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Regulating the Trade in Bear Parts for Use in Asian Traditional Medicine

William Carroll Muffett*

Bears once ranked among the most widespread of large carnivores, ranging across every continent except Antarctica and Australia.¹ Today, however, fewer than one million bears remain worldwide.² Of the eight surviving bear species, six are threatened or endangered.³ The increasingly precarious status of this once ubiquitous animal can be attributed almost exclusively to a single factor: the spread of humankind.⁴

Habitat destruction and human exploitation have eliminated bears throughout much of their historic range and continue to threaten surviving populations.⁵ Today, one of the most significant threats to bears is the trade in bear parts—paws,

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¹ INTERNATIONAL WILDLIFE TRADE: A CITES SOURCEBOOK 39 (Ginette Hemley ed., 1994) [hereinafter INTERNATIONAL WILDLIFE TRADE].

² J.A-MILLS ET AL., THE BEAR FACTS: THE EAST ASIAN MARKET FOR BEAR GALL BLADDER 35 (1995). Eight species of bear remain: American black bear; Asiatic black bear; brown bear; giant panda; sun bear; polar bear; sloth bear; and spectacled bear. Ian Stirling, The Living Bears, in BEARS: MAJESTIC CREATURES OF THE WILD 36, 36-49 (Ian Stirling ed., 1993) [hereinafter BEARS]. Six of these species contain two or more recognized subspecies or distinct populations. Thus, while only eight “species” of bear exist, the CITES agreement regulates trade in 17 distinct bear populations. See infra note 67 (discussing the importance of this distinction).

³ Stirling, supra note 2, at 37.

⁴ Christopher Servheen, The Future of Bears in the Wild, in BEARS, supra note 2 at 212, 212.

bones, teeth, and gallbladders—for use in Asian traditional medicine. Recent decades have witnessed a renaissance in the practice of traditional medicine and a corresponding boom in the bear parts trade, with devastating consequences for Asian bear species. As rising demand and dwindling Asian bear populations have driven prices for bear parts to astronomical levels, practitioners have turned to more plentiful North American bear populations to supply traditional medicine markets both in the United States and abroad.

The international trade in bear parts has caused growing concern within the scientific and environmental communities. Aware of the decimation that the traditional medicine trade has visited upon tigers, rhinoceroses, and other species, environmentalists have urged legislative action to bring the bear parts trade under control. Wildlife enforcement officials, however, contend that environmentalists and the media have exaggerated

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6. Servheen, supra note 5, at 3. For a detailed explanation of how bear parts are used in traditional Asian medicine, see supra notes 16 through 23.

7. See, e.g., Introduction to INTERNATIONAL WILDLIFE TRADE, supra note 1, at x (stating that both Asians and non-Asians have regained interest in traditional oriental medicine); JUDY A. MILLS & CHRISTOPHER SERVHEEN, THE ASIAN TRADE IN BEARS AND BEAR PARTS 10, 24, 32 (1991) (discussing revitalization of and adherence to traditional medicine in China, Japan, and South Korea).

8. MILLS ET AL., supra note 2, at 3. See also Introduction to INTERNATIONAL WILDLIFE TRADE, supra note 1, at x ("Many wildlife populations, already under pressure from habitat loss, cannot sustain [the] increased demand [for traditional medicine].")


10. MCCrackEN ET AL., supra note 9, at 15-16, 55; see, e.g., Rose, supra note 9, at 5 (urging greater regulation of the international bear parts trade); Servheen, supra note 5, at 3 (stating that the Asian demand for bear parts continues to increase and fuels the unregulated killing of bears).

11. See, e.g., ANDREA L. GASKI & KURT A. JOHNSON, PRESCRIPTION FOR EXTINCTION: ENDANGERED SPECIES AND PATENTED ORIENTAL MEDICINES IN TRADE, at v (1994) (providing statistical data concerning the decline in numbers of such species); Susan S. Lieberman, Improving International Controls on Wildlife Trade, ENDANGERED SPECIES BULL., Mar.-Apr. 1995, at 8, 9-10 (discussing increasing trade in such species).

12. See Rose, supra note 9, at 5 (urging a review of state wildlife laws with a view toward developing more uniform trade restrictions).
the extent of the bear parts trade in North America. They argue that existing laws adequately address the trade and that new regulation would impose unnecessary and unwelcome administrative burdens on already overwhelmed wildlife officers. As a result of this opposition, Congress has passed none of the seven bills introduced since 1992 to restrict the trade in bear parts.

This Note argues that the federal government should directly regulate the bear parts trade and proposes a regulatory scheme that balances the need for protection with the need to minimize the fiscal and administrative costs of that protection. Part I discusses the scope of the bear parts trade and evaluates the threat that the trade poses to domestic and world bear populations. Part II reviews existing regulatory mechanisms and evaluates their effectiveness in addressing the bear parts trade. Part III proposes a regulatory scheme that generally prohibits the import, export, or interstate sale of bear parts but provides an option for legalized trade in states willing to accept the burden of regulation. This plan combines administrative simplicity with a degree of flexibility that will allow states to tailor regulation to local capacities and preferences.

I. NATURE, SCOPE, AND IMPACT OF THE TRADE IN BEAR PARTS

A. THE ROLE OF THE BEAR IN ASIAN TRADITIONAL MEDICINE

The practice of Asian traditional medicine originated in China more than four thousand years ago and spread

13. See, e.g., Robert Wenting, CITES Aspects of Controlling Trade in Bear Parts: Canadian Perspectives, in PROCEEDINGS, supra note 5, at 25, 29 (arguing that certain nongovernmental organizations have suggested that there is a massive on-going slaughter of North American bears and that there is no evidence to support the existence of such slaughter in Canada).

14. Telephone Interview with John Neal, Special Agent, Division of Law Enforcement, U.S. Fish & Wildlife Service (Oct. 6, 1995); see also Susan S. Lieberman, CITES Aspects of Controlling Trade in Bear Parts: U.S. Perspectives, in PROCEEDINGS, supra note 5, at 17, 21 (asserting that new national legislation would not benefit bears).


16. GASKI & JOHNSON, supra note 11, at 1; see also MILLS ET AL., supra note 2, at 2 (stating that use of bear parts in Chinese medicine began in 3,500 B.C.).
throughout Central and East Asia. Practitioners use a wide array of animal and plant species in remedies for everything from arthritis to vertigo.

Several of the most respected remedies in Asian traditional medicine derive from the bear. The most celebrated and commercially valuable of these is bear gall, the bile produced by the bear’s gallbladder. Bear gall is believed to fight fever, hemorrhoids, heart disease, poisons, gall stones, diseases of the liver and stomach, and many other ailments. Although some traditional Asian prescriptions have legitimate medical uses, Western doctors attribute little medicinal value to bear gall or its derivatives.

B. SCOPE OF THE BEAR TRADE

As soldiers and merchants carried Chinese culture across

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17. See MILLS & SERVHEEN, supra note 7, at 3 (stating that Japan, Korea, and Southeast Asian nations developed their pharmacopeia from Chinese methods).

18. GASKI & JOHNSON, supra note 11, 23-29. For example, ground antelope horn remedies convulsions, nausea, and delirium. Id. at 25. Pangolin scales promote menstruation and lactation. Id. at 41. Rhinoceros horn reduces blood vomiting and nosebleeds. Id. at 45. Ginseng reduces blood sugar and diabetes symptoms. Id. at 78. Magnolia flowers cure diarrhea and heartburn. Id. at 90.

19. For example, bear fat strengthens the mind, promotes longevity and cures baldness; bear paw wards off colds; and bear meat is good for rheumatism and beri beri. Judy A. Mills, Bears as Pets, Food and Medicine, in BEARS, supra note 2, at 178, 180 & graphic.

20. MILLS & SERVHEEN, supra note 7, at 3.

21. Id.

22. See, e.g., GASKI AND JOHNSON, supra note 11, at 25, 30, 36, 42, 51 (discussing results of clinical research on various traditional prescriptions).

23. Telephone Interview with Dr. Bill Marks, Adjunct Professor, Natural Products Analytical Chemistry (Pharmacognancy), University of Illinois-Chicago Medical Center (Feb. 28, 1996). Laboratory tests have demonstrated that ursodeoxycholic acid (UDCA), an acid found in bear bile, effectively dissolves gall stones in a test tube. Id; MILLS & SERVHEEN, supra note 7, at 93; MILLS ET AL., supra note 2, at 2; Jianxin Huang, Asian Perspectives on Therapeutic Value of Bear Bile and Alternatives, in PROCEEDINGS, supra note 5, at 32, 33. The success of these tests initially generated excitement in the medical community, and doctors throughout the United States began prescribing a synthesized version of UDCA as a remedy for gall stones. Interview with Marks, supra. Research and practice subsequently established, however, that UDCA is effective against gall stones only when taken in prohibitively large quantities. Id. Further, gall stones begin to form again immediately after a patient stops taking the drug. Id. For this reason, Western doctors no longer administer UDCA to dissolve gall stones. Id. The other curative effects attributed to bear gall remain unsubstantiated by research. Id. Contra Huang, supra, at 33.
Asia, the practice of Chinese traditional medicine—and the use of bear parts—spread throughout the region. Today, the bear trade thrives in at least eighteen Asian nations. Bear consumption is not limited to Asia however; traditional medicine shops sell bear galls in Asian communities throughout North America and, presumably, throughout the world. The trade to supply these markets exists wherever bears are found.

No reliable estimate exists for the volume of the bear parts trade. Much of the trade is conducted illegally and, therefore, goes unrecorded. In the United States, for example, only three shipments of bear gallbladders have been exported legally since 1992, yet scores of recent arrests demonstrate that a significant trade continues. Due to this undocumented and
misdocumented trade, national customs statistics are inconsistent with statistics reported under international conventions and data collected in visits to traditional medicine shops.\textsuperscript{32} The situation is exacerbated because many items sold as "bear gallbladder" are fake.\textsuperscript{33} One study of seized "bear" gallbladders found that forty-seven percent came from animals other than bears.\textsuperscript{34}

Although the total size of the trade remains unclear,\textsuperscript{35} the practice of traditional medicine and the use of bear parts is "popular and pervasive" in Asia.\textsuperscript{36} Indeed, renewed interest in

\textsuperscript{32} John B. Heppes & Eric J. McFadden, The Convention on International Trade in Endangered Species of Fauna and Flora, 5 B.U. INT'L L.J. 229, 236 (1987); see MILLS ET AL., supra note 2, at 31-33 (attributing inaccuracy of international trade data to unrecorded and illegal trade); Lieberman, supra note 14, at 18-19 (noting the mislabelling of Asian bear parts as American black bear parts as a reason for disparate figures). China, for instance, strictly forbids the capture or sale of any wild bear, yet China continues to export bear paws and gallbladders to the rest of Asia. MILLS & SERVHEEN, supra note 7, at 9-10, 13-14; cf. id. at 22, 27, 37 (showing import records for Hong Kong, Macau, Japan, and South Korea.) Bear parts also remain commonly available in China's domestic markets. Id. at 12. Similarly, U.S. authorities report that only three shipments of bear gall bladders have been exported legally from the United States since 1992. Lieberman, supra note 14, at 20. Bear gall bladders of reputed U.S. origin were available in South Korean markets as recently as 1995.

\textsuperscript{33} See Edgard O. Espinoza et al., The Unbearable Facts About the (Vile) Bile Trade, in PROCEEDINGS, supra note 5, at 85, 88 (reporting that, in a sample of gallbladders seized by governments in Asia, the United States, and Canada, the proportion that came from bears was 2%, 49%, and 74% respectively); Huang, supra note 23, at 34 (noting that the shortage of bear bile often leads consumers to turn to other bile substitutes).

\textsuperscript{34} Espinoza et al., supra note 33, at 88. The most frequent substitute is domestic pig. Id.

\textsuperscript{35} Servheen, supra note 28, at 31.

\textsuperscript{36} See MILLS & SERVHEEN, supra note 7, at 20 ("traditional Chinese medicine remains popular and pervasive in Hong Kong, partly because 98% of the population in Hong Kong are of Chinese origin"); Kathryn Crawford, Bear Bile Use in Asian Medicine Threatens North American Bear, ASSOCIATED PRESS, Sept. 22, 1994, available in WESTLAW, 1994 WL 10131856 (reporting that 93% of traditional doctors in Korea claimed that bear bile is an essential part of their practice). In Japan, traditional medicine is an integral part of the current health-care system and more than sixty pharmaceutical firms sell bear gall. MILLS ET AL., supra note 2, at 18. In China, where the promotion of traditional medicine is mandated constitutionally, factories produce more than fifty different medicines from bear gallbladder. MILLS & SERVHEEN, supra note 7, at 11. To meet the high demand for bear bile, and relieve pressure on wild bear populations, China maintains 10,000 live bears on bile-milking farms. Keith Highley & Suzie Chang Highley, China's Bear Farms and the Trade in Bear Parts, in PROCEEDINGS, supra note 5, at 131, 133. Chinese officials plan to
Asian traditional medicine, combined with economic growth in the major consumer nations, has expanded the demand for bear gall and other bear parts in the past decade. Economic growth has increased the number of consumers able to forego cheaper synthetic bear bile substitutes in favor of real bear gall. Rising demand for an ever more limited supply of wild bears has driven prices for bear gall and bear paws to astronomical heights, creating tremendous incentives to participate in the trade.

The United States is both a supplier and a consumer of bear
parts. Incentives to participate in the trade are less dramatic for American hunters than for poachers in poorer countries; nonetheless, frequent seizures and arrests involving large quantities of bear gallbladders and paws evidence an active and extensive North American trade supplying both domestic and export markets. Often, those involved in the trade also traffic

41. McCracken et al., supra note 9, at 39, 44 (discussing markets within the United States); see Nobbe, supra note 9 at 51, 52 (noting South Korean demand for bear gall bladders from the United States); Constance J. Poten, A Shameful Harvest: America's Illegal Wildlife Trade, Nat'l Geographic, Sept. 1991, at 106, 112 (quoting a New York State wildlife investigator as saying, "I've seen 2000 galls at one time in [New York City's] Chinatown.").

42. Mills et al., supra note 2, at 34. In Ecuador, for example, the sale of a single gallbladder can net a poacher five times the minimum monthly wage. Id. Similarly, poachers in Russia can net a month's wage from a single gallbladder. Id. U.S. wildlife officials believe hunters in the United States receive between $20 and $200 for a gallbladder. Id. The monthly per capita income in the United States ranges from around $1100 to $2200. See New York Public Library Desk Reference 778-79 (2d ed. 1993) (showing state-by-state per capita income figures from 1991). Nonetheless, U.S. hunters and traders have sufficient incentives to participate in the bear parts trade. See George Laycock, The Wild Bears 255 (1986) ("If there is big money going into the bear poacher's equipment, there is also the promise of realizing more from the bear than ever before"); see also Rod Olsen & Ralph Krenz, Trade in Bear Parts: Lessons from Law Enforcement Investigations in British Columbia, in Proceedings, supra note 5, at 67, 67 (noting that selling the gallbladder may offset part of the cost of a hunt).

43. See Catherine McCracken, Status, Management and Commercialization of the American Black Bear, (Ursus americanus), Part II, in Proceedings, supra note 5, at 54, 55 (noting "an extensive and sophisticated network" of hunters, traders and buyers of bear parts in the United States). See supra note 31 and accompanying text (discussing bear trade-related arrests). A 1993 survey of state wildlife officials confirms this conclusion. McCracken et al., supra note 9, at viii, ix. Thirty-three responding states reported that black bears and bear parts were bought and sold within their territories. Id. at 113. Eleven states reported significant internal markets specifically for bear gallbladders. Id. at 39. Of 28 states having bear populations of 1000 or more, twenty-seven reported significant external markets for bear parts. Id. Twenty states considered the trade in bear parts conducted within their jurisdictions to be "very significant" or "somewhat significant." Id. at 35. Notwithstanding this sentiment, many wildlife officials assert that the size of the bear parts trade has been exaggerated by the media and that the trade in bear parts poses no significant problem for American black bears. See supra note 13 and accompanying text (addressing this proposition). The chief of the U.S. Fish and Wildlife Service's Law Enforcement Division has recognized, however, that "the scope of illegal wildlife crime is increasing at an alarming rate" and that there exists a "lucrative black market in wildlife parts such as . . . the gall bladder from American black bears." John J. Doggett, III, Training Conservation Officers, in Proceedings of the International Conference on Improving Hunter Compliance with Wildlife Laws 49, 49 (1992) [hereinafter Hunter Compliance Proceedings].
C. IMPACT OF THE BEAR PARTS TRADE ON BEAR POPULATIONS

The lack of reliable estimates for most bear populations and the unknown size of the bear parts trade make a thorough assessment of the trade's impact on bears impossible. Scientists agree that trade for traditional medicine is irreparably damaging bear populations across Asia. The trade has affected Asiatic black bears most severely, raising concern that the species may be extinguished in some regions. The former Soviet Union also has become a major supplier of bear parts and evidence suggests that unregulated trade may be decimating its bear populations there as well.

44. Id.; see Musgrave & Stein, supra note 40, at 24.
45. See, e.g., Michael R. Felton, The American Black Bear, in BEARS, supra note 2, at 111 (noting the difficulty of estimating American black bear populations); Donald G. Reid, The Asiatic Black Bear, in BEARS, supra note 2, at 118, 119 (Asiatic black bear); John Seidensticker, The Sloth Bear, in BEARS, supra note 2, at 128, 133 (sloth bear); Christopher Servheen, The Sun Bear, in BEARS, supra note 2, at 124, 124 (the sun bear). See generally David L. Garshelis, Monitoring Effects of Harvest on Black Bear Populations in North America: A Review and Evaluation of Techniques, 10 Proc. E. Workshop on Black Bear Res. & Mgmt. 120, 120-123 (1990) (critiquing methods of establishing bear population data and cautioning against misuse of that data).
46. See supra notes 28-34 and accompanying text (discussing difficulty of measuring the extent of the bear parts trade). The lack of information about even the most fundamental aspects of the bear parts trade makes formulating a coherent, informed response to the trade extremely difficult. McCracken et al., supra note 9, at 55. Wildlife management officials, conservationists, and scientists alike cite lack of data as a source of frustration. Telephone Interview with Judith Ball, General Curator, Seattle Woodland Park Zoo (Oct. 2, 1995); Telephone Interview with Gnam, supra note 28; Telephone Interview with Debra A. Rose, Staff Consultant, Traffic-USA (World Wildlife Fund D.C.) (Oct. 10, 1995). All three groups have asserted that information gathering should be a primary focus of future conservation efforts in this area. McCracken et al., supra note 9, at 60; Mills et al., supra note 2, at 38; Perspectives from the States, Provinces, and Territories on the Trade of Bear Parts, in PROCEEDINGS, supra note 5, at 154, 155-56.
47. Mills et al., supra note 2, at 3; Servheen, supra note 5, at 3. Despite their dwindling numbers, Asian species remain the most popular sources of bear parts. Mills et al., supra note 2, at 21.
48. Servheen, supra note 4, at 214-15. In South Korea, for example, fewer than sixty Asiatic black bears remain in the wild. The trade also significantly affects Asian populations of other bear species. See Mills et al., supra note 2, at 3 (discussing the threat to the sloth, brown, and sun bears).
49. Judy A. Mills, Asian Dedication to the Use of Bear Bile as Medicine, in PROCEEDINGS, supra note 5, at 4, 5; Servheen, supra note 4, at 219; Bear Gall Trade Noted in Russian Far East, BEAR NET, July 1995, at 5, 5 (reporting that poachers are killing Russian bears at three to four times the legal kill level).
In North America, the situation is more ambiguous. Although all three North American bear species are traded to some extent, most North American bear populations remain healthy. Continued unregulated trading may, nonetheless, have significant consequences for American bears. Wildlife officials have witnessed a significant rise in poaching attributable to the bear parts trade. Although any amount of illegal

50. The American black bear is the most heavily traded North American species. Cf. McCracken et al., supra note 9, passim (discussions focus on the trade’s impact on American black bears); Proceedings, supra note 5, passim (same); Black Bear Investigations, Bear Net, July 1995, at 1 (reporting that USFWS investigations focus on American black bear). Both brown and polar bears are traded to a lesser extent. Southern Comfort: Taxidermists Indicted, Traffic USA (World Wildlife Fund D.C.), Jan. 1994, at 4, 5 (reporting seizure of black bear and polar bear parts in trade). Telephone Interview with Christopher Servheen, Co-Chair, IUCN (International Union for the Conservation of Nature) Bear Specialist Group (Oct. 11, 1995) (reporting brown bear trade); Telephone Interview with Edgard Espinoza, Deputy Director, National Fish and Wildlife Forensics Lab (Oct. 6, 1995) (reporting polar bear trade).

51. Servheen, supra note 4, at 219. Indeed, most black bear populations in the United States are believed to be stable or growing. Lieberman, supra note 14, at 19; see also McCracken et al., supra note 9, at 20 (reporting population trends for North American black bears). The U.S. Fish and Wildlife Service points to this fact as evidence that additional regulation of the bear parts trade is unnecessary. Telephone Interview with Neal, supra note 14. On the basis of such data, the U.S. Fish and Wildlife Service, and some state wildlife agencies, contend that new regulation will impose an unwarranted and unwelcome administrative burden. Lieberman, supra note 14, at 21. But see Garshelis, supra note 46, at 120-123, 140 (critiquing current methods of establishing bear population data and cautioning against misuse of that data); Sterling D. Miller, Detection of Differences in Brown Bear Density and Population Composition Caused by Hunting, 8 Proc. Int’l Conf. on Bear Res. & Mgmt. 393, 393, 403 (1988).


The U.S. Fish and Wildlife Service estimates that for each of the 40,000 black bears killed legally in the United States and Canada each year, another bear is illegally killed by poachers. Poachers Take Aim at More Bears, Calgary Herald, Sept. 11, 1992, at A2 (citing statement by John Doggett, Chief of Law Enforcement Division, U.S. Fish and Wildlife Service). Field experiments suggest that the incidence of poaching may, in fact, be much higher. See Kirk H. Beattie, Warden Perceptions of Hunter Compliance in the United States from 1986-1991, in Hunter Compliance Proceedings, supra note 43, at 115, 116
killing will have an impact on bear populations, \(^{53}\) poaching to supply the gallbladder market may prove particularly harmful. Because the size of a bear's gallbladder does not depend on the size or age of the bear, poachers have every incentive to kill indiscriminately—slaughtering cubs as well as adults. \(^{54}\) By reducing the number of cubs that live to reproduce, poaching may affect a bear population in ways that will not become evident for several years. \(^{55}\)

Poaching-induced changes to population structure will particularly affect small, geographically isolated populations, which lack the resilience of larger populations. \(^{56}\) Several such vulnerable populations of both black and grizzly bears exist in the lower forty-eight states. \(^{57}\) Habitat fragmentation further subdivides many of these populations, including the grizzlies, into small, local breeding groups. \(^{58}\) Uncontrolled poaching will affect these groups very quickly, irrevocably damaging a genetically distinct population in the span of a few years. \(^{59}\)

(describing poaching simulations in which wardens failed to detect 96% of violations by hired "poachers"). Poaching, by its very nature, is difficult to monitor. Most wildlife crimes are not witnessed, and even observed violations generally go unreported. \(\text{Id. at } 115.\)

53. Telephone Interview with Servheen, \(\text{supra note 50.}\)

54. Nobbe, \(\text{supra note 9, at } 52.\)

55. Andrew E. Derocher, \textit{Why Bears Are So Vulnerable, in BEARS, supra note 2, at 216, 216; see also LAYCOCK, supra note 42, at 259 (noting that poaching has affected age structure of California black bear population); Poten, supra note 41, at 111 (noting significant decline in average age of bears killed in southern Appalachia).}

56. Michael R. Pelton, \textit{Black Bears in the Southeast: To List or Not to List?, 10 PROC. E. WORKSHOP ON BLACK BEAR RES. & MGMT. 155, 155 (1990); see also Derocher, supra note 55, at 216 (asserting that, in small populations, removing even a few adult females for protection purposes can result in local extinction).}

57. The 1000 grizzlies \textit{(U arctos horribilis)} remaining in the lower 48 states are divided among several small populations. Mike Roy & Hank Fischer, \textit{Bitterroot Grizzly Recovery: A Community-Based Alternative, ENDANGERED SPECIES UPDATE, Dec. 1995, at 1, 1.} Federal regulators classify grizzlies as threatened. \(50 \text{C.F.R. } \S 17.11 (1994).\) Fourteen states have a black bear population of 500 or fewer bears. \textit{MCCrackEN ET AL., supra note 9, at 17.} Black bears are threatened or endangered in eight states. \(\text{Id. at } 20.\)

58. See, e.g., Pelton, \(\text{supra note 56, at 155 (noting that human land use changes have created thirty or more small, isolated black bear populations in the Southeastern coastal plain).}\)

59. \textit{See id.} (noting that scientists recognize sixteen subspecies of American black bear and that small populations in these groups are vulnerable to unregulated hunting); Derocher, \(\text{supra note 55, at 216 (asserting that, in small populations, removing even a few adult females can result in local extinction). To the extent that these local populations are reproductively isolated and genetically unique, threats to their survival are significant.}
Although polar bear populations are currently healthy, the species remains vulnerable. Many traditional medicine practitioners prefer polar bear gall second only to that of the Asiatic black bear. In light of the growing rarity of the Asiatic black bear, this preference should be cause for concern.

II. EXISTING REGULATORY MECHANISMS DO NOT ADDRESS THE TRADE ADEQUATELY

A number of mechanisms exist for regulating the bear parts trade. International agreements restrict the movement of bear parts across national borders. Federal laws regulate the killing of, or interstate trade in, certain types of bears. State wildlife codes impose hunting restrictions and other controls on the trade. These mechanisms have proven inadequate, both singly and in concert, to control the bear parts trade.

A. CITES: AN INTERNATIONAL APPROACH TO REGULATION

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) establishes guidelines for the international wildlife trade. With 125 member nations, CITES has been called "perhaps the most successful of all international treaties concerned with the conservation of wildlife." CITES addresses only international aspects of the bear trade; it does not regulate portions of the trade occurring wholly within U.S. borders. Inadequate implementation and textual loopholes, moreover, make it possible for smugglers to

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60. Servheen, supra note 4, at 219.
61. MILLS ET AL., supra note 2, at 4.
63. Lieberman, supra note 14, at 17. Of the nations participating in the bear parts trade, all but five are CITES members. See CITES: List of Parties as of 9 November 1995, available in WORLD WIDE WEB at http://wcmc.org.uk/convent/cites/cn_ctprt.html (also on file with Minnesota Law Review). South Korea has entered a reservation to the agreement with respect to Appendix II bear species of CITES. MILLS ET AL., supra note 2, at 21. That reservation is scheduled to expire in July 1996. Id.
64. SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 240 (1985).
bypass entirely the controls of the Convention, thereby undermining attempts to control the international trade as well.

CITES establishes three categories, or "appendices," of species subject to varying levels of trade regulation. All eight bear species are now listed in either Appendix I or Appendix II. CITES accords the highest protection, Appendix I listing, to species that are threatened with extinction and whose chance for survival may be affected by trade. The Convention imposes strict controls on trade in Appendix I species and, with some important exceptions, limits trade to noncommercial

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66. See infra notes 80-97 and accompanying text (discussing difficulties in CITES implementation).
67. CITES defines "species" as "any species, subspecies, or geographically separate population thereof." CITES, supra note 62, art. I(a), 27 U.S.T. at 1090, 993 U.N.T.S. at 245. Recognizing that a species may fare differently throughout its range, this definition allows populations within a species to be separated out for differential treatment. DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES 5 (1989); LYSTER, supra note 64, at 242. A species endangered in a specific geographic area may be listed even if the overall population of the species is not threatened. FAVRE, supra, at 5, 32. This flexibility is essential to dealing with wide-ranging species such as the brown bear, which may be plentiful in certain areas but near extinction in others. See id. at 7 (noting differential listings for various populations of brown bear); cf. 50 C.F.R. § 23.23 (1994) (listing brown bear populations subject to CITES controls). Subdivision within species, however, can render impossible the already difficult task of distinguishing tradeable from nontradeable specimens, and facilitate laundering of more strictly controlled animals. FAVRE, supra, at 6.
68. Appendix I lists the following species: giant panda, Malayan sun bear, sloth bear, Asiatic black bear, spectacled bear, brown bear (Mexican grizzly, Chinese, Mongolian, Bhutanese, Tibetan Blue, and Red populations); Appendix II lists the American black bear, brown bear, and polar bear (all populations not listed in Appendix I).

Because only Appendices I and II are relevant to the present discussion, this Note will not discuss Appendix III in depth. When a country imposes protective regulations on a species found within its territory, it may seek international cooperation in enforcing those regulations by listing the species in Appendix III. CITES, supra note 62, art. II, para. 3, 27 U.S.T. at 1092, 993 U.N.T.S. at 246. Shipments of Appendix III species must be accompanied by a certificate of origin and, if the originating country is the one which listed the species on Appendix III, an export permit. CITES, supra note 62, art. V, para. 3, 27 U.S.T. at 1097, 993 U.N.T.S. at 248.
69. CITES, supra note 62, art. II, para. 1, 27 U.S.T. at 1092, 993 U.N.T.S. at 245. A species whose population is seriously declining will be included in Appendix I even if there is "only a probability of trade." LYSTER, supra note 64, at 243.
70. Article VII provides exemptions to the prohibitions and requirements of the Convention. The most important exemptions are those for pre-Convention specimens, for personal and household effects, and captive-bred or
transactions. Persons seeking to import or export specimens of an Appendix I species must obtain permits from both the exporting and the importing country. A country may grant such a permit only if trade "will not be detrimental to the survival" of the species.

CITES affords a lower level of protection for species that are not currently threatened with extinction but may become threatened unless trade in the species is regulated. All three

artificially propagated specimens. CITES, supra note 62, art. VII, paras. 2-5, 27 U.S.T. at 1099-1100, 993 U.N.T.S. at 249; see infra notes 92-97 and accompanying text (discussing effect of these exemptions on control of bear parts trade).

71. CITES, supra note 62, art. III, para. 3(c), 27 U.S.T. at 1094, 993 U.N.T.S. at 246. Trade is defined very broadly as "export, re-export, import and introduction from the sea." Id. art. I(c), 27 U.S.T. at 1091, 993 U.N.T.S. at 245. Significantly, however, the Convention fails to define "commerce" or "commercial purpose." Favre, supra note 67, at 82; cf. John L. Garrison, The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Debate Over Sustainable Use, 12 PACE ENVTAL. L. REV. 301, 346-351 (1994) (discussing the on-going debate about the proper definition of these terms). The regulations governing the import or export of wildlife into or out of the United States define "commercial activity" as "all activities of industry and trade." 16 U.S.C. § 1532(2) (1994).

72. The Convention defines "specimen" to include both living and dead animals and plants, and "readily recognizable" parts or derivatives thereof. CITES, supra note 62, art. I(b), 27 U.S.T. at 1090-91, 993 U.N.T.S. at 245.


74. CITES, supra note 62, art. III, paras. 2(a), 3(a), 27 U.S.T. at 1093, 993 U.N.T.S. at 246. Favre describes this requirement as "the final and strongest line of protection from extinction by international trade for listed species." See Favre, supra note 67, at 62. The importing country must find not only that the transaction itself is not detrimental to the species, but also that the purposes for which the trade is conducted are not detrimental to the survival of the species. CITES, supra note 62, art. III, para. 3(a), 27 U.S.T. at 1093, 993 U.N.T.S. at 246. This language imposes an additional check against exploitative uses of endangered species. Some range states argue that the requirement for an import as well as an export permit is an affront to their sovereign rights over their resources. Favre, supra note 67, at 70. These states argue that the exporting nation's "no detriment" determination provides sufficient assurance that its species are being protected; and that the import permit requirement essentially gives the importing state the power to veto this determination. Id.; see also Garrison, supra note 71, at 344-45 (discussing Zimbabwean resolution that would redefine the "no detriment" requirement in terms of "sustainable use."). The exporting country also must determine that the specimens in trade have not been obtained in violation of its own laws. CITES, supra note 62, art. IV, para. 2(b), 27 U.S.T. at 1095, 993 U.N.T.S. at 247.

75. CITES, supra note 62, art. II, para. 2(a), 27 U.S.T. at 1092, 993 U.N.T.S. at 245. Appendix II also contains "look alike" species: species that
North American bear species are listed in Appendix II.\textsuperscript{76} Unlike Appendix I species, CITES allows commercial trade in Appendix II species. Such trade does not require an import permit, but does require an export permit.\textsuperscript{77} Each exporting country must monitor its exports of Appendix II species and, if necessary, take protective measures to ensure species survival.\textsuperscript{78}

In theory, CITES creates an excellent mechanism for controlling international portions of the bear trade. In practice, however, it has proven inadequate to the task. Many CITES parties have failed to enact legislation or implement the trade controls necessary to meet their commitments under the agreement.\textsuperscript{79} Countries that have implemented CITES have found enforcing its provisions nearly impossible.\textsuperscript{80} The tremendous commitment of personnel and resources necessary to monitor all trade crossing national borders on a daily basis far outstrips the resources available for the task in even the most developed countries.\textsuperscript{81}
The United States, for example, employs only seventy-five wildlife inspectors\textsuperscript{82} to monitor the millions of freight containers that enter the country annually.\textsuperscript{83} Although inspectors focus their attention on those shipments specifically declared as wildlife products,\textsuperscript{84} there are 90,000 such shipments each year, ranging in size from trailer-sized freight containers to individual specimens.\textsuperscript{85} Not surprisingly, eighty percent of imported goods pass into the country without examination at a designated port of entry.\textsuperscript{86} The odds that inspectors will not discover an illegal shipment thus weigh heavily in favor of wildlife traffickers.\textsuperscript{87}

Those shipments that do come under scrutiny may still elude detection. Agents conducting wildlife inspections often lack the training necessary to distinguish prohibited from nonprohibited products.\textsuperscript{88} This problem is particularly acute in the context of the bear trade. Bear gallbladders generally are indistinguishable from the gallbladders of many other animals,

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\textsuperscript{83} See Michael Tennesen, Poaching, Ancient Traditions, and the Law, AUDOBON, July-Aug. 1991, at 90, 95 (noting that three million cargo containers pass through Los Angeles harbor each year).
\textsuperscript{84} Kosloff & Trexler, supra note 65, at 344.
\textsuperscript{85} Anderson, supra note 52, at 33.
\textsuperscript{86} Kosloff & Trexler, supra note 65, at 238 n.52; see Laurence R. Jahn, Summary: Management and Hunter Compliance, in HUNTER COMPLIANCE PROCEEDINGS, supra note 43, at 93, 96 (noting that wildlife officials inspect only a small percentage of the millions of sealed freight containers entering the country annually).
\textsuperscript{87} See Lieberman, supra note 14, at 21 ("[T]here is no way that we can know when a shipment is being exported, particularly due to the ease of hiding gallbladders"). In 1983, the Fish and Wildlife Service conducted, for the first time, a random inspection of fifty freight containers at U.S. customs houses. Thirty of the containers contained illegal wildlife; one shipment contained wildlife contraband valued at $700,000. Kosloff & Trexler, supra note 65, at 344.
\textsuperscript{88} FAVRE, supra note 67, at 20-21; David S. Favre, Tension Points Within the Language of the CITES Treaty, 5 B.U. INT'L L.J. 247, 260 (1987).
\end{flushleft}
some of which may be traded legally. Once the crystallized gall is removed from the gallbladder, only laboratory testing will identify its source. Because of the near impossibility of identification, agents often limit their inspections to items specifically labeled as bear gallbladders. It takes little effort to elude such a system.

Two important exceptions to CITES controls further impair the Convention’s ability to control the bear parts trade. Under Article VII, all personal and household effects are exempt from CITES controls. Items worn as clothing, carried in luggage, or included in shipments of household belongings may move across international borders without permits of any kind. The

89. MILLS & SERVHEEN, supra note 7, at 82-83 (noting that laboratory analysis is required to distinguish gallbladders of one species from another and the CITES enforcement difficulties this engenders); see also Telephone Interview with Espinoza, supra note 33 (stating that a laboratory often cannot distinguish between the gallbladders of different bear species). The elevation of all bear populations to Appendices I or II has somewhat alleviated this latter problem. Now, any bear gallbladder moving in international trade without CITES permits is prima facie illegal.

90. See FAVRE, supra note 67, at 260 (“If a customs agent saw a glass jar full of powder, how would he know it was a part of a black bear?“); Tennesen, supra note 83, at 90, 95 (“[W]e couldn’t identify eighty percent of our evidence. And we were afraid some . . . lawyer would stand up in court and ask us to prove what we had.”) (quoting a Los Angeles wildlife inspector). Once separated from the gallbladder itself, the bile of different bear species cannot be distinguished and officials will be unable to determine what level of CITES controls apply to the specimen. Neal, supra note 14.

91. See GASKI & JOHNSON, supra note 11, at 8 (noting that shipments often go undetected because they are labeled as food rather than wildlife products); Kosloff & Trexler, supra note 65, at 344 (noting that inspectors focus on shipments actually labeled as prohibited wildlife products).

92. CITES, supra note 62, art. VII, para. 3, 27 U.S.T. at 1099-1100, 993 U.N.T.S. at 249. A second CITES exception that increasingly will be important to bear trade regulation is that for captive-bred specimens of listed species. Id., art. VII, para. 4, 27 U.S.T. at 1100, 993 U.N.T.S. at 249. As bile production on Chinese bear farms increases, see discussion supra note 36, greater quantities of farmed bile can be expected to enter international trade. See, e.g., MILLS ET AL., supra note 2, at 18, 26 (reporting Chinese-farmed bile in Japan and Taiwan).

93. FAVRE, supra note 67, at 180. The United States applies the exemption to items “accompanying personal baggage or part of a shipment of the household effects of persons moving their residences to or from the United States.” 50 C.F.R. § 23.13(d). CITES does not define “personal” and “household effects,” but specifies two classes of activities that are excluded from the exemption and remain subject to regulation. Appendix I specimens are subject to regulation if “they were acquired by the owner outside his State of usual residence, and are being imported into that State.” CITES, supra note 62, art. VII, para. 3(a), 27 U.S.T. at 1099, 993 U.N.T.S. at 249. Appendix II specimens are subject to
transport of bear parts for *commercial purposes* probably falls outside the personal exemptions.\(^9\) In practice, however, customs agents rarely inspect the luggage or clothing of travellers passing through customs.\(^9\) Bear paws and gallbladders fit readily into suitcases or purses,\(^9\) and a number of seizures at airports suggest this may be the most common method of transporting them.\(^9\)

**B. FEDERAL MECHANISMS FOR REGULATING THE TRADE**

Federal law has not directly addressed the bear parts trade. Nonetheless, portions of the trade fall within the scope of existing federal law. The Endangered Species Act prohibits any wildlife trade conducted in violation of the United States' obligations under CITES and also prohibits the taking or sale of certain bear species.\(^9\) The Lacey Act prohibits trade in any bear parts that have been taken or traded in violation of a state regulation if they were acquired outside the owner's country of residence, they were removed from the wild in the country where the owner acquired them, they are being imported into the owner's country of residence, and the country where the specimens were acquired requires the prior grant of an export permit for any export of such specimens. *Id.*, art. VII, para. 3(b), 27 U.S.T. at 1099, 993 U.N.T.S. at 249. These controls have proven difficult to implement, however, and black marketers commonly transport bear parts in personal luggage. See *infra* notes 95-97.

94. FAVRE, *supra* note 67, at 182 (noting consensus among CITES Parties that personal exemption cannot be a pretence for commercial activity); see 50 C.F.R. § 14.15 (a) (stating that personal exemptions cover wildlife products "not intended for sale").

95. FAVRE, *supra* note 67, at 182; Lieberman, *supra* note 14, at 21; Telephone Interview with Mike Carpenter, Biologist, Office of Management Authority, U.S. Fish and Wildlife Service (Oct. 9, 1995) (stating that any item carried in baggage or on the person effectively falls within the personal effects exemption).

96. MCCracken et al., *supra* note 9, at 4.

97. Mills et al., *supra* note 2, at 38; Olsen & Krenz, *supra* note 42, at 70; and see Canadian Wildlife Convictions, TRAFFIC USA (World Wildlife Fund, D.C.), June 1993, at 6 (reporting arrest of Korean citizen who dipped bear gallbladders in chocolate and placed them in his luggage to disguise them while passing through airport customs).

or foreign law.\textsuperscript{99} The Pelly Amendment authorizes the President to use economic measures to persuade other countries to control the bear parts trade within their own borders.\textsuperscript{100} Despite this seemingly thorough coverage, however, federal law has failed to control the bear parts trade. By failing to address the trade directly, federal law leaves legal and practical loopholes through which black-marketeers continue to pass largely unimpeded.

1. ESA: CITES Implementation and Species Protection

The Endangered Species Act of 1973 (ESA)\textsuperscript{101} is the most comprehensive federal law for the protection of wildlife.\textsuperscript{102} The ESA provides for the conservation of endangered and threatened species and their habitats, and implements CITES in the United States.\textsuperscript{103} The ESA has been moderately successful in protecting endangered species.\textsuperscript{104} It has been less successful in curtailing the trade in bear parts for two reasons. First, the ESA provisions that apply to international trade in bear parts have not been effectively enforced, and may be largely unenforceable.\textsuperscript{105} Second, the ESA provisions imposing domestic trade and hunting restrictions do not apply to most U.S. bear populations.\textsuperscript{106}

The Endangered Species Act incorporates the provisions of CITES into the domestic law of the United States.\textsuperscript{107} The ESA prohibits both trade in wildlife contrary to the provisions of CITES and possession of any wildlife so traded.\textsuperscript{108} Because all

\textsuperscript{99} See infra notes 126-134 and accompanying text (discussing basic operation of the Lacey Act).
\textsuperscript{100} See infra notes 147-150 and accompanying text (discussing operation of the Pelly Amendment).
\textsuperscript{102} Karin P. Shelden, \textit{Wildlife, in SUSTAINABLE ENVIRONMENTAL LAW} 279, 303 (Celia Campbell-Mohn et al. eds., 1993).
\textsuperscript{103} 16 U.S.C. § 1531(b); 16 U.S.C. § 1537(a).
\textsuperscript{105} See supra notes 79-97 and accompanying text (discussing the near impossibility of effective control of the wildlife trade in general and the illegal bear parts trade in particular).
\textsuperscript{106} See infra notes 119-120 and accompanying text (discussing the lack of legal protections given to bears under the ESA).
\textsuperscript{107} 16 U.S.C. §§ 1537a, 1538(c) (1994); 50 C.F.R. § 23 (1994).
bears are listed in the CITES appendices, the ESA prohibits their import or export without the requisite permits. As the preceding section demonstrates, however, these trade controls are easy to evade. Thus, despite an active export trade in bear gallbladders, applicants have submitted only four requests for export permits since June 1992.

For certain species, the ESA imposes additional trade controls independent of those required by CITES. Pursuant to listing criteria enumerated in the Act, the Secretary of the Interior maintains a list of endangered and threatened species separate from the CITES appendices. The level of protection

109. See supra note 68.

110. See supra notes 72-74, 77 and accompanying text (discussing CITES permit requirements for international trade in listed species). ESA imposes substantial civil and criminal penalties for violations of such provisions. Persons who knowingly violate any provision of CITES or the ESA, or any regulation promulgated or permit issued thereunder, are subject to a maximum civil penalty of $25,000 for each offense, with each violation considered a separate offense. 16 U.S.C. § 1540(a)(1) (1994) (codified as amended by Act of Oct. 7, 1988, P.L. 100-478, § 1007(a), 102 Stat. 2309). Violators also are subject to a maximum criminal sanction of $50,000, imprisonment for up to one year and revocation of any federal export or import permits or licenses or hunting permits. 16 U.S.C. § 1540(b) (codified as amended by Act of Oct. 7, 1988, P.L. 100-478, § 1007(b), 102 Stat. 2309). Specimens moved in interstate or foreign commerce in contravention of the Act or of CITES are subject to seizure and forfeiture. 16 U.S.C. § 1540(e)(4) (1994).

111. See supra notes 79-97 and accompanying text (discussing difficulty of controlling international wildlife trade in general and illegal trade in bear parts in particular).

112. See supra note 31 (noting recent arrests that demonstrate an active bear parts trade in this country).

113. Of those four, three were granted. Interview with Gnam, supra note 28. The United States considers the American black bear a look-alike species but treats export requests no differently for American black bear than for other Appendix II species. Interview with Carpenter, supra note 95. The USFWS assumes that any bear taken legally under state law satisfies the “no detriment” requirement imposed by CITES. Id.; see supra note 74 and accompanying text (discussing “no detriment” requirement).

114. 16 U.S.C. § 1533(c) (1994). The lists are published at 50 C.F.R. § 17.11 (1994). ESA, like CITES, also provides for listing of look-alike species. Similarity of appearance between the species concerned is determined upon a finding of “substantial difficulty” in differentiating them “at the point in question.” 16 U.S.C. § 1533(e) (1994). In other words, at the stage of preparation or processing in which trade is taking place.

The Act’s listing criteria include such factors as habitat destruction or modification, overutilization for any purpose, disease or predation, and inadequacy of existing regulatory mechanisms. 16 U.S.C. § 1539(a)(1) (1994). As with CITES, the ESA allows differential treatment for populations within the same species. Arguably, the ESA definition narrows protection somewhat
afforded a species depends on whether that species is listed as "endangered" or "threatened." The ESA subjects endangered species, those in peril of extinction throughout all or much of their range,\(^\text{116}\) to strict protection and stringent trade controls. With limited exceptions, the ESA prohibits the taking, possessing, selling, or transporting in interstate or foreign commerce of any endangered species.\(^\text{116}\)

By contrast, the Act does not limit trade in species listed as threatened. Rather, it directs the Secretary of the Interior to issue any regulations "necessary and advisable" to conserve such species.\(^\text{117}\) The Secretary may restrict trade in a threatened species if he or she deems it necessary, but the ESA does not mandate such restrictions.\(^\text{118}\)

While ESA and CITES impose a legal framework for controlling the international trade in bears, they do not impose similar controls on the trade occurring wholly within the United States. No domestic bear population qualifies for endangered status under the ESA.\(^\text{119}\) Only the grizzly bear and a single subspecies of black bear are listed as threatened.\(^\text{120}\) Federal by requiring that sub-populations represent a "distinct population segment" that "interbreeds when mature." \(16\) U.S.C. § 1532(16) (1994) (emphasis added); cf. Notice, 61 Fed. Reg. 4722 (1996) (discussing USFWS interpretation of this requirement).

A species need not be native to the United States to be listed under ESA. Cf. \(16\) U.S.C. § 1533(b)(1) (1994) (noting that protective measures by foreign nations may be considered in listing decisions). The Bactrian Camel of Mongolia and China, for example, appears alongside the Woodland Caribou of the northern United States and Canada. 50 C.F.R. § 17.11 (1994). Both species are subject to the same trade and possession restrictions within the United States. \(\text{Id.}\)


\(^{119}\) 50 CFR § 17.11 (1994).

\(^{120}\) \(\text{Id.}\). The Louisiana black bear is a black bear subspecies found in Texas, Mississippi, and Louisiana. For "look-alike" reasons, other black bear populations in range states of the Louisiana black bear also receive protection. 50 C.F.R. § 17.40 (1994). Non-U.S. bear populations listed as endangered include the Mexican grizzly bear, Chinese and Tibetan brown bears, Italian populations of brown bear, and the Baluchistan black bear. 50 CFR § 17.11 (1994). The application of ESA protections to the polar bear is waived, 16 U.S.C. § 1543 (1994), to the extent that the ESA is less stringent than the protections afforded that species under the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1421(h) (1994).
regulations generally prohibit the killing, possession, or interstate sale of these bears or their parts. Aside from these restrictions, however, the domestic trade in all other bears lies beyond the scope of the ESA. Indeed, given the difficulty of distinguishing the gallbladders of different species of bear, the ESA affords even the two listed populations little effective protection.

2. The Lacey Act: Giving Teeth to Wildlife Laws

The federal Lacey Act offers the greatest promise of controlling the trade in bears and bear parts. First enacted in 1900, the Lacey Act is the country's oldest national wildlife protection statute and the most effective federal instrument for controlling illegal trade in wildlife. The Act has proven ineffective against the bear parts trade, however, due to the lack of a uniform body of laws upon which to base Lacey actions.

The Lacey Act makes it a federal offense to buy, sell, or transport in interstate commerce any wildlife specimen previously taken or possessed in violation of a federal, state, or foreign law. The Act defines "law" broadly to include any law, treaty, regulation, or Indian tribal law that regulates the taking, possession, or sale of wildlife. By defining "law" in this way, and imposing heavy civil and criminal penalties for violators, the Lacey Act significantly strengthens state wildlife

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121. 50 C.F.R. §§ 17.40(b)(i)(A), and (b)(iii)-(iv) in conjunction with § 17.32.
122. See supra notes 89-90 and accompanying text.
125. See BEAN, supra note 98, at 105 (characterizing Lacey as the "cornerstone of federal efforts to conserve wildlife through the regulation of commerce.")
127. 16 U.S.C. § 3371(d) (1994). This definition of law includes administrative regulations of state and foreign governments, regardless of whether those regulations impose civil or criminal sanctions. Salmon, 871 F.2d at 828-29; accord United States v. Lee, 937 F.2d 1388, 1392 (9th Cir. 1991). The regulation at issue must be "related" to the control of wildlife. See Anderson, supra note 52, at 74-75 (discussing the "wildlife relatedness" requirement).
128. In addition to forfeiture requirements, 16 U.S.C. § 3374 (1994), the Act imposes civil penalties of up to $10,000 for each violation; 16 U.S.C. § 3373(a)(1); and criminal penalties of up to $10,000 and one year in prison for
laws and game codes, U.S. treaties, including CITES, and foreign
laws. To establish a Lacey offense, a prosecutor must prove
two separate violations. First, the Act requires a violation
of some underlying state, federal, or foreign law governing the
wildlife specimen at issue. One commentator has described
this as the requirement of a “taint.” After establishing that
a specimen is tainted, the prosecutor must prove the defendant
knew or should have known of the taint and committed an
offense prohibited by the Act. If the requisite knowledge
exists, a defendant may be guilty of a Lacey offense without
having herself violated the underlying law. This makes the
Lacey Act particularly potent against traffickers who are not
poachers themselves.

Despite the strength of its provisions, the Lacey Act
encounters problems in the context of the bear parts trade,
where it is often difficult to prove a violation of underlying law.
In the international arena, Lacey Act prosecution might be based
on a violation of CITES or on a foreign law respecting the
bear parts trade. Thus, it affords an excellent legal basis for
misdemeanor violations, 16 U.S.C. § 3373(d)(2), or $20,000 and five years in
prison for felony violations. 16 U.S.C. § 3373(d)(1). Congress recently increased
the fines for all federal criminal violations, raising the maximum penalty for
Lacey Act violations to between $100,000 and $500,000 depending on the level
of the offense and the nature of the offender. See Anderson, supra note 52, at
71 (discussing recent increases in criminal sanctions under the Lacey Act).

129. Anderson, supra note 52, at 30; see also Jennifer Zoe Brooks, A Survey
of the Court Enforcement of International Wildlife Trade Regulations Under
(notting that Lacey often provides for stricter penalties than those authorized
for violation of the underlying state law).

130. See Anderson, supra note 52, at 59-61 (discussing Lacey’s “two-step
violation scheme”).

131. 16 U.S.C. § 3372(a); United States v. Carpenter, 933 F.2d 748, 750 (9th
Cir. 1991).

132. Anderson, supra note 52, at 60. The “taint” attaches when the specimen

133. 16 U.S.C. §§ 3373(a)(1), (d), 3374(a)(2) (1994). The contraband involved
is subject to forfeiture regardless of the defendant’s culpability. 16 U.S.C.
§ 3374(a) (1994).

134. United States v. Lee, 937 F.2d 1388, 1393 (9th Cir. 1991)

135. See supra note 63 (noting that most nations involved in the bear parts
trade are CITES members).

136. In 1991, 15 of 18 Asian nations restricted or regulated the trade in
bears and bear parts. See MILLS & SERVHEEN, supra note 7, at 85. China, for
example, prohibits the sale of gallbladders from wild bears. MILLS ET AL., supra
note 2, at 6. Hong Kong requires licensing of gallbladder traders. Id. at 12.
Taiwan prohibits trade in, or possession of, bear galls from all species except
reaching those who smuggle bear parts into the country. As previously noted, however, smugglers are rarely caught in the first place.137 Even if a smuggler is caught, it may prove impossible to determine the true origin of the smuggled bear parts. Without that information, a prosecutor cannot establish that another country's law has been violated.138

To base a Lacey offense on a federal violation, a prosecutor must identify a federal law that covers the specimen in question. The Endangered Species Act is not sufficiently broad in this respect: unless the specimen has moved in international trade, the ESA will only apply to grizzly or Louisiana black bears.139 Even where one of these subspecies is involved, the difficulty of distinguishing between the gallbladders of different species makes prosecution difficult.140 While certain other laws will apply to the bear trade in limited circumstances,141 the federal framework remains too disjointed to undergird most Lacey prosecutions.

The interaction between the Lacey Act and state wildlife laws and game codes might be expected adequately to address the domestic trade in bear parts. Yet a lack of uniformity among the states undermines this expectation.142 Because the various states have vastly divergent laws regarding bear hunting and the sale of bear parts143 and because the gallbladders of different bear populations are virtually indistinguishable, black-

the American black bear. Id. at 26.

137. See supra note 87-91 and accompanying text (discussing the ease with which smugglers can avoid detection).

138. Indeed, enforcement officials often encounter difficulty even determining what law governs a particular animal in a particular country. Rick Parsons, How Regulations Affect the Hunter, in HUNTER COMPLIANCE PROCEEDINGS, supra note 43, at 43, 44.

139. See supra notes 119-122 and accompanying text (noting that ESA protections of domestic bears apply only to listed populations, such as the grizzly bear and the Louisiana black bear).

140. See supra notes 89-91 and accompanying text (discussing the difficultly involved).

141. Trade in polar bear parts, for example, may violate the Marine Mammal Protection Act, 16 U.S.C. §§ 1371(a) (1994). Poaching bears in a national park would violate the National Park Service Organic Act. 16 U.S.C. § 3 (1994); see also Anderson, supra note 52, at 36 n.52 (discussing smuggling, conspiracy, and tax laws); Kosloff & Trexler, supra note 65, at 345 (discussing smuggling and customs laws).

142. See discussion infra notes 165-170 and accompanying text (discussing enforcement difficulties engendered by divergent state laws on this issue).

143. Interview with Neal, supra note 14.
marketeers can easily launder parts of illegally killed animals through states in which the taking would be legal. In light of the patchwork of state laws on this matter, Lacey Act enforcement based on those laws becomes difficult and erratic at best.

3. **Pelly Amendment: Using Diplomatic Pressure to Control the Trade**

The Pelly Amendment to the Fisherman's Protective Act employs different conservation tools than the ESA and the Lacey Act. Under the Pelly Amendment, the United States government may impose economic sanctions on other nations when it determines that those nations are violating their environmental obligations to the international community. The Pelly Amendment provides a means of reducing the international bear parts trade by pressuring other nations to regulate the activities of their own citizens and control the trade within their own borders.

The Pelly Amendment directs the secretaries of Interior and Commerce to notify the President formally when they determine that nationals of another country are acting in a way that "diminishes the effectiveness" of an international environmental agreement such as CITES. Upon receiving such notice, or "certification," the President may, at his discretion, suspend

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144. See infra notes 168-169 and accompanying text.
148. 22 U.S.C. § 1978(a)(4) (1994). Within sixty days of the certification, however, the President must report to Congress on any action taken or not taken, and explain the reasons why a full embargo was not ordered. 22 U.S.C. § 1978(b) (1994).

The President's decisions to threaten or impose trade sanctions sometimes may be based more on political and economic expediency than environmental necessity. See Charnovitz, supra note 147, at 768-69 (discussing decisions by Presidents Bush and Clinton not to sanction Norway for violating the
any or all trade relations with the certified country.\(^{149}\) Ideally, the economic threat posed by trade suspension will encourage the target country to rethink its environmental policy and take steps to improve its environmental performance.\(^{150}\)

The U.S. Office of Management Authority has investigated countries involved in the bear trade for possible Pelly certification but has not yet made a determination on the matter.\(^{151}\) Pelly sanctions might be used to encourage the major consumer nations to comply with their own laws\(^ {152}\) and their CITES obligations respecting the bear trade.\(^{153}\) Nonetheless, several factors counsel against the use of sanctions. Unilateral trade measures typically are ill-received by the international community,\(^{154}\) particularly when a nation applies them unevenly or

International Whaling Convention); id. at 771-72 (discussing President Clinton's decision to sanction Taiwan for its on-going trade in tiger and rhinoceros parts while not sanctioning China for the same trade); Christine Crawford, Conflicts Between the Convention on International Trade in Endangered Species and the GATT in Light of Actions to Halt the Rhinoceros and Tiger Trade, 7 GEO. INT'L ENVTL. L. REV. 555, 569-570 & nn.115-117 (1995) (citing and then rebutting criticism of Clinton's decision not to sanction China).


151. Interview with Gnam, supra note 28.

152. See supra note 136 (noting national laws in countries participating in the bear parts trade).

153. See supra note 67-78 (indicating CITES membership of participating nations); notes 68-79 (discussing CITES rules).

154. Charnovitz, supra note 147, at 758, 774; see TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES, supra note 150, at 74 (reporting the perspective of the Preparatory Committee for the U.N. Conference on Environment and Development that countries should "avoid unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country"); Robert E. Hudec, GATT Legal Restraints on the Use of Trade Measures Against Foreign Environmental Practices, in 2 FAIR HARMONIZATION: PREREQUISITES FOR
inequitably to different countries.\textsuperscript{155} Trade sanctions also run the risk of violating GATT.\textsuperscript{165} Moreover, the United States should be reluctant to pressure other countries to control the trade in bear parts when the United States itself has failed to do so.\textsuperscript{157}

Despite these concerns, the threat of Pelly Amendment sanctions has proven reasonably effective in pressuring other nations to come into compliance with CITES and other environmental treaties.\textsuperscript{158} Pelly certification thus remains a viable option should less aggressive measures prove unsuccessful.

\textsuperscript{155} \textit{Cf. supra} note 148; \textit{infra} note 156 (discussing economic and political influences on Pelly decisions and differential application of Pelly sanctions to China and Taiwan).

\textsuperscript{156} \textit{See generally} Charnovitz, \textit{supra} note 147, \textit{passim} (analyzing GATT-Pelly Amendment relationship); Crawford, \textit{supra} note 148, at 581-84 (discussing possible GATT-Pelly Amendment conflicts). Two GATT panels have already concluded that U.S. trade restrictions imposed under the Marine Mammal Protection Act were inconsistent with the GATT. \textit{TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES, supra} note 150, at 46-50 (discussing GATT Panel findings in the “Tuna Dolphin” cases). The Pelly Amendment itself requires that trade sanctions be GATT-consistent. 22 U.S.C. § 1978(4).

Charnovitz has suggested that the United States' differential treatment of China and Taiwan for their participation in the tiger and rhinoceros trade, \textit{supra} note 148, would have violated GATT were Taiwan a GATT member. Charnovitz, \textit{supra} note 147, at 793-94.

\textsuperscript{157} In most countries that supply the bear parts trade, the incentives to participate are much greater than in the United States. \textit{Mills et al., supra} note 2, at 34. At the same time, these states generally have fewer resources to dedicate to control. Kosloff & Trexler, \textit{supra} note 65, at 238. The same cannot be said, of course, for the Asian major consumer nations, whose tremendous economic growth has lead to the rapid expansion of the bear parts trade. \textit{See supra} note 37 and accompanying text (discussing increasing demand for bear gall and other bear parts).

\textsuperscript{158} Charnovitz, \textit{supra} note 147, at 772-73; \textit{TRADE AND ENVIRONMENT: CONFLICTS AND OPPORTUNITIES, supra} note 150, at 75. An analysis of fourteen Pelly certification “episodes” from 1974-1993 found that eight certifications were “successful” or “partially successful” in achieving a “significant concurrent change in the target country’s policy in the direction sought by the U.S government.” Often, certification has proven effective without the imposition of actual sanctions. \textit{See Charnovitz, supra} note 147, at 763-71 (discussing Pelly certification episodes).
C. STATE LAWS: A REGULATORY PATCHWORK

State wildlife laws and game codes represent the basic line of defense against poaching and overexploitation of wildlife. The several states have long exercised broad authority in the regulation of wildlife within their borders, and federal officials are reluctant to encroach upon that authority. The federal government generally defers to the states in matters of wildlife protection, intruding only where a problem is national in scope and cannot be addressed adequately through independent state regulation. The trade in bear parts constitutes such a national problem. As such, it has eluded efforts at control by individual states and will continue to do so as long as no uniform national strategy exists to confront it.

State laws on the hunting and sale of bears are widely divergent. While several states have sought to control the bear parts trade, either through regulation or outright prohibition, many states allow the trade to continue unregulated. This inconsistency among jurisdictions, combined

159. See MUSGRAVE & STEIN, supra note 40, at 14 (noting that states retain the primary responsibility for protecting wildlife within their borders); Shelden, supra note 102, at 337 (hunting and sale of wild game are managed by the states). States are free to regulate wildlife taking and sale so long as their laws do not conflict with federal laws or regulations. Musgrave et al., supra note 52, at 985.

160. Shelden, supra note 102, at 311; see MUSGRAVE & STEIN, supra note 7, at 13-14 (indicating that despite tension with federal interests, states have developed most laws that manage and protect wildlife).

161. Shelden, supra note 102, at 337; see Interview with Neal, supra note 14 ("States are the ones who manage their bear populations. If the states don't regulate the trade, it's not the federal government's position that we should do so.").

162. MUSGRAVE & STEIN, supra note 40, at 7.

163. Id.

164. See infra notes 176-180 and accompanying text (summarizing this author's arguments that the bear parts trade is a national problem).

165. MCCracken et al., supra note 9, at 34-35.


167. Twenty-eight states allow hunting of black bears. Rose, supra note 9, at 2. Twelve states allow the sale of gallbladders legally acquired within their borders. MCCracken et al., supra note 9, at 34-35. Two of these states, however, do not permit the harvest of bears within their borders; and two do not have bear populations. Id. Twenty states prohibit the sale of gallbladders for bears taken within their borders but allow or do not expressly prohibit such
with the ease of interstate travel in the United States, facilitates laundering of illegally taken bears and undermines states’ efforts to control the trade on their own.\textsuperscript{168} For example, Montana hunters who are prohibited from selling bear gallbladders in their own state need only cross into Idaho or Wyoming to sell the parts legally.\textsuperscript{169} As long as state laws remain inconsistent, states’ individual efforts to control the bear parts trade and protect bear populations within their borders will meet with little success.\textsuperscript{170}

D. SUMMARY

Existing regulatory mechanisms are inadequate to control the domestic and international trade in bears and bear parts. The agencies implementing CITES and the ESA confront the impossible task of monitoring the immense trade that passes daily over the nation’s borders and have proven incapable of that task.\textsuperscript{171} The ESA protects only a small portion of the nation’s bears from the domestic trade in bear parts.\textsuperscript{172} The Pelly Amendment’s record of moderate success is tainted by the international opposition its use engenders.\textsuperscript{173} The loopholes created by conflicting state laws have facilitated wildlife laundering and undermined both the states’ own enforcement efforts,\textsuperscript{174} and federal enforcement efforts based on the Lacey Act.\textsuperscript{175} A regulatory void thus remains in which the domestic trade operates unchecked.

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\textsuperscript{168} McCormack et al., supra note 9, at 35, 60; Mills & Servheen, supra note 7, at 84; Musgrave et al., supra note 52, at 1008.

\textsuperscript{169} Mills & Servheen, supra note 7, at 84.

\textsuperscript{170} See McCormack et al., supra note 9, at 35, 60; Musgrave et al., supra note 52, at 1008 (noting that uniformity between states would facilitate control of illegal wildlife trade).

\textsuperscript{171} See supra notes 81-91 and accompanying text (discussing difficulty of enforcing border controls on international wildlife trade).

\textsuperscript{172} See supra note 120 and accompanying text (noting that only grizzly and Louisiana black bears are subject to protection under the ESA).

\textsuperscript{173} See supra note 154-156 and accompanying text (discussing the international community’s dislike for sanctions).

\textsuperscript{174} See supra notes 165-170 and accompanying text.

\textsuperscript{175} See supra notes 142-144 and accompanying text (discussing interplay between state law and the federal Lacey Act).
III. THE BEAR TRADE CONTROL ACT: A PROPOSAL FOR REGULATION

The bear parts trade is a national problem that touches every region of the country.\textsuperscript{176} The illegal trade involves widespread violations of state and federal laws for the protection of wildlife.\textsuperscript{177} It is often connected with trade in illegal drugs and other organized crime.\textsuperscript{178} It has devastating consequences for bear populations throughout Asia and Russia and potentially serious consequences for American bear populations.\textsuperscript{179} Given these implications, the bear parts trade demands a national solution.\textsuperscript{180} This section proposes such a solution. Drafted in conjunction with this Note, the federal Bear Trade Control Act (BTCA)\textsuperscript{181} directly addresses the trade in bear parts for use in traditional medicine. By focusing specifically on the bear parts trade, the BTCA closes some of the major loopholes that currently undermine law enforcement efforts. As a national act, the BTCA establishes the baseline uniformity necessary to ensure the enforcement of its provisions and enhance control of the trade. While it leaves some fundamental issues unaddressed, the BTCA represents a significant step forward from the present system, and maintains the flexibility necessary to evolve as the demands of the trade become better understood.

A. THE BTCA COMBINES SIMPLICITY AND FLEXIBILITY

The BTCA contains four basic elements. A flat prohibition on trade establishes the national regulatory uniformity necessary for effective control of the bear parts trade. A state control option allows flexibility for those states willing to take responsibility for the trade. A dialogue requirement promotes international cooperation on the bear trade issue. Finally, an investigatory function will increase the information available for regulatory

\begin{itemize}
  \item \textsuperscript{176} See McCracken \textit{et al.}, \textit{supra} note 9, at 10-12 (reviewing major law enforcement investigations throughout the United States).
  \item \textsuperscript{177} See \textit{supra} note 31 and accompanying text (noting high number of bear parts trade-related arrests).
  \item \textsuperscript{178} See \textit{supra} note 40 and accompanying text.
  \item \textsuperscript{179} See \textit{supra} notes 47-49, 52-59 and accompanying text (discussing impact of the bear parts trade on bear populations in Asia, Russia, and the United States).
  \item \textsuperscript{180} See \textit{supra} notes 165-170 and accompanying text (noting that state laws are inadequate to address the trade).
  \item \textsuperscript{181} Set forth in Appendix, \textit{infra} page 1319.
\end{itemize}
decision-making, thereby optimizing the Act's effectiveness and adaptability.

1. General Trade Ban

Section 4(a) of the BTCA prohibits commercial transactions in bear parts.\textsuperscript{182} By establishing a uniform national standard, this prohibition will prevent laundering of bear parts between jurisdictions and overcome the principal weakness of the Lacey Act and the various state laws.\textsuperscript{183} Anyone found with tradeable bear parts who cannot prove those parts fall within one of the BTCA's few exceptions\textsuperscript{184} will be in violation of the Act.\textsuperscript{185} This simplicity should facilitate effective enforcement, thus addressing a major concern of wildlife enforcement agencies.\textsuperscript{186}

2. State Regulation Option

Many states currently allow the traditional medicine trade within their borders and may prefer not to restrict it.\textsuperscript{187} Section 6 of the BTCA offers these states the opportunity to take responsibility for regulating the bear parts trade within their borders. States can qualify for the regulatory option by implementing a series of controls designed to prevent laundering of illegally taken bears. The most important of these controls is a requirement that the state tag, mark, or otherwise register every part\textsuperscript{188} removed from every bear killed within its jurisdiction.\textsuperscript{189}

\begin{itemize}
\item \textsuperscript{182} BTCA § 4(a)(i)-(ii), infra page 1320. Because the United States maintains an active trophy hunting industry, the BTCA excludes from its definition of "bear parts" portions of the bear not generally used in Asian traditional medicine. BTCA § 3(a)-(b), infra page 1319. Thus written, the provision allows the movement of trophy specimens in interstate and international commerce. Cf. Parsons, supra note 138, at 44 (noting the problems the Lacey Act creates for U.S. trophy hunters). The exclusion of the trophy trade from regulation should minimize opposition to the measure from domestic hunters and from states with hunting tourism industries without undermining the protective purposes of the Act.
\item \textsuperscript{183} See supra notes 142-144, 165-170 and accompanying text.
\item \textsuperscript{184} BTCA §§ 4(b), 6(c), infra pages 1320-21.
\item \textsuperscript{185} Id. § 4(a).
\item \textsuperscript{186} See supra note 15 and accompanying text (noting that Congress has not passed one of the seven bills introduced since 1992 to restrict bear parts trade).
\item \textsuperscript{187} See, e.g., 12 MAINE REV. STAT. ANN. § 7452(15)(B) (West 1994) (expressly authorizing the sale of bear gallbladders); Gary Sargeant, The Bear Parts Business in Maine, in PROCEEDINGS, supra note 5, at 96-97 (noting that Maine allows the sale of bear parts in the state because these parts are simply byproducts of legally taken bears).
\item \textsuperscript{188} As defined by BTCA § 3(a), infra page 1319.
\item \textsuperscript{189} Id. § 6(a), infra pages 1320-21.
\end{itemize}
Properly tagged or marked bear parts are not subject to the domestic trade prohibitions of section 4(a)(2). For many states, such a marking requirement will impose too onerous a burden, and those states may defer to the federal prohibition of the trade. Several states, however, already maintain extensive tagging and registration systems. For these states, section 6 may afford the flexibility inherent in local control. At the same time, the stringent minimum standards established by section 6 limit trade to legally-tagged or registered parts, thereby evading the laundering problem that pervades the present system.

3. Trade Discussion

While purely domestic measures may alleviate some of the pressures of the traditional medicine trade, that trade is ultimately an international problem requiring an international solution. In recognition of this fact, section 7 requires the

190. See Sargeant, supra note 187, at 97 (discussing documentation requirements for bear parts sold or given away in Maine). New York allows the sale of parts from legally taken bears provided that such parts have been properly tagged. Louis T. Berchielli, Regulating the Legal Sale of Black Bear Gallbladders and Other Parts in New York, in PROCEEDINGS, supra note 5, at 111; New York Requires Tagging, BEAR NET, July 1995, at 4. Some Canadian provinces also have implemented registration programs that might serve as models for programs in the states. See, e.g., Dave Harvey & Laurie Roh, Saskatchewan Trade in Black Bear Parts, in PROCEEDINGS, supra note 5, at 99, 101 (discussing Saskatchewan’s permitting system for bear parts). Note, however, that Saskatchewan subsequently banned the bear parts trade after determining that the sale of legally obtained gallbladders was facilitating laundering of illegally obtained specimens. Saskatchewan Prohibits Gall Sales, BEAR NET, July 1995, at 4.

191. See, e.g., supra note 169 and accompanying text (noting how laundering undermines Montana’s efforts to control bear parts trade).

192. See McCracken et al., supra note 9, at 61 (recommending greater international cooperation on the bear parts trade); Discussion Group: Regulating Commercialization and Trade of Bear Parts: International Dimensions, in PROCEEDINGS, supra note 5, at 157, 160 (same); supra notes 24-26 and accompanying text (discussing worldwide scope of the bear parts trade). Particularly relevant in this respect is the need to coordinate enforcement efforts between the United States and Canada. See McCracken et al., supra note 9, at 61 (recommending information exchange between the United States and Canadian wildlife enforcement agencies); Discussion Group: Perspectives from the States, Provinces, and Territories on the Trade of Bear Parts, in PROCEEDINGS, supra note 5, at 154, 155 (recommending cooperative regional law enforcement efforts). Because the border between the United States and Canada is open, the two countries experience a transborder laundering problem similar to that experienced between jurisdictions within each country. Mills & Servheen, supra note 7, at 87.
Secretary of the Interior and the U.S. Trade Representative to pursue international efforts to protect the world’s bears. Section 7 emphasizes a cooperative approach to reducing the bear parts trade. Should it prove necessary, however, section 7(b) reaffirms the Executive’s right to employ unilateral, more coercive Pelly Amendment action. By including options for both multilateral and unilateral action, the BTCA assures flexibility in addressing international aspects of the bear parts trade.

4. Monitoring and Reporting

The most persistent problem plaguing discussions about the trade in bear parts has been the lack of reliable information on such fundamental issues as the size of the trade, the size of bear populations, and the relationship between the two. In the absence of hard data, researchers and policymakers have resorted to estimates, best guesses, and conjecture. Section 8 of the BTCA addresses this problem in two ways. To increase understanding of the trade, the BTCA directs the Fish and Wildlife Service to monitor all commercial activity in bear parts. It also requires the Secretary of the Interior to undertake a thorough investigation of all aspects of the trade, including the development of reliable population data for all bear species in the United States. On the basis of this investigation, the Secretary must submit recommendations to Congress on how the bear parts trade may best be addressed over the long term. This reporting requirement provides a mechanism for monitoring not only the bear parts trade but also the effectiveness and appropriateness of the BTCA itself.

193. See supra note 150 and accompanying text (discussing the provisions of the Pelly Amendment).
194. See supra notes 28-40, 45-46 and accompanying text (discussing the lack of reliable estimates of the volume of the bear trade and its impact on bear populations).
195. See, e.g., McCracken et al., supra note 9, at 10 (noting that estimates of the size, growth, and impact of bear parts trade are often based on the general impressions of field personnel).
196. BTCA § 8(a)(i), infra page 1322.
197. Id. § 8(a)(ii), infra page 1322.
198. Id. § 8(a)(ii)(B), infra page 1322.
199. Id. This section explicitly provides that the Secretary of the Interior may recommend the discontinuation of federal regulation of the bear parts trade if he determines, on the basis of the studies conducted pursuant to § 8(a)(i), that such regulation is not warranted. A regulatory program undertaken by the state of New York in 1993 contained a similar provision. Berchielli, supra note 190, at 111. The New York scheme authorized regulation of the bear parts
B. CRITIQUE OF THE BTCA PROPOSAL

While the BTCA addresses many of the issues that have made the bear parts trade hard to control in the past, several important critiques may be made of its approach. For example, the relatively straightforward prohibition provided in section 4(a) is complicated by the inclusion of the section 6, state regulation option. Lack of uniformity among the various states is a major obstacle to effective control of the bear parts trade in the present system; yet, section 6 encourages inconsistency between jurisdictions, and engenders the same enforcement difficulties the BTCA is designed to overcome.

The response to this critique is that section 6, by its terms, is available only to those states that can demonstrate the resources and commitment necessary to comply with the purposes of the BTCA. Inconsistent state laws have proven problematic in the past because the lack of uniformity made it difficult to determine which specimens were being traded legally and which specimens had been poached. Section 6 allows trade only in specimens bearing a legal mark or tag. Under the BTCA proposal, the mere assertion “I got it legally in state X” will not protect someone from prosecution or prevent seizure of the contraband.

The administrative burdens of the BTCA arguably will be significant. Any exercise of the section 6 option will require the Secretary to promulgate an array of rules and guidelines governing the shared duties of the state and federal governments. For states that accept the option, the marking requirements will create extensive new administrative burdens. Even in the absence of the section 6 option, the administrative burdens imposed by the section 8 monitoring and reporting requirements will be considerable—requiring the allocation of personnel, the development of monitoring systems, and the undertaking of a major research initiative.

trade for a trial period of two years but provided that regulation will automatically cease after two years if the legislature does not pass new authorizing legislation. [Id.]

200. See BTCA § 6(a), infra pages 1320-21.
201. See supra notes 168-169 and accompanying text.
202. BTCA § 6(c)(ii), infra page 1321.
203. See id., infra page 1322; cf. supra note 169 (noting that poachers have employed similar tactics to elude existing state laws).
The BTCA does not purport, however, to eliminate administrative burdens entirely, but merely to reduce them to a point where they do not outweigh the benefits gained by the Act. In light of the uncertainty that enshrounds the bear trade issue, and the risks entailed by that uncertainty,\footnote{See, e.g., supra notes 53-59 and accompanying text (arguing that unregulated killing may have effects upon small, unique populations which do not become apparent for several years).} section 8 provides substantial benefits that justify the expenditure of resources it will require. Section 6 marking requirements may impose substantial administrative burdens on section 6 states, but states undertake those burdens at their own discretion. Moreover, both section 4 and section 8 of the Act require Congress to allocate funds for their implementation, thereby mitigating some of the burden the BTCA will impose on existing resources.

This points to a final, fundamental issue the BTCA fails to address. The most frequently cited problem with all wildlife laws—state, national, and international alike—is the lack of proper enforcement.\footnote{See, e.g., Kosloff & Trexler, supra note 65, at 237-239 (asserting that personnel and resource shortages lead to poor enforcement and undermine the efficacy of wildlife laws); Musgrave et al., supra note 52, at 1003 (noting that the lack of adequate personnel forces wildlife officials to enforce the law against only the “worst of the worst” offenders).} Inadequate enforcement, in turn, may be attributed to the inadequate fiscal, material, and human resources assigned to wildlife enforcement offices.\footnote{Kosloff & Trexler, supra note 65, at 237-39; see also Musgrave et al., supra note 52, at 1006 (urging that funding for wildlife law enforcement should be increased).} As the national and international trade in wildlife continues to expand\footnote{See, e.g., Doggett, supra note 43, at 49 (asserting that wildlife crime is increasing at an “alarming rate”).} and the techniques and equipment available to poachers continue to improve,\footnote{See MUSGRAVE & STEIN, supra note 40, at 21 (noting that commercial poachers use modern aircraft and surveillance equipment superior to that currently available to enforcement officers).} the chance for effective enforcement by understaffed, underequipped wildlife agencies grows increasingly remote. By failing to address this issue, the BTCA acquiesces to the underenforcement of its own provisions.

This is a powerful critique, but it rests on a problem that far exceeds the scope of the BTCA. Its ultimate resolution must lie in political and social decisions about the allocation of scarce resources.
resources among the many problems society faces. An evaluation of these issues lies beyond the scope of this article.

CONCLUSION

The burgeoning trade in bear parts for use in Asian traditional medicines threaten bear populations worldwide. The laws and treaties currently in force for the United States do not address this trade adequately. The Bear Trade Control Act proposed in this Note specifically confronts the bear trade. The Bear Trade Control Act provides an effective mechanism for controlling the domestic trade, thereby reducing the markets and supplies available for the international trade. It also provides the executive branch with the authority necessary to actively pursue international cooperation on this important issue. Despite its advantages, the Act cannot address the biggest problem in both international and domestic wildlife enforcement—the lack of fiscal, material, and human resources necessary to police the countless forests, wetlands, airports and office suites where wildlife laws are violated. For this reason, the BTCA proposal should be considered less an answer to a narrow regulatory problem than an entry point into a larger dialogue about the true extent of our national and international commitment to wildlife conservation.
APPENDIX

THE BEAR TRADE CONTROL ACT
A BILL

To prohibit the import, export, sale, purchase, and possession of bear parts or products that contain or claim to contain bear parts.\footnote{Sections 1-3, 4(b), 5-6, and 8-9 of this proposal represent the original work of this author. Sections 4(a) and 7 have been adapted from S. 968, §§ 3-5, 104th Congress, 1st Sess. (1995).}

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE
This Act may be cited as the “Bear Trade Control Act”.

SEC. 2. PURPOSES
The purposes of this Act are: to ensure the continued protection of the bear populations of the United States and other nations from unsustainable exploitation; to promote cooperation between the Government of the United States and the governments of the several States and Indian tribes in protecting bear populations within the United States from unsustainable exploitation; to promote cooperation between the United States and other nations in protecting all bear species from unsustainable exploitation; and to increase the compliance of the United States with the provisions of international agreements respecting trade in wildlife and the conservation of wild bears.

SEC. 3. DEFINITIONS
In this Act, the term
(a) “Bear parts” means the paws, bones, spinal cord, body fluids (including bile), or internal organs (including the gallbladder) that have been separated from a bear carcass, or removed or extracted from a live bear.
(b) “Bones” shall not include the skull, teeth, or claws of a bear.
(c) “Sale” shall include, but shall not be limited to, the provision of guide or outfitting services in exchange for money,
goods, or services.

(d) "Purchase" shall include, but shall not be limited to, the provision of money, goods, or services in exchange for the provision of guide or outfitting services.

(e) "Aggregate value" means the total price that a person accused of violating section 4(a) of this Act paid or received, or reasonably expected to pay or receive, for all the bear parts in question. Aggregate value includes the value of any guide or outfitting services provided or received in furtherance of the violative act.

SEC. 4. PROHIBITIONS

(a) Except as otherwise provide by sections 4(b) and 6(c) of this Act, no person shall (i) import or attempt to import into the United States, or export or attempt to export from the United States, bear parts or products that contain or claim to contain bear parts; (ii) sell, barter, offer for sale or barter, purchase, possess with intent to sell or barter, or transport in interstate or foreign commerce, bear parts or products that contain or claim to contain bear parts.

(b) The provisions of section 4(a) shall not apply to the loan, sale, exchange, or transport of specimens (i) by officials of federal, state, or tribal governments acting in their official capacities; (ii) for purposes of conservation or scientific research conducted for noncommercial purposes or education.

(c) Congress shall appropriate such monies and the Secretary of the Interior shall promulgate such regulations as are necessary to enforce the prohibitions in section 4(a).

SEC. 5. VIOLATIONS

The violation of any provision of section 4(a) of this Act constitutes a prohibited act under 16 U.S.C. § 3372 and shall be subject to civil and criminal penalties pursuant to 16 U.S.C. § 3373. Any bear parts imported, exported, sold, purchased, or possessed in violation of section 4(a) of this Act, and any vehicles or equipment employed in furtherance of that violation, shall be subject to forfeiture pursuant to 16 U.S.C. § 3374.

SEC. 6. STATE AND TRIBAL REGULATORY OPTION

(a) Subject to the approval of the Secretary of the Interior under paragraph (b) of this section, a State or recognized Indian Tribe may assume responsibility for the trade in bear parts
within its jurisdiction by (i) notifying the Secretary of the Interior of its intent to regulate the bear trade within its jurisdiction and of its determination that such trade will not be detrimental to any bear population within its borders; (ii) promulgating regulations that require the marking, tagging, or registration of every bear part within a reasonable period after its removal from a bear; (iii) forwarding to the Secretary of the Interior copies of all such regulations; (iv) forwarding to the Secretary of the Interior in a timely manner (A) a copy of each registration issued; or (B) if the specimen is tagged or marked, the date of issuance, the sex and approximate age of the bear, if known, and the name and address of the person to whom such tag or mark was issued; and (v) regularly forwarding to the Secretary of the Interior any records or reports that may assist the Secretary in monitoring the trade in bear parts.

(b) The Secretary of the Interior may approve a plan forwarded by a State or Indian Tribe in accordance with paragraph (a) of this section if, and only if, the Secretary determines that-(i) the regulations proposed will provide an effective means of marking or registering every part of every bear legally taken within the jurisdiction of the State or Indian Tribe; and (ii) the trade in bears parts will not be detrimental to any bear population within the jurisdiction of the State or Indian Tribe.

(c) The provisions of section 4(a)(ii) of this Act shall not apply to any bear parts acquired within the jurisdiction of any State or Indian Tribe which has exercised its regulatory option under paragraph (a) of this section, provided that (i) such parts have been properly tagged, marked or registered in accordance with State or Tribal regulations; and (ii) such tag or mark remains affixed to the bear part, or such registration remains in the possession of the person or persons participating in the act otherwise proscribed by section 4(a)(ii).

(d) The Secretary of the Interior may provide to any State or Indian Tribe implementing a program under Section 6(a) such assistance as may be necessary to fulfill the purposes of this Act.

SEC. 7. DISCUSSIONS CONCERNING TRADE PRACTICES

(a) The United States Trade Representative and the Secretary of the Interior shall (i) discuss issues involving trade in bear parts with the appropriate representatives of such countries trading with the United States as are determined jointly by the Secretary of Commerce and the Secretary of the
Interior to be significant importers, exporters, or consumers of bear parts; and (ii) attempt to establish coordinated efforts with such countries and with the international community generally, to protect bears.

(b) Section 6(a) does not relieve the Secretary of the Commerce or the Secretary of the Interior of any duties imposed by 22 U.S.C. § 1978.

SEC. 8. MONITORING AND REPORTING

(a) The Secretary of the Interior shall (i) direct the Fish and Wildlife Service to monitor commercial activity in bear parts; (ii) not later than eighteen months from the enactment of this Act, prepare and submit to Congress (A) a report evaluating the scope of the bear parts trade in the United States and the probable impact of that trade on bear populations within the United States and in other nations. The report shall incorporate a scientifically-based estimate of the population and distribution of each bear species within the United States and information on any subspecies or distinct populations thereof; (B) on the basis of the report required by paragraph (ii)(A) of this subsection, a recommendation with respect to future action on this issue, including, if warranted, a recommendation that federal regulation of the bear parts trade be discontinued.

(b) Congress shall appropriate the monies necessary to effect the provisions of section 8(a).

SEC. 9. INTERPRETATION AND RELATION TO OTHER LAWS

(a) The provisions of this Act shall be interpreted in a manner that best advances the purposes set forth in section 1 hereof.

(b) This Act shall not prevail over any law or treaty of the United States that provides greater protection for bears.

(c) Should any provision of this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of this Act and such action shall not affect the enforceability of the remaining provisions of this Act.