

threatened. Under the ESA's listing process, foreign and domestic species are treated equally, and the biological criteria used for determining the appropriate classification of threatened or endangered species are the same. However, most of the key conservation provisions of the ESA do not apply to foreign species. Habitat conservation planning mechanisms, recovery planning and implementation, most Section 7 consultations, and the Section 6 grant-in-aid program do not apply to ESA-listed foreign species. Even the fundamental conservation tool of prohibition of take (defined by the ESA as killing, capturing, collecting, harassing, and related activities) is limited to actions taken within the United States, the territorial seas of the United States, or on the high seas (*i.e.*, when committed by persons under the jurisdiction of the United States). In some situations, listing under the ESA may provide few, if any, additional benefits and may complicate the implementation of conservation initiatives under other international authorities, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

The ESA specifically addresses foreign species under Sections 8 and 8A by providing the authority to allow for international convention implementation for CITES and to enter into other such treaties, and to otherwise cooperate with other countries for the purpose of conserving listed species. We have been able to use these authorities to encourage conservation of ESA-listed foreign species in certain countries where bilateral conservation programs have been developed, such as the Pakistan markhor example cited below. However, opportunities for such activities are limited in comparison to the larger number of ESA-listed foreign species and the many countries of the world in which they occur. Where these programs occur, range countries retain ultimate responsibility and authority for implementing conservation measures for their resident species.

Several other domestic measures, such as the African Elephant Conservation Act and the Wild Bird Conservation Act, work to encourage the conservation of foreign species also listed under the ESA. Under certain conditions, these statutes allow for the sustainable use and/or management of foreign species and recognize the limited, ancillary nature of the United States's ability to influence foreign species conservation.

Ultimately, the incentives that the United States can employ to encourage conservation activities for foreign species in other countries are limited, and we need to consider the use of every possible means available. In practical terms, one of the few available means for encouraging the conservation of foreign endangered species is through our decisions about whether to issue import permits. Permits can be issued for purposes of scientific research or the enhancement of survival for endangered species. For threatened species, permits can be issued for those same purposes as well as for zoological exhibition, educational purposes, or special purposes consistent with the purposes of the ESA. The FWS goal of using the permits program to promote the long-term conservation of animals, plants, and their habitats is outlined in a recent publication, "Leaving a Lasting Legacy" (<http://permits.fws.gov>).

However, this permitting authority is not being fully used even though it is internationally recognized as one of the most effective conservation tools employed by CITES and other multilateral international agreements. Implementing this policy could encourage proactive conservation through the use of "enhancement of survival" findings to allow for imports that result from programs that significantly advance the conservation of a species within a given range country.

This concept is consistent with a Federal District Court's rationale in *Defenders of Wildlife, Inc. v. Watt* (1981), which upheld our decision to lift a prior ban on the importation of kangaroo parts and products in recognition of and in response to kangaroo conservation activities undertaken by Australia. The court found that the "application of the Act to the kangaroo is necessarily collateral in nature, and the well-being of the species can only be ensured by the government of Australia." Further, the court ruled that "while the Defendants have some resources at their disposal (*e.g.*, import restrictions), to effectuate the Act, the effectiveness of these resources depends on Defendants' ability to encourage Australia to protect the kangaroo." The potential for removal of the import ban then imposed under the ESA was an important aspect of these negotiations. It was used by the United States as an incentive for the imposition of a more rigorous and meaningful conservation program by Australia.

In *Defenders*, the court recognized that we had no control over the species or its natural habitat. Consequently, our ability to protect the kangaroo was

limited to encouraging, or creating incentives for Australia to implement programs designed to ensure the species' well-being. Since the United States was an important market for kangaroo leather parts and products, our decision to lift the import ban was essential to encourage Australia to implement stricter conservation measures for kangaroos. Lifting the ban ultimately enhanced the status of the kangaroo in Australia and achieved the conservation objectives of the ESA for the species.

#### **CITES and the Endangered Species Act as Conservation Tools**

Many foreign species of concern to the United States are protected not only under the ESA but, also under CITES, a related but distinct conservation tool that regulates the international trade in certain wild plants and animals. Under CITES, species may be included, after approval by a two-thirds majority of CITES parties, in one of two Appendices, depending on the degree to which international trade impacts the survival of the species. Appendix I includes species "threatened with extinction" and imposes a general ban on trade for primarily commercial purposes. Appendix II allows controlled commercial trade in species that may become threatened with extinction without such controls. The import of an Appendix-I species is allowed if the purpose of the import is not primarily commercial and is not considered to be detrimental to the survival of the species. The import of an Appendix-II species is allowed if the species or its parts and products have been legally acquired and the export is not considered to be detrimental to the survival of the species. Thus, in all cases CITES requires that a "no detriment" finding be made for each species and country involved, and that appropriate CITES permits be issued.

The text of the CITES treaty provides for certain exemptions from the restrictions on commercial trade in Appendix-I species. Through more than 20 years of interpretation and implementation, the CITES parties have agreed that the treaty provides significant flexibility in determining what kinds of activities are considered to be detrimental to the survival of Appendix-I species. Article VII, paragraph 4, of the treaty provides that Appendix-I species meeting the CITES definitions of "bred in captivity" or "artificially propagated" may be treated as if they are listed in Appendix II, removing the ban on commercial trade. Likewise, under certain conditions and with established quotas, CITES allows