THE CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS CONCERNING THE CONSERVATION OF MIGRATORY BIRDS. . .

by
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A Report to the Fish and
Wildlife Service, Office of
Migratory Bird Management

on

The Convention between the United
States of America and the Union of
Soviet Socialist Republics Concerning
the Conservation of Migratory Birds
and Their Environment

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The purpose of this paper is to analyze the Convention Between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environment, signed November 19, 1976, (hereinafter referred to as "the Russian Convention") and to compare it with existing federal wildlife and other environmental legislation, emphasizing those aspects of the Russian Convention which are not implemented or not fully implemented by existing law. Included in this analysis is a discussion of various measures to be considered if the Fish and Wildlife Service determines to seek full legislative implementation of the Russian Convention.

A brief historical perspective provides a starting point for analysis. The Russian Convention is the fourth in a series of bilateral treaties concerning migratory bird conservation. Earlier treaties were signed with Great Britain (on behalf of Canada) in 1916,1/ with Mexico in 1936,2/ and with Japan in 1972.3/ Two years after

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1/ Convention for the Protection of Migratory Birds, Aug. 16, 1916, United States-Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628 (hereinafter referred to as "Canadian Treaty").

2/ Convention for the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, United States-Mexico, 50 Stat. 1311, T.S. No. 912 (hereinafter referred to as "Mexican Treaty").

3/ Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, March 4, 1972, United States-Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990 (hereinafter referred to as "Japanese Treaty").

signing of the Canadian treaty, it was implemented domestically by enactment of the Migratory Bird Treaty Act.4/ That Act actually went somewhat beyond the treaty in certain respects. For example, it authorized federal regulation of the means and the extent of migratory bird hunting, whereas the treaty expressly authorized limitations only on the seasons in which such hunting could occur. Generally, however, the Act sought to effectuate the treaty by conferring a broadly worded authority to impose such limitations on the taking, possession, and sale of migratory birds as were "compatible with the terms of the convention."

Rather than implement the subsequent treaties with Mexico and Japan by wholly new legislation or major amendments to the existing Treaty Act, Congress simply made minor technical amendments to that Act so as to incorporate appropriate references to the later treaties. Although that solution constituted a very simple and expeditious way of accomplishing at least partial implementation, it failed to achieve full implementation of some of the novel features of the later treaties, most notably the habitat protection provisions of the Japanese treaty, and it also failed to offer any guidance as to how to reconcile apparently conflicting provisions among

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4/ 16 U.S.C. §§703-11 (1970 & Supp. IV 1974).

the treaties.5/ Although the same quick solution is available with respect to implementing the Russian Convention, it would be subject to the same limitations.

Before considering the various alternatives relating to implementation, an Article by Article analysis of the Russian Convention will illuminate how it is intended to function and what its most significant features are. Article I contains certain definitions and other matter of a jurisdictional nature. It provides that the Convention shall apply to all species or subspecies of birds which meet either of two criteria. That is, it includes any species or subspecies for which there is reliable scientific evidence either of migration between the United States and the Soviet Union or of having separate populations in the two countries which share common breeding, wintering, feeding, or moulting areas. A list of species and subspecies

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5/ E.g., the Mexican and Japanese treaties contain a special exemption for "game farms," while the Canadian treaty contains no comparable exemption; similarly, the Japanese treaty confers discretionary authority to permit the taking of any otherwise protected species by Eskimos and Indians, the Canadian treaty contains an arguably mandatory exemption for taking of only a few specified kinds of birds by Eskimos and Indians, and the Mexican treaty contains no similar exemption at all. These and other differences among the treaties are discussed at greater length later in the text.

which the parties have agreed satisfy either of these criteria is appended to the Convention. That list may be amended from time to time upon the recommendation of either party and the acceptance of the other.6/

Other provisions of Article I require each party to designate, at the time instruments of ratification are exchanged, a "competent authority" responsible for carrying out activities under the Convention, and provide that, for the United States, the Convention shall apply to all areas under its jurisdiction. The latter language was apparently preferred to a more specific enumeration of those areas because of political disagreements as to the relationship of certain areas to the United States. The final language, however, effectively permits the United States to define for itself the geographic scope of the area in which it will implement the Convention.7/

Article II sets forth certain broad prohibitions pertaining to the direct utilization of migratory birds,

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6/ The list of migratory birds may in effect be expanded unilaterally by either party, at least as to areas under or persons subject to its own jurisdiction, by virtue of authority conferred by Article VIII. That Article authorizes either party, in its discretion, to treat any species or subspecies of bird as though it were a protected migratory bird under the Convention, so long as it belongs to the same family as any bird which is so protected.

7/ The Convention also has limited applicability in areas beyond the jurisdiction of either party. See the discussion of Article IV infra.

and then provides for certain exceptions. Prohibited activities include the taking of migratory birds, the sale, purchase, exchange, importation, or exportation of such birds, and their nests, eggs, parts, or products, the "collection" of migratory bird nests or eggs, and the"disturbance of nesting colonies." The last of these prohibitions is a new feature not found in any of the earlier treaties, or in the Migratory Bird Treaty Act, although it is arguably subsumed in the prohibition against "taking," a term that is undefined, in any of the treaties and the Treaty Act. Implementing regulations of the Fish and Wildlife Service, however, define it in a restrictive fashion that would not seem to include the disturbance of nesting colonies.8/

To the above prohibitions, Article II establishes a number of important exceptions. First, each party is authorized to establish hunting seasons, so long as they assure "the preservation and maintenance of stocks of migratory birds." Unlike the Canadian and Mexican treaties, no fixed dates are established within which the hunting season must fall,9/ nor is any overall hunting season duration provided for.10/ Unlike the Japanese

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8/ See 50 C.F.R. §10.12 (1976).

9/ Canadian Treaty, art. II, and Mexican Treaty, art. II(D).

10/ Canadian Treaty, art. II, and Mexican Treaty, art. II(C).

treaty, there is no requirement that hunting seasons be set so as to avoid principal nesting seasons (though this may be implicit in the requirement to preserve and maintain stocks) or to maintain bird populations in "optimum numbers."11/ Since many bird species are protected by more than one of the treaties, the regulation of their hunting is subject to varying standards. In most cases, fulfillment of all treaty obligations can only be accomplished by requiring that the most restrictive provisions be satisfied.12/

A second exception in Article II allows each party to prescribe seasons for the taking of migratory birds and the collection of their eggs by the indigenous inhabitants of certain designated areas, including Alaska, for their own nutritional and other essential needs. The Convention provides that each party has the responsibility of determining for itself what shall constitute "nutritional and other essential needs," but requires again that such seasons be set so as to preserve and maintain migratory bird stocks. Here again, as previously pointed out, the four treaties impose four separate standards regarding the same subject.

11/ Japanese Treaty, art. III, §2.

12/ The Fish and Wildlife Service follows this policy when domestic statutes impose varying duties with respect to any activity affecting a particular species. See 50 C.F.R. §13.1 (1976).

Notwithstanding that the most restrictive of these, the Mexican treaty, contains no exception for native subsistence taking, the Secretary of the Interior has apparently always permitted a limited subsistence taking exception for Eskimos and Indians in Alaska.13/

A third exception in Article II permits otherwise prohibited activities "[f]or the purpose of protecting against injury to persons or property." An identical exception appears in the Japanese treaty.14/ Similar exceptions in the Canadian and Mexican treaties are worded slightly differently. The former applies to birds which "under extraordinary conditions, may become seriously injurious to the agricultural or other interests in any particular community."15/ The latter applies only when otherwise protected birds "become injurious to agriculture and constitute plagues."16/

13/ Current administrative regulations permit year-round subsistence taking of auks, auklets, guillemots, murres, and puffins, as provided by the Canadian treaty, as well as of snowy owls and cormorants. See 50 C.F.R. §20.132 (1976). The addition of snowy owls and cormorants was effectuated in 1973 without ever having been the subject of a proposed rulemaking open for public comment. At the time it was done, the Fish and Wildlife Service explained that its action was authorized by Article I of the Mexican treaty. See 38 Fed. Reg. 17841 (July 5, 1973). In fact, not only did Article I not authorize the action taken, but Article II specifically prohibited it.

14/ Japanese Treaty, art. III, §1(b).

15/ Canadian Treaty, art. VII.

16/ Mexican Treaty, art. II(E).

The final exception authorized by the Russian Convention applies to "scientific, educational, propagative, or other specific purposes not inconsistent with the principles of this Convention." This exception is also taken verbatim from the Japanese treaty.17/ Both the Canadian and Mexican treaties contain exceptions for scientific and propagative purposes, though neither makes a specific reference to "educational" purposes.18/ The Mexican treaty contains an additional exception for museums,19/ and both it and the Japanese treaty contain an exception for "private game farms."20/ The open-ended language of the exception in the Russian Convention would appear to subsume these latter two exceptions.

Article III of the Russian Convention consists of but a single sentence in which the parties agree to take the steps necessary for the execution of the Convention as quickly as possible.

By far the most significant provisions of the Russian Convention are found in Article IV. That Article addresses

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17/ Japanese Treaty, art. III, §1(a).
18/ Canadian Treaty, art. VI, and Mexican Treaty, art. II(A).
19/ Mexican Treaty, art. II(A).
20/ Mexican Treaty, art. II(A), and Japanese Treaty, art. III, §1(d).

the problem of habitat protection. It includes a broadly worded exhortation to take measures necessary to "protect and enhance the environment," and a number of more specific directives aimed at accomplishing that goal. The latter include the establishment of a warning system whereby each party can promptly advise the other of impending or existing environmental damage and take steps to avert or minimize it, the control of the importation, exportation, and establishment of injurious wild animals and plants, and the designation of areas of special importance to migratory birds, both within and without the two signatory nations, for special protection.

The provisions of Article IV have no parallel in the Canadian and Mexican treaties. Similar, though more limited, provisions appear in the Japanese treaty,21/ but they have never been implemented by domestic legislation.

A close reading of Article IV reveals a number of ambiguities in interpretation that may bear upon its implementation. For example, the first paragraph of Article IV imposes a general obligation to take all necessary steps to "protect and enhance the environment of migratory birds and to prevent and abate the pollution

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21/ Japanese Treaty, art. VI.

or detrimental alteration of that environment," but qualifies that obligation with the words "[t]o the extent possible." Paragraph 2 then sets forth a non-exclusive list of specific things which each party "shall" do, but does not similarly qualify each of those more specific duties.22/ Thus, two different readings are possible. According to one, the duties imposed by paragraph 2 simply particularize the general duty of paragraph 1 and are therefore similarly subject to its qualifying language. According to the other, the two paragraphs are of equal stature and the qualifying language that appears in the first applies only to it. While the practical consequences of the two different readings are probably not great, the latter reading suggests a more clearly affirmative duty to take the steps required by paragraph 2.

Of potentially greater importance is the ambiguity inherent in paragraph 2(c), relating to the protection of areas of special importance. That paragraph first requires each party to identify "areas of breeding, wintering, feeding, and moulting which are of special

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22/ Paragraph 2(a) qualifies the duty to cooperate regarding the environmental hazards which are the subject of the warning system it establishes with the words "to the maximum possible degree." Similarly, paragraph 2(c) requires the protection of the ecosystems of designated areas of special importance "to the maximum extent possible."

importance in the conservation of migratory birds within the areas under its jurisdiction." The second sentence of the paragraph provides that such areas "may include areas which require special protection because of their ecological diversity or scientific value." (emphasis added) The third sentence then provides that "these special areas" are to be included in a list to be appended to the Convention. The final sentence requires each party, to the maximum extent possible, to protect the ecosystems of "those special areas described on [the] list." The quoted language is susceptible to several interpretations, depending on how one views the relationship between the first three sentences. On the one hand, there is presumably no point in identifying areas of special importance for migratory bird conservation unless such areas are to be given "special protection." On the other hand, the second sentence can be read so that only those identified areas which "because of their ecological diversity or scientific value" require special protection are to be listed, implying that other areas identified as having "special importance" need not be listed and given "special protection." It is even possible to read the second sentence as expanding the first, thus making eligible for special protection not only those areas which are of special importance in the conservation of migratory birds, but other areas as well,

so long as their "ecological diversity or scientific value" warrants it. The language of the subparagraph can support any of these interpretations. If the aim of the Fish and Wildlife Service is to assure significant protection for the areas which it will identify, and to minimize the opportunity for protracted disputes as to whether a particular area qualified as an area deserving special protection, the language of any implementing legislation should avoid the ambiguities inherent in the Convention language.

A closely related provision of Article IV authorizes the parties, by mutual agreement, to designate areas not under the jurisdiction of either of them as areas of special importance to the conservation of migratory birds. These areas are to be included on a second list to be appended to the Convention. The parties have two duties with respect to these areas. The simplest is merely to disseminate information about their significance. More important is the obligation that each party "to the maximum extent possible, undertake measures necessary to ensure that any citizen or person subject to its jurisdiction will act in accordance with the principles of this Convention in relation to such areas." What acting "in accordance with the principles of" the Convention means is not altogether clear. Presumably, it is intended to give such areas the same

or a similar degree of protection as those areas of special importance within the jurisdiction of the United States. The nature of the protection afforded the latter areas, however, may be inappropriate for the former areas. For example, if domestic areas of special importance are protected by a prohibition against the granting of any federal permit for activities which may substantially diminish the value of such areas to migratory bird conservation, similar protection for foreign areas may be inadequate if the same activities there would not require federal permits.

The mutual warning system mandated by Article IV is likewise not without its interpretational difficulties. Basically, each party is required to establish procedures for warning the other of "substantial anticipated or existing damage to significant numbers of migratory birds or the pollution or destruction of their environment." Once warned, the parties are to cooperate "in preventing, reducing or eliminating such damage" and in rehabilitating the environment. Apparently, this provision was intended to facilitate early detection of and cooperative action in combatting major disasters, such as oil spills. Literally, however, by applying to "existing" damage, the provision is of potentially limitless scope.

The one provision of Article IV that is free of

uncertainty pertains to the control of injurious plants and animals. This provision does, however, expand considerably the more limited restrictions currently found in the Lacey Act.23/ For example, the Lacey Act applies only to vertebrates, mollusks and crustaceans, whereas the Convention applies to all "live animals and plants."24/ Similarly, the Lacey Act restricts only the importation of injurious animals, whereas the Convention seeks to control "import, export, and establishment in the wild."25/ Finally, the Lacey Act applies only to such species as are determined to be injurious, a limitation which arguably requires a determination of actual injury, whereas the Convention applies to all species "that may be harmful." In one respect, the Convention is more limited than the Lacey Act because the former seeks to control only those species which may be harmful to migratory birds or their environment, whereas the latter seeks to protect a wide range of interests from injury.

Article V of the Russian Convention provides for special protective measures for migratory birds in danger of extinction. Whenever either party decides that

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23/ 18 U.S.C. §42 (1970).

24/ Article VI of the Japanese treaty also contains a restriction on the importation of injurious "live animals and plants."

25/ The Japanese treaty seeks to limit the "introduction" of species "which could disturb the ecological balance of unique island environments" as well as the importation of those thay may be hazardous to migratory birds.

any species, subspecies, or "distinct segment of a population" is endangered, and establishes special measures for its protection, it is to inform the other party of its action. The other party is then directed to "take into account such protective measures in the development of its management plans." This is a broader mandate than that of a similar provision in the Japanese treaty which merely directs each party to control the exportation or importation of any species or subspecies found by the other party to be endangered.26/

Article VI provides generally for the promotion of research, the exchange of scientific information, and the coordination of national bird banding programs.

Article VII directs each party, to the maximum extent possible, to establish preserves, refuges, protected areas, and facilities for the conservation of migratory birds. It also directs the parties "to manage such areas so as to preserve and restore the natural ecosystems."

Article VIII provides a means of expanding the scope of the Convention so as to include certain species or subspecies that do not otherwise meet the Convention's criteria as "migratory birds." That is, either party may, within the areas under its jurisdiction or with regard to citizens or person under its jurisdiction,

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26/ Japanese Treaty, art. IV.

treat as a migratory bird any species or subspecies belonging to the same family as any listed migratory bird. For such birds, that party may implement any or all of the protective measures of the Convention, as it sees fit.

The remaining four articles of the Convention deal with administrative and other related matters. They reaffirm the authority of either party to adopt stricter domestic measures, provide that the parties shall consult regarding the Convention's implementation, and provide for the amendment, ratification, and entry into force of the Convention.

From the foregoing summary of the Russian Convention, it is clear that certain of its provisions, among them those pertaining to the exchange of information and possibly the designation of areas of special importance, can be satisfied without the need for implementing legislation; others may require only minor modification in existing legislation; still others, if they are to be implemented fully, will require significant new legislative authority. The remainder of this paper addresses the latter, and suggests a number of options that may be available.

Certainly the most significant of the Convention's provisions requiring legislative implementation are those pertaining to the protection of areas of special importance.

If the Service intends, by its designation process, merely to establish a set of internal priorities for refuge acquisition, for concentrating its Fish and Wildlife Coordination Act consultation activities, and for other similar internal matters, there is probably no need to seek implementing legislation pertaining to it. If, on the other hand, the designation of areas of special importance is intended to have some substantive impact on other federal agencies or private persons, as the language of the Convention seems to contemplate, then implementing legislation which spells out the designation authority and its consequences is needed.

There are a number of models in existing law that might be followed in seeking to implement this authority. Which one is best depends in large measure on the Service's assessment of the size and nature of the areas which it intends to designate as areas of special importance. If those areas are expected to be quite extensive, to be widely distributed, and to include considerable private land, it is not difficult to foresee not only intense political opposition but also substantial litigative challenges to stringent protective measures. If, on the other hand, the areas to be designated are relatively small, not widely distributed, and composed exclusively or predominantly of publicly owned land, it may be possible to impose substantially more protec-

tive measures. These considerations, while obviously not determinative, will doubtless influence any decision as to which implementation strategy to pursue.

At least four basic approaches, together with a host of minor variations, are available to implement the Convention's provisions regarding the protection of areas of special importance. For convenience, these can be referred to as the Wilderness Act approach, the Coordination Act approach, the Transportation Act approach, and the Endangered Species Act approach. The essential feature of the Wilderness Act approach is the clear identification, in advance, of the activities which will be regarded as inconsistent with the preservation of the areas in question. Thus, just as the Wilderness Act prohibits all permanent roads and most temporary roads, motor vehicles, mechanical transport, and physical structures or installations in designated wilderness areas,27/ so too the Convention's implementing legislation could prohibit the same or other things in designated areas of special importance for migratory bird conservation. The disadvantage of this approach is its inflexibility. While it may be true that certain activities, such as road construction, invariably destroy the essential character of wilderness areas, it

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27/ 16 U.S.C. §1133(c)(1970).

seems unlikely that that or any other activity would necessarily impair the value of all areas determined to be of special importance for migratory bird conservation. On the other hand, the Wilderness Act approach has the advantage of certainty. The opportunities for litigation and protracted disputes are measurably reduced when the permissibility of a given activity is determined by its character rather than by a necessarily uncertain evaluation of its likely impact on certain protected values.

An alternative approach for the protection of areas of special importance would be along the lines of the Fish and Wildlife Coordination Act.28/ Basically, that approach would require that before any federal agency could authorize or undertake any activity in or affecting a designated area of special importance, it must first consult with the Secretary of the Interior for the purpose of ascertaining the impacts of the proposed activity on that area. Having thus consulted, the agency would then be required to give "full consideration" or some other appropriate degree of deference to the recommendations of the Secretary regarding the avoidance of adverse impacts. The advantage of this approach is that it is a familiar one, and therefore might not generate

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28/ 16 U.S.C. §§661-667e (1970).

major opposition from development-oriented federal agencies. On the other hand, the limitations of the approach are apparent in the limited success of the Fish and Wildlife Coordination Act. Most courts have held that it imposes no duties not already imposed by the National Environmental Policy Act.29/ That is, its requirements are purely procedural, and it establishes no substantive standard against which to measure ultimate agency decisions. Moreover, actual administration of the Act has been strongly criticized by many who have studied it, including the General Accounting Office.30/ For all of these reasons, the Department of the Interior has encouraged recent efforts to amend the Act so as to enhance the status of the recommendations of the Secretary. Accordingly, if the Coordination Act approach is to be the preferred means of implementing the Convention, presumably the Service will want the language of any proposed legislation to parallel

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29/ See Environmental Defense Fund v. Corps of Engineers, 325 F. Supp. 749 (E.D. Ark. 1971), injunction dissolved, 342 F. Supp. 1211, aff'd, 470 F.2d 289 (8th Cir. 1972); Environmental Defense Fund v. Froehlke, 473 F.2d 346 (8th Cir. 1972); Cape Henry Bird Club v. Laird, 359 F. Supp. 404 (W.D. Va.), aff'd 484 F.2d 453 (4th Cir. 1973); Save Our Sound Fisheries Ass'n v. Callaway, 387 F. Supp. 292 (D.R.I. 1974); and Akers v. Resor, 339 F. Supp. 1375 (W.D. Tenn. 1972).

30/ General Accounting Office, Improved Federal Efforts Needed to Equally Consider Wildlife Conservation with Other Features of Water Resource Development (1974).

the language of the proposed amendments to the Coordination Act.

The third basic approach, here called the Transportation Act approach, is essentially akin to the Coordination Act approach, except for the inclusion of a stringent substantive standard which would prohibit any harmful activity in a protected area except for compelling reasons. The Department of Transportation Act prohibits the use of any publicly owned park, wildlife refuge or recreation area for transportation project purposes unless there is no feasible and prudent alternative thereto and unless all possible planning to minimize harm has been done.31/ In a similar vein, implementing legislation could provide that no federal agency could authorize or undertake any activity which, in the judgment of the Secretary of the Interior, would adversely affect any designated area of special importance unless the same or similar conditions were met.

The elimination of the compelling circumstances escape route is the cardinal feature of the Endangered Species Act approach. Implementing legislation modeled after section 7 of that Act32/ would provide that all federal agencies must insure that activities undertaken or authorized by them not adversely affect any designated

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31/ 49 U.S.C. §1653(f)(1970).
32/ 16 U.S.C. §1536 (Supp. IV 1974).

area of special importance. Although this approach assures the maximum level of protection for such areas, the current controversy over section 7 raises some doubt as to its political viability. Moreover, this approach is arguably more stringent than the Convention requires, because of the language, "to the maximum extent possible," which qualifies the Convention's requirement to protect areas of special importance.

All of the approaches that have been suggested here impose limitations only on federal activities. Private activity affecting a designated area of special importance would be regulated only to the extent that it required a federal permit or other federal authorization. Direct regulation of other types of private activity is exceedingly difficult for at least two reasons: (1) it is a function traditionally exercised by state and local government, and (2) substantial constitutional questions of unlawful takings of private property without just compensation are involved. Even without a direct handle over private activity, however, there would be some opportunity to at least influence some state and local regulation of private activity affecting designated areas of special importance. To the extent that such areas fall within the coastal zones of any state, the

the Coastal Zone Management Act provides this authority.33/

The Coastal Zone Management Act provides federal funding to the states for the development of coastal zone management programs. Once developed and found to be consistent with certain statutory standards, those management programs provide the basis for further federal financial assistance in the form of "administrative grants." By now, most states are nearing completion of the development stage of their management programs. Accordingly, the opportunity for influencing the content of those initial programs because of the existence of designated areas of special importance within the coastal zones would appear to be very limited. However, to be approved, each state program must include "procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, or esthetic values."34/ Once areas of special importance are designated under the Russian Convention, these procedures can be utilized in an effort to persuade the states to preserve them. In addition, the Act permits the states to modify or amend their management programs,

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33/ 16 U.S.C. §§1451-64 (Supp. IV 1974), as amended by Act of July 26, 1976, Pub. L. No. 94-370, 90 Stat. 1013.

34/ Id. §1455(c)(9).

even after they have been approved.35/ While the Act does not clearly spell out any duty to amend an approved program in light of changed circumstances, such as the designation of an area of special importance to migratory bird conservation within a state coastal zone, nevertheless the fact of designation may present the Service with an opportunity to urge an appropriate amendment.

One other aspect of the Coastal Zone Management Act that may be of importance for implementation of the Convention is its provision for "federal consistency" with state programs. Section 307(c)(2) of that Act requires that development projects undertaken by a federal agency in a state's coastal zone be consistent with the state's approved management program.36/ However, the Office of Legal Counsel of the Department of Justice has interpreted the Act's definition of "coastal zone" to exclude all federally owned lands.37/ Accordingly, any development projects undertaken on national wildlife refuges or other federally owned lands for the purpose of facilitating compliance with the Russian Convention are not subject to the foregoing consistency

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35/ Id. §1455(g).
36/ Id. §1456(c)(2).
37/ See 41 Fed. Reg. 42880 (Sept. 29, 1976).

requirement. However, by virtue of section 307(c)(1), those same development projects, if they "directly affect" a state's coastal zone, must be carried out, to the maximum extent practicable, in a manner consistent with the state's approved management program.38/ Thus, there exists at least the potential for conflict between what the Service may believe is necessary for protection of an area of special importance and what the state requires under its approved management program. However, the proposed regulations that implement section 307 of the Coastal Zone Management Act define the phrase "consistent to the maximum extent practicable" so as to allow a deviation from an approved state program where "some circumstance arose after the approval of the management program which was not foreseen at the time of the approval" and to insist upon consistency would impose an unreasonable burden on the federal agency.39/ In those cases where a state management program has been approved prior to the designation of an area of special importance within the state's coastal zone (or more precisely, prior to the time that such designation was foreseen), the foregoing proposed regulation would probably exempt most federal activities

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38/ 16 U.S.C. §1456(c)(1)(Supp. IV 1974).

39/ See 41 Fed. Reg. 42885 (Sept. 28, 1976) (proposed 15 C.F.R. §921.1(o)).

aimed at protecting that area from the otherwise applicable consistency requirement.

Section 307(c)(3) imposes yet a third consistency requirement.40/ Subject to certain limited exceptions, this provision requires that no federal license or permit be granted to conduct any activity affecting land or water uses in the coastal zone of a state having an approved management program unless the state concurs that the activity is consistent with its program. Thus, for example, a section 404 dredge and fill permit which might otherwise be issued could be denied if a state deems it inconsistent with its management program. On the other hand, where a state regards the issuance of such a permit as not inconsistent with its management program, the federal authorities may still deny it "where there are overriding national program factors which dictate rejection of the application."41/ The protection of areas of special importance designated as such pursuant to the Russian Convention would presumably constitute such an overriding national program.

In summary, the provisions of the Russian Convention pertaining to the protection of areas of special importance provide a vehicle for far-reaching new federal

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40/ 16 U.S.C. §1456(c)(3)(Supp. IV 1974).
41/ See 41 Fed. Reg. 42883 (Sept. 28, 1976).

legislation and for affecting at least some state and local land-use decisions. To implement these provisions, a variety of options, offering varying degrees of protection, are available.

A second means of habitat protection afforded by the Convention and not fully implemented by existing law relates to the control of exotic species. At present, the Lacey Act confers authority upon the Secretary of the Interior to restrict the importation of those species of wild mammals, birds, fish, reptiles, amphibians, mollusks and crustaceans which are determined to be injurious to human beings, to the interests of agriculture, horticulture, forestry, or to wildlife or the wildlife resources of the United States."42/ In 1976, the Secretary of the Interior abandoned a three-year old effort to utilize this authority to restrict the importation of broad categories of wildlife which were presumed (until demonstrated otherwise) to be injurious to one or more of the interests protected by the statute. That effort was reportedly abandoned in favor of seeking a legislative clarification of the Secretary's authority to proceed in the manner

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42/ 18 U.S.C. §42(a)(1)(1970). Because the terms "wildlife" and "wildlife resources" are defined in the Lacey Act to include all types of aquatic and land vegetation upon which wild animals are dependent, the Act in effect confers authority to restrict the importation of wild animals determined to be injurious to "the environment."

proposed. The Russian Convention provides a strong justification for that clarification because the regulatory authority it obliges each party to assume extends not just to those species determined to be injurious but to all species which "may be harmful" to migratory birds or their environment.

An identical regulatory authority is conferred with respect to the "establishment in the wild" of potentially harmful species. How this authority can effectively be implemented is very difficult to determine. Preventing the establishment of potentially harmful non-native species is, of course, the actual goal of restricting their importation. Notwithstanding that fact, existing law has been directed at importation rather than establishment simply because the enforcement task for the former, difficult though it may be, is infinitely easier than for the latter. What the Convention apparently calls for, then, is some means of controlling the ultimate disposition of those potentially harmful species which are imported for lawful purposes. The simplest form of that control would be a clear prohibition of the release into the wild of any living species whose importation is subject to control. Effective enforcement of such a prohibition would require some form of monitoring by the government and record-keeping by importers.

Yet another authority not found in existing law pertains to controlling the exportation of potentially harmful species. Here again, it is not exportation per se that is sought to be prevented, but the establishment in the wild of potentially harmful species after exportation. Attacking that problem through controls on exportation is probably more complicated than the converse problem previously discussed. For example, some species might be harmful if exported to and established in subtropical or tropical countries, but the same species may pose no risk of harm if exported to countries in temperate regions. In light of these complexities, the simplest legislative mechanism for implementing the authority conferred by the Convention may be to give the Secretary of the Interior a broadly worded authority to control the exportation of potentially harmful species, perhaps coupled with some sort of directive to consult with the foreign governments affected.

Under the Convention, all of the foregoing authority, including the control of importation, establishment, and exportation, applies not merely to wild animals, but also to plants. Nothing in the Lacey Act confers any authority to regulate the importation of plants. Statutes such as the Plant Pest Act43/ and the Plant Quarantine

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43/ 7 U.S.C. §§147a, 149, and 150aa-150jj (1970).

Act44/ do vest some regulatory authority over the importation of plants in the Department of Agriculture, but that authority is designed solely to protect against the introduction of diseases or pests harmful to other plants. Since the interests to be protected under the Russian Convention are migratory birds and their habitat, the Secretary of the Interior can most effectively exercise any regulatory authority pertaining to plants. However, in light of the Secretary of Agriculture's established expertise in related matters, it may be well to provide for some degree of shared responsibility.

A number of more minor amendments to existing law will also be necessary to implement the Russian Convention fully. Among these is the authority conferred by the Migratory Bird Conservation Act to acquire lands "necessary for the conservation of migratory birds."45/ The term "migratory birds" is defined in that Act to include only those birds subject to the Canadian and Mexican treaties.46/ Although the Migratory Bird Treaty Act was amended in 1974 to include a reference to the Japanese treaty, the need to amend the Conservation Act similarly was overlooked. Any legislation to implement the Russian Convention should make clear the authority

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44/ 7 U.S.C. §§151-67 (1970).
45/ 16 U.S.C. §715c (1970).
46/ Id. §715j.

to acquire lands for the conservation of birds subject to any of the four treaties.

There also would seem to be much sense in including a definition of the term "take" in the Migratory Bird Treaty Act. Although that Act restricts the "taking" of migratory birds, it nowhere defines what that term means. Incongruously, the Migratory Bird Conservation Act includes a definition of the term "take," but nowhere uses the term.47/ Therefore, it would be a simple and sensible matter to transfer that definition from the Conservation Act to the Treaty Act. To implement the Russian Convention fully, that definition could be amended so as expressly to include the "disturbance of nesting colonies"; alternatively, that could be listed as a separate prohibited act.

The remaining issue that requires consideration is that of native subsistence taking. At present, the Migratory Bird Treaty Act makes no mention of this issue, although by directing the Secretary of the Interior to regulate the taking of migratory birds in a manner that is consistent with the various treaties, it impliedly authorizes him to permit such native subsistence taking as the treaties themselves authorize. Unfortunately,

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47/ The term "take" was at one time found in the Conservation Act, but it was eliminated by amendment in 1966. The term's definition, however, remained.

however, as has previously been described, the various treaties are themselves irreconcilable on this issue. Accordingly, it would be impossible to include in any implementing legislation a provision which authorized the rather liberal native subsistence taking permitted by the Russian Convention without at the same time doing violence to the Canadian and Mexican treaties. Though it may be true that neither of those nations would be likely to object, there is at least the possibility that such legislation would be vulnerable to attack by private litigants. Notwithstanding the irreconcilability of the existing treaties, the Service has for some time permitted a limited amount of native subsistence taking and thus far escaped challenge. Continuing that practice may be the most attractive option pending a comprehensive solution by way of a multilateral treaty like that declared to be the goal of the Soviets and the Americans.48/

48/ The native taking issue is complicated further by the fact that at least one case, United States v. Cutler, 37 F. Supp. 724 (D. Idaho 1941), has held that existing Indian treaty rights were unaffected by enactment of the Migratory Bird Treaty Act.