

PART I

LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973

INTRODUCTION

BACKGROUND

The following material is taken from a review of fisheries and wildlife conservation legislation of the 93d Congress written by CRS and issued by the Senate Committee on Interior and Insular Affairs as a Committee Print (*See Congress and the Nation's Environment: Environmental and Natural Resources Affairs of the 93d Congress*, April 1975, Committee Print, Senate Committee on Interior and Insular Affairs, Washington, U.S. Govt. Print. Off., pp. 561-566):

Congress first comprehensively addressed the problem of endangered species with passage of the Endangered Species Preservation Act of October 15, 1966 (Public Law 89-669). This Act caused the Secretary of the Interior to initiate and carry out program efforts to conserve, restore, and in some cases propagate certain species of indigenous fish and wildlife he determined to be in danger of extinction. The Act also consolidated and even expanded authority for the Secretary of the Interior to manage and administer the national Wildlife Refuge System. The endangered species program was expanded by the Endangered Species Act of 1969 (Public Law 91-135) which authorized the Secretary of the Interior to develop a list of species or subspecies of animals threatened with worldwide extinction and prohibited the importation from any foreign country of any such animal or any part, any product, or egg thereof. Limited exceptions for scientific, educational, zoological or propagational purposes and for certain cases of commercial "economic hardship" were allowed under strict permitting procedures. The 1969 Act also amended existing laws to prohibit throughout the United States the sale or purchase by any person of any domestically endangered species or part or product thereof which was taken in any manner in violation of the laws or regulations of a State or foreign country. Finally, the 1969 Act authorized up to \$15 million to be appropriated to acquire lands for the purpose of conserving, protecting, restoring, or propagating any endangered species.

Experience of the Department of the Interior with these two endangered species acts indicated they did not provide the management tools needed to act early enough to save a

vanishing species. Hearing testimony indicated remedial, stronger legislation should provide the Secretary of the Interior with considerable discretion in listing and delisting animals so that he could afford immediate protection to those species both within present danger of extinction and likely within the foreseeable future to become so endangered. Such legislation should provide protection for animals which are endangered or threatened, should amend existing law to permit Land and Water Conservation Fund Act monies to be used for habitat acquisition for endangered species conservation, and should assure the Secretary authority to acquire lands for such purposes. Testimony taken at the hearings also argued that the many efficient state management programs for the benefit of endangered species ought to be protected and not undercut by Federal legislation. In short, the hearing record indicated concern for wisely relating Federal and State efforts, for broadening the concept of "endangered species" to include threatened species not yet actually endangered or populations of species which may be in danger in part of the species range but not necessarily over all of it, and for providing strengthened means of habitat acquisition in furtherance of endangered species conservation.

[Thus the 93d Congress again addressed the subject of endangered species protection and considered several bills with the following results:]

The Administration bill (H.R. 4758), Congressman Dingell's bill (H.R. 37), and Senator Williams' bill (S. 1983) were not greatly dissimilar in their approach or content. H.R. 37 as reported . . . combined elements of the Administration and Dingell bills. Some items of note include:

(1) The administration bill contained language somewhat ambiguous so far as Federal preemption of State laws was concerned. H.R. 37 as reported made it clear that the States were to be free to adopt legislation or regulations. The only exception to State powers to regulate more restrictively or to include species not on the Federal list is in cases where specific Federal permission had been granted for or ban issued on importation, exploitation, or interstate commerce.

(2) The Administration bill did not address itself to the problems of endangered or threatened plant species while H.R. 37 did. As reported, H.R. 37 provided authority for the acquisition of critical habitat of plants in the U.S., regulation of their importation and exportation, and foreign assistance programs consistent with the purposes and policies of the Act. The question of national regulation of endangered plants was assigned to the Smithsonian Institution to study and to recommend action to the Congress within one year of the Act's taking effect.

(3) The Administration bill recommended that the expired authority provided in the earlier endangered species Act of 1966 and 1969 for acquisition of habitat be renewed and ex-

panded to allow the Secretary of the Interior to use funds from the Land and Water Conservation Fund and to use authorities under the Migratory Bird Conservation Act, the Fish and Wildlife Act of 1956, and the Fish and Wildlife Coordination Act, H.R. 37, as reported, accomplished that.

As reported, the Senate bill contained language defining the term "conservation and management" as these concepts relate to endangered species; the House bill did not. Some refinement of the definition was made in Conference, but a definition remained. The Senate bill also included an exception allowing an exclusion from the Act's protection in those cases (admittedly unlikely) where an endangered or threatened species of insect might pose an overwhelming and overriding risk to man. Thus the Secretary's hands would not be tied in this hypothetical exigency. The Senate bill also added a definition of "commercial activity" to delineate the types of activities which would qualify for special treatment under the Act. Included are trades and exchanges of animals or their products wherever they are undertaken for gain or profit.

The bill reported out of Conference assigned responsibility for the general management and regulation of marine species to the Secretary of Commerce; neither House nor Senate bills had addressed that jurisdictional problem. While both bills require the Secretary of the Interior to engage in consultation with all affected parties prior to determining the status of any given species, the Senate bill had required consultation with a special Advisory Committee created for that purpose; the House bill had no such body created. The Conference bill as reported deleted creation of such a body but required the Governor of each state within which the species under consideration is known to occur to be specially notified that a review of the species' status was underway and specifying such State was to have at least 90 days in which to respond.

The Senate bill had followed in part and differed in part from the otherwise controlling Administrative Procedures Act; the House bill did not address the subject thereby deferring to that Act. Enforcement agencies had expressed concern that the variations might complicate matters unduly so the conference bill as reported substituted language extending the period of public notice, providing for discretionary hearings, and establishing procedures for emergency, short-term action.

With respect to land acquisition, both House and Senate bills provided authority for endangered species conservation program managers to acquire habitat deemed critical to the survival of such endangered species, but the Senate bill restricted the authority to fish and wildlife habitat. The House bill extended the authority to acquire plant habitat, but restricted it to the Secretary of the Interior alone; the Conference bill included these House provisions.

So far as cooperation with the states is concerned, the House placed responsibility for establishing and overseeing an endangered species program in the Federal government in combination with development of cooperative agreements with concerned state agencies. The Senate opted for cooperative state and federal programs but gave the initial responsibility to the states. The Conference bill as reported compromised with a device to give the states fundamental roles with regard to resident species for a given period of time in hopes that strong state programs will be developed avoiding any Federal preemption. After this establishment period, the law would apply as in the House bill.

While both bills provided for a grant program to enable the states to develop systems for conserving endangered and threatened species, the Senate bill authorized a sum of \$10 million over a 3½ year period and the House bill was open-ended; the Senate bill restricted unobligated grant authority to other grant programs under that section of the bill whereas the House bill authorized a larger share of assistance. The Senate version prevailed except in respect to the federal percentage of cost-sharing agreements.

Both bills authorized international endangered species programs but the Senate restricted them to countries in which counterpart funds were provided; the House stipulated that where such counterpart funds were available, they should be used in preference to appropriated funds. The House version prevailed. The House also allowed foreign assistance programs relating to plants but the Senate did not; the Senate version prevailed.

On the subject of species held in captivity or in a controlled environment as of the date of enactment, the Senate bill restricted prohibitions so as to exclude such animals; the House bill was silent thus making such prohibitions applicable. The Conference version of these bills provided alternative language positively defending certain of these noncommercial activities but placing the burden of proof on the person holding such goods or animals to show noncommercial purpose and action.

Application of and exceptions under the Act so far as Alaskan natives were concerned was a sensitive consideration. The Senate bill had extensive language providing exceptions for certain Alaskan native and nonnative residents to take threatened or endangered species for purposes of subsistence or native handicrafts; the House bill was silent on the subject. The Conference version provides for an Alaskan native exception which allows the State of Alaska to restrict native and non-native taking as a part of or separate from a state endangered species program. Natives, in this act, are considered to be as defined in the Alaska Native Land Claims Settlement Act.

Both bills provided for study of problems associated with endangered and threatened plant species, such as controls on

interstate commerce. The House version prevailed, assigning the study directive to the Smithsonian Institution.

The Senate bill provided language specifying whenever a conflict between the Endangered Species Act and the Marine Mammal Protection Act might occur, the stricter of the two should prevail. The House accepted the Senate provision.

Finally, the Senate bill contained language prohibiting construction of a road through the Pioneer Weapons Hunting Area in the Daniel Boone National Forest. This provision was deleted in Conference on the grounds it was controversial enough to warrant separate hearings and Congressional consideration. There were other, relatively minor, differences between the Senate and House bills but these were largely of a technical, confronting or clarifying nature.

Thus, as enacted, Public Law 93-205 finds biological extinction is a continuing threat domestically and internationally and that it is the responsibility and intent of the Nation to conserve various species of fish and wildlife and plants both domestic and foreign, and that a key to meeting international and domestic responsibilities for fish and wildlife conservation is through financial assistance and other incentive programs which encourage States and other interested parties to develop and maintain conservation programs meeting national and international standards. The purpose of the Act is stated to be provision of "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation 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 a subsection of the Act). The stated policy of the Congress is declared to be "that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act."

To effect this policy in pursuit of the Act's purposes, the Act provides for the Secretaries of the Interior and Commerce to determine which species are endangered and which threatened according to any of a number of broadly worded causes and on the basis of the best scientific and commercial data, and after following specified procedures of consultation and notification of intent, to publish official lists of such species. The Act provides for the Secretaries of Commerce and of the Interior, as appropriate, to promulgate regulations designed for the conservation of such listed species. They may extend endangered and threatened species status to non-endangered or non-threatened species which resemble listed species if necessary to best assure adequate protection of the latter. Other provisions of the Act include establishment and implementation of a program by the Secretary of the Interior to conserve certain species of fish, wildlife and plants by utilizing land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, and

the Migratory Bird Conservation Act, as appropriate, and by newly authorized authority to acquire lands, waters or interests therein, which authority is in addition to any other land acquisition authority the Secretary of the Interior possesses. Land and Water Conservation Fund Act of 1956 funds are made available for land acquisition as part of endangered species conservation programs. In carrying out the program authorized by the Act, the appropriate Secretary is charged to cooperate with the States to the maximum extent possible, including consultation, entry into management and administration agreements for certain areas, and entry into cooperative agreements to assist States in implementing their own "adequate and active" programs for the conservation of endangered and threatened species. The Secretary is authorized to provide financial assistance to any State with which it has entered into a cooperative agreement; the allocation of available funds is to be on the basis of specified factors or criteria; and the Federal share of program costs is to be no more than 66 $\frac{2}{3}$ percent (or up to 75 percent if the joint Federal-state cooperative agreement involves two or more states).

The Endangered Species Act of 1973 also provides that in case of conflict between state laws and this law, the Federal law takes precedence unless the State law is more restrictive in provisions protecting endangered or threatened species. The Secretary is charged to review other programs under his administration and utilize them in furtherance of the purposes of the Act. All other Federal departments and agencies are to consult with the Secretary of Commerce or the Secretary of the Interior, as appropriate, and with the assistance of those Secretaries to use their authorities to carry out endangered and threatened species conservation programs, to see that actions authorized, funded or carried out by them do not have adverse effects on the survival of such species including destruction of habitat deemed critical to their survival as determined by the appropriate Secretary.

The President is authorized to use certain foreign currencies to assist any consenting foreign country in the development and management of programs in that country determined by the appropriate Secretary to be necessary or useful for the conservation of any listed species. He is also authorized, when necessary, to use appropriated funds as well as, or instead of, available foreign currencies. The Secretaries of the Interior and Commerce, certain foreign countries in the form of loaned personnel, conduct of personnel education and training programs, and conduct of law enforcement investigations and research abroad.

The Act also provides for assistance of various kinds in implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

There is a detailed section dealing with prohibited acts which apply to all individuals subject to U.S. jurisdiction. Listed species may not be taken, possessed, bought, sold,

traded, imported, exported, delivered, carried, transported, received, etc. on penalty of fine or imprisonment or both. Similar prohibitions apply to violations of provisions of the Convention cited above.

Species held in captivity or in controlled environments for noncommercial purposes on the effective date of the Act are exempted from these prohibitions. Exemption is also provided for taking of listed species by Alaskan natives for subsistence purposes. A permit system is also established to regulate some taking and possession of endangered species for scientific purposes or to enhance propagation or survival of the affected species or for reasons of economic hardship as carefully prescribed.

Finally, civil and criminal penalties for violations are set forth, court jurisdiction is addressed, citizen suits in support of the purposes of this legislation are specifically authorized. The Smithsonian Institution is instructed to prepare a proposed list of endangered and threatened plants and to recommend methods of adequate protection of such species, including needed legislative action. Conforming amendments addressing other pertinent legislation are provided, portions of the earlier endangered species acts are repealed, appropriations are authorized, and a last section of the law provides that no provision of the Act shall take precedence over any more restrictive conflicting provision of the Marine Mammal Protection Act of 1972.

As signed into law, S. 1983 became Public Law 92-205. There follow the texts of the 1966 and 1969 Acts, and a chronology of enactment of the 1973 statute. Subsequently, the next section provides the documentary history of the 1973 Act.