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FEDERAL AND STATE PROTECTION AGAINST COMMERCIAL EXPLOITATION OF ENDANGERED WILDLIFE*

Introduction

At a time of expanding ecological consciousness, it is profitable to consider the following statement concerning yet another aspect of man's environmental arrogation.

We need another and a wiser and perhaps a more mystical concept of animals. Remote from universal nature and living a complicated artifice, man in civilization surveys creatures through the glass of his knowledge and sees thereby a feather magnified and the whole image in distortion. We patronize them for their incompleteness, for their tragic fate of having taken form so far below ourselves. And therein we err, we greatly err. For the animal shall not be measured by man. In a world older and more complete than ours, they move, finished and complete, gifted with extensions of the senses we have lost or never attained, living by voices we shall never hear. They are not brethen, they are not underlings, they are other nations caught with ours in the net of life and time, fellow prisoners of the splendour and travail of the earth.¹

The most reliable data² indicates that man has been exterminating wildlife and fish at a rapidly accelerating rate.³ Research by the Inter-

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¹ H. BESTON, *THE OUTERMOST HOUSE*. 25 (1931); see S. REP. NO. 91-526, 91st Cong., 1st Sess. 3 (1969) [hereinafter 1969 SENATE REPORT].

² The principal organ for the dissemination of information on wildlife is the International Union for the Conservation of Nature and Natural Resources (IUCN), with headquarters in Morges, Switzerland. IUCN's Survival Service Commission publishes the Red Data Book which gives an informational listing of endangered wildlife and fish.

³ J. FISHER, N. SIMON & J. VINCENT, *WILDLIFE IN DANGER* 11 (1969) [hereinafter *WILDLIFE IN DANGER*] This book was written by the Survival Service Commission of IUCN and contains a selective analysis of Red Data Book listings. 1969 SENATE REPORT 2.

national Union for the Conservation of Nature and Natural Resources [IUCN] demonstrates that since 1600 A.D. more than 130 species of mammals and birds have become extinct.⁴ Further, approximately 120 species of mammals and 187 species of birds are presently in danger of extinction. Today conservationists estimate that one or two species of mammals and birds disappear each year.⁵ According to the IUCN, seventy-five per cent of the destruction of wildlife is caused by man, principally through hunting.⁶

To combat the commercial exploitation of wildlife, Congress in 1969 enacted the Endangered Species Conservation Act,⁷ which prohibited the importation of enumerated endangered species. This action by the United States was appropriate not only because of its historical role as one of the world's leaders in conservation, but because it is one of the largest markets for the trade of endangered wildlife.⁸ The Endangered Species Conservation Act served as an impetus for the Mason Act,⁹

a New York State law, which prohibited the sale of the skins of certain endangered species. These acts represent the latest attempt to protect endangered wildlife.

The purpose of this note is to trace the historical developments that led up to the Endangered Species Conservation Act and to analyze its strengths and deficiencies; to demonstrate the significance of the Mason Act and discuss the challenges to its constitutionality; and to emphasize the need for international cooperation in the protection of wildlife from commercial exploitation.

I. Federal Protection of Wildlife

A. Historical Background

The landmark case of *Geer v. Connecticut*¹⁰ in 1896 established that primary responsibility for wildlife protection rested with the states. The case involved a state statute which prohibited the killing of certain game with the intent to transport it from the state. The United States Supreme Court upheld the statute as a valid state regulation of internal commerce¹¹ and historically traced the concept of *ferae naturae*, or sovereign ownership of wildlife.¹² The state ownership doctrine¹³

⁴ WILDLIFE IN DANGER 11-12.

⁵ 1969 SENATE REPORT 2.

⁶ WILDLIFE IN DANGER 13.

⁷ 16 U.S.C. §§ 668aa-ee (1970). Subsection 11 of this Act provided that subsections 1-10 of the Act would be classified within the existing code provisions of the 1966 Endangered Species Act, and in addition would amend sections 705, 851, 852a and 852d(a) of title 16 and sections 43, 44, 3054 and 3112 of title 18. 16 U.S.C. §§ 668cc-1 to cc-6 (1970).

⁸ *Hearings on H.R. 4812 Before a Subcomm. on Fisheries and Wildlife of the House Comm. on Merchant Marine and Fisheries*, 91st. Cong., 1st Sess., ser. 2, at 77-79 (1969) [hereinafter *1969 House Comm. Hearings*].

⁹ N.Y. AGRIC. & MKTS. LAW § 358-a (McKinney 1970).

¹⁰ 161 U.S. 519 (1896).

¹¹ The state statute was challenged as an interference with property that had begun to move as an article of interstate commerce. The court held that the state law regulated commerce in game that was purely internal commerce and distinguished it from the federal commerce power. *Id.* at 530-32.

¹² The court traced the origin of the concept back to Athenian law, demonstrating that from the earliest traditions the right to reduce animals *ferae naturae*, or animals in the wild, to possess-

elucidated by the court had an inhibitive effect on federal wildlife regulation, as the states interpreted it to mean that they were the exclusive owners of wildlife within their borders.¹⁴ However, a broad reading of *Geer* has proven to be unjustified since the issue resolved was state authority in the absence of federal action.¹⁵ Although the state ownership doctrine has retained some vitality,¹⁶ its restrictive effect on federal activity has been largely negated.¹⁷

Four years after the *Geer* decision Congress passed an act which restricted the importation of foreign wild animals and birds.¹⁸ This so-called Lacey Act was a

progressive piece of legislation indicative of the United States' leadership in wildlife protection. Although it was an expression of federal commerce power, the Lacey Act was intended to apply for the benefit of the states.¹⁹ As amended in the Federal Tariff Act of 1930,²⁰ the Lacey Act currently prohibits²¹ the importation of any wild mammal or bird protected by foreign law unless such exportation is certified by the foreign country.²²

In 1913 Congress enacted the Migratory Bird Act,²³ which provided for federal protection of certain native species of birds. The 1913 Act was declared unconstitutional by two district courts²⁴ as violative

sion had been subject to the control of the law-giving power. As evolved through Roman law and English common law the concept places authority over animals *ferae naturae* with the state. *Id.* at 522-28.

¹³ The court concluded from this historical digression that,

[t]he power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people. . . .

Id. at 529.

¹⁴ Note, *Federal Protection of Endangered Wildlife Species*, 22 STAN. L. REV. 1289, 1303 & nn.100-02 (1970) [hereinafter *Federal Protection*].

¹⁵ *Id.* at 1303 & n.103. In discussing the power of the sovereign over wildlife the court in *Geer* noted,

It is also certain that the power which the colonies thus possessed passed to the States with the separation from the mother country, and remains in them at the present day, *insofar as its exercise may not be incompatible with, or restricted by, the rights conveyed to the federal government by the Constitution.*

161 U.S. at 528 (emphasis added).

¹⁶ See cases cited note 86 and 93 *infra*.

¹⁷ *Federal Protection*, at 1303-04

¹⁸ Act of May 25, 1900, ch. 533, §§ 1-5, 31 Stat. 187.

¹⁹ Section 5 of the Lacey Act read in pertinent part:

That all dead bodies, or parts thereof, of any foreign game animals, or game or song birds, the importation of which is prohibited, or the dead bodies, or parts thereof, of any wild game animals, or game or song birds transported into any State or Territory, . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory. . . .

Id.

²⁰ Tariff Act of 1930, ch. 497, § 527, 46 Stat. 527, *as amended*, 19 U.S.C. § 1527 (1970).

²¹ When the Lacey Act provisions were incorporated into the Endangered Species Conservation Act, 16 U.S.C. §§ 668cc-1 to cc-6, a new subsection was added to clarify that the new legislation did not supercede or limit the authority of the Lacey Act.

²² The certification required is an attestation to the legality of the export according to the exporting country's law from the United States Consul of the exporting country. 19 U.S.C. § 1527(a) (1970).

²³ Act of March 4, 1913, ch. 145, 37 Stat. 847.

²⁴ *United States v. McCullagh*, 221 F. 288 (D.

of the state ownership doctrine. However, subsequent legislation²⁵ similar to the 1913 Act was sustained in *Missouri v. Holland* on the basis of federal treaty power.²⁶ Justice Holmes' opinion in that landmark case undermined the significance of the state ownership doctrine, especially in cases where there was a conflict with federal interests.²⁷

Congress extended protection to bald eagles in 1940²⁸ in recognition of the threatened extinction to the national symbol. Under the commerce power Congress

in 1948 enacted two provisions²⁹ aimed at protecting wildlife through regulation of interstate and foreign commerce. The first law dealt with trade in contraband wildlife;³⁰ the second provided for clear markings on all packages containing wildlife.³¹ In 1966 Congress passed the Endangered Species Act³² which authorized federal purchase of private and state lands for the purpose of conserving, protecting, restoring, or propagating domestically endangered species.³³

The Endangered Species Conservation

Kan. 1915); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914). Both decisions relied principally on *Geer* as depository of the issue in question.

²⁵ Act of July 3, 1918, ch. 128, §§ 2-12, 40 Stat. 755, *as amended*, 16 U.S.C. §§ 703-11 (1970).

²⁶ 252 U.S. 416 (1920). The purpose of the 1918 Act was to effectuate a treaty with Great Britain. The Act was upheld by the court as a necessary and proper measure executing federal treaty power under article I, § 8, and the Supremacy Clause, respectively, of the Constitution.

²⁷ In an often cited passage from that opinion Justice Holmes remarked:

To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another state, and in a week a thousand miles away. . . .

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. . . . It is not sufficient to rely upon the States.

252 U.S. 416, 434-35 (1920).

²⁸ Act of June 8, 1940, ch. 278, §§ 1-5, 54 Stat. 250, *as amended*, 16 U.S.C. § 668 (1970). Recent news of wanton slaughter of eagles set off an environmental scandal. See *NEWSWEEK*, Aug. 6, 1971, at 23.

²⁹ Act of June 25, 1948, ch. 645, § 2, 62 Stat. 687, *as amended*, 18 U.S.C. § 43 (1970); Act of June 25, 1948, ch. 645, § 2, 62 Stat. 687, *as amended*, 18 U.S.C. § 44 (1970).

³⁰ This provision made it unlawful for any person to deliver, carry, transport, ship, or knowingly receive in interstate or foreign commerce any wild mammal or bird or the dead body, or part thereof, or the offspring or eggs therefrom, which had been taken, captured, killed, purchased, sold, possessed, or transported contrary to any federal, state or foreign law or regulation. 18 U.S.C. § 43 (1970).

³¹ This provision made it unlawful for anyone to ship, transport, carry, bring, or convey in interstate or foreign commerce any package containing wild animals or birds, or the dead bodies or parts thereof, without plainly marking, labeling or tagging such package. 18 U.S.C. § 44 (1970).

³² 16 U.S.C. §§ 668aa-ee (1970).

³³ *Id.* To assist in carrying out the purposes of the Act, the Secretaries of the Interior, Agriculture and Defense—including the various bureaus and agencies within their departments—were required to take measures to protect threatened species of fish and wildlife and, where practicable, to preserve the habitat of such species in lands under their jurisdiction. In addition the Act allowed the Secretary of the Interior an appropriation of \$5 million annually and an aggregate appropriation of \$15 million to implement the purposes of the Act, with a \$750,000 limitation on the acquisition of lands or waters for any one area. *Id.*

Act of 1969 incorporated existing law with revisions and created new provisions aimed at the curtailment of the commercial exploitation of endangered species. For the purpose of cohesiveness the following analysis of the 1969 Act will be limited to mammals although birds and fish are included within its ambit.

B. *Endangered Species Conservation Act of 1969*

The 1969 Act represents the most extensive federal legislation to date in the area of endangered wildlife. The major significance of the Act was its prohibition of the importation into the United States of specified endangered species. Although this unilateral action is seemingly progressive, it suffers from a number of serious deficiencies which detract from its effectiveness.

The Senate Report recommending passage of the Act indicated three basic reasons for the accelerating rate of the extermination of wildlife.³⁴ Although recognition was given to the related problems of destruction of natural habitat, and water and air pollution, the focus of the Act was clearly the commercial exploitation of wildlife.³⁵ The legislative intent was explicit, namely that by drying up the international market for endangered species the Act would reduce the incidence of poaching. Similarly, by making illegal in

every state the sale or purchase of species taken illegally from any other state, the Act would reduce incentive for domestic poaching.³⁶

Sections 1 through 5 of the 1969 Act deal with the importation of endangered species into the United States. Sections 1 and 2 provide definition of terms and clarification of references in the Act. Subsection 3(a) instructs the Secretary of the Interior, on the basis of scientific and commercial information,³⁷ and after consultation with various groups,³⁸ to develop a list of species or subspecies of wildlife or fish which, in his judgment, are threatened with worldwide extinction.³⁹ Subsection 3(b) authorizes the Secretary to permit the importation of a listed endangered species up to one year after its listing in order to minimize any undue economic hardship to a person who had contracted to import that species before it was determined to be endangered.⁴⁰ A limited ex-

³⁴ 1969 SENATE REPORT 2. See also *Hearings on S.335, S.671, & S.1280 Before the Subcomm. on Energy, National Resources, and the Environment of the Senate Comm. on Commerce*, 91st Cong., 1st Sess., ser. 10, (1969) [hereinafter *1969 Senate Comm. Hearings*].

³⁵ 1969 SENATE REPORT 2.

³⁶ *Id.* 4.

³⁷ 16 U.S.C. § 668cc-3(a) (1970). The Senate and House Reports indicated that prior to publication of the list of endangered species the Secretary would seek advice and assistance from several scientific organizations, the most prominent of which was the IUCN.

³⁸ The groups to be consulted were specialists from the fields of zoology, ornithology, herpetology, and ichthyology as well as representatives of Federal and State Governments. 1969 SENATE REPORT 5.

³⁹ U.S. List of Endangered Foreign Fish and Wildlife, 50 C.F.R. § 17.11 (1971). After the Secretary compiled a list of endangered species he would be required to review this entire list at least once every five years. 1969 SENATE REPORT 5.

⁴⁰ 50 C.F.R. § 17.12 (1971). This regulation seeks to clarify the basis for the importer's undue economic hardship request and through an appended questionnaire ascertain its validity.

ception to the importation prohibition is given in subsection 3(c) for certain bona-fide scientific purposes,⁴¹ and subsection 3(d) provides that regulations must comply with the Administrative Procedure Act requirements.⁴²

Section 4 is one of the enforcement provisions of the Act. It establishes civil and criminal penalties⁴³ for violation of the importation prohibitions. Provision is also made in section 4 for court review of penalties,⁴⁴ seizure of wildlife,⁴⁵ forfeiture pro-

ceedings,⁴⁶ and a limitation of ports of entry for wildlife and fish.⁴⁷ Section 5 emphasizes the need for international cooperation and provides encouragement to that end.⁴⁸

Sections 7 through 10 deal with the interstate transportation, sale, or purchase of endangered species. Section 7 amends existing law⁴⁹ by prohibiting in all states the sale of wildlife taken illegally in any other state. Section 8 amends existing law⁵⁰ by authorizing the Secretary to provide other reasonable means of marking

⁴¹ This exception would apply to listed species brought into the country for zoological, educational, scientific, or propagation purposes although there is no blanket exception for any purpose. 16 U.S.C. § 688cc-3(c) (1970).

⁴² *Id.* § 688cc-3(d). Administrative Procedure Act, 5 U.S.C. § 553 (1970) provides that publication of any proposed rulemaking shall be published in the Federal Register and that all interested parties shall have an opportunity to submit written data or to make oral arguments with respect to the proposed rule. However, the Act did not include reference to the hearing and judicial review requirements under the Administrative Procedure Act and therefore there are no such requirements binding on the Secretary.

⁴³ 16 U.S.C. §§ 668cc-4(a)(1)(b) (1970). The Secretary is authorized to assess a civil penalty of not more than \$5,000 for each violation, or for a willful violation, a criminal penalty of not more than \$10,000 or imprisonment for not more than one year, or both. No penalty can be assessed until such person is given notice and an opportunity for a hearing with respect to the alleged violation. 1969 SENATE REPORT 9.

⁴⁴ 16 U.S.C. § 668cc-4(a) (1970). The Secretary is authorized, in the event of failure to comply with his penalty assessment, to request the Attorney General to institute a civil action in a U.S. district court to collect the penalty. The district court has the authority, in such an action, to review *de novo* both the violation and the assessment of the civil penalty. 1969 SENATE REPORT 8.

⁴⁵ 16 U.S.C. § 668cc-4(a) (2) (1970). The au-

thority provided here is in addition to other authority provided by law relating to search and seizure in order to insure that the powers of Customs officials are in no way limited by this Act. 1969 SENATE REPORT 8.

⁴⁶ 16 U.S.C. § 668cc-4(a)(2) (1970). The Secretary must seek forfeiture in a court of competent jurisdiction and must dispose of the civil penalty proceedings before seeking forfeiture. However, forfeiture is automatic upon a criminal conviction. In addition, if a forfeiture action is not commenced within 30 days following the assessment of the civil penalty, the seized material is to be immediately returned to the owner. 1969 SENATE REPORT 8.

⁴⁷ 16 U.S.C. § 668cc-4(d) (1970). This subsection was designed to facilitate the enforcement of the importation prohibitions of the Act. For a listing of the ports of entry see 50 C.F.R. §§ 17.1-17.16 (app. B 1970).

⁴⁸ 16 U.S.C. 668cc-5(b)-(c) (1970). The Secretary, working through the Secretary of State, is directed to seek the convening of an international ministerial meeting on fish and wildlife prior to June 30, 1971, for the purpose of signing a binding international convention for the conservation of endangered species. Authorization for appropriation of \$200,000 is given for the purpose of implementing this provision. 1969 SENATE REPORT 11.

⁴⁹ Act of June 25, 1948, ch. 645, 62 Stat. 687, *as amended*, 18 U.S.C. § 43 (1970).

⁵⁰ Act of June 25, 1948, ch. 645, 62 Stat. 687, *as amended*, 18 U.S.C. § 44 (1970).

the contents of packages containing wildlife when present marking creates a significant possibility of theft. Sections 9 and 10 deal with the revision of fish and bird provisions.⁵¹

Section 6, an important provision, declares that the Lacey Act as amended⁵² will not be limited or superceded by any of the provisions of this Act. Section 11 provides for the effective date of the Act, and section 12 increases the allotment given to the Secretary for land acquisition under the 1966 Act.⁵³

When the effectiveness of the Act is measured against its stated purposes, several deficiencies are manifest. First, before a species can be listed as endangered by the Secretary it must be threatened with worldwide extinction. The Senate Report indeed emphasizes that serious reduction in numbers of a species is insufficient reason for protection unless the reduction is worldwide.⁵⁴ Expert testimony at the Senate and House hearings on the bill voiced disapproval with this test,⁵⁵ for the

provision is clearly inadequate, as it allows for the serious endangerment of a species without affording the protection which is the very purpose of the Act. In fact, an argument can be made that in many cases species of high commercial value are excluded from listing until their chances of preservation are precarious at best. The following examples illustrate the force of this contention.

The Endangered Species List includes only four of the seven accepted races of tiger.⁵⁶ Bali, Javan, Caspian, and Sumatran tiger are included,⁵⁷ thus excluding Chinese, Bengal, and Siberian or Amur tiger. Of the included races all are faced with near extinction based on the most authoritative information.⁵⁸ Of the excluded races, however, two are listed as endangered in the Red Data Book and the Bengal tiger

⁵¹ 16 U.S.C. § 852 (1970), *amending* Black Bass Act of 1926, ch. 346, 44 Stat. 852; 16 U.S.C. § 705 (1970), *amending* Migratory Bird Treaty Act of 1918 ch. 128, 40 Stat. 755.

⁵² 1969 SENATE REPORT 3.

⁵³ 1969 SENATE REPORT 2.

⁵⁴ The allotment for acquisition of lands or waters for any one area was increased from \$750,000 to \$2,500,000. *Id.* 2-3.

⁵⁵ At the hearings, Lloyd Tupling, a Sierra Club representative, made the following statement: "As time is of the essence and each moment wasted may bring the extinction of anyone of the hundreds of animals threatened, we suggest that wording be added which would immediately establish as endangered and protected by such legislation the birds and mammals listed in the IUCN "Red Data Books."

1969 Senate Comm. Hearings, at 73. At the House hearings, Louis Clapper of the National Wildlife Federation, offered the following suggestions:

We believe that conformance to criteria developed by the IUCN will add a credence that can be valuable in international negotiations and deliberations . . . We suggest that the committee clarify that position of section 2 which relates to "worldwide extinction" . . .

1969 House Comm. Hearings, at 127.

⁵⁶ THE PRINCE PHILIP, DUKE OF EDINBURGH & J. FISHER, WILDLIFE CRISIS 239-40 (1970) [hereinafter WILDLIFE CRISIS]. This is the only document of its kind to be prepared with the approval and assistance of the World Wildlife Fund and the IUCN. A section at the end of the work offers a well-illustrated compendium of extinct and endangered birds and mammals as listed by the IUCN's Red Data Book. *Id.* 217-48.

⁵⁷ See U.S. List of Endangered Foreign Fish and Wildlife, 50 C.F.R. § 17.11 (1971).

⁵⁸ WILDLIFE CRISIS 239. All four races are in such danger as to have earned a red sheet in the Red Data Book—"a critically endangered form."

faces imminent endangerment status.⁵⁹ The excluded races of tiger would certainly seem to be well qualified for listing by the 1969 Act in view of their high commercial value and endangered status, yet protection is not forthcoming. Urgent pleas by interested parties evince the seriousness of the situation.⁶⁰

Of the six races of leopard listed as endangered by the Red Data Book only three are included on the protected list.⁶¹ The included races, Sinai, Barbary, and Anatolian leopard, are near extinction.⁶² The excluded races again meet the criteria for protection but have been ignored. For example, the Snow Leopard, although exist-

ing in several areas, has a total estimated population of only 400 with 90 in captivity.⁶³

The clear intent of the 1969 Act was to protect against the commercial exploitation of wildlife. Yet the exclusions of tiger and leopard illustrate a distinct deficiency in the enforcement of the Act. The exclusion of such commercially valuable species can only sanction their exploitation, and in this respect the Act works as a sword against the excluded animals.

A second major drawback of the 1969 Act stems from an identification problem. Since many subspecies resemble each other, those that are endangered often cannot be distinguished from those that are not. Although, as indicated above, all tigers should be considered endangered, they are not all listed and thus provide a good example of another problem with the enforcement of the Act. When tiger skins are imported customs inspectors simply cannot distinguish the hides of one subspecies, or race, from another.⁶⁴ Another example of this problem is the trade in crocodile hides. The Nile crocodile, although on the Endangered Species List, cannot be effectively protected under the 1969 Act because few can distinguish its hide from other non-endangered crocodile hides.⁶⁵

This identification problem has been capitalized on by poachers, who smuggle

⁵⁹ *Id.* 239. The Siberian tiger is estimated at 100-120 in number with only 149 in captivity; the Chinese tiger has a wide range in China but within it is very rare and fractionated into relict populations under considerable hunting pressures; and the Bengal tiger, with its principal habitat in India, has a rapidly deteriorating status.

⁶⁰ NATIONAL PARKS AND CONSERVATION MAGAZINE, Aug., 1971, at 21. Arjan Singh, owner of a tiger farm in India is alarmed at the deteriorating status of the tiger,

South India has almost lost the tiger, but we can still save the tiger in the north if we can control the export of skins. The Kingdom of Nepal poses a direct threat to the operation of an export ban. The 800 mile border between Nepal and India is mainly a tiger habitat and is almost entirely uncontrolled. . . . The way is clear to the tiger's early disappearance unless Nepal can be persuaded to enforce a ban on tiger hunting also.

⁶¹ U.S. List of Endangered Foreign Fish and Wildlife, 50 C.F.R. § 17.11 (1971).

⁶² WILDLIFE CRISIS 239-40. The Barbary leopard exists in just one part of Morocco, where it is doubtful whether 100 survive; the Sinai leopard is most probably extinct; and the Anatolian leopard survives in only relict populations in Turkey, Israel, Syria, Jordan, and possibly Lebanon.

⁶³ *Id.* 240.

⁶⁴ NATURAL HISTORY, May 1971, at 10. This article was written by Dr. Wayne King, curator of herpetology at the New York Zoological Society, a herpetologist of high repute.

⁶⁵ *Id.* at 10.

illegally taken skins into countries where the species are not protected. The skins can then be sold openly or, as is more often the case, exported to the United States. When imported into this country the identification problem manifests itself again as no one can tell where a particular hide has come from originally.

This problem of trans-shipment or the smuggling of skins into unprotected countries for export, has been of major significance. United States government statistics⁶⁶ substantiate this in several instances. During 1968 and 1969, 3,422 leopard skins were imported from Kenya, of which 2,051 skins represented trans-shipped, or poached skins.⁶⁷ Ethiopia virtually stopped legal export of leopard and cheetah skins in 1968, issuing only one permit for six leopard skins and no permits for cheetah skins. Yet in 1968, 2,304 leopard skins and 178 cheetah skins were imported into the United States from Ethiopia.⁶⁸ These poached and smuggled skins entered Ethiopia as legal imports and received legal export papers, which were then used to import the skins into the

⁶⁶ United States Imports of Merchandise for Consumption, U.S. Dep't of Commerce IM 146 (leopard and cheetah skins imported to the United States from Ethiopia).

⁶⁷ *Id.* Poached and smuggled leopard skins from Africa and Asia were shipped to other countries without papers, but could not enter the United States without papers from the country of origin. The skins were then shipped back to Kenya where having entered as legal imports they received legal export papers, with which they could now enter the United States. Examples of countries shipping skins back into Kenya for export to the United States included Great Britain (623 skins) and Switzerland (122 skins). *Id.*
⁶⁸ *Id.*

United States. Another glaring example of trans-shipment resulted from India's prohibition of leopard skin exports in July, 1968. By October, 1968, the bordering country of Nepal, up to then not an exporter of leopard skins, began exportation. When the United States refused any further shipments from India in May, 1969, the export traffic from Nepal jumped from 36 skins in May to 721 in June.⁶⁹ Trans-shipment has become so widespread that import agents are at a loss to cope with the problem.⁷⁰

In order to effectively combat the identification problem and its trans-shipment ramifications, it is imperative that all endangered species and the subspecies with which they can be confused be denied import. The Endangered Species List of the 1969 Act is clearly inadequate in this respect.

There are three other potential weaknesses in the 1969 Act pertaining to the exercise of discretion by the Secretary. First, the enforcement apparatus of section 4,⁷¹ including penalty assessment, court enforcement, and forfeiture proceedings, is cumbersome and requires great initiative from the Secretary to be effective. Second, the grace period for importers in subsection 3(b)⁷² might permit importers to use

⁶⁹ *Id.* The 800 mile border between India and Nepal makes the prevention of smuggling impossible. *See* note 60.

⁷⁰ NATURAL HISTORY, at 10.

⁷¹ *See* notes 42-46 *supra*.

⁷² *See* 50 C.F.R. § 17.12 (1971). This subsection was the subject of some interest during the Senate hearings. For example, see the statement of Walter Boardman, consultant on conservation, National Parks Association, 1969 Senate Comm. Hearings, at 74.

undue economic hardship as an excuse to enter into long term contracts with foreign agents. Third, the amendment to existing law in section 8⁷³ liberalizing marking requirements for packages containing wildlife can effectively destroy once strong marking provisions. In all these instances the potential for abuse is great and must be zealously guarded against through the Secretary's discretionary powers.

II. State Protection—The Mason Act

New York State Assemblyman Edwyn E. Mason, as chairman of the Committee on Agriculture, introduced a bill to the 1970 Legislature which sought to prohibit the sale or possession in New York of enumerated endangered species.⁷⁴ The measure was intended to supplement the federal Endangered Species Conservation Act⁷⁵ and effectively cut off the fur and

leather trade in New York.⁷⁶ Mason reasoned that since the world center of the fur industry is located in New York City, prohibition of the use of skins of endangered species would be a great step toward preserving these species from extinction.⁷⁷ Apparently Mason was also aware of the weaknesses of the federal Act, as his bill enumerated all races of tiger, leopard, and crocodylia in addition to other species not on the federal list.⁷⁸

A similar bill was introduced by Assemblyman Glenn Harris during the 1970 session.⁷⁹ The major difference was that the Harris bill did not enumerate any species but defined as endangered those species designated by the federal list and vested the New York State Commission of Environmental Conservation with the power to amplify the federal list by addition of those species which he considered endangered. Both bills eventually passed the New York State legislature and were due to go into effect on September 1, 1970.⁸⁰

However, in July, 1970, suit was brought in the State Supreme Court, Onondaga County, by the A. E. Nettleton Company, a men's shoe manufacturer, testing the constitutionality of both the Mason and Harris

⁷³ 18 U.S.C. § 43 (1970), *amending* Act of June 25, 1948, ch. 645, 62 Stat. 687.

⁷⁴ NEW YORK LEGISLATIVE RECORD AND INDEX A 401 (1970), Assembly Bill No. 4270-B, 193d Sess. (1970), *enacted as* N.Y. AGRIC. & MKTS. LAW § 358-a (McKinney 1970) recited in pertinent part as follows:

Sale of certain wild animals or wild animal products prohibited. 1. 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 . . . after the effective date of this section:—Leopard, Snow Leopard, Clouded Leopard, Tiger, Cheetah, Alligators, Caiman or Crocodile of the Order Crocodylia, Vicuna, Red Wolf, or Polar Bear, nor after a period of twelve months from the effective date of this section, of the following species:—Mountain Lion, sometimes called Cougar, Jaguar, Ocelot, or Margay. (Scientific names excluded).

⁷⁵ NEW YORK LEGISLATIVE ANNUAL 125 (1970), Memorandum of Assemblyman Edwyn E. Mason,

Assembly Bill No. 4270-B, ch. 1048 (Feb. 3, 1970).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ NEW YORK LEGISLATIVE RECORD AND INDEX A 567 (1970), Assembly Bill No. 5876-A, 193d Sess. (Feb. 17, 1970).

⁸⁰ N.Y. AGRIC. & MKTS. LAW § 358-a (McKinney 1970); N.Y. CONSERV. LAW § 187 (McKinney 1970).

Acts.⁸¹ The plaintiff industry attacked the power of the state to legislate in the area of wildlife preservation,⁸² and argued that the enactments violated both the Supremacy Clause and the Commerce Clause of the Federal Constitution.⁸³ The court rejected the contention that the federal act pre-empted state legislation under the Supremacy Clause⁸⁴ and sustained the constitutionality of the Harris Act. However, the Mason Act was held unconstitutional on the ground that it was an unreasonable exercise of the state police power and deprived the industry of property without due process of law.⁸⁵ On appeal, the Court of

Appeals overturned the lower court by affirming the constitutionality of the Mason Act. In so deciding the Court agreed that the federal act did not pre-empt the state legislation of wildlife but differed with the lower court on the propriety of the exercise of state police power. The court upheld the Mason Act as a reasonable exercise of state police power under the facts of the case. The rationale for this decision was twofold: first, the Court noted that such power was the least limitable power of state government;⁸⁶ second, the Court asserted the ecological needs to be served by the exercise of that power. On the latter point the Court emphasized that wildlife was a vital asset to the people, and that protection was necessary not only for aesthetic and scientific purposes but also for the key role that wildlife played in the maintenance of the life cycle. The Court's opinion by Justice Scileppi was a strong assertion of the need for, and the validity of, the extension of state police power to meet the threat to endangered wildlife.

⁸¹ *Nettleton Co. v. Diamond*, 63 Misc. 2d 885, 313 N.Y.S.2d 893 (Onondaga County 1970).

⁸² The contention here was that Section 358-a of the Agriculture & Markets Law had been pre-empted by the Federal Endangered Species Act of 1969 and was, therefore, unconstitutional under clause 2 of article VI of the United States Constitution. *Nettleton Co. v. Diamond*, 27 N.Y. 2d 182, 183, 264 N.E.2d 118, 121, 315 N.Y.S.2d 625, 626 (1970).

⁸³ On the first point, the industry contended that the federal Endangered Species Act pre-empted the state Mason Act under the supremacy clause of the Constitution. The second contention was that the Mason Act constituted an unlawful burden on the interstate and foreign commerce in violation of clause 3 of section 8 of article I of the United States Constitution. Industry made the additional contention that the Mason Act violated the fourteenth amendment to the United States Constitution and section 6 of article I of the New York State Constitution in that it deprived plaintiff of his property without due process of law. *Nettleton Co. v. Diamond*, 27 N.Y.2d 182, 183-184 (1970). The last two contentions were sustained by the State Supreme Court in holding the Mason Act unconstitutional. *Nettleton Co. v. Diamond*, 63 Misc. 2d at 895, 313 N.Y.S.2d at 904.

⁸⁴ *Nettleton Co. v. Diamond*, 63 Misc. 2d at 890-92, 313 N.Y.S.2d at 899-901.

⁸⁵ *Id.* at 895, 313 N.Y.S.2d at 904. The supreme

court's conclusion that the Mason Act violated the due process would seem to be based on an antedated and narrow construction of the state's police power. Furthermore, the court seemed to be substituting its judgment for that of the Legislature in striking down the Mason Act for exceeding the bounds of necessity and being "unconstitutionally oppressive." See Brief for Appellants at 11-20, *Nettleton Co. v. Diamond*, 27 N.Y.2d 182 (1970).

⁸⁶ *Nettleton Co. v. Diamond*, 27 N.Y.2d at 192, 264 N.E.2d at 123, 315 N.Y.S.2d at 632. The Court also rejected plaintiff's Commerce Clause argument stating that the Mason Act merely prohibited sale or offer for sale, within New York State, of skins or products made from the forbidden species.

While *Nettleton* was moving up through the state courts, Palladio, Inc., a Massachusetts shoe manufacturer, instituted action in federal court also challenging the constitutionality of the Mason Act and seeking injunctive relief from its enforcement.⁸⁷ Although agreeing to await the *Nettleton* decision, Palladio pursued its remedy in the district court after that ruling was made. In addition to the averments of constitutional infirmities made in *Nettleton*, Palladio argued that the absence of hearings on the Mason Act denied industry the opportunity to voice its opinion.⁸⁸ The Court noted that there was conflicting evidence as to whether the hearings took place,⁸⁹ but resolved the question by answering that the legislature was not required to build a record,⁹⁰ and alternately that hearings held on the Harris bill could be used to support the Mason bill.⁹¹ Although the question of hearings may have been in doubt, there is evidence⁹² that

representatives of foreign governments voiced strong support for the passage of the Mason Act. The district court, in an enlightened opinion by Judge Mansfield, denied Palladio's motion for injunctive relief and convening of a three judge court, and upheld the constitutionality of the Mason Act.⁹³ The United States Court of Appeals, upon the subsequent appeal by Palladio, affirmed the lower court decision *per curiam*.⁹⁴ On March 22, 1971, the United States Supreme Court dismissed an appeal challenging the New York Court of Appeal's decision in *Nettleton*.⁹⁵

Nettleton and *Palladio* have a broad significance in wildlife legislation specifically and environmental law generally. Not only did they uphold the power of a state to protect wildlife outside its borders, their

Olindo, the director of the Kenya National Parks, and in part it recited:

If there are no markets there can be no inducement to poach This can only be achieved if the countries outside Kenya where the markets exist enact the necessary protective legislation.

Affidavit from Humayun Abdulali to Assemblyman Mason, Sept. 11, 1970; affidavit from Perez Malande Olindo to Assemblyman Mason, Sept. 14, 1970.

⁹³ *Palladio, Inc. v. Diamond*, 321 F. Supp. at 631. The opinion began as follows:

It is now generally recognized that the destruction or disturbance of vital life cycles or of the balance of a species of wildlife, even though initiated in one part of the world, may have a profound effect upon the health and welfare of people in other distant parts. We have come to appreciate the interdependence of different forms of life. We realize that by killing certain species in one area we may sound our own death knell.

⁹⁴ *Palladio, Inc. v. Diamond*, 440 F.2d 1319 (2d Cir. 1971).

⁹⁵ *Reptile Products Ass'n, Inc. v. A.E. Nettleton*, 401 U.S. 969 (1971).

⁸⁷ *Palladio, Inc. v. Diamond*, 321 F. Supp. 630 (S.D.N.Y. 1970).

⁸⁸ *Id.* at 632-33.

⁸⁹ *Id.* at 633.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² The evidence consists of affidavits, in the form of notarized letters, written to Assemblyman Mason from the heads of various foreign wildlife agencies supporting the efforts contained in the Mason Act. At the hearings two such letters were read. One letter from, Humayan Abdulali, the honorary secretary of the Bombay Natural History Society, recited in part:

While the ban on the import of these skins and the manufactures therefrom into the U.S.A. as a whole would be invaluable, the prohibition of their sale, even as confined to the State of New York, would be very great assistance in lessening the drain on the population of these species in India.

The other letter was from Perez Malande

language⁹⁶ indicated a definite deference to environmental concern and sanctioned the greatest expansion of police power to date to enforce environmental law.⁹⁷

The Mason Act has also had a marked significance. It has effectively deterred commercial exploitation of endangered species by destroying the biggest market for their sale; it has increased public awareness of the threat of commercial endangerment of wildlife;⁹⁸ and it has encouraged other states to adopt similar legislation in the struggle to protect endangered wildlife.⁹⁹

⁹⁶ See cases cited notes 86 & 93 *supra*. Judge Mansfield's *Palladio* decision endorses several of the expert affidavits contained in the appellant's brief. For example, reference and quotation is made in the opinion to statements of Dr. F. Wayne King (*supra* note 64), Herndon Dowling, research associate in the Department of Herpetology of the American Museum of Natural History, and William Conway, General Director of the New York Zoological Society. *Palladio, Inc. v. Diamond*, 321 F. Supp. at 634-35.

⁹⁷ Note, *Constitutional Problems in Environmental Legislation—The Mason Law*, 12 B.C. IND. & COM. L. REV. 657, 672-73 (1971). This article traces the expansion of state police powers in aesthetic and ecological cases while focusing on the significance of the *Nettleton* decision. The author concludes that *Nettleton* provides a logical basis for the development of new state remedies to meet environmental problems.

⁹⁸ Periodicals and newspapers are giving increased attention to wildlife endangerment. See, e.g., U. S. NEWS, Nov. 2, 1970, at 81-82; TIME, Mar. 28, 1969, at 54; LIFE, Nov. 27, 1970, at 46-57; SCIENCE, Jan. 9, 1970, at 152; N.Y. Times, Jan. 4, 1970, at 48, col. 8. More specifically, recent newspaper and television editorials warned against an attempt by Assemblyman Harris to destroy the effectiveness of the Mason Act. N.Y. Times, Apr. 7, 1971, editorial; C.B.S. editorial, May 8, 1971.

⁹⁹ CAL. FISH. & G. CODE §§ 2050-2055 (West Supp. 1971). California has had a progressive

III. Conclusion—The Danger of Victory

Although unilateral action such as the Endangered Species Conservation Act and the Mason Act are steps in the right direction, more meaningful protection for endangered species lies in multilateral agreement. Only through international cooperation can endangered species be realistically protected. The future existence of wildlife and fish depends on the development of effective international conventions.

Recent times have seen the growth of international conventions as world concern over diminishing wildlife increases. These conventions have been both fruitful and horribly disappointing. Since 1911 a four power treaty has restricted the ocean killing of seals; consequently the seal herd has increased from a low of 200,000 in 1911 to 1½-million animals today.¹⁰⁰ However, in 1946 a whaling convention was signed by seventeen nations, establishing an International Whaling Commission,¹⁰¹ but the past two decades has seen an unprecedented slaughter of whales, as the signatories argue over killing rights to a dying species.¹⁰²

record in wildlife protection and recently added the above cited endangered species provision to its statutes. CONN. GEN. STAT. ANN. § 26-55 (Supp. 1971). This enactment, approved on May 16, 1971, prohibits the exportation, sale, or exchange of listed species without prior approval of a designated board. PA. STAT. §§ 1351, 1352 (Supp. 1971). This enactment, approved on July 30, 1971, is very similar to the Mason Act and illustrates best the latter's effect on other states.

¹⁰⁰ 16 U.S.C. § 1151 (1970).

¹⁰¹ 16 U.S.C. § 916 (1970), formerly Act of Aug. 9, 1950, ch. 653, §§ 2-14, 64 Stat. 421-25.

¹⁰² WILDLIFE IN DANGER 60-66.

Aside from the lack of multilateral cooperation, the primary difficulty in the enforcement of international conventions is the inability of countries to control their exports.¹⁰³ A seemingly progressive proposal would be for each country to enact a Lacey Act. By refusing importation of any species prohibited export by a foreign country, the government will have taken a meaningful step in the direction of international cooperation for the preservation of endangered species.

¹⁰³ See note 66 *supra* and accompanying text.

Ecological concern is emerging as a hallmark of our time. However, unless concern is translated into positive action it will be too late for wildlife. For a species once lost is lost forever. This concluding thought is offered for the skeptic:

In the long war on wildlife man has steadily advanced and wildlife retreated. We are now in danger of achieving total victory. In such a victory we would surely find catastrophic defeat.¹⁰⁴

¹⁰⁴ NATIONAL PARKS AND CONSERVATION MAGAZINE, Mar. 1971, at 17.