

The Symbiotic Relationship of International Treaties and Federal Wildlife Conservation Laws

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Measures to Conserve Migratory Birds

- 1885 USDA – Division of Ornithology & Mammalogy (later renamed the Bureau of Biological Survey in 1905). “The Division . . . studies the geographic distribution of animals and plants, and maps the natural life zones of the country; it also investigates the economic relations of birds and mammals, and recommends measures for the preservation of beneficial and destruction of injurious species.” Yearbook of the USDA 1894 at 524.

Measures to Conserve Migratory Birds (Cont'd)

- 1900 Enactment of the Lacey Act (established a prohibition on the interstate transport of any wild animals or birds killed in violation of state law).
- Section 1: “The duties and powers of the Department of Agriculture include the preservation, distribution, introduction, and restoration of game birds and other wild birds. The Secretary . . . is authorized to adopt such measures as may be necessary to carry out the purposes of this Act . . . subject, however, to the laws of the various States and Territories.” Later codified at 16 U.S.C. § 701 (substituting Interior for Agriculture).

Measures to Conserve Migratory Birds (Cont'd)

- 1913 Migratory Bird Act, or McLean Act, attached as a rider to the FY14 USDA appropriations act. (The 1913 Act authorized Agriculture to close hunting seasons by regulation. The law was found to be unconstitutional in two district court decisions.)

10th Amendment

- “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Measures to Conserve Migratory Birds (Cont'd)

- 1916 U.S.-Canada Migratory Bird Treaty
- In general, the treaty established a closed season on migratory game birds from March 10 to September 1, with season length not to exceed 3.5 months.
- Year-round closed season established for insectivorous birds.

Measures to Conserve Migratory Birds (Cont'd)

- 1918 Enactment of the Migratory Bird Treaty Act (MBTA). In general, the MBTA prohibits the take or sale of any migratory bird included in the terms of the US-Canada Treaty (later expanded by the species covered in the Treaties with Mexico, Japan, and Russia). Exceptions may be established by regulation issued under 16 U.S.C. § 704(a). State laws are not preempted as long as they do not purport to allow conduct that is prohibited by the MBTA or regulations adopted under its terms. *Id.* § 708.

Missouri v. Holland

- 1920 Opinion by Justice Oliver Wendell Holmes:
“To answer this question [the constitutionality of the MBTA] it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land.” 252 U.S. at 432.

Missouri v. Holland (Cont'd)

“The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment.”
252 U.S. at 433-34.

Missouri v. Holland (Cont'd)

“Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power.” 252 U.S. at 435.

The Supreme Court upheld the validity of the treaty and the MBTA, noting that the Congress is empowered under Article I, § 8 to enact laws that are necessary and proper to implement a valid Treaty.

Measures to Conserve Marine Mammals

- 1946 International Convention on the Regulation of Whaling
- 1949 Whaling Convention Act

(These authorities were administered by the Department of the Interior until 1970, when all functions vested by law in the Bureau of Commercial Fisheries were transferred to the Department of Commerce under Reorganization Plan No. 4.)

Measures to Conserve Marine Mammals (Cont'd)

- Marine Mammal Protection Act of 1972.
- Agreement on the Conservation of Polar Bears (1973) (Canada, Denmark, Norway, Russian Federation, U.S.).
- U.S. – Russia Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear Population (2000).

Measures to Conserve Endangered Species

Multilateral treaties:

- Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Articles V, VII, & VIII (1940).
- Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973).

Measures to Conserve Endangered Species (Cont'd)

- Endangered Species Act of 1973.

Implemented the int'l trade prohibitions of CITES in Section 9(c)(1) for species included in Appendices I, II, and III of the treaty.

Domestic and foreign species listed as endangered or threatened under Section 4 of the ESA; Section 9(a) prohibitions apply to such species, a number of which are addressed in the U.S. Annex to the Western Hemisphere Convention.

Measures to Conserve Endangered Species (Cont'd)

- African Elephant Conservation Act of 1988.

Enacted as part of the 1988 Amendments to the ESA.

Provides for the imposition of an import moratorium on ivory originating from certain ivory-producing countries.

Anticipated the actions of the CITES Parties to transfer African elephants to Appendix I at the 7th Meeting of the Conference of the Parties (Lausanne, 1989).

Measures to Conserve Endangered Species (Cont'd)

- Wild Bird Conservation Act of 1992.

Enacted to support efforts to curtail the massive international market in wild-caught birds destined for the pet trade.

Established a moratorium on the importation of wild birds included in the Appendices of CITES unless certain administrative findings were made within one year of the date of enactment.

Measures to Conserve Endangered Species (Cont'd)

- Rhinoceros and Tiger Conservation Act of 1998. Enacted to support CITES enforcement measures to disrupt trade in all Appendix I tiger and rhinoceros parts, products, and derivatives. Imposed a prohibition on all sales (not limited to interstate or foreign commerce) of “any product, item, or substance intended for human consumption or application containing, or labeled as containing, any substance derived from any species of rhinoceros or tiger.” 16 U.S.C. § 5305a(a).

Pelly Amendment

- Pelly Amendment to the Fishermen's Protective Act of 1967—the Secretary of the Interior, upon proper investigation, certifies to the President whether the actions of nationals of a foreign country are engaging in taking or trade that is diminishing the effectiveness of any multilateral program for endangered or threatened species. 22 U.S.C. § 1978.

Pelly Amendment (Cont'd)

- Japan certified in 1991 for its trade in CITES Appendix I sea turtles (certification withdrawn when Japan withdrew its reservations to the Appendix I listings).
- China and Taiwan certified in 1993 for their trade in CITES Appendix I rhinoceros and tiger products; President Clinton imposed trade restrictions on wildlife specimens and products from Taiwan.

Pelly Amendment (Cont'd)

- Pending Pelly Amendment petitions:
- Icelandic taking/trade involving fin whales and minke whales (CITES Appendix I).
- Canadian development of oil sands in Alberta (Western Hemisphere Convention, woodland caribou and whooping cranes).
- Canada/Nunavut – taking of polar bears from the West Hudson Bay population (Agreement on the Conservation of Polar Bears).

Future Developments

- Discussions on the management of the shared population of Pacific walrus in the Bering and Chukchi Seas.
- Enhanced coordination on law enforcement, coupled with infrastructure investments, regarding the trade in elephant ivory, tiger bone derivatives, polar bear hides, and rhino horn parts and derivatives.

Future Developments (Cont'd)

- Inclusion of wildlife and plant conservation provisions in future trade promotion agreements and bilateral investment treaties.