ Convention, Art. III, *Id.*

⁸² Convention, Art. III (2), *Id.*

⁸³ Convention, Art. III (3), *Id.*

⁸⁴ Convention, Art. III(5), *Id.*

⁸⁵ Convention, Art. III(3)(c), *Id.*

⁸⁶ Convention, Art. II(2), *Id.*

⁸⁷ Convention, Art. IV, *Id.*

⁸⁸ Convention, Art. II(3), *Id.*

⁸⁹ Convention, Art. V, *Id.* at 40337.

⁹⁰ Pub. L. No. 91-135, §8(a), 83 Stat. 281.

⁹¹ Pub. L. No. 91-135, §12(c), 83 Stat. 282.

⁹² UNITED STATES CODE CONG. AND ADMIN. NEWS 1414 (1969).

⁹³ *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

⁹⁴ 27 N.Y.2d 182, 315 N.Y.S.2d 625, 264 N.E.2d 118, *app. den. sub. nom. Reptile Prod. Assoc. v. Diamond*, 401 U.S. 969 (1970).

⁹⁵ No part of the skin or body, whether raw or manufactured, of the following species of wild animals or the animal itself may be sold or offered for sale by any individual, firm, corporation, association, or partnership within the state of New York . . .

N.Y. CONSOL. LAWS §358-a (McKinney 1970).

⁹⁶ . . . the importation, transportation, possession or sale of any endangered species of fish or wildlife or hides or other parts thereof, or the sale or possession with intent to sell any article made in whole or in part from the skin, hide, or other parts of any endangered species of fish or wildlife, is prohibited, except under license or permit from the Department.

N.Y. CONSOL. LAWS §187 (McKinney 1949).

⁹⁷ 373 U.S. 132 (1963).

⁹⁸ *Id.* at 141.

⁹⁹ *Id.*

¹⁰⁰ *Nettleton*, *supra* n. 94, at 191, 315 N.Y.S.2d at 631, 264 N.E.2d at 122.

¹⁰¹ *Id.*

¹⁰² *Matter of Engelsher v. Jacobs*, 5 N.Y.2d 370, 373, 184 N.Y.S.2d 640, 642, 157 N.E.2d 626, 627 (1959).

¹⁰³ *Barrett v. State*, 220 N.Y. 423, 116 N.E. 99, 100 (1917).

¹⁰⁴ *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹⁰⁵ *Nettleton*, *supra* n. 94, at 193, 315 N.Y.S.2d at 633, 264 N.E.2d at 123.

¹⁰⁶ A similar exemption, with the same allocation of burden of proof, was included by Congress in the 1973 Act when dealing with the sale of animals. 16 U.S.C.A. §1538(b) (1974).

¹⁰⁷ *Supra*, note 35.

¹⁰⁸ 321 F. Supp. 630 (S.D.N.Y. 1970) *aff.* 440 F.2d 1319 (2 Cir. 1971).

¹⁰⁹ 321 F. Supp. at 635.

¹¹⁰ *Id.*

¹¹¹ "The eagle is preserved, not for its use, but for its beauty." *Barrett*, *supra* n. 103, at 428, 116 N.E. at 101.

¹¹² 321 F. Supp. at 633.

¹¹³ H. REP. No. 93-412 in UNITED STATES CODE CONG. AND ADMIN. NEWS 2991 (1973).

¹¹⁴ *Id.*

¹¹⁵ Other factors listed were “. . . the present or threatened destruction, modification, or curtailment of its habitat or range; overutilization for commercial, sporting, scientific, or educational purposes; . . . or other natural or man-made factors affecting its continued existence.” 16 U.S.C.A. §1533 (a)(1) (1974).

¹¹⁶ 16 U.S.C.A. §1533 (1974).

^{116.1} 16 U.S.C.A. §1532(4) (1974).

^{116.2} 16 U.S.C.A. §1533(b)(1) (1974).

¹¹⁷ 16 U.S.C.A. §1532(15) (1974).

¹¹⁸ 16 U.S.C.A. §1533(d) (1974).

¹¹⁹ . . . except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any state which has entered into a cooperative agreement pursuant to section 1535(a) of this title only to the extent that such regulations have been adopted by such State. 16 U.S.C.A. §1533(d) (1974).

¹²⁰ Sanders, *supra* n. 75.

¹²¹ Excerpt from the President's Environmental Message of February 8, 1972 in UNITED STATES CODE CONG. AND ADMIN. NEWS 2991 (1973).

¹²² 16 U.S.C.A. §1535 (1974).

¹²³ *E.g.*, Nettleton, *supra* n. 94.

¹²⁴ 16 U.S.C.A. §1535 (f) (1974).

¹²⁵ 16 U.S.C.A. §1535(f) (1974).

¹²⁶ 16 U.S.C.A. §1535(f) (1974).

¹²⁷ 16 U.S.C.A. §1537 (1974).

¹²⁸ 16 U.S.C.A. §1537(c) (1974).

¹²⁹ 16 U.S.C.A. §1538(a) (1974).

¹³⁰ 16 U.S.C.A. §1538(a)(1) (1974).

¹³¹ 16 U.S.C.A. §1538(a)(2) (1974).

¹³² UNITED STATES CODE CONG. AND ADMIN. NEWS 2990 (1973).

¹³³ 16 U.S.C.A. §1532(14) (1974).

¹³⁴ *See*, Katzenbach v. McClung, 379 U.S. 294 (1964) and Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

¹³⁵ U.S. CONST. Art. 2, §2.

¹³⁶ SEN. REP. No. 93-307 in UNITED STATES CODE CONG. AND ADMIN. NEWS 2994 (1973).

¹³⁷ 16 U.S.C.A. §1531(4) (1974).

¹³⁸ 252 U.S. 416 (1920).

¹³⁹ 221 F.288 (D. Kan. 1915).

¹⁴⁰ 252 U.S. at 433.

¹⁴¹ *Id.*

¹⁴² 16 U.S.C.A. §1538(b) (1974).

¹⁴³ 16 U.S.C.A. §1538(b) (1974).

¹⁴⁴ "Endangered Species Act of 1973 Prohibitions and Permits." Fact sheet distributed by the U.S. Department of the Interior, Fish and Wildlife Service, Washington, D.C. 20240 (hereinafter cited as Fact Sheet).

¹⁴⁵ *Id.* The argument that including or excluding progeny is insignificant because of the small number of animals within the class is contradicted by the facts. In a survey of 40 zoos taken in early 1974, it was reported that of the 126 Bengal tigers held in captivity, 99 of them had been born there, while all 134 Siberian tigers held by these zoos had been born in captivity. Telephone conversation with William Braker, past President of the American Association of Zoological Parks and Aquariums, at Shed Aquarium, Chicago, Illinois, November, 1974 (hereinafter cited as Braker). As importation of these animals becomes more strictly controlled, the significance of animals born in captivity will rise accordingly.

¹⁴⁶ 16 U.S.C.A. §1538(a)(1)(A) (1974). This argument assumes that the animals involved were brought into the country after the implementation of the 1969 importation permit system. If brought in prior to that time, they are not covered by either the 1969 or 1973 Act.

¹⁴⁷ 16 U.S.C.A. §1538(a)(1)(B) (1974).

¹⁴⁸ 16 U.S.C.A. §1539(d)(2) (1974).

¹⁴⁹ Personal interview with Mr. John Walsh, Field Services Director, International Society for the Protection of Animals, Jamaica Plain, Massachusetts, November, 1974 (hereinafter cited as Walsh).

¹⁵⁰ NEWSWEEK, January 6, 1975, at 37.

¹⁵¹ 364 F. Supp. 16 (S.D.N.Y. 1973).

¹⁵² *Id.* at 19.

¹⁵³ Animal dealers have been known to type in the names of additional species onto the end of a permit obtained legally from the Department of the Interior. Walsh, *supra* n. 149.

¹⁵⁴ One South American dealer confined a condor to a small space in the rear of a false-backed crate by tying its beak shut and its wings to its side, causing its death. *Id.*

¹⁵⁵ One foreign animal supplier advertised that it would ship cheetahs and orangutans to United States customers, but warned that shipping invoices would have to list the animals as "wildcats" and "giant monkeys." *Id.*

¹⁵⁶ One way importers have attempted to smuggle endangered species of birds into the country has been to discreetly mix a select

few in with a large number of birds from non-endangered species.
Id.

¹⁵⁷ Telephone conversation with Mr. Frank Potter, counsel to Rep. Dingell, sponsor of the 1973 Act, November, 1975.

¹⁵⁸ 16 U.S.C.A. §1538(b) (1974).

¹⁵⁹ Conversation with Mr. Earl Baysinger, Assistant Chief, Office of Endangered Species and International Activities, Department of the Interior, Washington, D.C. December, 1974 (hereinafter cited as Baysinger).

¹⁶⁰ *Id.*

¹⁶¹ 16 U.S.C.A. §1538(b) (1974).

¹⁶² 16 U.S.C.A. §1532(1) (1974).

¹⁶³ Fact Sheet, *supra* n. 144.

¹⁶⁴ Braker, *supra* n. 145.

¹⁶⁵ *Id.*

¹⁶⁶ Obviously the implementation of such a system would be more difficult than the present system, but the result would be a system which more accurately related the kind of activity involved to the benefits which might be derived from such activities.

¹⁶⁷ 16 U.S.C.A. §1539 (1974).

¹⁶⁸ 16 U.S.C.A. §1539(a) (1974).

¹⁶⁹ Pub. L. No. 91-135, §3(c), 83 Stat. 276.

¹⁷⁰ 16 U.S.C.A. §1539(b) (1974).

¹⁷¹ 16 U.S.C.A. § 1539(d)(2) (1974).

¹⁷² 39 Fed. Reg. 1176 (1974).

¹⁷³ 16 U.S.C.A. §1539(e) (1974).

¹⁷⁴ This group may be differentiated from other groups of native artists, such as New England scrimshaw artists, which involve more people and whose activities are rarely engaged in for subsistence purposes.

¹⁷⁵ 16 U.S.C.A. §1539(e)(4) (1974).

¹⁷⁶ Braker, *supra* n. 145.

¹⁷⁷ 16 U.S.C.A. §1539(c) (1974).

¹⁷⁸ Baysinger, *supra* n. 159.

¹⁷⁹ *Id.*

¹⁸⁰ Wall St. Journal, October 4, 1974, at 1, col. 5.

¹⁸¹ Braker, *supra* n. 145.

¹⁸² *Id.*

¹⁸³ *Hearings on H.R. 3616 and Other Bills Before Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries 92d Cong., 2d Sess., at 147 (1972).*

¹⁸⁴ NEWSWEEK, January 6, 1975, at 39.

¹⁸⁵ Braker, *supra* n. 145.

¹⁸⁶ Baysinger, *supra* n. 159.

¹⁸⁷ Telephone conversation with Ms. Betty Gillis, Law Enforcement Division, Fish and Wildlife Commission, Department of the Interior, Washington, D.C., November, 1974.

¹⁸⁸ 16 U.S.C.A. §1539 (a) (1974).

¹⁸⁹ A similar proposal for temporal permits has been submitted by the AAZPA in response to a proposed permit system under the Lacey Act for the importation of "injurious wildlife". The arguments advanced in support of that proposal are equally applicable here: (1) unreasonably burdening zoos is unnecessary to accomplish the purposes of the Act; (2) increased costs of paperwork threaten the existence of small zoos; and (3) the delays being experienced in the handling of permits by the Department of the Interior can be reduced by decreasing the number of permits required. AAZPA, *supra* n. 18, at 11-12.

¹⁹⁰ H.R. 16458, 93d Cong., 2d Sess. introduced in the House on August 19, 1974 by Representatives Dingell, McCloskey, Breaux, Forthsythe, and Whitehurst.

¹⁹¹ *Id.* §§ 202-203.

¹⁹² *Id.* § 207(b).

¹⁹³ Such a system of industry-controlled regulation has been utilized by the New York Stock Exchange and the American Medical Association.

¹⁹⁴ Its membership includes every major zoological park and aquarium in the United States, as well as professional staffs of such organizations and animal dealers. AAZPA, *supra* n. 18, at 2.

¹⁹⁵ Baysinger, *supra* n. 159.

¹⁹⁶ *Id.*

¹⁹⁷ 16 U.S.C.A. §1532(11) (1974).

¹⁹⁸ 16 U.S.C.A. §1532(11) (1974) (Emphasis added).

¹⁹⁹ Baysinger, *supra* n. 159.

²⁰⁰ 16 U.S.C.A. §1533(d) (1974).

²⁰¹ 375 F. Supp. 456 (D. Nev. 1974).