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Environmental Review of Outer Continental Shelf Development: the *Flint Ridge* Legacy

by Fern Shepard

Norton Sound, Alaska

When Prudhoe Bay on Alaska's North Slope was confirmed in 1968 to hold oil reserves of up to 10 billion barrels, a new record was established for the largest petroleum deposit in the United States. The discovery's magnitude seized the attention of the domestic oil industry. Alaska's outer continental shelf (OCS) has been abuzz with activity ever since, as dozens of oil companies search for comparable reserves.

Norton Sound, on Alaska's western coast, opens into the Bering and Chukchi Seas. Native towns and villages dot its circumference, with Seward Peninsula to the north and the mouth of Alaska's principal river, the Yukon, to the south. Icebound during the long winters, during the summer Norton Sound is an estuary for numerous bird species; a home for porpoises, walrus, and seals; and part of the migratory pathway for bowhead, sperm, and beluga whales.

Norton Sound soon may be home for offshore oil drilling platforms. The central portion has been leased by the U.S. Department of the Interior to companies seeking exploitable reserves. But as the companies gear up to explore their tracts, the human residents fear that the region's wildlife, its delicate ecology, and their traditional cultures are in jeopardy. Before any exploration begins, they urge assessment of the possible adverse effects and the precautions necessary to avert their occurrence.

This article sketches one of the hurdles that the Norton Sound community and others concerned about the impacts of OCS development now face. Although a primary goal of the National Environmental Policy Act was to provide additional consideration of environmetnal impacts in such situations, the means to do so could be precluded by a technical reading of the U.S. Supreme Court's *Flint Ridge* decision.

Statutory Framework for OCS Development

Petroleum and natural gas reserves on the OCS of the United States represent an enormous potential for energy independence. Divorced from the whims of OPEC and international politics, domestic OCS supplies have attracted the attention of the federal government and the energy industry. Engineering advances have provided an indispensible foundation for expanded OCS operations by permitting safer and more efficient development at greater depths and distances from shore. However, the highly publicized Santa Barbara and North Sea blowouts, coupled with massive oil spills in the Delaware River and off the Massachusetts coast, have engendered potent opposition to OCS development without stringent environmental safeguards.

The federal government regulates development activity on the OCS under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1331 et. seq. Since the 1978 amendment of OCSLA, four distinct stages in development of an offshore oil well have been defined under the Act: (1) specification of a five year leasing plan by the Department of the Interior; (2) lease sales of tracts on the OCS; (3) exploration for oil and gas by the lessees; and (4) development and production. Each stage is subject to separate and independent governmental regulation. OCSLA itself defines its purpose as providing for "expeditious and orderly develpment, subject to environmental safequards." 43 USC §1332(3).

The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §4321 et. seq., expresses a federal policy to address environmental impacts, and generally applies to all federal actions regardless of their underlying source of authorization. NEPA requires the preparation of an environmental impact statement (EIS) for all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Given the definite federal involvement in OCS resource development under OCSLA, there is little question whether NEPA applies. The issue is *when:* with four distinct stages, when is an EIS required?

The issue raised at Norton Sound is whether a site-specific EIS is required at Stage 3, when leaseholders begin exploring their OCS tracts for recoverable resources. EIS's are not currently required until Stage 4, when development and production occur. However, there are two critical characteristics of Stage 3. First, significant physical activities commence at this stage with platform installation, sonic testing, and initiation of drilling. For the first time in the process,

the twin dangers of gas blowouts and oil spills are real possibilities. Second, the United States Supreme Court recently indicated that under OCSLA the exploration stage may be the first appropriate time for environmental review. The Court concluded:

> The stated reason for this four part division was to forestall premature litigation regarding adverse environmental effects that all agree will flow, if at all, only from the later stages of OCS exploration and production. *Sec'y of the Interior v. California,* ___ *U.S.* ___, 104 S. Ct. 656, 671 (1984).

OCS Exploration Should Require an EIS

The operative language of NEPA requires an action "significantly affecting the quality of the human environment". The initiation of exploration on the OCS probably meets this requirement because of the visual and physical impacts, and the potential for oil leakage and blowouts. Regulations adopted under the OCSLA recognize that an EIS may be required by NEPA prior to approval of an exploration plan. *See* 30 C.F.R. §250.34-4 (1984). However, further analysis suggests that this approach may be precluded by *Flint Ridge Development Co. v. Scenic Rivers Assn. of Oklahoma,* 426 U.S. 776, 96 S. Ct. 2430, 49 L. Ed.2d 205 (1976).

Statutory Conflict Doctrine

In *Flint Ridge,* "a clear and fundamental conflict of statutory duty" between the governing statute's 30 day review period and NEPA's EIS requirement led the Supreme Court to conclude that compliance with NEPA could not be required. The *Flint Ridge* statute, the Interstate Land Sales Full Disclosure Act, required that land developers file an informational statement prior to land sales. To shield developers from costly delay, the Disclosure Act provides that the statement automatically becomes effective 30 days after filing unless found inadequate by the Secretary of Housing and Urban Development. The Court found that the Secretary had discretion to suspend the statement's effective date only if it was inadequate, but not to require an EIS. Quoting from the Congressional Record, the Court concluded that "each agency of the Federal Government *shall* comply with the directives set out in [NEPA], *unless* the existing law applicable to such agency operations expressly prohibits or makes full compliance with one of the directives impossible . . . " 426 U.S. at 787-88. The Court observed:

> It is inconceivable that an [EIS] could, in 30 days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments . . . 426 U.S. at 788-89. Draft [EIS's] on simple projects prepared by experienced personnel take some three to five months to complete . . . *Id.* at 789 n. 10.

Since an EIS cannot be completed in 30 days, and the Disclosure Act's 30 day review period cannot be suspended to do an EIS, NEPA was held inapplicable to the land sales process.

Statutory Conflict Between NEPA and OCSLA

Strict application of *Flint Ridge's* holding could mandate preclusion of an EIS for OCS exploration plans. OCSLA requires that the Secretary of the Interior review exploration plans within a 30 day period, which is clearly incompatible with EIS preparation. The Secretary of the Interior's only authority to reject a plan is if the proposed activity "would probably cause serious harm or damage to life . . . property . . . any mineral . . . national security or defense . . . or . . . marine, coastal, or human environment," 43 U.S.C. §1334 (a)(2)(A)(i), and the plan cannot be modified to avoid the offending condition. An exploration scenario involving a probability of "serious harm or damage" is far more extreme than the trigger for an EIS of "significantly affecting the quality of the human environment". Thus, the Secretary does not appear to have discretion to reject a plan in order to require an EIS unless the "serious harm or damage" standard is met.

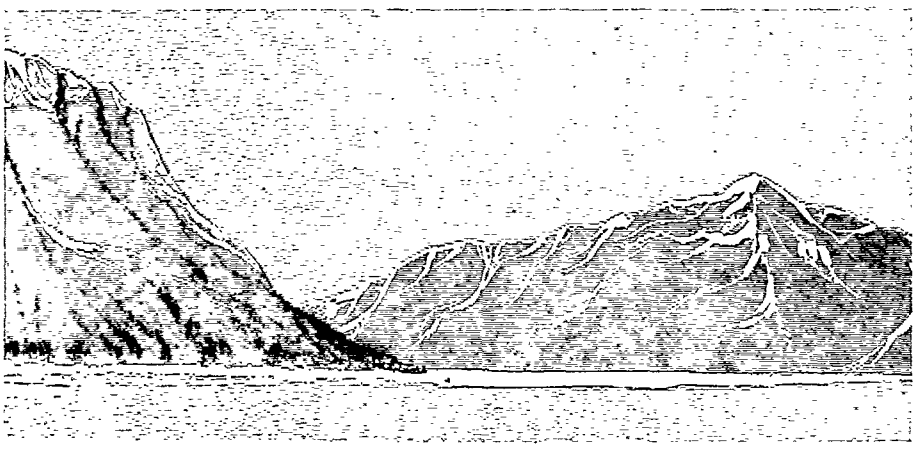
In *NRDC v. Berglund,* 609 F.2d 553, 558 (D.C. Cir. 1979), the court stated that "certainly, an agency cannot escape the requirements of NEPA by excessively constricting its statutory interpretation in order to erect a conflict with NEPA policies." The Interior Department didn't apparently anticipate such a conflict, since OCSLA regulations require review of the environmental impacts of an exploration plan to determine if an EIS is required *prior* to the plan's approval. But if the 30 day approval period cannot be suspended and an EIS unquestionably takes more than 30 days to complete, it is not clear how a direct conflict can be avoided using the *Flint Ridge* analysis.

Taken literally, the *Flint Ridge* holding would preclude EIS preparation whenever a governing statute's terms conflict with the time-consuming environmental review process. However, significant distinctions between the *Flint Ridge* facts and the realities of OCS development suggest that such literal application is inappropriate.

First, in *Flint Ridge,* the Disclosure Act's 30 day review period was expressly designed to shield developers from costly delays resulting from administrative review of the statements. To require EIS preparation would clearly frustrate Congress' rationale for limiting the review period. In contrast, the legislative history behind the 30 day limit on OCS exploration plan review is silent. There is no evidence of a clear Congressional purpose, and the rationale of shielding oil companies from delays, by analogy to *Flint Ridge,* is unconvincing. OCS development is complex, heavily regulated, and inherently time-consuming. Thus, requiring EIS completion before exploration plan approval would not necessarily circumvent Congressional intent.

Second, the Disclosure Act did not refer to compliance with NEPA. On the other hand, regulations interpreting OCSLA repeatedly refer to NEPA's requirements. One suggests that an EIS may be required before exploration plan approval. *See* 30 C.F.R. §250.34-4 (1984).

Finally, the need for an EIS before OCS exploration activities begin is far more compelling than prior to *Flint Ridge's* real estate sales. *Flint Ridge* involved consumer rather than environmental pro-



Evolution Of A Wilderness Bill

by Mary Scoonover

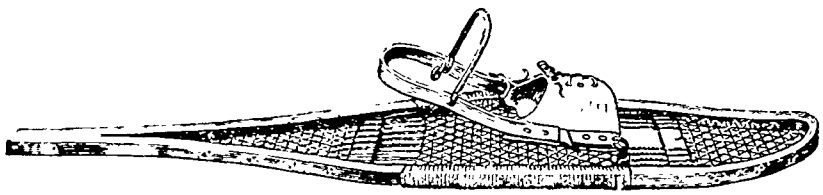
After years of litigation, lobbying, hearings and boundary adjustments, the California Wilderness Bill was signed into law without fanfare last September. The Bill designates 25 new wilderness areas and 14 additions to existing wilderness areas, providing protection for 1.8 million acres. Portions of Yosemite National Park and Sequoia and Kings Canyon National Park were also designated as wilderness. The Bill directs the Forest Service to complete wilderness studies for three areas—the Hoover Wilderness Additions in the Toiyabe National Forest, the Pyramid Creek roadless area in the San Bernadino National Forest, and three portions of the Carson-Iceberg area in the Stanislaus and Toiyabe Forests—to be completed within 3 years. 1,700,000 acres were designated as "further planning areas" to be studied during the ongoing forest planning process, where timber sale, method of harvest, and watershed management decisions are made. Over 3 million acres of roadless lands were released for development.

Inspired and directed by the late Congressman Phil Burton, the U.S. House of Representatives had passed wilderness bills three previous times. The Senate, however, never approved them because of strong anti-wilderness advocates on the Senate Energy Committee, and because former California Senator S. I. Hayakawa opposed designating new wilderness areas in his home state. After months of negotiating, California Senators Alan Cranston and newly elected Pete Wilson co-sponsored the successful California Wilderness Bill. Their compromise eliminated 19 areas and reduced others in size by comparison with the April, 1983 House version. Wild and scenic classification for 83 miles of the Tuolumne River and establishment of a national scenic area in the Mono Lake basin were tied to this wilderness bill. The Senate leadership acknowledged the compromise, and the Bill passed the Senate. After years of Senate opposition, and without the leadership of Phil Burton, the House passed the Cranston-Wilson compromise without change last September.

Origins

When signed into law in 1964, the original Wilderness Act incorporated existing Forest Service wild and wilderness areas into the National Wilderness Preservation System. It required the Forest Service to review only their existing primitve areas and immediately adjacent lands for possible wilderness designation. Other Forest Service lands which could qualify as wilderness but were not previously classified ("*de facto* wilderness") were not included in the mandatory review process.

Many of these *de facto* wilderness areas were imminently threatened by development. Conservationists began pressuring the Forest Service to extend some type of protection to pristine areas not protected by the 1964 Act.



In 1967 the Chief of the Forest Service issued a directive to his Regional Foresters to review roadless areas and submit a list of areas recommended to become new "study areas" for possible wilderness designation. Few areas were recommended as Regional Foresters largely ignored this directive for four years.

However, in 1971 the Nixon Administration formulated an Executive Order to prevent further erosion of wilderness lands. The order was designed to a) safeguard all wilderness lands due for review and Congressional action under the 1964 Act; b) require the Forest Service to identify and protect areas of wilderness continguous to existing Primitive areas until Congress acted; and c) require the identification of all *de facto* wilderness areas by December 31, 1972. The order would have given firm interim protection to the unprotected pristine areas controlled by the Forest Service.

In order to forestall signing of the proposed order, Forest Service Chief John R. McGuire took the position that it was unnecessary because of the roadless area review program established in 1967. The Chief set a June 30, 1972 deadline for recommendations on new study areas, and attempted to standardize review procedures.

Roadless Area Inventory

The 1971 inventory of roadless and undeveloped areas was the first step in the Forest Service's review. This inventory was to include all roadless lands, regardless of present commitments or future plans for timber harvesting, road construction, or other development. The Forest Service identified approximately 1,449 Roadless Areas containing 56 million acres.

Unfortunately, the Chief did not define "roadless". As a result Regional Foresters all over the United States applied dif-

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Flint Ridge *(continued from page 2)*

tection issues, and it can be argued that exemption from the EIS requirement in that context risks significantly less than in the context of OCS oil exploration. The adverse environmental impacts from an oil spill or blowout during exploratory drilling are potentially severe and extensive. The entire Norton Sound region—including the sea life, birds, and humans dependent on it—would be threatened by such an incident.

Conclusion

As of this writing, no court has considered whether an EIS is precluded at the exploration plan stage due to the OCSLA's 30 day review period. Technical application of *Flint Ridge's* statutory conflict doctrine could result in preclusion. However, both factual and legal differences between OCSLA's exploration stage and the Interstate Land Sales Full Disclosure Act suggest that site-specific EIS's for the former should not be precluded by operation of the statutory conflict doctrine.

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ferent criteria to determine "roadlessness". Areas with the same resource and road characteristics would therefore receive entirely different treatment in different regions.

In the rush to meet the Chief's deadline, many pristine areas were not even identified as having wilderness potential.

Conservationists objected that the time frame prevented the Forest Service from doing the research necessary to select candidate areas based on objective criteria. Since most of the areas were snowbound, no on-site investigations could be conducted: the Forest Service had to rely on existing data. Conservationists also argued that there was inadequate time for state or federal agencies, conservation organizations, or the general public to conduct their own studies or to examine the information available concerning over 1,400 roadless areas on the inventory lists.

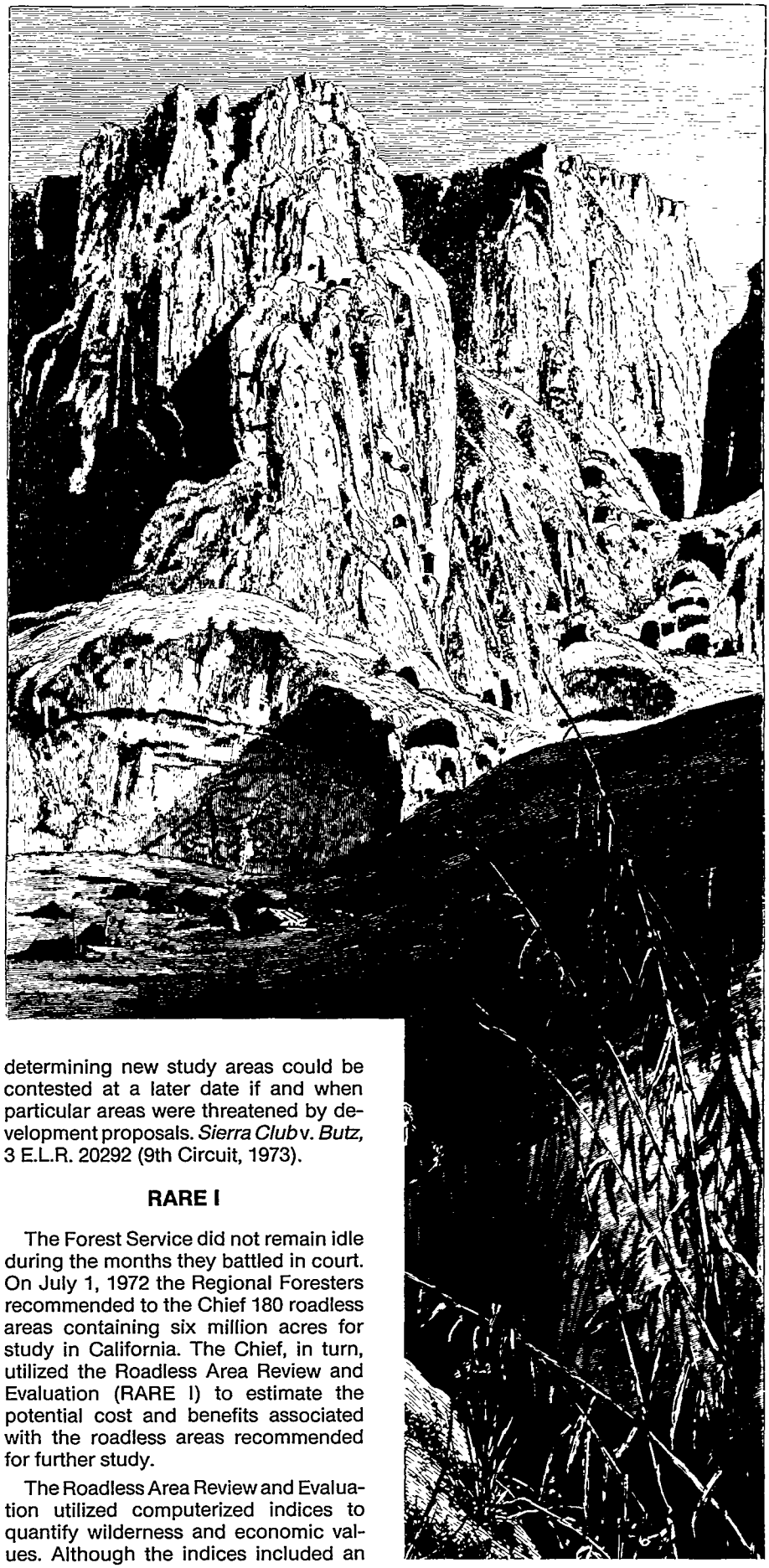
Sierra Club v. Butz

Meeting with top officials failed to convince the Forest Service to correct deficiencies in the inventory program. The Sierra Club and other conservation organizations brought suit against the Service, claiming that it acted illegally in 1) failing to prepare and consider impact statements required by the National Environmental Policy Act (NEPA); 2) neglecting to perform adequate multi-disciplinary studies in violation of NEPA and Forest Service regulations; 3) providing insufficient procedures for public participation in violation of the Constitution's due process clause, the Multiple Use-Sustained Yield Act, and Forest Service regulations; and 4) violating Forest Service criteria for determining the lands to be recommended as New Study Areas.

The complaint was filed on June 16, 1972. The federal district court promptly issued a temporary restraining order against timber cutting, road building, or any other development of the inventoried roadless areas after July first of that year. Shortly before trial, the Forest Service ordered that an environmental impact statement (EIS) be prepared for each of the 1,449 inventoried roadless areas before allowing any change in their wilderness quality.

After determining that his directive was, indeed, a commitment to comply with NEPA, the court dissolved the injunction against timber harvesting and road building. It refused to consider the other claims raised by the Sierra Club, based on the assumption that the Forest Service would comply with its own regulations in preparing and considering EISs for specific areas.

The court noted that the adequacy of the EISs, the procedures for public participation, and the criteria applied in determining new study areas could be contested at a later date if and when particular areas were threatened by development proposals. *Sierra Club* v. *Butz,* 3 E.L.R. 20292 (9th Circuit, 1973).



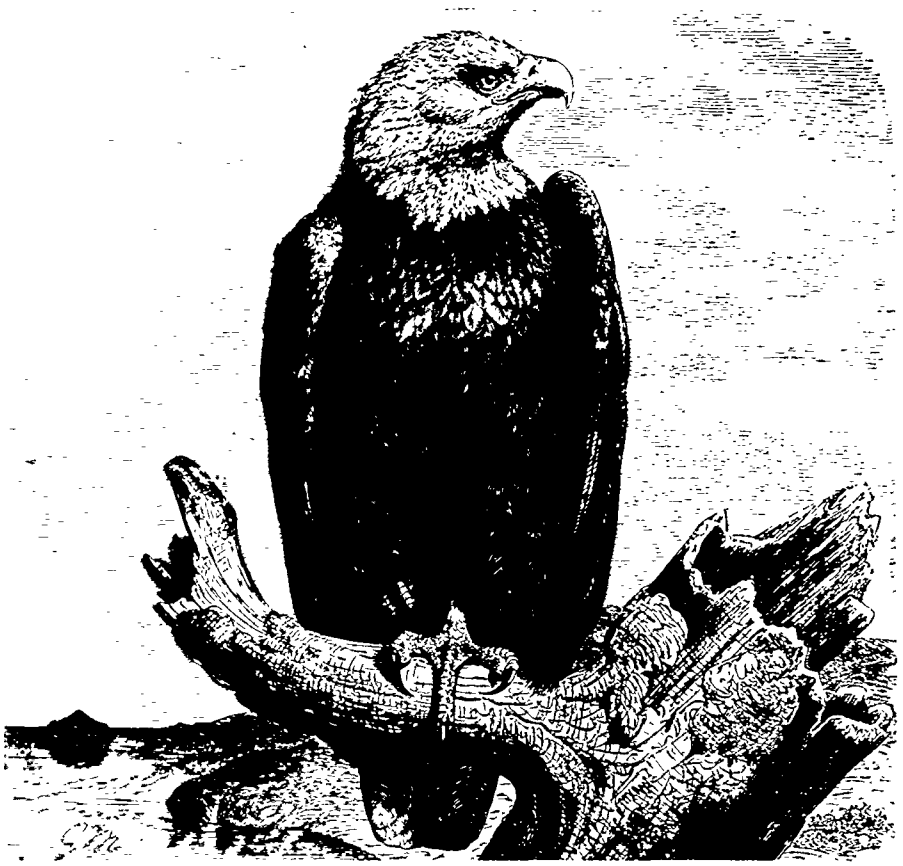
RARE I

The Forest Service did not remain idle during the months they battled in court. On July 1, 1972 the Regional Foresters recommended to the Chief 180 roadless areas containing six million acres for study in California. The Chief, in turn, utilized the Roadless Area Review and Evaluation (RARE I) to estimate the potential cost and benefits associated with the roadless areas recommended for further study.

The Roadless Area Review and Evaluation utilized computerized indices to quantify wilderness and economic values. Although the indices included an

The United States and International Wildlife Conservation Treaties

by Mark C. Trexler



Wildlife conservation has long been the subject of international cooperation. Within the U.S., a surprising number of governmental agencies have responsibilities within this area, and legislative concern is slowly being focused on the rapid depletion of the world's wildlife resources. Evidence of this concern can be seen in the proposed *Elephant Protection Act of 1979,* which would have banned the import of elephant ivory, established an international conservation corps, and set up a system of wildlife resource attachés. A more successful effort was the passage of the *International Environment Protection Act of 1983.* This act requires the Secretaries of State and of Interior to review the effectiveness of current U.S. activities relating to international wildlife conservation, while at the same time calling for a "U.S. strategy, including specific policies and programs, to protect and conserve biological diversity in developing countries." The resulting reports are scheduled for publication early this year.

A primary focus of U.S. international wildlife policy has been the development of formal international agreements. Many such agreements have been enacted in recent decades in an attempt to address the problems of habitat destruction, ex-

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Effectiveness Index, a Total Opportunity Costs, and an Effectiveness/Cost ratio Index, the cornerstone was the Quality Index. This was a method to compare the relative wilderness "quality" of the various roadless areas. Unfortunately, the Forest Service chose to compare little more than the areas' scenic and recreational aspects rather than analyzing the wildness elements—the factors Congress reviews when deliberating on wilderness proposals. Scientific, educational, and wildlife values of the roadless areas were considered only in the light of recreational uses; outstanding geologic features, rare plants, and endangered species were not rated at all.

Roadless areas received a Quality Index score from 0 to 200. Many of the items rated required highly subjective judgment-making. For example, roadless areas could score as many as 24 points for having numerous lakes; deserts, grassland, and other dry areas could qualify for only four points. One criterion scored an area high for little or no influence of humans, penalizing an area for trails and campgrounds; other criteria rewarded the presence of numerous trails and campsites.

Even though acreage came into consideration in the determination of the Qualiy Index (large areas receiving as many as 12 points, small areas zero), an area's acreage was multiplied by its Quality Index in order to determine its Effectiveness Index. Thus the Effectiveness Index reflected total acreage far more than wilderness quality. A small high quality area would likely score lower than a large, low quality area.

After all the indexing was done the proposed new study list totaled 235 areas with 11 million acres and the public was once again asked to comment. Over 7,000 letters came into the Forest Service. The vast majority of people asked for more areas to be added to the new study list. Twelve persons were favorable of the RARE process; 1,489 people were critical of the program. Ninety-five percent of those expressing an opinion about the new study list favored studying more than 235 proposed areas, and one-third wanted all areas studied.

RARE II

This overwhelming opposition to the Forest Service RARE I recommendations led to the second review of roadless lands (RARE II) in which the Forest Service recommended only 15.4 million acres of the more than 62 million acres eligible. The goal of this second review was to make management decisions for those roadless areas whose resource values were known and for which a consensus among competing interest groups could be reached. Areas studied were recommended as wilderness, non-wilderness or further planning (where more data was needed to make a decision or no consensus was possible). RARE II was completed in early 1979.

In California, the Forest Service inventoried about 6.3 million acres under RARE II. After preparing an environmental impact statement (EIS), the For-

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cessive exploitation, and the introduction of exotic species. Many treaties are limited to a few countries and focus on individual species or groups of species; some are actually international wildlife management agreements and provide for the apportionment of the harvest, rather than the elimination of exploitation. Some examples include:

- The Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment. 1976.
- The Convention on Conservation of North Pacific Fur Seals. 1957 (amended 1963).
- The Convention between the USA and Canada concerning Sockeye and Pink Salmon Fisheries. 1930 (amended 1956).
- The Agreement on the Conservation of Polar Bears. 1973.
- The Convention for the Regulation of Whaling. 1931.

Some agreements, however, are much broader in scope. This article will briefly introduce those Conventions which are most important to the United States. They generally receive little media coverage, but if effectively implemented they could have a significant impact on the deteriorating state of the world's wildlife.

The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere

The Western Hemisphere Convention does not provide global coverage, but it does include the biologically richest wildlife habitats in the world, the tropical forests of Central and South America. It is also the oldest of the Conventions outlined here, having been signed in 1940 and entering into force in 1942. The Contracting States agree to establish national parks and other types of reserves as soon as their circumstances permit; to prohibit commercial exploitation of national parks; to adopt, or at least propose the adoption of, legislation and other measures necessary to implement their conservation efforts; and to cooperate among themselves in promoting the objectives of the Convention.

Although various meetings have been held over the years, the Western Hemisphere Convention has been singularly ineffective. In recent years, however, the U.S. government and conservationists have again become interested in the Convention due to its significant conservation potential, and some progress may result.

The Convention Concerning the Protection of the World Cultural and Natural Heritage.

The World Heritage Convention was adopted in 1972 and entered into force in 1975. Its objective is to protect sites around the world unique for the cultural or natural heritage they contain. The Convention imposes a number of duties on Party States. For example, Party States are to identify, protect, conserve and transmit to future generations the cultural and natural heritage located in that State; develop comprehensive planning, scientific, administrative and financial programs to allow for the protection of the State's heritage; and submit an inventory of national heritage sites to the World Heritage Committee for compilation into a "World Heritage List". The Convention is unique among conservation conventions in its establishment of a World Heritage Fund, financed by the Parties, which is to be made available to help countries protect heritage sites.

Although it can be said that the letter of the Convention is being followed it is not really clear what is being accomplished. There are now lists of heritage sites, but it is often unclear whether the sites are actually being protected. Better monitoring of the status of these sites is needed. Moveover, procedures for use of the World Heritage Fund should be reevaluated. While the Fund is acclaimed as a truly progressive feature of this Convention, there is little evidence that it is having much impact.

The Convention on Wetlands of International Importance Especially as Waterfowl Habitats.

This Convention, known as the "Ramsar Convention" because it was signed in the city of Ramsar, Iran, was adopted in 1971 and entered into force in 1975. Its primary objective is to slow the rate of destruction of the world's wetlands, and to promote recognition of the fundamental ecological functions performed by wetlands, as well as their economic, cultural, scientific and recreational values. The Convention provides for Party States to designate at least one national wetland for inclusion in a List of Wetlands of International Importance, and requires that Parties consider their international responsibilities for the conservation and wise management of waterfowl stocks, and establish wetland reserves. Although it is currently considering ratification, the U.S. is not a Party to the Convention. U.S. membership is probably not as important for the conservation of U.S. wetlands as it is for making available U.S. funds to further the Convention's goals internationally.

Good intentions aside, it has become clear since 1975 that the provisions of Ramsar are insufficient to achieve the policy aims desired. Its provisions are easily complied with without actually protecting any wetlands, and the effects of the Convention have been correspondingly weak. There has been little aggressive national interest in updating and strengthening the provisions of the Convention to bring them into line with the spirit underlying Ramsar.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora.

CITES, as this Convention is more commonly known, was adopted in 1973 and entered into force in 1975. Its goal is to protect selected species of wildlife from overexploitation resulting from international trade in individuals of the species or their products. The Convention's permit system applies to whole specimens, as well as to any recognizable parts or derivatives. Party States are responsible for assigning administrative and scientific functions under the Convention to a governmental agency. CITES is unique for the administrative infrastructure established to implement it, and is widely heralded as the most successful international wildlife conservation convention. CITES is dealt with in more detail in the next article.

International Wildlife Law

These four treaties have all been viewed as important governmental steps to promote environmental conservation. The tendency of governments to focus on legal instruments as a means to address joint problems is a natural one. In most countries conservation problems are generally addressed by passing a law. The problems faced in implementing conservation legislation at the national level, however, are magnified at the international level. International agreements tend to serve as least common denominators of governmental policy, and the final product of international negotiations on a issue can be far weaker than a realistic assessment of the prob-

lem being addressed would demand. Agreements are often hortatory in nature, most so-called "mandatory" provisions are sufficiently vague so as to allow a great deal of discretion, and enforcement generally relies on national implementing legislation. The "enforcement" of treaty terms is therefore a somewhat ambiquous concept. Rarely is an international body given policing powers, and the degree to which international obligations are translated into national laws (not to mention their enforcement) varies very widely, and is often not even known.

On the positive side, international agreements establish both policy goals and legal commitments on the part of signatory nations. These can hopefully be used by interest groups within countries to push for national action, and can also serve an educational function for the government and society in general. And while domestic legislation and policies are, of course, within the sovereign control of the individual nation, other signatories to an agreement do have a legitimate interest in a Party's domestic implementation of that agreement. Unfortunately, this feature of international agreements is inadequately used in the conservation arena. Almost no one ever really checks to see what the majority of countries are doing to fulfill their wildlife protection obligations under a given agreement. If the letter and intent of currently existing treaties were being effectively implemented by all Party States, the status of wildlife would be much less alarming.

Conclusions

It is far easier and more glamorous to develop a law, even an international one, than it is to follow through on its implementation. The status of implementation of most international legal measures to protect wildlife resources is not well understood. Until a higher priority is put on actually assessing the factors underlying the successes and failures of such measures, the volumes of treaties will increase while the species continue to disappear. Even now there are calls for new global conventions on protected areas and genetic resources conservation. The lessons which the implementation of existing agreements have to teach us about the how's and why's of international cooperation on environmental matters should be learned before we embark on new ventures. Reflecting on past experience should improve our approach to new problems and issues.

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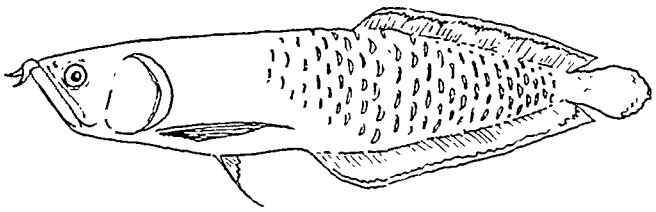
FOR SALE: Parrots, Leopard Skin Coats, and Crocodile Shoes

Laura H. Kosloff

Introduction

You are shopping for your daughter's Christmas present, or perhaps a birthday present for your spouse. Pets of all sizes and shapes are favorite choices for both. Birds are a beautiful choice. How about a red-spectacled parrot? How about a cat? Easier to take care of, and more cuddly. You consider an elegant blue-point Siamese, but it lacks that special something that will tell your loved one that you really care; ah, but what about something more exciting, an ocelot perhaps? Tropical fish, perhaps. Your eyes light on the guppies, but everybody has guppies; now that Asian arowana in the corner tank looks more interesting.

Oh, yes, the second detail. If you try hard enough—and sometimes that isn't very hard—you can probably find the species mentioned above in this country. The pet trade in America is a booming business. Most of us may think of box turtles and guppies when we think of the pet trade, if we think of it at all, but this is a naive perception. Even a legally imported bird can command a price of over $5,000. And few of us realize that the U.S. alone legally imports and exports some one billion dollars of wildlife and wildlife derived products every year. Smuggling adds another several hundred million dollars a year to this figure.



Arowana (*Osteoglossum bicirrhosum*)

The exotic species mentioned above have little in common except for two small details. The first is that they are all illegal to import into the U.S. and 86 other countries in the world under restrictions established by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES has been regulating the international trade in wildlife and wildlife products for almost ten years. From its start with ten ratifying nations in 1975 and a Secretariat staff of one, it has grown to include almost 90 countries, and boasts a Secretariat of four professionals and three support staff. It has governments and non-governmental organizations throughout the world rooting for it. It holds a Conference of the Parties every two years at which policy issues are debated, resolutions are passed, and species potentially threatened by the wildlife trade are added to the existing Appendices. Overall, CITES is widely hailed as the most successful conservation convention in existence.

Wildlife Trade As A Conservation and Legal Issue

In the 1960's and 1970's numerous environmental laws were enacted in the U.S. and abroad. Without some framework for control and regulation of human activities, many resources were being depleted at alarming rates for short term profits, in spite of the potential for long term disaster by overexploitation.

Wildlife has historically been a a resource that has been rapidly depleted. Under many systems of law, you could not claim ownership of a wild animal until you had killed it; hence the incentive to kill it before someone else did. The problem of wildlife conservation transcends the acknowledged authority of governments to regulate within their own borders; borders are political and not biological, and are not necessarily re-

spected by living plants and animals. Although clearly a substantial amount of protection can be afforded to wildlife on a state or national level, much can only be done by cooperation between countries.

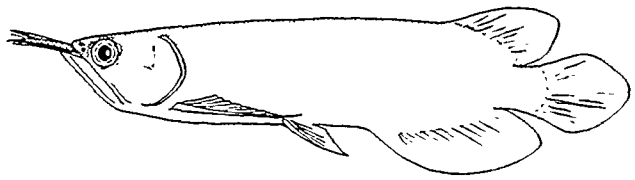
The accelerating rate at which species extinctions are occurring has given rise to more and more alarm during the last decade. About half of all recorded mammal extinctions have occurred in the past sixty years; some estimates are that one million species of wildlife will be lost by the year 2000. Reasons to be concerned over the loss of species include the loss of biological and genetic diversity for the stability of ecosystems, loss of potential sources for economic and societal gain such as agricultural, medical, and industrial uses of wildlife, and the aesthetic and ethical consequences of willfully causing the extinction of a species. There are many causes that underlie the precarious state of the planet's wildlife, but experts cite the primary ones as being loss of habitat, overexploitation, and the introduction of exotic species which can compete with and displace native species.

There have been a number of attempts over the years to pursue wildlife conservation at the international level; some are outlined in the previous article. Despite the existence of such agreements, pressures on wildlife as a result of loss of habitat and increasing trade have continued. Efforts during the 1960's by various non-governmental organizations (NGO's), governments, and individuals in the conservation community culminated in 1973 in the signing of CITES, an agreement focusing exclusively on the issue of international trade as a threat to species.

The Convention On International Trade In Endangered Species (CITES)

How does CITES translate into something that affects what you can buy at the furrier's or through the pet store? A good example is the Asian arowana mentioned above. There are perhaps six or seven arowana species spread through South America, Africa, and Asia. There are at least three varieties of the single Asian species, usually referred to as the red, silver, and golden varieties. The Asian species is apparently quite rare, and prices on specimens of the red variety have been quoted as high as $7,000. The species has been listed on Appendix I of CITES since 1973, a status which should prohibit international commercial trade in it; no export is suppposed to occur from the country of origin unless the particular specimen falls into specifically defined exceptions, primarily for purposes of scientific exchange.

But walk into some tropical fish stores, and you will see Asian arowanas for sale. No hiding, no whispered "psssst! Hey, buddy, interested in an endangered species?"; they are right next to the guppies and the gouramis. If the store doesn't have any on display, an employee will often tell you either that they just don't have any right now or that they don't get the Asian varieties in very often; perhaps he or she will even know that they are rare. In a recent informal survey in Sacramento, California, however, employees in only one of eight pet stores responded to a query for Asian arowanas by stating that selling the Asian arowana was illegal. In one popular tropical fish store, in a tank which is prominently displayed for customers, swims exactly such a fish described as a "golden dragon arowana" and as being very rare and coming from the "Communist infested jungles" of Thailand. The description goes on the say that it is a wonder any of the arowanas survived the three day trek out of the jungle. It is being sold for $2500, and it was smuggled into the U.S.



Asian Arowana (Scleropages formosus)

CITES has been embraced by conservation leaders worldwide and is hailed as a major conservation achievement. Yet illegal trade appears to be thriving in spite of the ten year old treaty. And the trade in live animals, as extensive as it is, is only a small portion of the problem that CITES was enacted to address. The international trade—both legal and illegal—in wildlife *products* far surpasses the trade in live animals, both in numbers of species involved and economic value, with U.S. seizures of illegal wildlife and wildlife products alone amounting to about $100 million dollars per year. How much more is getting smuggled through can only be guessed at, but it is certainly a great deal. Is CITES a failure? Before an answer can even be ventured, it is necessary to understand the premises and provisions of the Convention and the problems involved in implementing a complex international treaty.

Structure and Basics Of the Convention

The stated goal of CITES is to completely stop the international trade in those species of plants and animals which are seriously threatened by overexploitation, and to monitor and control trade in species which may not yet be seriously threatened but which could be in the future. The mechanism by which these goals are supposed to be implemented is a system of permits and prohibitions as well as specific rules regulating the issuance of trade permits. The Convention establishes three lists of species. Appendix I consists of those species that are not to be commercially traded at all. There are currently over 700 species on Appendix I; many of the species whose endangered status has been the subject of widespread public concern are on this list, such as chimpanzees, gorillas, and the big cats.

Appendix II is the longest of the three lists, with some 30,000 species listed (most of them plants). Appendix II species may be traded commercially, with some restrictions, and usually only need an export permit indicating that the wild population will not be harmed by the removal of those specimens in the shipment. A third appendix lists those species for which protective regimes exist in individual countries, with the intent that the international community help enforce that country's laws.

Although the Convention does have a Secretariat with a full-time staff (a fairly unusual provision in an international legal instrument), the Secretariat does not direct this complex scheme. Regulation is left up to the individual Parties to the treaty; the Convention mandates that each Party establish a "Management Authority" to implement the Convention and regulate the issuance of permits, and a "Scientific Authority" to insure that permits are granted according to the conservation criteria set out under the Convention.

The requirement that Conferences of the Parties be held every two years is another unusual provision of the Convention. At the Conferences, policy decisions are made regarding appendix and enforcement issues. Decisions are usually expressed in the form of resolutions and require a majority vote of those Parties present; actual amendments to the treaty text are more difficult, as they

require a special meeting and a vote of two-thirds of all Parties.

Changes to the Appendices are also made at the Conferences of the Parties, but a Party which does not agree to the particular addition may make a "reservation" to that listing. Many reservations that have been taken by Parties have not been significant. In some cases, however, reservations have been taken by most of the Parties which engage in heavy trade in the particular species, thus effectively nullifying any potential conservation effect of adding the species to an Appendix.

Notwithstanding this elaborate regime for regulating the international wildlife trade, the only provision for evaluating whether CITES's terms are in fact being adhered to is the requirement that Parties provide the Secretariat with annual reports describing the extent and nature of trade in and out of their country. Over the years, guidelines for what should be included in a "good" annual report have been suggested, but the quality of annual reports still varies immensely. Analyses of the data provided by the Parties are generally accompanied by the caveat that they don't mean very much because the data provided are so incomplete and of questionable accuracy.

Enforcement

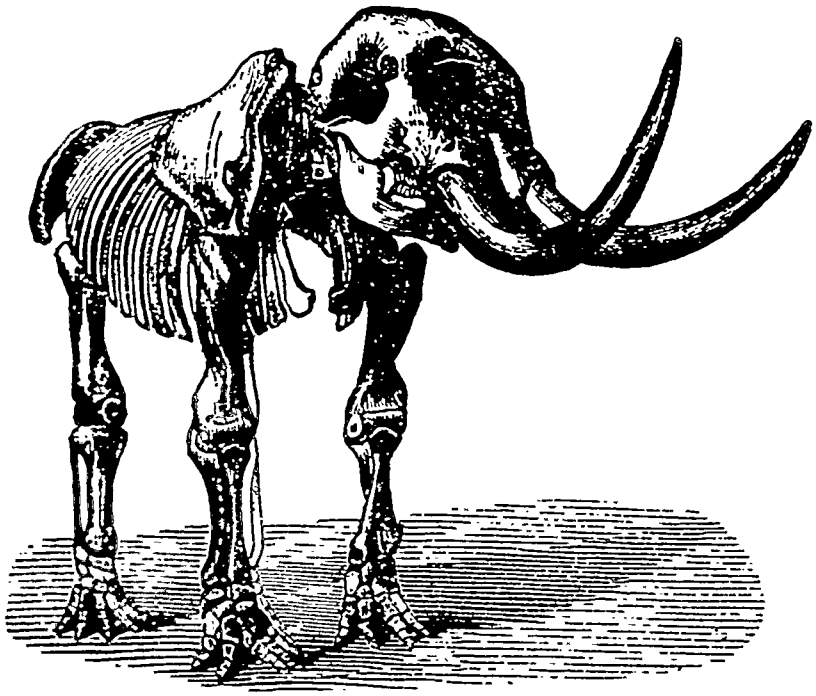
Although the intricate scheme created by the Convention has many positive aspects not previously incorporated into international conservation conventions (such as the requirement that each Party designate an agency with specific responsibility for the country's international trade in wildlife resources), the problem CITES attempts to solve is inherently difficult to address. Like the drug trade, the illegal wildlife trade is so lucrative that people will always be willing to take the risk. Achieving control in the trade of one species often shifts trade to a similar species. These shifts are not inherently bad, but the issue has received less attention than it should. Another factor involves the political nuances associated with wildlife trade flows from the exporting to the importing countries, which generally follow developing-developed country lines. Thirdly, the amount of resources provided by individual countries for the control of illegal wildlife trade will continue to vary immensely as long as the wealth and philosophies of nations differ; priorities in poorer countries are simply not going to focus on the status of a single species of fish which lives in the heart of an Asian jungle. The global implications of accelerating rates of species extinctions may be very significant but they are often not as widely recognized as CITES enthusiasts might like to think, or they simply cannot be acted upon for financial reasons.

Inhibiting even the most diligent efforts to comply with CITES is the magnitude of the trade. How much illegal trade takes place is unknown, but in the U.S. alone it certainly exceeds the $100 million worth of seizures made by the Fish and Wildlife Service (FWS) every year. The illegal export of U.S. wildlife is a particularly difficult problem, for there is virtually no way to check what goes out of the country. Does the amount being seized represent 5% or 50% or 95% of the illegal trade? Who knows, but more and more smuggling turns up as Fish & Wildlife inspectors look in new places for it. Just recently, for example, FWS began inspecting some of the 800,000-900,000 containerized shipments that annually enter the U.S. In 1983, FWS inspected 50 such containers, at random, and found illegal wildlife in 30 of them. The illegal contents of one shipment alone was worth $700,000.

Even though the U.S. Fish & Wildlife Service is probably the best-equipped and best-trained of all the Management Authorities of CITES Parties, the true magnitude of the task is difficult to comprehend. 50,000 incoming shipments are declared as containing wildlife every year. Perhaps 20% of these shipments can be inspected by the 36 wildlife inspectors who are divided among the nine ports of entry through which wildlife must enter. Very few inspections are done on the vast number of shipments which *could* harbor illegal wildlife. Attempting to control goods brought back by tourists, as well as other forms of smuggling, presents additional problems.

In addition, there are the mechanics of how items come in through the ports of entry. Tropical fish, for example, are transported in styrofoam cartons. Each shipment may contain more than thirty styrofoam cartons; each carton may contain many fish. Opening up the cartons to carefully inspect and identify all the species inside would be a horrendous task, and is clearly not feasible. Protected species can be mislabelled as other species, or the importer can simply hope that no one will notice a few fish that don't show up on the import declarations. There is a good chance she will be right, especially since the importer can avoid the wildlife inspectors completely by arranging to have the shipment arrive after 5:00 p.m.

Identification of particular species is also not always a simple matter, even if a shipment is opened for inspection. The various species of arowana, to take up the story of our Asian friend, bear a reasonable resemblance to one another, especially when only two inches long. Although wildlife inspectors at the ports of entry do have manuals for identification purposes and do receive training in species identification, there are times when no one but an experienced expert could identify a species in a shipment as being different from the species listed on the declaration forms.



Conclusions

CITES is a significant step forward in the history of international conservation efforts for several reasons. It incorporates the fact that a piece of paper can perhaps go farther if it has a staff to see to its day-to-day administration and if it provides for periodic review by Parties to

at least remind them of their legal duties. CITES does attempt to focus exclusively on one of the three primary causes for species extinctions and cannot be faulted for failing to address all causes.

Serious questions remain, however, as to whether CITES is a "success". Definitions of success vary from the claim that a perfect correlation of import and export statistics means success, to the view that having 87 ratifying nations means success. But has the Convention helped to improve the status of wildlife species threatened by international trade? The provision for annual reports has increased the data concerning wildlife trade. Unfortunately the paucity and dubious validity of that data prevents it from showing whether CITES has in fact improved the status of the species it is intended to protect. In addition, the increase in bloc-voting and vote trading which has occurred with the increase in the number of Parties, many of whom have little inherent national interest in the wildlife trade, may be contributing to the politicization of the Convention. This may decrease the effectiveness of CITES and the ability of the Parties to come to workable solutions for various trade issues.

One thing that CITES has promoted is the involvement of domestic conservation groups as forces on the international scene. Conservation NGO's embraced the concept of CITES in the 1960's and have maintained their involvement with the treaty as it has evolved. A most unusual aspect of the Convention is its granting of observer status to NGO's at Conferences of the Parties; although observers may not vote, they may participate in most sessions. This has enabled conservation groups in Europe and the U.S. to keep closely tied to events over the years. Many conservation groups focus on CITES as their primary or exclusive active involvement with international agreements; they see it as providing a more tangible opportunity for concrete success in protecting species than exists with other international agreements. Huge amounts of money and effort have been expended on CITES by U.S. conservation groups alone during the past ten years. Some CITES projects approved by the Conferences of the Parties have been partially or wholly funded or directed by NGO's. As much as governments would like to and do take credit for CITES, any real success in achieving the Convention's goals is primarily attributable to the continuing dedication and the watchdog role played by NGO's.

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Evolution Of A Wilderness Bill

(continued from page 3)

est Service submitted its recommendations to the Secretary of Agriculture, who had the final administrative decision-making power over the RARE II designations. The Forest Service's recommendations differed significantly from those made by the state of California. The State requested that 1.45 million acres be opened to development as non-wilderness, and the remaining 2.8 million acres be subject to further study. The Forest Service recommended 975,201 acres for wilderness designation and that 2.34 million acres be opened for development—about one-third less wilderness and one and one-third times the developable area.

Controversy grew over the 640,000 acres the Forest Service released to development that the State sought to protect as wilderness or further planning. Angered by the RARE II recommendations, Huey Johnson, then State Secretary of Resources, assembled a citizen's committee in April 1979 to study Forest Service resource management policy. The resulting report severely criticized the Forest Service land management practices and the RARE II process. The report concluded that the Forest Service emphasized timber production at the expense of other natural resources and that the RARE II recommendations for preserving wilderness ignored citizen recommendations that were superior to its own findings.

California v. *Bergland*

In July 1979 the State of California filed suit against the Department of Agriculture and the Forest Service in an effort to block the release to development of nearly one million acres of roadless areas in California. The suit, *California* v. *Bergland,* 483 F. Supp. 465 (E.D. Cal. 1980), charged that the environmental impact statement was hastily prepared and inadequate. It requested that the 991,000 acres released as non-wilderness be protected until a site-specific, use-specific analysis was made in an environmental impact statement consistent with the National Environmental Policy Act (NEPA) requirements. Finally, the State contended that the Forest Service ignored local citizens' concerns and the land management proposals of the State itself.

In January 1980 federal District Court Judge Karlton granted summary judgment against the Forest Service. The Court determined that the Forest Service had failed to comply with NEPA in several respects. The Forest Service's draft EIS neglected to examine the site-specific adverse environmental impacts which would result from non-wilderness designation. Karlton noted that the Forest Service review of major land features of a roadless area was often reduced to generalized terms such as "mountain" or "river". "One can hypothesize," observed Karlton, "how the Grand Canyon might be rated: 'Canyon with river, little vegetation.' "

The Forest Service also violated NEPA's requirement that a broad range of alternatives to the proposed action be considered. Of the eleven alternatives chosen by the Forest Service for study, ten allocated all of the areas to wilderness use. None of the alternatives considered designation of more that 34% and less than 100% as wilderness—ignoring roughly two-thirds of the possible range of options.

The third NEPA violation was the failure to adequately solicit and consider public comment. The Forest Service's chosen alternative was not made public until the final EIS was released in January 1979, and differed substantially from the alternatives described in the draft EIS. The administrative position was therefore chosen without public input. The court held that the Forest Service should have circulated its final proposal as a supplement to the draft EIS for public comment before taking final action.

The court also determined that the

Forest Service failed to respond to public comment on specific RARE II areas. It had expressly solicited such comments in the draft environmental impact statement, but only responded to general comments about the overall RARE II process in the final EIS.

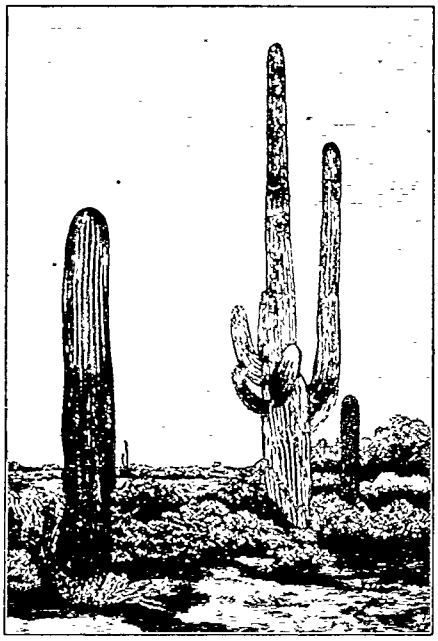
The Forest Service appealed, contending that the degree of detail required was unwarranted. The Ninth Circuit Court of Appeals, however, upheld the district court's ruling in favor of the State. *California* v. *Block,* 650 F.2d 753 (9th Cir. 1982).

Environmentalists' Concerns

Most conservation organizations did not join the State in its suit against the Forest Service. In fact, when Huey Johnson proposed a RARE II suit, environmental leaders attempted to dissuade him. They feared that a lawsuit would cause the Forest Service to immediately initiate nationwide RARE II legislation based solely on Forest Service recommendations. Environmental leaders were not prepared to successfully oppose such legislation. They needed time to analyze the Forest Service's review process, develop alternative proposals, and provide for effective public participation where the Forest Service had not. Without time to gather and evaluate information, conservation organizations would be at a disadvantage in analyzing any proposed bill and in informing Members of Congress of the effects such a bill would have.

Jim Eaton, Executive Director of the California Wilderness Coalition, described the concerns of the many conservation organizations not joining in the suit. "There was no doubt in our minds that RARE II would be thrown out by the courts. Our fear was that a sweeping, nationwide decision would panic Congress into overriding the court by approving the Forest Service's proposal with little change. We felt we could get more wilderness by trying the legislative path before the judicial one. It was a little like using a nuclear bomb when conventional weapons would suffice. Your victory might be short-lived."

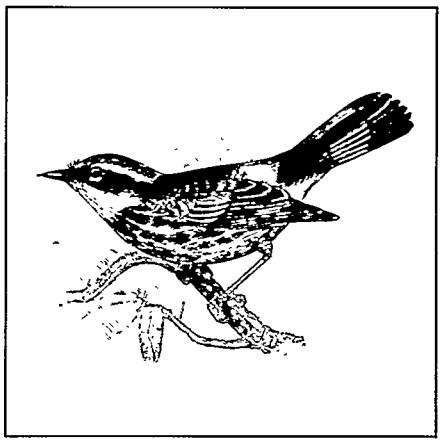
Eaton remains convinced that had the lawsuit not been limited in scope to only a portion of the Forest Service's California recommendations that its effects would not have been so positive. "In hindsight," Eaton concluded, "the lawsuit was a major factor in getting a good California Wilderness Act passed. It put the pressure on the Forest Service and timber industry to reach a settlement with environmentalists."

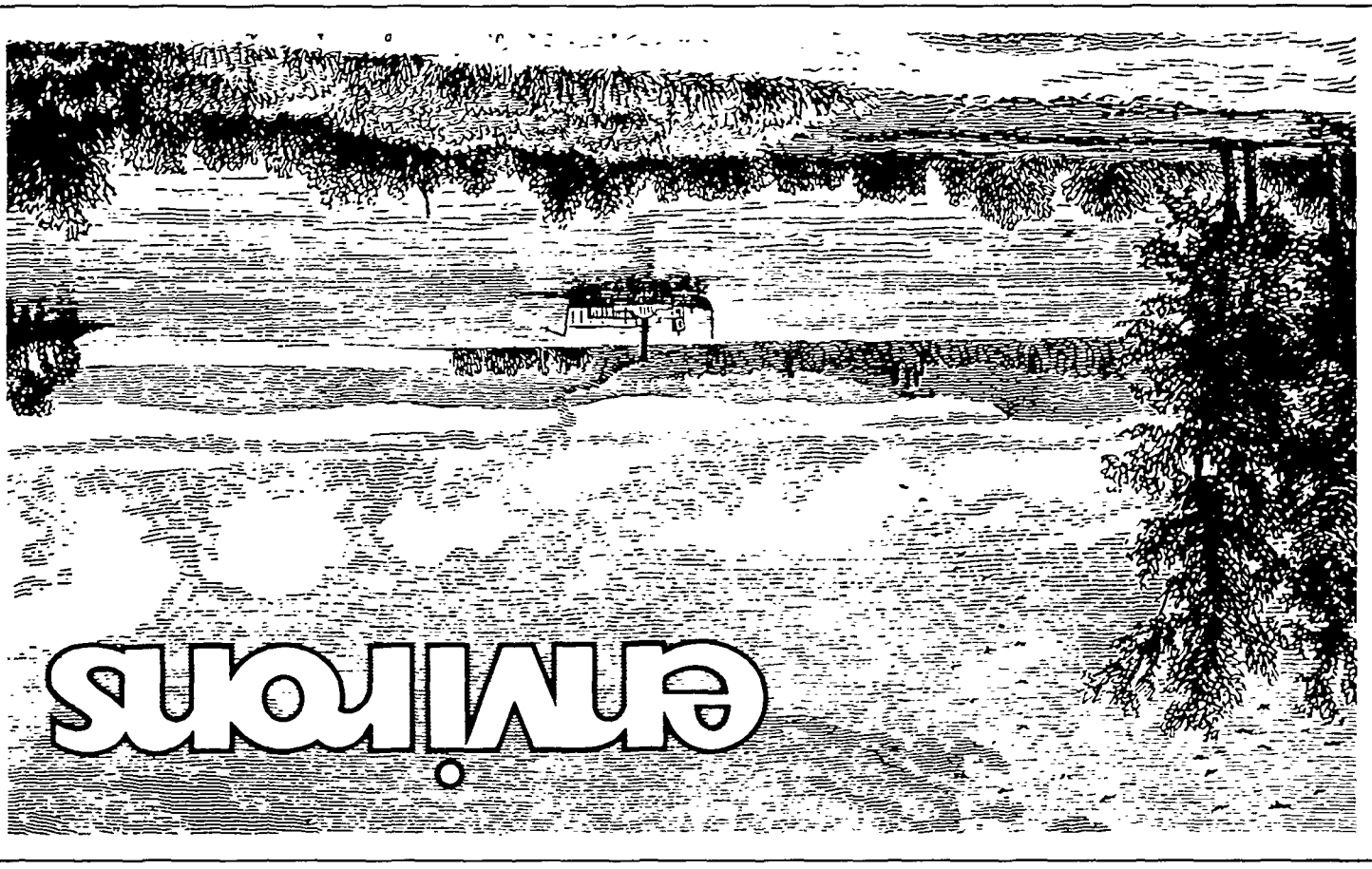


Conclusion

The California Wilderness Bill was truly a compromise with only 1.8 of the more than 6 million eligible acres protected by the bill. It was the culmination of years of judicial, administrative and legislative attempts to adequately review California's pristine areas. The evolution chronicled in this article is only a small portion of the history surrounding California's wildlands. The California Wilderness Bill, celebrated by some and criticized by many, is a significant step to preserve California's wilderness. It is not, however, the final step. The Bureau of Land Management and the State are reviewing many other potential wilderness areas, and the issue of National Forest wilderness is far from resolved. Pristine areas not protected in this bill will be the critical focus in forest-wide land management plans due to be completed in California by December 31, 1985. Congressional approval of the California Wilderness Bill last year marked the end of battles to protect some wilderness areas and the beginning of the struggle to protect others.

Mary Scoonover is a first year law student at King Hall who has served as an intern for the American Rivers Conservation Council, Sierra Club, and the California Wilderness Coalition. She has testified before Congress on California wilderness and river issues, and continues work with the Wilderness Coalition.





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