

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS )  
OF THE UNITED STATES )  
1201 Fifteenth Street, N.W. )  
Washington, D.C. 20005 )

and )

BUILDING INDUSTRY LEGAL DEFENSE )  
FOUNDATION )  
1330 Valley Vista Drive )  
Diamond Bar, California 91765 )

and )

CITY OF COLTON, CALIFORNIA )  
Civic Center )  
650 N. La Cadena Drive )  
Colton, California 92324 )

and )

COUNTY OF SAN BERNARDINO, )  
CALIFORNIA )  
385 North Arrowhead Avenue )  
San Bernardino, California 92415-0140 )

and )

CITY OF FONTANA, CALIFORNIA )  
P.O. Box 518 )  
8352 Sierra Avenue )  
Fontana, California 92334-0528 )

and )

CALIFORNIA BUILDING INDUSTRY )  
ASSOCIATION )  
1107 Ninth Street, Suite 1060 )  
Sacramento, California 95814 )

Plaintiffs, )

v.	)	C.A. No. 1:95CV01973 RMJ
	)	
BRUCE BABBITT, Secretary,	)	
UNITED STATES DEPARTMENT OF INTERIOR	)	
1849 C Street, N.W.	)	
Washington, D.C. 20240	)	
	)	
and	)	
	)	
MOLLIE BEATTIE, Director,	)	
UNITED STATES FISH AND WILDLIFE SERVICE	)	
1849 C Street, N.W.	)	
Washington, D.C. 20240	)	
	)	
	)	
Defendants.	)	
	)	
	)	

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FIRST AMENDED COMPLAINT FOR DECLARATORY ORDER  
AND INJUNCTIVE RELIEF

I. NATURE OF ACTION

1. This action seeks declaratory and injunctive relief pursuant to 28 U.S.C. §§ 1331, 2201 and 2202, Federal Rules of Civil Procedure 57 and 65, and the United States Constitution, Article I, Section 8, and Amendment Ten.

2. This action challenges the constitutional validity of a certain provision of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531, *et. seq.*, ("ESA"), namely the so-called "take" provisions contained in 16 U.S.C. § 1538 (a)(1)(B), and the regulations

promulgated by the United States Fish & Wildlife Service pursuant to, and interpretative of, that statutory provision, as applied with respect to the Delhi Sands Flower-loving Fly ("Fly"). The United States Fish & Wildlife Service listed the Fly as endangered in its September 23, 1993 Final Rule, published in the Federal Register, Vol. 58, No. 183 at 49881.

3. This is the Fly.

The Fly (*Rhaphiomidas terminatus abdominalis*) is a large fly (Diptera) in the family Apioceridae. It has an elongate body and a long tubular proboscis which is thought to be used for extracting nectar from flowers. The Fly is approximately 2.5 centimeters long -- making it slightly larger than a horse fly -- orange-brown in color with dark brown oval spots on the upper surface of the

abdomen. The Fly is currently known from and believed to be restricted to seven sites in southwestern San Bernardino and northwestern Riverside Counties. All known Fly colonies exist on private land within an 8--10 mile radius.

4. The Fly is not, and never has been, an object of commerce. Furthermore, the Fly is not tied to any interstate or foreign activities. Rather, it is merely an insect which is indigenous to a small area of Southern California.

5. Despite the purely local nature of this insect, the federal defendants have asserted control over the Fly and its habitat, and any activities that might affect the Fly. Plaintiffs state that it is beyond the power of Congress to legislate, or the federal defendants to regulate, with respect to activities relating to the Fly which do not involve interstate or foreign commerce. As applied to the Fly, the provisions of 16 U.S.C. § 1538 (a)(1)(B) do not address matters involving interstate or foreign commerce, but rather prohibit and regulate activities which are purely intrastate and local in nature. These prohibitions and regulations interfere with and diminish the authority of state and local governments, as well as the rights of citizens to control the use of private property. The federal defendants' assertion of authority over these activities is repugnant to our historical notion of

federalism.

## II. JURISDICTION AND VENUE

6. This Court maintains subject matter jurisdiction over this action pursuant to the provisions of 28 U.S.C. §§ 1331, 2201 and 2202. Notice of this action was hand delivered to Secretary Babbitt and Director Beattie on June 15, 1995, and was provided as a matter of courtesy.

7. Venue is appropriate in this district pursuant to the provisions of 28 U.S.C. § 1391(e).

## III. PARTIES

### A. The Building Industry Plaintiffs

#### 1. Background

8. Plaintiff National Association of Home Builders of the United States ("NAHB") is a not-for-profit corporation organized under the laws of the State of Illinois. NAHB's corporate headquarters are located at 1201 Fifteenth Street, N.W., Washington, D.C. 20005. NAHB functions as a trade association, representing over 180,000 members organized in approximately 850 affiliated state and local associations located in all fifty states, the District of Columbia, and Puerto Rico. NAHB's members

are involved in all aspects of the building and construction industry.

9. NAHB's express functions and objectives include, inter alia, the representation of its members' interests by engaging in dialogue with, and appearing before, courts, legislative bodies, government authorities and officials who are concerned with or who render decisions that affect either the provision of adequate housing for Americans of all income levels, or the construction industry.

10. Plaintiff Building Industry Legal Defense Foundation ("BILD") is a not-for-profit corporation organized under the laws of the State of California. BILD's corporate headquarters are located at 1330 Valley Vista Drive, Diamond Bar, California 91765. BILD is a wholly owned subsidiary of the Building Industry Association of Southern California ("BIA-Southern California").

11. BIA - Southern California is an affiliate of NAHB with over 1400 members involved in all aspects of the building and construction industry. BIA-Southern California members are involved in the construction of 70% of all new homes annually in the Southern California region which includes Riverside and San Bernardino Counties.

12. Each BIA - Southern California member is also a member of

NAHB.

13. BILD's mission is to "[d]efend the legal rights of home and property owners." BILD promotes and supports legal cases to secure a body of favorable court decisions for its members specifically, and property owners and developers generally. BILD's efforts are coordinated with the California Building Industry Association (also an NAHB affiliate) and NAHB so as to allow the housing industry to speak with one voice.

14. Plaintiff California Building Industry Association ("CBIA") is a not-for-profit corporation under the laws of the State of California. CBIA's corporate headquarters are located at 1107 Ninth Street, Suite 1060, Sacramento, California 95814. CBIA functions as a trade association, representing over 5,000 members who employ over 100,000 people. CBIA's members are involved in all aspects of the building and construction industry.

15. CBIA is an affiliate of both NAHB and BIA-Southern California. CBIA's members are all members of NAHB, and all BIA-Southern California members are also members of CBIA.

16. CBIA's express functions and objectives include, inter alia, the representation of its members' interests by engaging in dialogue with, and appearing before, courts, legislative bodies,



government authorities, and officials who are concerned with or who render decisions that affect either the provision of adequate housing for Americans of all income levels, or the construction industry.

2. The Building Industry Plaintiffs' Economic And Legal Interests

17. The Building Industry Plaintiffs' members are directly impacted by the United States Fish and Wildlife Service's listing of species as endangered, and the regulations and prohibitions which accompany said listings. The listing of the Fly as endangered has halted, delayed, or otherwise affected projects undertaken by NAHB/CBIA/BIA-Southern California members conducting business in Riverside and San Bernardino Counties.

18. Moreover, the mere listing of the Fly as an endangered species has injured the Building Industry Plaintiffs' members due to the ESA's statutory and regulatory prohibitions. The ESA regulations and restrictions governing the development of land that is or may be occupied by the Fly affect specific projects and directly impose costs upon the Building Industry Plaintiffs' members. These same restrictions also interfere with the value of real property generally, raising prices and discouraging needed development and progress throughout the area.

19. Furthermore, the Building Industry Plaintiffs' members who may violate the provisions of 16 U.S.C. § 1538 (a)(1)(B) are subject to severe civil and criminal penalties. The provisions of 16 U.S.C. § 1540 (a) allow Secretary Babbitt to assess a civil penalty of up to twenty-five thousand dollars (\$25,000.00) for each violation. Additionally, the provisions of 16 U.S.C. § 1540 (b)(1) allow the imposition of criminal penalties which include a fine of up to fifty-thousand dollars (\$50,000.00) and/or imprisonment for up to one (1) year.

20. The Building Industry Plaintiffs' members also face actions by citizens and groups challenging their business activities as a direct result of incentives provide by 16 U.S.C. § 1540 (d). That provision encourages citizens to seek out and accuse the Building Industry Plaintiffs' members of violations of the ESA through the payment of rewards. These citizens and groups who oppose the Building Industry Plaintiffs' members' business activities are also encouraged and empowered to initiate litigation against the Building Industry Plaintiffs' members by virtue of the provisions of 16 U.S.C. § 1540 (g)(1)(A).

3. The Building Industry Plaintiffs' Environmental Interests

21. In light of the close, inseverable relationship between

land-use regulations and home building and construction, the Building Industry Plaintiffs necessarily maintain an intense interest in the administration of laws and regulations at all levels of government involving land-use matters, such as the ESA.

22. Moreover, the Building Industry Plaintiffs and their members do not oppose the goals and ideals of environmental legislation such as the ESA simply because of its effect on land-use. Rather, the Building Industry Plaintiffs and their members support the goals of species preservation as envisioned by the ESA. NAHB's official policy supports sufficient Congressional appropriations in order to achieve the ESA's objectives, including, inter alia, the purchase of land for habitat conservation.

23. Plaintiff NAHB, supported by its affiliates such as BIA-Southern California and the California Building Industry Association, has been active in the study of endangered species preservation, sponsoring and promoting programs designed to educate builders on their responsibilities in this area.

24. The Building Industry Plaintiffs' members have been active in local and state wildlife protection and control. These members have long opposed the intervention of the federal government in these activities, which are historically--and properly--within the province of state and local authority.

25. One example of the Building Industry Plaintiffs' members activism involves the reauthorization of the ESA which is currently before the Congress. Ms. Amy Glad, current Executive Officer of BIA-Southern California, is a member of the NAHB Endangered Species Working Group ("Group"), whose mission is to propose legislative solutions in order to improve the current statutory scheme. Furthermore, the Group's chairman, Mr. Bruce Smith, recently testified before the United States House of Representatives Task Force on the Endangered Species Act of the Resources Committee. Four of the main points presented by Mr. Smith are as follows:

- a. "Reform legislation is crucial to balance worthy aspirations of species preservation with realistic budgetary constraints."
- b. "[T]he statute's legislative scheme should be made more effective, more efficient and more equitable."
- c. "The significant consequences of listing should require a process open to the public at all stages."
- d. "[F]ederal resources should be aimed at recovering the maximum number of species that pose the minimum amount of conflict with development."

26. The Building Industry Plaintiffs' and their members' interest in ESA reauthorization is based upon the premise that

efforts should be made to protect and recover the maximum number of endangered and threatened species, rather than creating "an ever-burgeoning catalog of rare species." These interests are clearly in line and lock-step with the current statute's legislative direction and intent. These interests are also compatible with, and complementary to, a healthy and thriving building industry.

B. The Local Government Plaintiffs

1. Background

27. The City of Colton, California is a general law city of the State of California, with geographic boundaries lying within San Bernardino County, California.

28. Colton, founded in 1887, has a population of 42,000 people, living within geographic boundaries encompassing approximately 22 square miles. Much of the known habitat for the Fly lies within the City of Colton, including the Agua Mansa Enterprise Zone.

29. Authority over the use of land within Colton's boundaries rests with the City Council and the Planning Commission.

30. The County of San Bernardino, California is a political subdivision of the State of California.

31. San Bernardino County has a population of 1.6 million

people, living within geographical boundaries encompassing approximately 20,000 square miles. Much of the known habitat for the Fly is found within San Bernardino County, including the Agua Mansa Enterprise Zone.

32. Authority over the use of land within San Bernardino County not otherwise under the jurisdiction and control of other political subdivisions, resides with the County Planning Agency.

33. The City of Fontana, California is a general law city of the State of California, with geographic boundaries lying within San Bernardino County, California.

34. Fontana, founded in 1952, has a population of 105,240 people, living within geographic boundaries encompassing approximately 35.5 square miles. Much of the known habitat for the Fly lies within the City of Fontana.

35. Authority over the use of land within Fontana's boundaries rests with the Planning Commission and the City Council.

2. The Local Government Plaintiffs' Economic And Legal Interests

36. The Local Government Plaintiffs enact ordinances and promulgate regulations for the use of land within their respective jurisdictions.

37. Such ordinances and regulations are based upon comprehensive general plans which govern the proposed uses of land within their respective jurisdictions.

38. Additionally, Local Government Plaintiffs are responsible for protecting the health, safety, and welfare of their residents and for ensuring that land within their jurisdictions is used in a fashion compatible with that duty.

39. The protection of life and property within the Local Government Plaintiffs' jurisdiction, including the protection and regulation of animal and plant life within their respective jurisdictions, is a vital component of the Local Government Plaintiffs' exercise of their land use authority.

40. Local Government Plaintiffs are directly impacted by the listing of the Fly as endangered under the ESA. The Fly's listing has halted, delayed, or otherwise affected projects planned or undertaken in Colton, San Bernardino County, and Fontana which provide necessary facilities and revenues for the Local Government Plaintiffs' operations and the use and enjoyment of their citizens.

41. Moreover, the Fly's listing, and the accompanying prohibitions and regulations, severely impacted the construction of a San Bernardino County hospital being built within the City of Colton. San Bernardino County has spent millions of dollars in

order to comply with federal regulations imposed by the Service to protect the Fly.

42. Additionally, the mere listing of the Fly, along with the accompanying prohibitions and regulations, injures the Local Government Plaintiffs. The ESA's prohibitions and regulations eviscerate the operative effect of locally enacted ordinances and development permits granted by the Local Government Plaintiffs for the development and use of land within their boundaries.

43. These prohibitions and regulations contravene the zoning and planning authority of the Local Government Plaintiffs, disrupting their ability to govern and to provide services to their citizens. It interferes with joint economic development efforts between localities--such as the Agua Mansa Enterprise Zone--that are designed to improve the quality of life within these jurisdictions.

44. Finally, the Fly's listing interferes with the ability of Local Government Plaintiffs to protect and preserve the health, safety, and welfare of their citizens. The ESA regulations and prohibitions preclude and prevent the Local Government Plaintiffs from undertaking necessary fire control and prevention steps such as vegetation removal on land within their jurisdictions.

3. The Local Government Plaintiffs' Environmental



### Interests

45. Local government plaintiffs have an intense interest in the administration of laws and regulations involving land-use matters, such as the ESA, especially when such laws and regulations intrude upon Local Government Plaintiffs' ability to protect the health, safety and welfare of their residents and to preserve the environment within their respective jurisdictions.

46. Local Government Plaintiffs are "local agencies" under the California Environmental Quality Act (CEQUA) and, as such, are charged with ensuring that their respective land-use planning and environmental review procedures are adopted and implemented in accordance with CEQUA. Such procedures include a review of Local Government Plaintiffs' actions which may have adverse impacts on plant life and animal life, such as the Fly, within their respective jurisdictions.

47. Any community development plan adopted by Local Government Plaintiffs for the control of land-use within their jurisdiction includes a review of the impact of such plan on the environment, including plant life and animal life, such as the Fly.

48. The issuance of building permits, zoning permits, zoning variances, and other land-use permits and approvals by Local Government Plaintiffs pursuant to their land-use control authority,

is predicated upon a determination, whether formal or informal, that the activities authorized by such permits or approvals will not have significant impact on the environment, including plant life and animal life, such as the Fly.

49. Local Government Plaintiffs are uniquely familiar with the impact of local land-use on the ecosystems within their respective jurisdictions. Federal government intrusion in Local Government Plaintiffs' authority to control land-use disrupts the sensitive balance between land development and the preservation of such ecosystems achieved by the exercise of such local land-use authority.

C. The Federal Defendants

50. Defendant Bruce Babbitt is sued in his official capacity as Secretary of the United States Department of the Interior ("Interior Department"), a cabinet level agency of the Executive Branch of the United States government. The Interior Department has statutory responsibilities for the administration and implementation of the ESA and is the agency responsible for the promulgation of the September 23, 1993 Final Rule.

51. Defendant Mollie Beattie is sued in her official capacity as Director of the United States Fish and Wildlife Service

("Service"), an agency within the Interior Department. The Interior Department has delegated to the Service certain responsibilities for administering and implementing the ESA. Specifically, the Service administers the regulatory process that leads to the promulgation of final rules concerning ESA listings, including the September 23, 1993 Final Rule.

#### IV. Facts

52. The Service promulgated a Final Rule on September 23, 1993 pursuant to the ESA which listed the Fly as endangered. This Final Rule was published in the Federal Register, Vol. 58, No. 183 at 49881.

53. The Fly is one of a number of flower-loving flies (i.e., flies that drink nectar from flowers) that are part of the Diptera order. Other species in the Diptera order include the common house fly.

54. According to the Final Rule, the Fly is found only in "northwestern Riverside and southwestern San Bernardino Counties, California...." Indeed, "[o]nly five populations of the [ ] [Fly] exist, all are threatened by urban development activities." (Unless otherwise noted, all quotations in paragraphs 48-54 are attributable to the Final Rule). The Fly has never been found at

any other locations.

55. "All known [Fly] colonies occur on privately owned land within an 8-mile radius circle."

56. Suitable habitat for the Fly covers a significantly larger area. The "Delhi series" of sandy soils "cover approximately 40 square miles in several irregular patches, extending from the cities of Colton to Ontario and Chino in northwestern Riverside and southwestern San Bernardino counties."

57. The Fly does not occupy any other portions of the State of California, or any other state within the United States of America. "Based on the best available scientific and commercial information, the Service concludes that this species is endemic to Delhi Sands which historically occupied an area encompassing about 40 square miles...."

58. "The remaining fragments of suitable [Fly] habitat continue to be destroyed by the construction of homes, businesses, and associated roads and infrastructure."

59. "A significant amount of habitat for the [ ] [Fly] is located south of I-10 in the city of Colton." "This habitat is surrounded by petroleum facilities, railroad, storage yards, a land fill, a cement quarry, and a sewage treatment plant."

60. "All of the sites in San Bernardino County south of I-10

containing suitable [Fly] habitat ... are within the Agua Mansa Enterprise Zone ...." "This is a joint project of the cities of Colton, Rialto, and Riverside, and the counties of Riverside and San Bernardino. Its purpose is to encourage industrial development of the area through various tax and other economic incentives. The few remaining [Fly] colonies ... would quickly be eliminated from increased development in this region."

61. The Final Rule notes that the "take" prohibitions of 16 U.S.C. § 1538 (a) (1) (B) as interpreted in the Service's regulations now apply to the Fly by virtue of its endangered status. As a result, it is unlawful to "take" the Fly, including modifying its habitat in a way that injures, or may injure, the Fly, absent a permit from the Service. The violation of these provisions -- intentional or not -- would subject any person to penalties. These prohibitions have impacted local landowners and communities including Plaintiffs' members.

#### V. CAUSE OF ACTION

(Constitutional Violation)

62. Plaintiffs repeat and incorporate herein the allegations contained in paragraphs 1-61.

63. The Fly is not an article of commerce.

64. The Fly is not engaged in interstate or foreign commerce, nor does the Fly have a substantial impact upon interstate or foreign commerce.

65. The provisions of 16 U.S.C. § 1538 (a)(1)(B) do not address either interstate or foreign commerce. Rather, this statute makes it unlawful to "take any such [endangered] species within the United States...."

66. "Take" in 16 U.S.C. § 1532 (20) is defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting an endangered species, or attempting any of these activities.

67. The Service has further defined in 50 C.F.R. § 17.3 the term "harm" to include land-use activities which disturb or modify the habitat of an endangered species.

68. The regulations promulgated pursuant to, and interpretative of, 16 U.S.C. § 1538 (a)(1)(B) do not address either interstate or foreign commerce.

69. There is no finding in the statute, nor have the Federal defendants made a specific finding in this case, that a taking of the Fly would have a substantial effect on interstate or foreign commerce.

70. Land-use and construction activities in Colton, Fontana,

and San Bernardino County, California that may take the Fly do not constitute interstate or foreign commerce. Furthermore, these activities do not have a substantial effect on interstate or foreign commerce.

71. The United States of America is a federal republic organized under the Constitution of 1787. The national or federal government created by the Constitution is a government of limited powers. Indeed, the Constitution specifically enumerates the federal government's powers. Those powers not specifically granted by the Constitution to the federal government are reserved to the states, or to the people, as mandated by Amendment Ten.

72. The United States Constitution, Article I, Section 8, does not provide the federal government with the power to regulate private land use. Specifically, the federal government is without the constitutional authority to regulate private land use activities because of adverse impacts upon the Fly.

73. No provision of the United States Constitution provides the federal government with the power to regulate private land use.

74. Land-use regulation is a power reserved by the United States Constitution, Amendment Ten, to the states. Indeed, land use regulation is a power traditionally exercised by state and local governments.

75. Neither Article I, Section 8, nor any other provision of the Constitution, provide the federal government with the power to prohibit, regulate, or punish the harassment, harm, pursuit, hunting, shooting, wounding, killing, trapping, capturing or collecting of the Fly on non-federal lands.

76. The regulation of resident populations of wildlife on non-federal lands, including the so-called taking of wildlife, is a power reserved by the United States Constitution, Amendment Ten, to the states. Indeed, wildlife regulation is a power traditionally exercised by state and local governments.

77. By virtue of the provisions of 16 U.S.C. § 1538 (a) (1) (B) and 50 C.F.R. 17.3, the federal defendants purport to have the authority to regulate the use of non-federal lands. By virtue of the provisions of 16 U.S.C. § 1538 (a) (1) (B) and 50 C.F.R. 17.3, the federal defendants, armed with the civil and criminal penalty provisions of 16 U.S.C. §§ 1540 (a) and (b), do, in fact, regulate the use of non-federal lands. This "regulation" is without constitutional authority, and thus, is ultra vires and illegal.

78. The federal defendants' statutorily authorized regulation of non-federal land use is aided by citizens hostile to the Building Industry Plaintiffs' members and others who seek merely to lawfully use their land, by virtue of the provisions of 16 U.S.C.



§ 1540 (g) (1) (A).

79. As a direct result of the enactment of 16 U.S.C. § 1538 (a) (1) (B), and the regulations promulgated pursuant to, and interpretative of, that statute, the federal defendants regulate the non-federal lands known to be inhabited by the Fly. This "regulation" is without constitutional authority, and thus, is ultra vires and illegal.

80. As a direct result of the enactment of 16 U.S.C. § 1538 (a) (1) (B), and the regulations promulgated pursuant to, and interpretative of, that statute, the federal defendants regulate the non-federal lands containing, or capable of containing, suitable habitat for the Fly. This "regulation" is without constitutional authority, and thus, is ultra vires and illegal.

81. The regulation of non-federal land use in the name of the Fly by the federal defendants pursuant to the provisions of 16 U.S.C. § 1538 (a) (1) (B) directly infringes upon the Building Industry Plaintiffs' members' rights to conduct their business and to use their land.

82. The Local Government Plaintiffs -- the City of Colton, the City of Fontana, and the County of San Bernardino -- are charged with the responsibility to regulate land use within their jurisdictions by virtue of their zoning and planning authority.

83. The regulation of non-federal land use by the federal defendants pursuant to the provisions of 16 U.S.C. § 1538 (a) (1) (B) -- as a result of the listing of the Fly as endangered pursuant to the ESA -- usurps the authority of the Local Government Plaintiffs.

84. The federal defendants' intrusion into areas of authority reserved by the Constitution to the states, or to the people, is violative of the Constitution, Article I, Section 8, including, but not limited to, the so-called commerce clause, as well as Amendment Ten.

85. As a result of the federal defendants' regulation of non-federal land use and other activities relating to the Fly, pursuant to the provisions of 16 U.S.C. § 1538 (a) (1) (B), in violation of the Constitution, Plaintiffs have been irreparably damaged. Absent court intervention, the Building Industry Plaintiffs' members and the Local Government Plaintiffs will continue to be irreparably damaged.

#### VI. PRAYER FOR RELIEF

Plaintiffs National Association of Home Builders of the United States, Building Industry Legal Defense Foundation, California Building Industry Association, City of Colton, California, City of Fontana, California, and County of San Bernardino, California, pray

for relief against the federal defendants as follows:

A) That this Court issue an order declaring that with respect to the Delhi Sands Flower-loving Fly, the provisions of 16 U.S.C. § 1538 (a)(1)(B) and the regulations promulgated pursuant to, and interpretative of, that statute, including, but not limited to, 50 C.F.R. § 17.3 and 17.21, are violative of the United States Constitution as being beyond the federal government's powers, and, as such, illegal, invalid, and unenforceable;

B) That this Court enjoin the federal defendants from enforcing 16 U.S.C. § 1538 (a)(1)(B) and the regulations promulgated pursuant to, and interpretative of, that statute, against any person for actions undertaken on private and/or public, non-federal lands in the City of Colton, County of San Bernardino, City of Fontana, Riverside County, and surrounding and adjoining California jurisdictions;

C) Plaintiffs' reasonable attorneys' fees and court costs incurred herein; and,

D) Such other and further relief as this Court may determine  
is proper.

Respectfully submitted,

THE NATIONAL ASSOCIATION  
OF HOME BUILDERS OF THE  
UNITED STATES

THE BUILDING INDUSTRY LEGAL  
DEFENSE FOUNDATION

THE CALIFORNIA BUILDING  
INDUSTRY ASSOCIATION

COLTON, CALIFORNIA

FONTANA, CALIFORNIA

SAN BERNARDINO COUNTY,  
CALIFORNIA

By: \_\_\_\_\_

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February 29, 1996

SENT BY:

; 2-29-96 ;10:40AM ;

NAHB Legal Dept. →

WILDLIFE SECTION:#31

FLY-2COMPL

ENDANGERED AND THREATENED SPECIES  
CONSERVATION ACT OF 1973

JULY 27, 1973.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mrs. SULLIVAN, from the Committee on Merchant Marine and Fisheries, submitted the following

REPORT

[To accompany H.R. 37]

The Committee on Merchant Marine and Fisheries, to whom was referred the bill (H.R. 37) to provide for the conservation, protection, and propagation of species or subspecies of fish and wildlife that are threatened with extinction or likely within the foreseeable future to become threatened with extinction, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendment to the text of the bill strikes out all after the enacting clause and inserts in lieu thereof a substitute which appears in the reported bill in italic type.

The other amendment modifies the title of the bill to make it conform to the changes made by the amendment to the text.

PURPOSE OF THE LEGISLATION

There is presently in effect a series of Federal laws designed to protect species of fish and wildlife which may face extinction without that protection. The first of these laws was passed in 1966 and the second in 1969; at the time they were enacted, they were adequate to meet the demands as they then existed.

Subsequent events, however, have demonstrated the need for greater flexibility in endangered species legislation, more closely designed to meet their needs. In response to this need, legislation was proposed in the last Congress, but failed of passage. The Congress is now in a position to move in this critical area.

H.R. 37, as amended, combines features of the Administration bill (H.R. 4758), and the original H.R. 37. It is designed to widen the protection which can be provided to endangered species under the laws now on the books.

The principal changes to be effected by the new legislation in

1. It extends protection to animals which may become endangered, as well as to those which are now endangered.
2. It permits protection of animals which are in trouble significant portion of their range, rather than threatened worldwide extinction.
3. It makes taking of such animals a Federal offense.
4. It eliminates existing dollar ceilings (\$15 million, as consumed) on acquisition of critical habitat areas.
5. It gives management authority for marine species to the Department of Commerce.
6. It authorizes the use of counterpart funds, where proper.
7. It allows states to adopt more restrictive legislation than the Federal laws.
8. It clarifies and extends the authorities of the Department of Agriculture to assist landowners to carry out the purposes of the Act.
9. It directs a study of the problems involved in the domestic regulation of trade in endangered plants.

A recent international Convention produced a draft treaty which responds to the needs of endangered species and imposes a worldwide pattern of restrictions upon the unfettered trade in species of animals and plants which may face extinction. The legislation considered and reported by the Committee attempts to work into this framework those steps which may be necessary or desirable to accomplish this purpose as well.

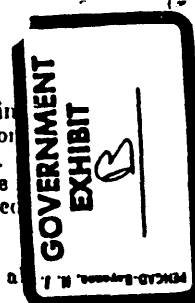
LEGISLATIVE BACKGROUND

According to the Department of the Interior, there may be more than 100 species of fish and wildlife which are presently threatened with extinction within the United States. The recently concluded international Convention on International Trade in Endangered Species of Wild Fauna and Flora listed 375 species of animals as imminently threatened with extinction throughout the world and another 230 species of animals as not yet threatened with extinction but requiring additional controls over their trade.

The threat to animals may arise from a variety of sources; principally pollution, destruction of habitat and the pressures of trade. For the most part, United States executive and legislative attention in recent years has concentrated upon the latter factor in attempting to enforce legislation designed to reduce or eliminate the financial incentives to trading in endangered species of fish and wildlife.

Prior to enactment of endangered species legislation, United States efforts to protect fish and wildlife were concentrated on enforcement of the Lacey and Black Bass Acts, which made it illegal for any person to transport in interstate commerce any fish or wildlife taken in violation of national, state or foreign laws. These Acts are still on the books, and some conservationists feel that they are even now inadequately utilized in the interests of protecting endangered species.

In 1966 the Congress adopted the first "Endangered Species Preservation Act" (P.L. 89-609). This Act directed the Secretary of the Interior to carry out a program to conserve and encourage the growth



of replacements for selective species of *native* fish and wildlife that he found to be threatened with extinction. Addressing itself to the issue of habitat protection, the Act also consolidated and expanded the authority of the Secretary of the Interior relating to the administration of the National Wildlife Refuge System.

The next step took place when the 91st Congress enacted the Endangered Species Conservation Act of 1969 (P.L. 91-135). This Act expanded the 1968 Act in several ways:

(1) It authorized the establishment of a list of fish and wildlife threatened with extinction and prohibited the importation from foreign countries of any such species. Exceptions were provided to allow importations for scientific, educational, zoological, and/or propagational purposes and to allow one-year economic hardship exemptions in specified cases.

(2) It made it unlawful to buy or sell any animal taken in violation of the laws of any State or foreign country.

(3) It increased the authorization for funds to a limit of \$2.5 million per area, or \$5 million per year, with a total overall ceiling of \$15 million.

(4) It designated certain ports of entry for the importation of fish and wildlife and their products.

In the years since 1969, the need for further amendment of the domestic endangered species legislation has become clear. Accordingly, the Administration proposed a bill for this purpose in the 2nd Session of the 92nd Congress (H.R. 13081), to substitute a new and more comprehensive endangered species act for those enacted in 1966 and 1969. Hearings were held on that legislation, but due to lack of time neither body acted upon it.

The Administration bill was reoffered early this year as Executive Communication No. 442 and introduced by Mr. Dingell for himself and several other members as H.R. 4758. Mr. Dingell had earlier introduced, for himself and others, an alternative form of legislation based on the 1972 hearings (H.R. 37). These bills, and a number of similar and identical bills, were before the Committee when it held hearings on this question on March 15, 26 and 27, 1973.

These hearings were held on the heels of an international meeting of technical experts and national representatives in Washington on these and similar questions in February and March. This meeting was a direct outgrowth of earlier U.S. endangered species legislation, which had mandated such an international ministerial meeting for the purpose of developing effective international controls on the unrestricted trade in endangered species. The result of that meeting was the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973—a Convention which has been widely acclaimed as eminently successful in devising forceful and practical mechanisms for controlling these problems.

Essentially, the Convention requires creation of 3 types of endangered species lists:

Appendix I lists species of animals and plants imminently threatened with extinction which are or may be affected by trade and which therefore may be traded only upon approval by the countries of both import and export, when not to be used for commercial purposes.

Appendix II lists species of plants and animals which are not yet necessarily threatened with extinction but which may become so unless subjected to strict regulation. Export permits only will be required for trade in species on Appendix II.

Appendix III is provided as a means for countries to list species protected within their jurisdiction for the purpose of preventing or restricting their exploitation, whether or not these species are threatened with extinction. These will also require an export permit, once listed.

Because of the short interval between the conclusion of the Convention and the consideration of this legislation, it was not possible to develop a complete consensus on the additional steps that might and should be taken to implement the Convention. Technically, of course, it is unnecessary to do this since the Convention has not yet been ratified and is not yet effective. It was and is the Committee's view, however, that it would be proper for this country to take every appropriate step at this time to bring our own laws into conformity with the Convention procedures, so that no further legislation will be necessary to implement it, once it has become effective.

#### BACKGROUND AND NEED FOR THE LEGISLATION

Throughout the history of the world, as we know it, species of animals and plants have appeared, changed, and disappeared. The disappearance of a species is by no means a current phenomenon, nor is it an occasion for terror or panic.

It is however, at the same time an occasion for caution, for self-searching and for understanding. Man's presence on the Earth is relatively recent, and his effective domination over the world's life support systems has taken place within a few short generations. Our ability to destroy, or almost destroy, all intelligent life on the planet became apparent only in this generation. A certain humility, and a sense of urgency, seem indicated.

From all evidence available to us, it appears that the pace of disappearance of species is accelerating. As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwittingly) we threaten their—and our own—genetic heritage.

The value of this genetic heritage is, quite literally, incalculable. The blue whale evolved over a long period of time and the combination of factors in its background has produced a certain code, found in its genes, which enables it to reproduce itself, rather than producing sperm whales, dolphins or goldfish. If the blue whale, the largest animal in the history of this world, were to disappear, it would not be possible to replace it—it would simply be gone. Irretrievably. Forever.

One might analogize the case to one in which one copy of all the books ever printed were gathered together in one huge building. The position in which we find ourselves today is that of custodians of this building, and our choice is between exercising our responsibilities and ignoring them. If these theoretical custodians were to permit a madman to enter, build a bonfire and throw in at random any volume he



selected, one might with justification suggest that others be found, or at least that they be censored and told to be more careful in the future. So it is with mankind. Like it or not, we are our brothers' keepers, and we are also keepers of the rest of the house.

From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.

To take a homely, but apt, example: one of the critical chemicals in the regulation of ovulation in humans was found in a common plant. Once discovered, and analyzed, humans could duplicate it synthetically, but had it never existed—or had it been driven out of existence before we knew its potentialities—we would never have tried to synthesize it in the first place.

Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being those potential cures by eliminating those plants for all time? Sheer self-interest impels us to be cautious.

The institutionalization of that caution lies at the heart of H.R. 37, as ordered reported to the Congress. Several scores of nations have similarly endorsed the need for comparable legislation within their own countries by signing the recent Convention which takes a giant step in this direction.

Man can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat.

Clearly it is beyond our capability to acquire all the habitat which is important to those species of plants and animals which are endangered today, without at the same time dismantling our own civilization. On the other hand, there are certain areas which are critical which can and should be set aside. It is the intent and purpose of this legislation to see that our ability to do so, at least within this country, is maintained. H.R. 37 articulates and enhances this purpose and ability.

Restrictions upon the otherwise unfettered trade in these plants and animals are a significant weapon in the arsenal of those who are interested in the protection of these species. The recent international Convention on International Trade in Endangered Species of Wild Fauna and Flora was directed primarily at this problem: most of the provisions of H.R. 37 are also designed to deal with the problem in one way or another.

It is paradoxical that the scarcer an animal may be, the more people may be willing to pay to acquire it. The great whites may be said to have been involuntary beneficiaries of such an equation; the same is true of the so-called "spotted cats"—tigers, jaguars, cheetahs and others—whose skins have been sought by furriers and hunters around the world. The inevitable effect of this popularity has been to make them scarce, and perhaps to endanger their survival.

Their very scarcity and value, however, may be used as a lever to promote their protection. If the countries in which these and other valuable animals may be found are sufficiently alert and enlightened, this should encourage them to maintain healthy and viable stocks of these animals as a resource. The nurture and protection of these resources may ultimately prove to be the greatest incentive for their protection. H.R. 37 encourages such programs in a number of ways.

Honesty compels us to admit that steps taken by H.R. 37 to close the U.S. market to trade in endangered and threatened species may not be sufficient, in and of themselves, to remove pressure and thus to allow these species to recover. Passage of this legislation is, however, of importance—both because the United States is an important market, and because of the precedent that it will create. The Convention was especially significant in this respect; it was built upon the model that had already been created in this country, and it exerts a strong pressure upon other countries to follow suit.

Existing United States legislation was, when first proposed and adopted, adequate to meet the pressures upon endangered species at the time. Changing patterns of trade and exploitation have, however, created a situation in which this legislation is no longer entirely adequate. At times, present laws are too broad, and at others, they are too narrow and restrictive.

The events of the past few years have shown the critical nature of the interrelationships of plants and animals between themselves and with their environment. Another word for the study of these interrelationships is "ecology." The hearings proved (if proof is still necessary) that the ecologists' shorthand phrase "everything is connected to everything else" is nothing more than cold, hard fact.

In practically every circumstance endangered species are at the outer selves pushed out of that environment, harried and hunted by those edges of the circumstances in which they evolved. They find themselves pushed out of that environment, harried and hunted by those who would use them for their own advantage. Any program for the protection of endangered species must necessarily concern itself with more than a simple "hands-off" attitude toward the animals and plants themselves.

Such an attitude lies at the heart of the legislation here presented to the House. The basic purpose of the Act is clearly stated in the legislation; to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, protected or restored. In furtherance of this purpose, the bill declares a policy that Federal agencies are to use the authorities that are available to them in carrying out the objectives of the bill.

During the hearings on the legislation, it became apparent that there was little controversy as to the need for a bill of the types before the Committee. Both H.R. 37 and H.R. 4758, the Administration bill, followed essentially the same pattern; and as reported by the Committee, H.R. 37 adopts elements of both.

The principal areas of discussion during the hearings and in markup of the legislation centered on the proper role of the state and Federal governments with regard to endangered species programs, and the protection of plants. As regards both of these issues, there is fairly general agreement on the nature of the problem, but there was no clear agreement as to the best course to follow.

## STATE AND FEDERAL RELATIONSHIPS

Any bill which is designed to deal with the complicated issues involved in protection of endangered species must do so in the light of at least two competing considerations: first, protection of endangered species is not a matter that can be handled in the absence of coherent national and international policies; the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded. Second, however, the states are far better equipped to handle the problems of day-to-day management and enforcement of laws and regulations for the protection of endangered species than is the Federal government. It is true, and indeed desirable, that there are more fish and game enforcement agents in the state system than there are in the Federal government. Any reasonable and responsible program designed to protect these species must necessarily take account of this fact.

Balancing these two factors produced the legislation in the form in which it is presented to the Congress. The bill places the essential responsibility for establishment of the lists of endangered species, and amendment of these lists, in the Secretary. At the same time it is expected and required that there be good faith consultation between the Secretary and the states, as well as with other interested and knowledgeable parties. The states have no veto over the listing or delisting of endangered species, but they do have the power to discuss the problems and to make recommendations as to their resolution.

Regulatory jurisdiction is given to the Federal government under this legislation, and if a cooperative agreement is successfully negotiated and signed, to the states as well. The subject of cooperative agreements was discussed extensively within the Committee and with other knowledgeable people. It was and is contemplated that representatives of the state and Federal governments, who would in any case be working together, would negotiate these agreements. These might or might not include financial incentives to assist in the operation of endangered species programs.

Where a cooperative agreement has been put into effect, the bill allows concurrent jurisdiction over the species affected in both the state and Federal judicial systems. The ultimate approval or disapproval of these cooperative agreements lies within the discretion of the Secretary, who has been given broad powers of review, together with the authority to intervene and to suspend any such agreement in the interests of the species affected, if he feels that the agreement is not being properly carried out or if he feels that new circumstances require additional steps to be taken that had not been contemplated at the time the original agreement had been prepared.

The question of preemption of state laws was of great interest during the hearings, due in part to the fact that the language in the Administration bill was susceptible of alternative interpretations. Accordingly, the Committee rewrote the language of the Administration bill to make it clear that the states would and should be free to adopt legislation or regulations that might be more restrictive than that of the Federal government and to enforce the legislation. The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exploitation or inter-

state commerce; in any such case the State could not override the Federal action. In every other respect, the State powers to regulate in a more restrictive fashion or to include additional species remain unimpaired.

Because the State roles with regard to endangered species are so significant, the Committee felt it desirable to incorporate a program allowing financial assistance for those programs. Any such program might be a part of, or independent from, arrangements under which the states would agree to manage and protect such species on the Federal list as might be found within their borders. The Committee provided a separate authorization in this regard, to make it clear that any funds to be paid to the states under this section should come from that specific authorization, rather than from the general authorization contained in Section 15 of the bill.

## PLANTS

The hearings demonstrated that the protection of plants must also be a matter of urgent concern. The Administration bill did not address itself to the problem, while H.R. 37, as introduced, treated plants in like manner as animals. There were vigorous objections to this approach by some, to the effect that the circumstances and the regulatory mechanisms respecting animals were not and should not be the same for plants.

It must be recognized that plant species and subspecies are even more vulnerable to man's intervention than are animals, since they cannot move to more hospitable circumstances when necessary. Until recent times, it should also be pointed out, most species of plants were not under the same kinds of heavy pressures that affect animals. Variations in plant species typically occur in areas where land development pressures were traditionally least intense: variations in grasses found at the eastern and western fringes of the American Great Plains before the advent of the white man would be almost insignificant, whereas plant communities in high mountain valleys, on the other hand, might vary significantly within a few miles of each other. It has only been in the past few years that these more remote areas have come under intense development pressures, and so it is that plant protection has become correspondingly more urgent.

The Secretary of Agriculture presently exercises considerable authority in the regulation of the importation and exportation of plants, and it appears that these authorities can be used and adequate enforcement mechanisms devised for the purposes of the Act without significantly changing existing programs. This was preserved in H.R. 37. Further, the recent Convention laid upon signatory members a responsibility for devising adequate programs to control the importation and exportation of both plants and animals that might be or become endangered. At the same time, however, the question of regulation of interstate commerce in species of plants raises a number of unresolved issues which, with justification, might be termed thorny.

The Committee resolved the issue by rewriting the legislation to provide authority for the acquisition of critical habitat of plants in the U.S., the regulation of their importation and exportation, and foreign assistance programs consistent with the purposes and policies of the Act. The additional questions of national regulation of endangered

species of plants were assigned to the Smithsonian Institution, which was directed to study the problems of management on a national scale, and to prepare lists of present and potential endangered species of plants. It was also directed to report back on the results of its study within one year of the effective date of the legislation. It is expected that at that time, the Committee will be in a position to consider the matter and to recommend any further amendments to his legislation that may appear appropriate and desirable.

#### LAND ACQUISITION

The protection of the habitat of endangered species is clearly a critical function of any legislation in this area. The earlier Acts of the Congress in 1966 and 1969 provided an ultimate authorization of fifteen million dollars for the protection of habitat. That fifteen million dollars has now been used up, and the authority no longer exists. The Administration recommended that this authority be expanded to allow the Secretary to use funds from the Land and Water Conservation Fund without specific authorizations, and to use authorities under this legislation, under the Migratory Bird Conservation Act, the Fish and Wildlife Act of 1956, and the Fish and Wildlife Coordination Act. The Committee agreed with this approach, and the bill so provides.

#### IMPLEMENTATION OF CONVENTION

The International Convention was signed on March 3; it has not yet been formally ratified by any country. Notwithstanding that fact, however, the Committee felt strongly that it was desirable to take any steps that might be appropriate at this time, so that when the Convention does come into force, as it almost certainly will, no further legislation will be needed at that time to implement it.

#### OTHER LEGISLATION

As reported, H.R. 37 provides ample authority for the Secretary of the Interior—authority which the Committee expects him to exercise—to provide protection for species such as the Everglades Kite and the pupfish. These species are already listed as endangered, but require additional protection in the form of habitat acquisition and/or the enforcement of strict regulations. In this way, the bill will render unnecessary other legislation presently pending before the Committee which deals specifically with these species.

#### SECTION-BY-SECTION ANALYSIS

##### SHORT TITLE

Sec. 1. This Act may be cited as the "Endangered and Threatened Species Act of 1973."

##### FINDINGS, PURPOSES AND POLICY

Sec. 2. (a) The findings by Congress are to the effect that the decline and disappearance of species and subspecies is a matter of national and international concern, and that it is necessary to take steps for the benefit of all people to halt and, if possible, to reverse this decline.

(b) The essential purpose of the Act is to provide a means for protecting the ecosystems upon which we and other species depend. Another, allied purpose is to provide a specific program for the protection of endangered species,<sup>1</sup> and a third allied purpose is to take the necessary steps to implement international conventions and treaties which bear upon this objective.

(c) The policy of the legislation is to state a national purpose that all federal agencies and instrumentalities will take steps within their authorities to protect endangered species.

#### DEFINITIONS

Sec. 3. (1) "Convention" means the recently concluded Convention on International Trade in Endangered Species of Wild Fauna and Flora.

(2) The term "Endangered Species" means any species of fish or wildlife which is in danger of extinction throughout its entire range, or any portion of its range. This definition is a significant shift in the definition in existing law, which considers a species to be endangered only when it is threatened with worldwide extinction. It includes the possibility of declaring a species endangered within the United States where its principal range is in another country, such as Canada or Mexico, and members of that species are only found in this country insofar as they exist on the periphery of their range.

(3) The term "fish or wildlife" means all wild animals, whether or not raised in captivity. Thus, in addition to controlling trade in captive animals, the bill makes it clear that an animal which has been raised in captivity and released, or which escaped, would be subject to protection under the provisions of this Act. The term also includes any parts or products of these animals.

(4) "Foreign commerce" is defined quite broadly and evidences a clear intent of the Congress to reach acts committed beyond the boundaries of the United States, including those on the high seas and in foreign countries, if those actions were taken by persons subject to U.S. jurisdiction.

(5) "Import" means any introduction into areas subject to U.S. jurisdiction, or attempt to introduce into those areas, regardless of whether this constitutes an importation under Custom laws.

(6) "Person" is defined broadly enough to cover any person or entity, including employees of state or Federal agencies.

(7) "Plant" means any member of an endangered or threatened species within the plant kingdom, or any part of such plant.

(8) "Secretary" incorporates the split in jurisdiction contained in the 1970 Reorganization Plan, which had the effect of assigning management authority for certain animals to the Department of the Interior and for certain other animals to the Department of Commerce. That reorganization did not purport to change responsibilities specifically assigned to the Secretary of the Interior with regard to the listing of endangered species, and those responsibilities are not affected by this bill. "Secretary" means the Secretary of Agriculture with regard to the importation or exportation of terrestrial plants:

<sup>1</sup> In this discussion the words "endangered species" will be taken, in the interests of space and time, to include threatened species unless the context clearly indicates otherwise.

marine plants would be a matter of concern to the Secretary of Commerce.

(9) "Species" is defined broadly enough to include any subspecies of fish or wildlife or plants, or any population of such species.

(10) "State" means any state, territory or possession.

(11) "Take" is defined broadly. It includes harassment, whether intentional or not. This would allow, for example, the Secretary to regulate or prohibit the activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.

(12) "Threatened species" means any species which may become endangered. It would certainly include those species which are presently on the decline and those which have achieved a stabilized position, or even were on the increase, so long as the Secretary was satisfied that a measurable risk to those species could be said to exist.

A species could be determined to be "threatened," even in cases where it is commercially harvested at the time the determination is made, if inadequately regulated harvesting has resulted in a serious decline of population stocks throughout all or a significant portion of its range and the Secretary determines that regulations controlling activities affecting the species would serve to conserve, protect, or restore the species concerned in accordance with the purposes of the Act set forth in section 2(b).

(13) "United States" includes all states as defined in the Act.

#### DETERMINATION OF ENDANGERED OR THREATENED SPECIES

Sec. 4. (a) This paragraph gives to the Secretary the authority to determine whether any fish or wildlife species is endangered because of any of a combination of several listed events. The section is drawn broadly to allow the Secretary to declare endangered or threatened any species for any legitimate reason.

(b) This section requires the Secretary to make determinations of endangered status on the basis of the best available evidence, after consultation with individuals, organizations, states or foreign countries, as appropriate. Where any such species exists within the boundaries of a given state, the Secretary is required to consult with the appropriate agencies within that state before making a final determination. The section requires the Secretary to give full consideration to efforts being currently made by any foreign country to protect fish or wildlife species within that country, in making a determination as to whether or not those species are endangered or threatened. There is provided ample authority and direction to the Secretary to consider the efforts of such countries in encouraging the maintenance of stocks of animals for purposes such as trophy hunting. If, on the other hand, the Secretary feels that inadequate measures are being taken by those countries, he is authorized and expected to take any steps necessary to discourage activities which might be inimical to those species by persons subject to U.S. jurisdiction. The Secretary is also required to consider, in establishing such lists, any animal which has been designated by any foreign country, or pursuant to any international convention, as requiring protection from unrestricted commerce.

(c) The Secretary is required to publish lists of endangered species and threatened species in the Federal Register. If any person proposes that a species be listed or delisted, the Secretary must review the status of that species when he determines in good faith that substantial evidence has been presented in support of the proposed action. The Committee intends, by this section, to require that the discretion of the Secretary be exercised so as to provide adequate protection to any species of fish or wildlife which is or which might become endangered. The section preserves designations under current law by requiring republication of existing lists. Until such republication, those species continue to be protected; there will be no hiatus pending such republication.

(d) The Secretary is authorized to issue appropriate regulations to protect endangered or threatened species; he may also make specifically applicable any of the prohibitions with regard to threatened species that have been listed in section 9(a) as are prohibited with regard to endangered species. Once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species.

With regard to threatened species, the section goes on to indicate that, if a cooperative agreement has been reached, the Federal enforcement powers will thereafter be coextensive and concurrent with the state powers of enforcement. This will allow both state and Federal management officials to seek enforcement through both state and Federal courts—whichever seems most appropriate in the circumstances of a given case. The element of concurrent jurisdiction with regard to threatened species, and, as will later appear, with regard to endangered species, is a vital element of the protective scheme contemplated under this Act.

(e) This paragraph provides authority to the Secretary to regulate species which resemble, either in the natural state or in the form in which they enter the country, species which are listed under the authority of section 4. If the enforcement agencies are confronted by a situation in which they cannot adequately distinguish between listed and nonlisted species of animals, they are authorized to ban the importation of the "look-alikes." It is not the intention of the Committee to grant absolutely unrestricted authority to the Secretary in this regard, but if there is a legitimate problem and the Secretary is confronted by those who claim that the product in question does not derive from an endangered species, he may act to resolve the uncertainty by listing the species.

(f) This section requires that the rule-making procedures of the Administrative Procedures Act shall be applied to regulations adopted under this Act.

#### LAND ACQUISITION

Sec. 5. This section allows the Secretary to use broad authorities under this Act, the Migratory Bird Conservation Act, the Fish and Wildlife Act of 1956 and the Fish and Wildlife Coordination Act for the purpose of acquiring lands, waters and partial or total interests therein in order to establish programs contemplated under the Act or

international Convention. The section authorizes the Secretary to use funds available to him under the Land and Water Conservation Act without regard to the appropriation ceilings provided elsewhere.

The Department of the Interior, which will be exercising primary authorities with regard to the use of these Land and Water Conservation Fund moneys, was unable to provide a specific set of figures as to anticipated habitat acquisition under this section, but indicated that its present expectations were that the funds requested would not exceed \$1.4 million in fiscal year 1974, \$8.5 million in fiscal 1975 and \$12.5 million in fiscal 1976.

#### COOPERATION WITH THE STATES

**SEC. 6. (a)** This subsection requires the Secretary to consult with the affected States in carrying out any program authorized under the Act. That consultation includes discussions before acquiring lands or any other action taken under the authority of this Act.

**(b)** The Secretary is authorized to enter into agreements with any State regarding the administration and management of lands acquired for purposes of this Act. Revenues received are subject to existing legislation concerning state participation in revenues from the National Wildlife Refuge System.

**(c)** The Secretary is given authority and direction to enter into cooperative agreements, which may involve financial assistance regarding the management of endangered species, with those state jurisdictions. Any such cooperative agreement must be pursuant to a finding by the Secretary that the state has adequate statutory and regulatory authority in its fish or game agencies, or the combined agency, as the case may be, to maintain a program; that the programs are in fact consistent with the purposes of the Act and are acceptable; that the agency has sufficient authority to perform necessary investigations on the status of endangered species or their requirements; that the state agency is authorized to establish programs, including land acquisition programs, to carry out the provisions of this Act; and that there is adequate provision for public participation in state endangered species programs.

**(d)** The Secretary is authorized to allocate funds for financial assistance to the states to assist state programs. With regard to the moneys authorized under the Act, the Secretary is required to consider several listed factors in determining which state gets how much money. Any funds allocated which are unobligated as of the end of the fiscal year may be expended until the end of the next fiscal year; lapsed funds may be reallocated by the Secretary pursuant to the Act. Any cooperative agreements executed pursuant to this authority must describe the responsibilities of the parties, the benefits expected to be derived, the costs of the programs and the state and Federal share of those costs. Under no circumstances may the Federal share exceed  $\frac{2}{3}$  of the total program costs, except that the Federal government may assume  $\frac{3}{4}$  of the program costs if two or more states develop a joint or regional program which is acceptable to the Secretary. He is given authority to advance funds to the state on a reimbursable basis.

**(e)** The Secretary is required to review any such cooperative and cost-sharing agreements at least annually. This authority would allow

the Secretary to intervene at any time if the circumstances were so changed as to render it imperative in his judgment that the cooperative agreement be terminated or that a new agreement be negotiated. The Committee expects the Secretary to provide reasonable notice to the states and other affected parties, wherever possible, of his intentions in making any such modification.

**(f)** This paragraph indicates that the states are to be free to develop regulatory mechanisms which are more stringent or more restrictive than those of the Federal government. Existing state endangered species programs would, for example, be in a position to include species which were not on the Federal list. The only exception to this is contained in the language which expressly prohibits the state from voiding actions specifically permitted by Federal agencies or from permitting specific actions forbidden by Federal agencies. In all other regards, the state law is not pre-empted, but is merely subject to the Federal "floor" of regulations under the Act. Thus, laws already passed in States such as New York, California and Hawaii, which list additional species or prohibit such activities as sales within their jurisdiction would remain unaffected.

**(g)** This paragraph authorizes the Secretary to promulgate any appropriate regulations to carry out the section regarding financial assistance.

**(h)** This paragraph authorizes the Secretary such funds as may be necessary to carry out the purposes of the section. It is not anticipated that such funds will exceed \$10 million any fiscal year.

#### INTERAGENCY COOPERATION

**Sec. 7. (a)** This subsection requires the Secretary and the heads of all other Federal departments and agencies to use their authorities in order to carry out programs for the protection of endangered species, and it further requires that those agencies take the necessary action that will not jeopardize the continuing existence of endangered species or result in the destruction of critical habitat of those species. To the extent that those actions involve the protection of habitat, the states must be consulted. Under the authority of this paragraph, for example, the Director of the Park Service would be required to conform the practices of his agency to the need for protecting the rapidly dwindling stock of grizzly bears within Yellowstone Park. These bears, which may be endangered, and are undeniably threatened, should at least be protected by supplying them with carcasses from excess elk within the park, by curtailing the destruction of habitat by clearcutting National Forests surrounding the Park, and by preventing hunting until their numbers have recovered sufficiently to withstand these pressures.

**(b)** This paragraph authorizes the Secretary of Agriculture to carry the full cost, or any portion thereof, of any program which is considered desirable to carry out the purposes of this Act and which involves installation of any facility or program on private lands. Any such program must be directed at assisting private land owners to take actions consistent with the preservation and protection of endangered species where the landowners wish to do so. The Secretary of Agriculture is also authorized to conduct research programs in order to further the purposes of this Act. Any such research may be carried

on jointly by the appropriate Secretary and the Secretary of Agriculture.

#### INTERNATIONAL COOPERATION

Sec. 8. (a) This paragraph authorizes the use of counterpart funds in foreign countries, where those countries are agreeable, to provide assistance in the development and management of programs which the Secretary finds to be important to endangered species. The President, under the appropriate provision of law, is authorized to do anything that is mutually considered as desirable. There is a restriction on the use of counterpart funds, however, which indicates that in a case where counterpart funds are available, they will be used in preference to those authorized under section 15 of this Act.

(b) The Secretary is authorized and directed to encourage foreign countries to develop adequate programs for the protection of endangered species, to encourage the development of bilateral and multilateral agreements for the protection of endangered species and to encourage foreign persons who take endangered species of plants or animals for importation to use such practices as will encourage appropriate conservation practices and protection of endangered species.

(c) After consultation with the Secretary of State, the Secretary is authorized to use Federal employees to develop personnel programs relating to endangered species, and to provide training for foreign personnel in this country or elsewhere, in the management of endangered species.

(d) The Secretary is authorized, in cooperation with the Secretary of the Treasury, to develop programs for law enforcement and research, as necessary to carry out the purposes of the Act.

(e) This section authorizes the establishment of appropriate management and scientific authorities as required pursuant to the terms of the International Convention, when it becomes effective. It also requires appropriate action under the Convention on Nature Protection in the Western Hemisphere. It is anticipated that the agencies designated under this section will perform appropriate functions necessary to assure effective administration of the responsibilities of the United States under the Convention and to advise the public of export and import controls and the species subject to controls under the Convention.

#### PROHIBITED ACTS

Sec. 9. (a) Subparagraphs (1) through (5) of this paragraph spell out a number of activities which are specifically prohibited with respect to endangered (not threatened) species for persons subject to the jurisdiction of the United States. It includes, in the broadest possible terms, restrictions on the taking, importation and exportation, and transportation of such species, as well as other specified acts. Concurrent jurisdiction with states is provided for, where the taking of such species violates the provisions of an existing cooperative agreement. Subparagraph (6) makes it unlawful for any person to violate any regulation promulgated by the Secretary with respect to a threatened species. In this respect the Secretary is given authority to prohibit activities with respect to threatened species which have specifically been prohibited with respect to endangered species.

(b) It is unlawful for any person subject to the jurisdiction of the United States to do anything which would result in a violation of the international Convention. The reference to the definitions in the Convention is required because a number of terms used in that Convention, such as "specimen" and "introduction from the sea", were defined with special care in that Convention and have highly specific meanings. This paragraph provides that an export permit covering the shipment of nonendangered species on Appendix II of the Convention will be presumed to be valid and issued in good faith, unless the Secretary has reliable evidence to offset the presumption of validity. In all other respects, of course, the requirements and regulations of the Act, including the requirement that such goods be brought in through designated ports of entry, accompanied by appropriate documentation, must be followed by the importer; the purpose of paragraph (b) (2) is to allow the Secretary to look behind an export permit only where he has evidence that it does not correctly reflect the situation in the country in which the animal or plant was originally taken, or that the permit itself is not valid.

(c) It is illegal to engage in business as an importer or exporter of fish or wildlife without a permit; this category includes zones, brokers, forwarders and taxidermists. The only exception to this requirement is provided in the case of businessmen dealing in nonendangered and nonthreatened species of shellfish and fish which are imported for commercial purposes or taken in U.S. waters or on the high seas for recreational purposes. Permit holders or licensees under this section are required to keep adequate records, permit inspection of these records and their premises by the Secretary, and file all required reports. The Secretary is also authorized to prescribe regulations under which these requirements are to be carried out.

(d) It is illegal for anyone (except in the specified conditions of the proviso), whether a businessman or otherwise, to fail to file declarations or reports required by the Secretary in conjunction with the enforcement of this Act or of the Convention. The filing of a false or misleading report would be a violation of this section.

The subsection is designed to provide the Secretary with the information which he must have on the wildlife shipments which presently cross U.S. borders in order for this country to participate effectively in the Convention, which requires a workable system of worldwide information in this area.

(e) This paragraph makes it illegal for anyone (except in the specified conditions of the proviso), whether a businessman or otherwise, to bring in fish or wildlife or plants in any port other than one designated by the Secretary. The requirement can be waived or modified at the discretion of the Secretary. Ports already designated under existing law will continue to be designated in the future, except as specifically changed.

(f) It is illegal to conspire to commit, or to attempt to commit, a violation of the Act.

#### EXCEPTIONS

Sec. 10. (a) The Secretary is allowed to issue permits for actions otherwise prohibited for scientific purposes or for the purpose of enhancing the propagation or survival of the species affected. The restrictions upon the discretion of the Secretary lie in the requirements

of subsection (c), as later described. Any such activities to encourage propagation or survival may take place in captivity, in a controlled habitat or even in an uncontrolled habitat so long as this is found to provide the most practicable and realistic opportunity to encourage the development of the species concerned. They might even, in extraordinary circumstances, include the power to cull excess members of a species where the carrying capacity of its environment is in danger of being overwhelmed.

(b) This paragraph provides the so-called "hardship exemption", authorizing the Secretary to exempt for a period of not to exceed one year from the date that a species is first proposed for inclusion on the list persons who can show that the listing of that species will create an undue economic hardship for them. Like subsection (a), exemptions to be provided under this subsection would be subject to the overall policy requirements of subsection (c) of this section. The paragraph does not prevent or forestall existing hardship exemptions under the Act; it does, however, require that no economic hardship exemption be granted covering an animal which is on Appendix I of the Convention if the use of the animal is for primarily commercial purposes. The Secretary is authorized to obtain any information necessary for him to decide whether or not the issuance of such an exemption is justified, and any information so received is to be a matter of public record. If the applicant concludes that this will result in the public release of information which he would prefer to remain private, he may of course, decide not to submit his application or to attempt to persuade the Secretary not to require that information.

(c) This paragraph prescribes the circumstances under which the Secretary may grant exemptions under subsections (a) and (b) of this section. It provides overall policy guidance, requiring that the Secretary find and publish his finding that the exemption application was applied for in good faith (and is not for the purpose of stockpiling animals or products), is not to the disadvantage of the species, and will be consistent with the purposes and policies stated in Section 2.

The effect of this subsection is to limit substantially the number of exemptions that may be granted under the act, but given that these exemptions apply to species which are in danger of extinction, the restrictions imposed by this paragraph seem entirely reasonable.

(d) This subsection extends the exception provided in the Marine Mammal Protection Act of 1972 (P.L. 92-522) regarding taking of endangered species by Alaskan natives. Under that Act, certain types of taking of endangered species of animals are permitted subject to the overriding power of the Secretary to intervene and restrict or prohibit further taking in the interests of protecting the species or stocks of those animals. The same powers of intervention are thus preserved by this Act. While any such taking would not be a violation of either the Marine Mammal Protection Act or this Act, the taking would still be subject to whatever stricter state regulations apply to the taking of the animals concerned.

#### PENALTIES AND ENFORCEMENT

Sec. 11. (a) Civil penalties are provided for anyone who violates any provision of the Act, or permits or certificates issued pursuant to the Act, or regulations.

All violations prescribed by statute, including those of Section 9(a) (6), are punishable by a \$10,000 fine, as are all violations of any permit or certificate. It should be noted, however, that only violations of 9(a) (6) regulations are punishable to this extent insofar as they implement or parallel restrictions specifically enumerated in section 9(a) (1-5), 9(b), 9(c), 9(a) or 9(f). Violations of any other regulations, if knowingly committed, are punishable by a \$5,000 penalty.

The subsection is subject to the requirement that violators be given an opportunity for a hearing and requires the Secretary to sue in a Federal district court to collect any penalties assessed. Penalties may be remitted or mitigated by the Secretary upon finding of proper cause. Hearings by the Secretary are required to be conducted subject to the existing adjudicatory hearing requirements of the Administrative Procedures Act and the Secretary is given authority to issue subpoenas and other process necessary to determine the facts of the case.

(b) Criminal penalties are also provided for any acts which are knowingly taken and which violate the provisions of the Act, or of any permit or certificate. Violation of certain regulations will carry the full penalty, as in the case of civil penalties, and violations of other regulations will carry lesser penalties. The section incorporates a "finders' fee provision", authorizing payment of a portion of the criminal fines to any person who furnishes information, not in the course of his Federal or state employment, which leads to conviction under this subsection.

The subsection also authorizes Federal officials to terminate or modify any outstanding Federal grazing lease or other agreement allowing the use of Federal lands upon conviction of a violation under this Act. It makes mandatory the cancellation of any Federal fish or game permit in similar circumstances for up to one year from the date of conviction.

(c) Jurisdiction over offenses and violations under this Act is vested in United States District Courts. Under the principle of concurrent jurisdiction, set out earlier, state courts may also be vested with proper jurisdiction in some cases.

(d) This paragraph authorizes Federal agencies to issue enforcement regulations and allows the use of other Federal personnel and facilities, with or without reimbursement. It authorizes U.S. judges and magistrates to issue warrants for violations of the Act, and allows authorized agents to open packages, serve warrants, and seize and hold goods pending their disposal of the case in the courts. If the Secretary permits it, bonds or other sureties may be posted to permit recovery of property so seized.

This subsection changes existing law by providing an *in rem* procedure under which the Secretary may seek forfeiture of the goods at any time, or in lieu of a civil penalty. This is required, for example, by cases in which no consignee could be found within the United States, or the item was received as a "gift", without constituting a formal importation.

The section provides for forfeiture of illegal goods, which may, but need not, take place in conjunction with civil or criminal proceed-

ings. It is expected that goods properly seized and forfeited would not be returned if the Secretary concludes that the Act has been violated. Goods other than the prohibited fish or wildlife may also be forfeited, in the discretion of the court, upon a criminal conviction for violation of the Act or any regulations under the Act. It also preserves existing customs laws regarding seizures.

(e) The appropriate agency heads are authorized to promulgate enforcement regulations and to charge reasonable fees for expenses properly incurred under the Act. Any such fees are to be covered into the General Treasury to the credit of the appropriation covering such activity.

(f) This subsection authorizes citizen actions to enforce the provisions of the Act. It allows any person, including a Federal official, to seek remedies involving injunctive relief for violations or potential violations of the Act. The language is parallel to that contained in the recent Marine Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in the same fashion.

(g) The Secretaries are directed to coordinate their activities with those of the Secretary of Agriculture to provide for enforcement of the Animal Quarantine and Tariff Acts. In no respect is the authority so provided intended to limit the authorities otherwise available to the Secretary of Agriculture.

(h) The Act specifically disclaims any intent to interfere with the responsibilities of the Secretary under the Tariff Act relating to importation of contraband animals, which may or may not also be endangered.

#### ENDANGERED PLANTS

Sec. 12. This section authorizes the Secretary of the Smithsonian, together with any other interested agencies of the state or Federal government, public or private, to review plant species which are or may become endangered or threatened and possible regulatory programs. The results of this study are to be communicated to the Congress at the time, and we will then be in a position to consider the necessity for further amendments to this legislation.

#### CONFORMING AMENDMENTS

Sec. 13. For the most part, the amendments in this section simply conform existing laws to the provisions of this Act, as reported. The Committee has made a conscientious effort to find all references to the existing laws, and to correct them to refer to the new Endangered and Threatened Species Act of 1973. It is presumed that any references to older legislation which have not been so conformed would continue to refer to this Act.

Subsection (d) of this section handles a housekeeping change which was brought to the attention of the Committee after enactment of PL 92-534 last year, dealing with the acquisition of lands in national conservation and recreation areas. As amended, the legislation will permit

the acquisition of lands within the boundaries of such areas, as well as those adjacent to them.

As to the recent Marine Mammal Protection Act of 1972, a number of changes are made to conform the reference to this Act. There is no intention whatever to repeal any portion of that Act, and it is intended that the more restrictive provisions of each law will prevail, to the extent that any conflict may later appear.

#### REPEALER

Sec. 14. This section repeals the existing 1966 and 1969 endangered species acts, which have been superseded by this bill.

#### AUTHORIZATIONS

Sec. 15. This section authorizes certain sums to the Interior and Commerce Departments for the current and next two fiscal years. The sums authorized are in line with the agency projections of program needs for the years in question, and provide a total of \$27.5 million for these three years.

#### EFFECTIVE DATE

Sec. 16. The effective date of the legislation is the date of its enactment.

#### COST OF THE LEGISLATION

In the event that this legislation is enacted into law, the Committee estimates the maximum costs to the Federal Government, on the basis of information supplied by the Executive Branch, to be as follows:

The Departments of the Interior and Commerce estimate their three year costs to be \$69.9 million, as represented by the following table:

	Fiscal year—		
	1974	1975	1976
Habitat acquisition (sec. 5b): Interior.....	1.4	8.5	12.5
State grants-in-aid (sec. 6): Interior.....		10.0	10.0
Program costs (sec. 15):			
Interior.....	6.0	9.0	10.0
Commerce.....		1.5	2.0
Total.....	7.4	28.0	34.5

It is to be noted the Department of the Interior anticipates habitat acquisition costs will be provided by the Land and Water Conservation Fund. The Smithsonian Institution and the Department of Agriculture anticipate any cost to their agencies in implementing the legislation will be borne by existing program authorizations.

After reviewing the foregoing estimate of costs with respect to this legislation, the Committee has concluded that these costs are reasonable and that the costs incurred in carrying out this legislation will be consistent with those estimates.



[From the Congressional Record, Sept. 18, 1973]

## HOUSE CONSIDERATION AND PASSAGE OF H.R. 37, WITH AMENDMENTS

### ENDANGERED AND THREATENED SPECIES CONSERVATION ACT OF 1973

Mr. DINGELL. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 37) to provide for the conservation, protection, and propagation of species or subspecies of fish and wildlife that are threatened with extinction or likely within the foreseeable future to become threatened with extinction, and for other purposes, as amended.

The Clerk read as follows:

#### H.R. 37

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act, with the following table of contents, may be cited as the "Endangered and Threatened Species Conservation Act of 1973".*

#### TABLE OF CONTENTS

Sec. 2. Findings, purposes, and policy.
Sec. 3. Definitions.
Sec. 4. Determination of endangered species and threatened species.
Sec. 5. Land acquisition.
Sec. 6. Cooperation with the States.
Sec. 7. Interagency cooperation.
Sec. 8. International cooperation.
Sec. 9. Prohibited acts.
Sec. 10. Exceptions.
Sec. 11. Penalties and enforcement.
Sec. 12. Endangered plants.
Sec. 13. Conforming amendments.
Sec. 14. Repealer.
Sec. 15. Authorization of appropriations.
Sec. 16. Effective date.

#### FINDINGS, PURPOSE, AND POLICY

Sec. 2. (a) The Congress finds and declares that one of the unfortunate consequences of growth and development in the United States and elsewhere has been the extermination of some species or subspecies of fish, wildlife, and plants; that serious losses in species of wild animals with educational, historical, recreational, and scientific value have occurred and are occurring; that the United States has pledged itself, pursuant to migratory bird treaties with Canada and Mexico, the Migratory and Endangered Bird Treaty with Japan, the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, the International Convention for the Northwest Atlantic Fisheries, the International Convention for the High Seas Fisheries of the North Pacific Ocean, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and other international agreements, to conserve and protect, where practicable, the various species of fish, wildlife, and plants facing extinction; that a key to more effective protection and management of native fish and wildlife that are endangered or threatened is to encourage and assist the States in developing programs for such fish and wildlife; and that the conservation, protection, restoration, or propagation of such species will inure to the benefit of all citizens.

(b) The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, protected, or restored, to provide a program for the conservation, protection, restoration, or propagation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to protect endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

#### DEFINITIONS

Sec. 3. For the purposes of this Act—

(1) The term "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on March 3, 1973, and the appendices thereto.

(2) The term "endangered species" means any species of fish or wildlife which is in danger of extinction throughout all or a significant portion of its range.

(3) The term "fish or wildlife" means any wild member of the animal kingdom, whether or not raised in captivity, including without limitation, any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, or crustacean, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(4) The term "foreign commerce" includes, among other things, any transaction—

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(5) The term "import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(6) The term "person" means (A) any private person or entity, and (B) any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.

(7) The term "plant" means any member of the plant kingdom, including seeds, roots and other parts thereof.

(8) The term "Secretary" means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this Act and the Convention which pertain to the importation or exportation of terrestrial plants, the term means the Secretary of Agriculture.

(9) The term "species" includes 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.

(10) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(11) The term "take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to harass, pursue, hunt, shoot, wound, kill, trap, capture or collect.

(12) The term "threatened species" means any species of fish or wildlife which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

(13) The term "United States", when used in a geographical context, includes all States.

#### DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

Sec. 4. (a) The Secretary shall by regulation determine whether any fish or wildlife is an endangered species or a threatened species because of any of the following factors:

(1) the present or threatened destruction, modification, or curtailment of its habitat or range;

(2) overutilization for commercial, sporting, scientific, or educational purposes;

(3) disease or predation;

(4) the inadequacy of existing regulatory mechanisms; or

(5) other natural or manmade factors affecting its continued existence.

(b) (1) The Secretary shall make determinations required by subsection (a) of this section on the basis of the best scientific and commercial data available to him

H.R. 37 revises and extends existing law—law which was proposed by this committee in earlier years. As far as it went, the earlier legislation has been valuable—even invaluable—but that law did not go far enough. That defect we hope to remedy today.

H.R. 37 comes on the heels of and implements, an important international convention, which produced a treaty providing for the protection and preservation of endangered species of plants and animals. That Convention, signed by the United States on March 3 of this year, has been submitted to the Congress for approval by the Senate and was in fact approved 5 months later. That is pretty fast action and I would hope that we can reciprocate by moving promptly on H.R. 37 today.

That additional protection for endangered species of plants and animals is necessary is indisputable. Within the past few years, it was necessary for the Department of the Interior to place eight species of whales on that list, and as many species of "spotted cats": leopards, tigers, cheetahs, et cetera.

For the most part, the principal threat to animals stems from the destruction of their habitat. The destruction may be intentional, as would be the case in clearing of fields and forests for development of resource extraction, or it may be unintentional, as in the case of the spread of pesticides beyond their target area. Whether it is intentional or not, however, the result is unfortunate for the species of animals that depend on that habitat, most of whom are already living on the edge of survival. H.R. 37 will meet this problem by providing funds for acquisition of critical habitat through the use of the land and water conservation fund. It will also enable the Department of Agriculture to cooperate with willing landowners who desire to assist in the protection of endangered species, but who are understandably unwilling to do so at excessive cost to themselves.

Another hazard to endangered species arises from those who would capture or kill them for pleasure or profit. There is no way that the Congress can make it less pleasurable for a person to take an animal, but we can certainly make it less profitable for them to do so. H.R. 37 makes it a Federal offense to violate the act or regulations published pursuant to the act, and prescribes penalties and fines of up to \$20,000 for persons convicted of violations.

I should point out, however, that in our desire to create unpleasant consequences for those who violate the act, we have at the same time been very aware of the need to assure due process for anyone accused of violating the act. There are requirements for public hearings on violations, with a full opportunity for the defendants to review the evidence against them, and judicial review of decisions which are felt to be unjust.

Protection of endangered species is, as the gentleman from Michigan has already indicated, far more than a matter of esthetics. As our report on the bill points out, endangered species of plants and animals possess genetic characteristics which cannot be replaced or artificially reproduced. Once the passenger pigeon disappeared, it was gone. It will not, and cannot, ever be back. The loss of the passenger pigeon is unfortunate; it may or may not be tragic. The loss of the blue whale, on the other hand, might very well be tragic: It is possibly the largest

mammal ever to have existed on the face of the Earth, and it may be the most efficient harvester of tiny marine life that exists today. In a protein-hungry world, the loss of huge potential sources of food is not an occasion which can be lightly considered.

When we threaten endangered species, we tinker with our own futures. We run risks whose magnitude we understand dimly, if at all. And we do so, for the most part, for reasons that can be described most charitably as trivial.

The purpose and intent of the bill before you is to bring into focus the costs of further endangering the plants and animals of this world. I believe that we have achieved this objective, and I support the bill strongly, and urge the support of my colleagues.

Mr. DINOZZI. Mr. Speaker, I yield myself 3 minutes.

Mr. Speaker, I strongly urge enactment of H.R. 37, a bill to protect and encourage endangered and threatened species of fish and wildlife. This bill has been considered at length by our committee in the course of hearings during this and the previous Congress. It has been unanimously endorsed by members of our subcommittee and by members of the full Committee on Merchant Marine and Fisheries. It should be enacted today.

H.R. 37 amends and extends laws now on the books: Endangered species legislation enacted in 1966 and 1969. The existing laws are sound, as far as they go, but later events have shown that they do not go far enough. Present laws need to be made more flexible, to adapt themselves to the needs of the animals themselves and to deal with problems which did not exist until a few years ago.

There is a further need, which enactment of this legislation will meet. In March of this year, representatives of 80 nations met in Washington, in response to an earlier congressional directive, and negotiated a comprehensive convention for the protection of endangered species of plants and animals. On August 3, that convention was approved by the Senate, making this country the first to approve the convention. That it will ultimately be in force—which will take place after the 10th ratification takes place—is not questioned by anyone. Enactment of H.R. 37 will take all the steps which must be taken by this country in order to fully implement the requirements of this convention. It will place us in the forefront of the nations of the world that have expressed interest and concern for this problem.

The principal changes to be effected by passage of H.R. 37 are:

First, it extends protection to animals which may become endangered, as well as to those which are now endangered.

Second, it extends protection to animals which are in trouble in any significant portion of their range, rather than threatened, and they must now be, with worldwide extinction.

Third, it makes taking of such animals a Federal offense.

Fourth, it eliminates existing dollar ceilings on acquisition of critical habitat for such species. The present ceiling, which has been almost exhausted, is \$15 million.

Fifth, it gives to the Department of Commerce the authority to manage endangered and threatened species which were transferred to them under Reorganization Plan No. 4 of 1970.

Sixth, it authorizes the use of counterpart funds for programs involving foreign countries, wherever this is appropriate.

There is no objection that I know of to the aims of this bill. It is the product of some very good mutual cooperation between the administration and our committee, and deserves the favorable consideration of every Member of the House.

Mr. BIACCI. Mr. Speaker, I want to express my support for H.R. 37 and strongly urge its passage.

The need for this bill is manifest; our hearings in the Merchant Marine and Fisheries Committee clearly established the serious danger to many species in our environment.

But I also want to recommend the bill, which I cosponsored with many of my colleagues on the committee, for another reason: It represents a sound approach to tackling environmental problems. We are doing three things in this bill which are important and which should be models for future environmental legislation.

First, we are defining the problem as broadly as possible. Instead of merely protecting those species which are now in danger, we are developing a concept of protection which will have continuous force. We are including those species which, at some future date, might become endangered. This is a long range and comprehensive approach to the problem of environmental protection, and this is as it should be. The seriousness of the problem amply justifies such action.

Second, we are making the killing of animals in the protected class a Federal offense. This approach is also fundamentally important. If we are going to have effective environmental legislation we must write tough penalties for violation of the law. Again, no other approach does justice to the seriousness of the problem.

Third, the bill eliminates existing dollar ceilings on the acquisition by the Federal Government of critical habitat areas. This provision represents an important philosophy in environmental legislation—namely, that if we are serious about preserving our environment we are going to have to spend some real money. It is not a question of saying that cost is no object, but of determining that unwise cost restriction now may do damage that will later cost far more, and may not be correctable at all.

Mr. Speaker, I urge all my colleagues to support this bill. What it does is right, and the way it does it is right. And so is the time.

Mr. HARRINGTON. Mr. Speaker, by polluting the air and water, destroying natural habitats, and catering to commercial demands for items like rare furs, man unnaturally interferes in the natural process of evolution. H.R. 37, the Endangered and Threatened Species Act of 1973, is designed to rectify the harm that has been done.

The legislation changes and enlarges the scope of existing conservation law by extending protection to animals which may become endangered, as well as those now endangered; by making the killing of such animals a Federal offense; by eliminating existing limitations on the acquisition of critical habitat area; by allowing States to adopt more restrictive legislation than the Federal Government if they wish; and by mandating the Secretary of the Smithsonian Institution to study any plant species in possible danger of extinction, with the objective of recommending further action that Congress should take to protect endangered plant life.

It seems to me that man may lose more than he thinks, if he does not act to correct his interference with nature. A particular animal or

plant species contributes much more to the world than general esthetic pleasure; it contributes to that much-used but little-understood phrase "the balance of nature." If man is going to grow sufficient food for himself; find cures for the diseases that plague him, and expand his understanding of how his own body functions, he will have to derive much of the needed knowledge from his fellow species.

In his effort to guard the Earth from his own awesome technological capacity, man has yet to learn that an instinct for self-preservation is not enough. He must direct both his intellect and ability to plan for the future toward insuring his self-preservation, as well. H.R. 37 represents recognition of this imperative.

Mr. ANNONZIO. Mr. Speaker, H.R. 37—legislation for which I am a cosponsor. Passage of this measure today will be one more significant step toward righting a serious wrong. Simply stated—many of the thousands of animal species which have disappeared from the face of the Earth have gone because of the interference of mankind. Nearly a thousand species are endangered today because of man's interference with natural habitats, because of his greed, and because he fouls the air and the waters. We have filled the Red Book of the International Union for the Conservation of Nature with mammals, birds and fishes who are running out of places to go to escape human carelessness.

Historically the evolution of new species and the decline of others was a natural process—the result of various natural forces. However, as man emerged as a more dominant life form, things began to change. Our powerful technologies and our blind desire for "progress" enabled us to interrupt the rhythm of nature.

In the name of fashion, we have stalked our big cats and birds with showy plumage until they are gone forever from the face of the Earth—or threatened with extinction. In the name of science and education, we have shipped—and killed through poor and unregulated shipping regulations—countless animals.

Each year our growing world population places greater and greater stress on wilderness areas and national parks. We have crowded many species to the point where their numbers are too slight to insure survival in their natural habitat. Often, that habitat is threatened by land development.

We have mistreated our wildlife—one of nature's greatest gifts—and we are paying a high price. We have made attempts to stop the ravage of wild animals, but unless we do more, the price we pay will be still higher. Already we have denied our children and all generations that follow the wonder of some of our animals. We must not, as an international people, hesitate any longer, or we will seal the fate of grizzly and polar bears, spotted cats and so on. The balance of nature, on which we depend for our survival, depends on the survival of our wildlife.

Any action we take now will, unfortunately, be too late to save some species presently on the list. But we still have a chance to save thousands and thousands of species. We can still cut the Red Book list back drastically and increase our own well-being at the same time. Not all, but certainly some of the wrongs man has perpetrated on wildlife, can still be righted. I think the measures which we are considering today can help in that direction.

## SENATE CONSIDERATION AND PASSAGE OF S. 1983, WITH AMENDMENTS

## ENDANGERED SPECIES ACT OF 1973

The ACTING PRESIDENT pro tempore (Mr. Nunn). Under the previous order the Senate will proceed to the consideration of S. 1983, which will be stated by title.

The bill was stated by title as follows:

A BILL (S. 1983) to provide for the conservation, protection, and propagation of species or subspecies of fish and wildlife that are threatened with extinction or likely within the foreseeable future to become threatened with extinction, and for other purposes.

The Senate proceeded to consider the bill which had been reported from the Committee on Commerce with an amendment to strike out all after the enacting clause and insert:

That this Act may be cited as the "Endangered Species Act of 1973".

## DECLARATION OF POLICY

SEC. 2. (a) FINDINGS.—The Congress finds and declares that—

- (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
- (2) other species of fish, wildlife and plants have been so depleted in numbers that they are in danger of or threatened with extinction;
- (3) these species of fish, wildlife and plants are of educational, historical, recreational, and scientific value to the Nation and its people;
- (4) the United States has pledged itself as a sovereign state in the international community to conserve and protect to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—
  - (A) migratory bird treaties with Canada and Mexico;
  - (B) the Migratory and Endangered Bird Treaty with Japan;
  - (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;
  - (D) the International Convention for the Northwest Atlantic Fisheries;
  - (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;
  - (F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and
  - (G) other international agreements.
- (5) encouraging the States, through Federal financial assistance and a system of incentives, to develop and maintain conservation, protection, restoration, and propagation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish and wildlife.

(b) PURPOSES.—The Congress hereby declares that the purposes and policy of this Act are to—

- (1) provide an effective means to conserve, protect, and restore the ecosystems upon which endangered and threatened species of fish or wildlife depend;
- (2) provide a viable program for the conservation, protection, restoration, and propagation of endangered and threatened species;
- (3) take all appropriate steps to implement the Nation's international commitments with respect to endangered and threatened fish or wildlife; and
- (4) insure that all departments, agencies, and instrumentalities of the United States seek, within the scope of their authority and administrative jurisdiction, to protect endangered and threatened species.

## DEFINITIONS

SEC. 3. As used in this Act—

- (1) "Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.
- (2) "Endangered species" means any species of fish or wildlife which is in danger of extinction throughout all or a significant portion of its range.
- (3) "Fish or wildlife" means any living member of the animal kingdom and the remains of any dead member of the animal kingdom, including, but not limited to, any mammal, fish, bird, amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate or any part, egg, or offspring of any such member, or any product produced from any part or parts of the remains of any such member.
- (4) "Foreign commerce" includes any transaction—
  - (A) between persons within one foreign country;
  - (B) between persons in two or more foreign countries;
  - (C) between a person within the United States and a person in a foreign country; or
  - (D) between persons within the United States, where the fish or wildlife involved are moving in any country or countries outside the United States.
- (5) "Import" means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.
- (6) "Person" means an individual, corporation, partnership, trust, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State or political subdivision thereof, or of any foreign government.
- (7) "Plant" means any member of the plant kingdom, including seeds, roots, or other parts of any such member.
- (8) "Secretary" means, except as otherwise provided, the Secretary of the Interior or the Secretary of Commerce in the same manner in which program responsibilities are vested under Reorganization Plan Numbered 4 of 1970. With respect to enforcement of the provisions of this Act and of the Convention, which pertain to the importation of terrestrial plants, the term means the Secretary of Agriculture.
- (9) "Species" includes any subspecies or other group of fish or wildlife of the same species or lesser taxa in common spatial arrangement that interbreed when mature.
- (10) "State" means any State, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.
- (11) "State agency" means the State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish and wildlife resources within a State.
- (12) "Take" means to harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.
- (13) "Threatened species" means any species of fish or wildlife which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.
- (14) "United States", when used in a geographical sense, includes all States.

## DETERMINATION OF ENDANGERED OR THREATENED SPECIES

SEC. 4. (a) GENERAL.—The Secretary shall by regulation determine whether any fish or wildlife is an endangered or threatened species as a result of any of the following factors:

- (1) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) overutilization for commercial, sporting, scientific, or educational purposes;
- (3) disease or predation;

(f) **EFFEKTIVE DATE.**—Except as otherwise provided in this section, the provisions of this Act shall become effective in their entirety upon the date of enactment of this Act.

**MARINE MAMMALS ACT**

**SEC. 17. CONFLICTS.**—Except as otherwise provided in this Act, no provision of this Act shall take precedence over any more restrictive conflicting provision of the Marine Mammals Protection Act of 1972.

**AUTHORIZATION FOR APPROPRIATIONS**

**SEC. 18.** For purposes of this Act, other than section 6 and section 13 of this Act, there are authorized to be appropriated such sums as are necessary, not to exceed \$3,000,000 for the fiscal year ending June 30, 1974; not to exceed \$6,000,000 for the fiscal year ending June 3, 1975; and not to exceed \$8,870,000 for the fiscal year ending June 30, 1976.

The **ACTING PRESIDENT pro tempore**. The time for debate on this bill will be limited to 1 hour, to be equally divided and controlled by the majority leader and the minority leader or their designees, with 30 minutes on any amendment, debatable motion, or appeal.

The Senator from California is recognized.

**Mr. TUNNEY.** Mr. President, I yield to the Senator from Alaska.

**Mr. STEVENS.** I only wanted to have stated the time situation. I shall handle the bill for the minority.

The **ACTING PRESIDENT pro tempore**. The Senators from California and Alaska, according to the understanding of the Chair, are the designees of the majority leader and the minority leader.

Who yields time?

**Mr. TUNNEY.** Mr. President, the Endangered Species Act of 1973 is a vital piece of legislation which is absolutely necessary to provide protection to our Nation's species of wildlife that are threatened with extinction.

The goal of the Endangered Species Act is to conserve, protect, restore, and propagate species of fish and wildlife, that are in imminent danger of extinction or are likely to become endangered within the foreseeable future. This bill employs several mechanisms to insure the accomplishment of this goal. They include provision of greater authority to the Secretaries of Interior and Commerce to list endangered or threatened animals, encouragement of further international cooperation for the protection of these animals, provision for the acquisition of habitat useful for the purposes of this act, and incentives for the establishment of effective endangered species programs by the several States.

There is an urgent need for this type of protective legislation. In our country alone, there are 100 species listed as endangered by the Secretary of the Interior. On his foreign list, there are over 300 species. Furthermore, the situation continues to worsen. The rate of extinction has increased to a point where, on the average, one species disappears every year.

This is an extremely disturbing trend. To allow the extinction of animal species is ecologically, economically, and ethically unsound. Each species provides a service to its environment; each species is a part of an immensely complicated ecological organization, the stability of which rests on the health of its components. At present, we are unsure of the total contribution of each species of fish and wildlife to

the health of our ecology. To permit the extinction of any species which contributes to the support of this structure without knowledge of the cost or benefits of such extinction is to carelessly tamper with the health of the structure itself.

The existence of each species is also important to the growth of our scientific knowledge of man and his environment. Diversity of genetic types is necessary for thorough scientific knowledge. There is a yet unknown potential for investigation into these species' genetic structure which must remain unhindered if we wish to probe for further knowledge and the transfer of that knowledge into beneficial uses for man.

Finally, many of these animals simply give us esthetic pleasure. We like to view them in zoos and in their natural habitats. We, and our children, learn from these species about the diversity of our universe and the many forms of life which are necessary to support our bountiful and wonderful environment.

For these reasons, it is important that we adopt this act to protect our wildlife. In prior legislation we have taken several steps toward solution of the problem. In 1966 and in 1969, we provided the Secretary with the power to list species or subspecies of fish and wildlife that were threatened with extinction. Importation of these species from foreign countries was prohibited. Federal endangered wildlife reserves were encouraged by authorization of grants for land acquisition. However these provisions only gave limited protection to domestic endangered species; and the Federal grant program terminated last year. There is still no Federal prohibition against the taking of endangered species, still no widespread action to conserve and restore these animals, and the problem of the continuing extinction of species still exists.

The challenge before us now is to protect these species and their vital habitat and to restore their numbers to optimum levels. S. 1983 would accomplish this goal in several ways. First, it provides protection to a broader range of species by affording the Secretary the power to list animals which he determines are likely in the foreseeable future to become extinct, as well as those animals which are presently threatened with extinction. This gives the Secretary and the States which adopt endangered species management plans, the ability not only to protect the last remaining members of the species but to take steps to insure that species which are likely to be threatened with extinction never reach the state of being presently endangered.

The bill would thus hopefully, prevent a crisis situation from occurring for a number of species which would otherwise come close to extinction in future years. The two levels of classification facilitate regulations that are tailored to the needs of the animal while minimizing the use of the most stringent prohibitions. Since most of our resources for restoring and propagating species lie with the States, they are encouraged to use their discretion to promote the recovery of threatened species and Federal prohibitions against taking must be absolutely enforced only for those species on the brink of extinction.

To aid in the delicate and highly specialized task of listing these animals, the Secretary is required to appoint an advisory committee to assist him in the designation of endangered and threatened species.

To insure that the States that may be effected by the Secretary's designation are fully active through the listing process, the Secretary must consult with the States effected prior to listing any species. Furthermore, half the members of the advisory committee must be employed by State governments.

Many species have been inadvertently exterminated by a negligent destruction of their habitat. Their habitats have been cut in size, polluted, or otherwise altered so that they are unsuitable environments for natural populations of fish and wildlife. Under this bill, we can take steps to make amends for our negligent encroachment. The Secretary would be empowered to use the land acquisition authority granted to him in certain existing legislation to acquire land for the use of the endangered species programs. The bill also eliminates the restrictive ceiling which was placed on funds available to the Land and Water Conservation Fund Act by the Act of 1969. Through these land acquisition provisions, we will be able to conserve habitats necessary to protect fish and wildlife from further destruction.

Although most endangered species are threatened primarily by the destruction of their natural habitats, a significant portion of these animals are subject to predation by man for commercial, sport, consumption, or other purposes. The provisions in S. 1983 would prohibit the commerce in or the importation, exportation, or taking of endangered species except where permitted by the Secretary for scientific purposes in furtherance of the purpose of this act, or for the propagation of such species in captivity in a controlled habitat. Amendments which will be offered today, and which would greatly add to the purposes of this act would permit otherwise prohibited acts when they are undertaken to enhance the propagation or survival of the affected species or to prevent serious and otherwise unavoidable threats to human health or the environment.

In order to minimize economic hardship on persons who entered into contracts prior to the passage of the act, such persons are permitted for a limited period of time to engage in activities which would otherwise be in violation of the act.

Alaska Natives are allowed, under regulations to be adopted by the Secretary, to take animals for consumption or use in a native community or for the production of authentic native articles of handicraft or clothing.

Under the bill, the taking of an endangered species for their sale or movement in interstate or foreign commerce is forbidden. Violators of any prohibition under this bill will be liable for a civil penalty of up to \$10,000. Knowing violators of the law will be liable for a criminal penalty of up to \$20,000 and/or imprisonment for up to 1 year. The most important protective provisions of this bill are those which will improve the condition of existing species. These will be actions taken by the Secretary, the States, and individual citizens. However, we must extend some protection to animals subject to unrestrained predation.

Among the greatest contributions that have been made to the conservation, restoration, protection, and propagation of endangered and threatened species are the contributions made by private citizens. Exceptions to the prohibitions could be made by the Secretary wherever possible to encourage individual actions which will further the pur-

poses of this act. Recent activities by the Secretary to prosecute individuals involved in harmless violations of prior acts which were part of programs designed to restore endangered species appear to have been taken counter to the purposes of our earlier legislation. Penalty provisions of this act are intended to be used to prevent activity which may be actually harmful to a species or its individual members and not merely to employ the law enforcement divisions of the departments.

I would like to discuss what is perhaps the most important section of this bill. Important because I believe it provides the most effective means to achieve the purposes of this bill. Undoubtedly, the threatened extinction of our wildlife is a national problem, necessitating involvement of the Federal Government. Endangered animals are not limited to any one area or State of the Nation so it is impossible for the individual States to limit their movement in interstate or foreign commerce. Furthermore, no one State should be responsible for balancing its interests, with those of other States, for the entire Nation. Central authority is necessary to oversee endangered species protection programs and to insure that local political pressures do not lead to the destruction of a vital national asset.

On the other hand, it was well established in the hearings record that most of the States possess much greater wildlife management resources than does the Federal Government. Clearly, any effort on the part of the Federal Government to encourage restoration of threatened or endangered species would fail without the assistance of the State agencies. This bill is designed to permit and encourage State endangered species programs that act in concert with the purposes of this act.

Subject to the provisions of this act which provide maximum protection for species on the brink of extinction, States with active endangered species programs are given full discretion to manage threatened species which reside within their boundaries. Under the bill, the States are given 1 year to submit plans to the Secretary for the establishment of agencies for the promulgation, conservation, restoration, and protection of resident endangered species. Provisions of this act governing the taking and management of endangered species go into effect 15 months after the passage of this act only for those States where the submitted plans have not been approved by the Secretary.

Further, States, whose plans have been approved by the Secretary, are eligible for a portion of the \$10 million provided under this act for financial assistance to defer the cost of implementation. In the case where a State plan is not initially approved by the Secretary, and the Secretary must intervene to insure furtherance of the purposes of this act, a State may reapply at any time for approval of its plan. A State's power to manage endangered species is preempted only to the extent that such State does not prevent taking of endangered species—that is, species which are in imminent danger of extinction. Even in these cases, States whose plans have not been disapproved by the Secretary would have management powers not inconsistent with the prohibitions against taking.

The plan for Federal-State cooperation provides for much more extensive discretionary action on the part of the Secretary and the

I am most pleased to express my appreciation to the staff of the Commerce Committee's Environmental Subcommittee and to the Alaska legal services in regard to this amendment. I believe that it does protect fully the rights of those residents of Alaska Native villages. That is the intent of the amendment, to clarify the congressional intent with regard to that protection.

I am hopeful that the Senator from California may be able to accept the amendment.

Mr. TUNNEY. Mr. President, I understand that this amendment is not intended to create a loophole for those who would exploit their Native village resident status in order to increase their taking of the endangered species or to increase commerce in such endangered species but only in order to meet the bona fide community needs; is that not correct?

Mr. STEVENS. The Senator from California is absolutely correct. They are bona fide residents of Native villages who may not be considered to be Natives, who may be married, for instance, to Native people and who are part of the subsistence economy. This amendment is not intended to give anyone the opportunity to start taking endangered species or any other kind of species by virtue of merely establishing residence in a Native village.

Mr. TUNNEY. We have seen examples of thoughtless commercial taking of endangered species, which only helps to drive endangered species nearer and nearer to extinction. I would expect that no permit would be granted under the provisions of this amendment to further that kind of process. I am sure that the Senator from Alaska would agree that no area of the drafting of this amendment would be utilized in order to permit unwarranted exploitation of endangered species.

Mr. STEVENS. I absolutely concur. The Endangered Species Act of the State of Alaska is specific in that regard already. I am trying to make certain that the Federal law is as specific. We are not trying to open the door to commercial exploitation. We are trying, however, to protect those people who live in a subsistence economy and depend on the animals for food and for their livelihood. It is not intended in any way to encourage or to authorize commercial exploitation by those not so dependent.

Mr. TUNNEY. The Senator from California is aware that certain non-Native Alaska village residents are dependent upon the taking of endangered species. Some of these people have entered into contracts which may have to be broken due to this act. They would suffer unwarranted economic hardship. As I understand the amendment, its purpose is to provide individuals, particularly those who depend on such taking for subsistence purposes, and may be unaware of the application requirements of the act, with a 1-year period to find other means of support. Is that correct?

Mr. STEVENS. That is correct.

Mr. TUNNEY. With that understanding, I think that the Senator from Alaska has offered an amendment which will strengthen the legislation and will protect certain constituents of the Senator in Alaska, and the committee will accept the amendment.

The PRESIDING OFFICER (Mr. Chiles). Is all time yielded back on the amendment?

Mr. STEVENS. I yield back the remainder of my time.

Mr. TUNNEY. I yield back the remainder of my time.

The PRESIDING OFFICER. All time on the amendment has been yielded back.

The question is on agreeing to the amendment of the Senator from Alaska (Mr. Stevens).

The amendment was agreed to.

Mr. STEVENS. Mr. President, I move that the vote by which the amendment was agreed to be reconsidered.

Mr. TUNNEY. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. TUNNEY. Mr. President, I ask for the yeas and nays on final passage.

The yeas and nays were ordered.

Mr. STEVENS. I call up another amendment.

The PRESIDING OFFICER. The clerk will report the amendment.

The second assistant legislative clerk read as follows:

On page 71, lines 20 through 24, strike the proviso and substitute:  
 "Provided, That if, within fifteen months of the date of enactment of this Act, the Secretary finds that a state which does not prevent the taking of a species listed by him as endangered does not provide adequate protection for that species, he may by regulation implement the provisions of subsection 10(b) of this Act with respect to that species in that State."

Mr. STEVENS. Mr. President, I ask for the yeas and nays on the amendment.

The yeas and nays were ordered.

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent that the vote on the pending amendment occur today at the hour of 2 p.m.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. EASTLAND. Mr. President, I send an amendment to the desk and ask for its immediate consideration.

The PRESIDING OFFICER. The Senator would have to ask unanimous consent for that because there is an amendment already pending.

Mr. EASTLAND. Mr. President, I ask unanimous consent that I may send an amendment to the desk for immediate consideration. The manager of the bill has agreed to accept it.

The PRESIDING OFFICER. Without objection, it is so ordered, and the clerk will state the amendment.

The second assistant legislative clerk read as follows:

On page 29, line 15, before the period, insert a comma and the following:  
 "other than a species of the order Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man."

The PRESIDING OFFICER. Who yields time?

Mr. EASTLAND. Mr. President, I yield myself such time as I may desire.

Mr. President, this amendment would except insect pests which the Secretary found presented an overwhelming risk to man from the protection provided by the bill. The Senate recently passed S. 1888 to provide for a program to eradicate the boll weevil and other insect pests of cotton. Millions of dollars are spent every year in trying to protect man from such pests. If these eradication programs should

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF HOME BUILDERS	)	
OF THE UNITED STATES, et al.	)	
Plaintiffs,	)	
	)	No.1:95CV01973 RMU
v.	)	
	)	
BRUCE BABBITT, Secretary,	)	
UNITED STATES DEPARTMENT OF INTERIOR	)	
	)	
and	)	
	)	
MELIE BEATTIE, Director	)	
UNITED STATES FISH AND WILDLIFE SERVICE	)	
	)	
Defendants.	)	

I, TERRY W. TAYLOR declare:

1. I am an owner of a business named Combined Scientific Supplies located in Fort Davis, Texas. I have owned Combined Scientific Supply since 1963. As owner, I am actively involved in the day-to-day operation of this business.

2. Combined Scientific Supply operates a catalog business in insects and related fauna. Through this catalog business, Combined Scientific Supply offers specimens of approximately 10,000 species of preserved or dried insects and related fauna, including at one time the Delhi Sands Flower-loving Fly (Meridiomidas terminatus abdominalis) ("Flower-loving Fly"), for sale to collectors and educational and research facilities throughout the United States.

3. In 1990, I obtained, through either purchase or trade, specimens of the Flower-loving Fly from an individual in



California. This individual sent me the specimens of the Flower-loving Fly from California via the United States mail.

4. Attached as Exhibit A to this Declaration is a true and correct copy of a Combined Scientific Supply insect catalog I prepared in 199~~8~~<sup>2</sup>. Combined Scientific Supplies ships our catalogs to over 1,300 out-of-state domestic customers and over 800 international customers. As noted on page 227 of this catalog, Combined Scientific Supply offered for sale the Delhi sands flower-loving fly at \$2.00 per specimen. The complete catalog number for this species 42D0001. This catalog number is abbreviated on some order forms as 42D1.

5. When processing orders from our catalog, I or my staff completes a standard invoice form. A copy of each completed invoice form is retained on file at our office in Ft. Davis.

6. Attached as Exhibit B to this Declaration is a true and correct copy of Invoice No. 010698, dated May 19, 1992. The starred item (42D1) indicates that the order included 4 specimens of the Delhi sands flower-loving fly. This invoice was made at or near the time this order was shipped, via United States mail, <sup>W Parcel Service</sup> from Combined Scientific Supplies in Ft. Davis, Texas to an individual in Northport, New York.

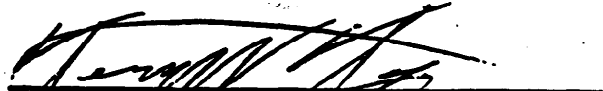
7. Attached as Exhibit C to this Declaration is a true and correct copy of Invoice No. 012744, dated March 21, 1991. The starred item (42D1) on the attached letter indicates that the order included 1 specimen of the Delhi sands flower-loving fly. This invoice was made at or near the time this order was shipped,

United States mail, from Combined Scientific Supplies in Ft. Davis, Texas, to Nashville, Tennessee.

8. For the years 1991 and 1992, Combined Scientific Supplies amassed approximately \$125,000 per year in gross annual sales. For the last three years, Combined Scientific Supplies produced over \$200,000 per year in gross annual sales. Since 1991, over 95 percent of Combined Scientific Supplies' gross annual sales resulted from out-of-state domestic and international purchases.

I declare the foregoing to be true and correct.

Dated: April 26, 1996, at Fort Davis, Texas.

  
TERRY W. TAYLOR

# Insects

*Economic & Non-Economic....*

*Foreign & Domestic*



COMBINED SCIENTIFIC SUPPLIES  
P. O. Box 1446  
Fort Davis, Texas 79734  
United States of America

\$5.00

cat. 13

0450

**NEMESTRINIDAE, Tangle-Winged Flies**

33D0001	Neoryhnchocephalus sp.; USA,	1.00
33D0010	Trichophthalma niveibarbis; Chile	6.00

**ATHERICIDAE**

34D0001	Atherix sp.; USA, larva	2.00
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**BOMBYLIIDAE, Bee Flies**

35D0006	Systoechus sp.; USA,	1.00
35D0010	Bombylia atriceps; USA	1.00
35D0011	Bombylia major; USA	1.00
35D0015	Ligyra gazophalax; USA	1.00
35D0020	Lordotus striatus; USA	♂ 4.00
10021	Lordotus pulcherrimus; USA	♀ 2.00
35D0025	Poecilanthrax wilsonii; USA	1.00
35D0027	Poecilanthrax californicus; USA	2.00
35D0028	* Poecilanthrax apache; USA	3.00
35D0030	* Exoprosopa jonesi; USA	3.00

**EMPIIDAE, Dance Flies**

36D0002	Rhamphomyia longicauda; USA,	1.00
36D0003	Rhamphomyia glabra; USA	1.00
36D0010	Weidemanis sp.; USA	1.00
36D0015	Hilara sp.; USA	1.00
36D0020	Chellera sp.; USA	1.00

**DOLICHOPIDAE, Long-Legged Flies**

37D0001	Long-Legged Fly; USA,	1.00
37D0005	Medetera diadema; USA	♂ 3.00

**MYDIDAE, Mudos Flies**

38D0005	Nemomydes pantherinus; USA	1.00
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**PHORIDAE, Humpbacked Flies**

39D0001	Humpbacked Fly; USA	1.00
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**PIPUNCULIDAE, Big-Headed Flies**

40D0001	Pipunculus sp.; USA	1.00
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**SYRPHIDAE, Flower Flies**

41D0004	Eristalis tenax; USA	1.00
41D0005	Eristalis tenax; USA, Rat-tailed Maggot	1.00
41D0006	Eristalis dimidiatus; USA	1.00
41D0007	Eristalis latifrons; USA	1.00
41D0008	Eristalis arbustorum; USA	1.00
41D0009	Eristalis venetorum; USA	1.00

41D0010	Eristalis aenea; USA	1.00
41D0015	Copestylum marginatum; USA	2.00
41D0021	Melanostoma mellinum; USA	1.00
41D0025	Mesogranima marginata; USA	1.00
41D0030	Ornidia obesa; USA,	1.00
41D0032	Volucella vesicularia; USA	1.00
41D0033	Volucella mexicanus; USA	1.00
41D0041	Helophilus fasciatus; USA	1.00
41D0048	Chrysogaster nitida; USA	1.00
41D0055	Syrphia pipiens; USA	1.00
41D0060	Spilomyia interrupta; USA	1.00

**APIOCERIDAE, Flower Loving Flies**

42D0001	Rhaphiomidas terminatus abdominalis; USA	2.00
42D0002	Rhaphiomidas acton maculatus; USA	6.00
42D0003	Rhaphiomidas acton maeherli; USA	4.00
42D0004	Rhaphiomidas undulatus; USA, Giant Raphiomid	8.00
42D0005	* Rhaphiomidas parkeri; USA	8.00
42D0006	Rhaphiomidas nigricauda; USA, III	♂ 12.00
42D0020	Aplocera alleni; USA	4.00
42D0021	* Aplocera parkeri; USA	4.00

**CONOPIIDAE, Thick-Headed Flies**

43D0001	Phytocephala texana; USA	2.00
43D0005	Cophora sp.; USA	2.00

**SPHAEROCERIDAE, Small Dung Flies**

44D0001	Small Dung Fly; USA	1.00
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**QTITIDAE, Picture-Winged Flies**

49D0005	Tetanops luridipennis; USA	1.00
49D0005	Tetanops luridipennis; USA	1.00
49D0010	Euxesta sp; USA	2.00
49D0020	Chaetopsis aenea; USA	1.00
49D0025	Tritoxas incurva; USA	1.00

**PYRGOTIDAE**

51D0001	Sphecomyleta valida; USA	1.00
51D0020	Pyrgota undata; USA	1.00

**TEPHRITIDAE, Fruit Flies**

52D0004	Dacus dorsalis; USA, Oriental Fruitfly	1.00
52D0005	Dacus dorsalis; USA, larva or pupa	1.00
52D0006	Dacus cucurbitae; USA, larva or pupa	1.00
52D0010	Strauzia longipennis; USA, Sunflower Fruitfly	1.00

INS<sub>A</sub> FS  
 div. Comb. Scientific Supplies  
 P.O. Box 1446  
 FT. DAVIS, TEXAS 79734-1446

# INVOICE

010698

TO Ted Weisse  
 11 Acre View Dr  
 Northport, NY 11768

INVOICE NO.

INVOICE DATE

May 19, 1992

SHIPPED TO



2720 3427 302

OUR ORDER NO.	YOUR ORDER NO.	SALESPERSON	TERMS	PPD. OR COLL.
<b>QUANTITY</b>				
				\$ 6.00
2pr	(out of females	126C1812		12.00
4		1814		16.00
4		1820		36.00
4		1811		68.00
1pr		1785		8.00
1pr		1815		68.00
1pr		1844		16.00
2		63J13 (last of stock)		24.00
4		28C257		16.00
2		1C9131		12.00
2set		9124		16.00
2set		9125		96.00
2pr		1426		56.00
1pr		1416		18.00
1pr		250		6.00
2		9042		18.00
1pr		9049		4.00
4		9053		2.00
4		9056		2.00
2		1 9067		6.00
1pr		9091		6.00
1pr		9093		12.00
1pr		9100		4.00
2		9237		6.00
2		9238		8.00
2		9243		12.00
4		9244		16.00
4		9246		8.00
2		9247		10.00
2pr		9249		3.00
2		9057		6.00
2pr		9076		16.00
2pr		9515		24.00
1pr		9147		6.00
1pr		9026		4.00
4		99D80		8.00
2		89D4		4.00
1dz		28F1		2.00
1pr		28D5 snipe fly		8.00
2pr		35D20		8.00
4		42D1		24.00
2pr		42D6		

**INSEC**  
 div. Comb. Solent. Supplies  
 P.O. Box 1446  
 DAVIS, TEXAS 79734-1446

915 - 426-8651

# INVOICE

TO

Stephen Treadway  
 Cheekwood Bot. Gardens  
 Forest Park Dr  
 Nashville, TN 37205

INVOICE NO.

012744

INVOICE DATE

March 21, 1991

SHIPPED TO

OUR ORDER NO.	YOUR ORDER NO.	SALESPERSON	TERMS	SHIPPED VIA	PPD. OR COLL.
			20% discount = \$100		
QUANTITY	DESCRIPTION			PRICE	AMOUNT
	Insect specimens from your listing Also, sent 1C2460 to make up balance Out of 57J1, 10, 60J30, 276, 280, 285, 63J1			TOTAL	\$100.00

Item # F530 Grayac, P.O. Box 2944, Hartford, CT 06104-2944  
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DUPLICATE



0454

Chickwood Bot. Gardens  
Forest Park  
Nashville, TN 37205  
8 February 1979

0455

Dear Combined Scientist

Last week I sent you \$50 on the \$96 I owe you. Enc is another \$60 to \$50 I can hurry and get the \$400 so I can use the 20% discount I would like to use the 20% discount on getting the following insects:

- ✓ 1351 *Cyrtodisca major* 1.00
- ✓ 36675 *Delus. brachi* 1.50
- ✓ 36680 *Conochinus megalis* 1.00
- ✓ 40610 *Mazema arizonensis* 1
- ✓ 531 *Proxena canaliculata* 2
- 5751 *Asomutilla meli* 1
- 52510 *Sphaerophthalma* sp. 1
- ✓ 40510 *Atloxyste* sp. 50
- 60530 *Parapanora clavata* 2
- 60526 *Myrmeica brevicornis* 1
- 605280 *M. myricetorum* 1.50
- 605285 *Rhytidoponera mayri* 1.50
- ✓ 6531 *Pseudonastitius edwardsi* 1
- ✓ 6252 *P. wheeleri* 1.50
- ✓ 65340 *Steinoda duplicata* 1.00
- ✓ 65345 *Stelopolybia pallipes* 1.00
- ✓ 77557 *Xyllocopa californica* 2
- ✓ 77558 *X. sp. Argentina* 3
- ✓ 4201 *Rhaphiomidas terminata dolomiti* 2
- ✓ 4301 *Physocophala texana* 2
- ✓ 3805 *Neomomyzodes pantherina* 1
- ✓ 1663 *Asadus subniger* 1.25
- ✓ 15155 *Tremex laevigata* 3
- ✓ 1516 *T. abdominalis* 3
- 6351 *Pracneneris praevis* 6.50
- ✓ 77510 *Psidalea piercei* 3
- ✓ 77515 *Centistes atripes* 3
- ✓ 77520 *Eumphrosopis depressa* 50
- ✓ 65320 *Bembix spiridosa* 1
- ✓ 65322 *B. humilipennis* 11
- ✓ 65323 *B. comata* 1.50
- ✓ 62523 *Plectiscus carnifex* 50
- ✓ 62515 *P. esclamae* 50
- ✓ 62514 *P. apachus* 1
- ✓ 62524 *P. curifer* 2
- ✓ 62525 *P. matibilis* 2
- ✓ 60586 *Tetraneura carpata* 50
- ✓ 60575 *Camponotus mucronatus* 50
- ✓ 77525 *Araugha lucana* 50
- ✓ 87530 *Dianotenus rapae* 50
- ✓ 6053 *Atis sexdens* 3 f
- ✓ 20571 *Compsoidea senecalis* 50
- 20520 *Metaphryax helvales* 50
- ✓ 2251 *Polecimus* sp. Black 6
- ✓ 14510 *Tetras-tiche rapae* 50
- ✓ 14512 *T. ramosissima* 50
- ✓ 14513 *T. hagenovii* 75
- ✓ 14514 *T. gigas* 50
- ✓ 14522 *Melittobius* 50

✱

- ~~✓ 40510 Alloxyston 50 100~~
- ✓ 14525 *Aphelinus nulli* 52
- ✓ 1051 *Emucopilla* sp. 1
- ✓ 10515 *Lissipimpela excelsa* 3
- ✓ 1k6 *Eorwig* Java 2
- ✓ 2k8 *Fafficula* sp. <sup>Austr.</sup> 1
- ✓ 5261 *Thepoceta abassa* 1
- ✓ 4064 *Thasus* sp. <sup>Mal.</sup> 2
- ✓ 4063 *Thasus* sp. <sup>♂</sup> 3
- ✓ 4068 *Leptoglossus lineosus* 1
- ✓ 24610 *Pachycoris* sp. 2
- ✓ 24630 *Tetyra* sp. 2
- ✓ 2461 *Pachycoris taccidus* 1
- ~~✓ *Parastita* sp. 2~~
- ✓ 161 *Lethococcus maximus* 12

~~106.50%~~  
~~100 = 20%~~  
 6.50 balance due

Thank you  
 Stephen Trendway