



United States Department of the Interior



OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Memorandum

To: Frank Dunkle, Director
Fish and Wildlife Service

From: Gale A. Norton, Associate Solicitor
Conservation and Wildlife

Subject: Samish Tribe ESA Petition

The Samish Indian Tribe has petitioned the Service for a listing as an endangered species under the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq. We have concluded that the tribe does not qualify for listing.^{1/}

The petition contends that the tribe is a "population," distinguished by language and habits, of the species Homo Sapiens. They do not contend that Homo Sapiens as a whole is endangered or threatened, nor does that species appear to be. Since its origins in the area of central Africa some millions of years ago,^{2/} Homo Sapiens has expanded its range to encompass virtually the entire globe.^{3/} The listing decision must, of course, be based upon "The best scientific and commercial data available," 16 U.S.C. § 1533(b). A review of this data indicates that Homo Sapiens are found in all 50 states, comprise 100% of the population of each, and are subject to extensive legal protection against taking and commercialization.^{4/} It is thus

^{1/} We thus pass over other issues presented, such as whether it is a breach of etiquette for a species to propose itself for listing.

^{2/} A differing view places the origins in the watershed of the Tigris River at a more recent date. See M. Moses, ed., Genesis (undated ca. 600 B.C.). This view attributes the subsequent spread of the species to a loss of habitat following a dietary change influenced by interaction with a local reptile.

^{3/} A small experimental population was also established, temporarily, on the moon in 1968.

^{4/} To be sure, the legal protections afforded endangered species are in some respects superior to those afforded Homo Sapiens. It
(footnote continued)

apparent that Homo Sapiens is not endangered as a species.

The instant petition raises the question of whether a group Homo Sapiens may be listed as an endangered "population" of a larger species. Such a "population" may be listed. 16 U.S.C. § 1532(16). However, to qualify, such population must be "of any vertebrate fish or wildlife." Id. The question is thus posed whether the Samish, or any portion of Homo Sapiens, may be classified as "wildlife." The petition correctly notes that our regulations define "wildlife" to include "any member of the animal kingdom." 50 C.F.R. § 424.02(n). The Service's more general regulations indicate, however, that "wildlife" is properly confined to "any wild animal." 50 C.F.R. § 10.12. Traditionally, wild animals are "those wild by nature, which, because of habit, mode of life, or natural instinct, are incapable of being completely domesticated, and require the exercise of art, force or skill to keep them in subjection." 3A C.J.S. Animals § 3 (1973).^{5/} While certain classes of Homo Sapiens may meet this test, and all may meet it during certain periods (roughly the ages of 2-3 and 16-21), it cannot be said that Homo Sapiens as a whole are not "domesticated."

An examination of the ESA as a whole supports this interpretation. If Homo Sapiens, or a population thereof, were listed, the Fish and Wildlife Service would be authorized to authorize their taking for scientific purposes, 16 U.S.C. § 1539 (a)(1)(A), and to allow their killing incidental to otherwise lawful activity. 16 U.S.C. § 1539(A)(1)(B). Alaskan natives would be entitled to kill them, sell the edible portions within their villages, and convert them into "authentic native articles of handicrafts and clothing." 16 U.S.C. § 1539 (e). State laws on assault, homicide, and conversion of persons into authentic native articles of handicrafts and clothing would be void as in conflict with activities permitted under ESA. 16 U.S.C. § 1535

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is, for example, a crime to "annoy" an endangered species to the point of significantly disrupting its behavior. See 50 C.F.R. § 17.3. Annoying Homo sapiens is, in contrast, rarely a crime and often constitutionally protected. On the other, hand, endangered species may be killed for scientific research, 16 U.S.C. § 1539(a)(1)(a), while Homo Sapiens may not, at least intentionally.

^{5/} See also The King v. Manu, 4 Haw. 409 (1881); Giles v. State, 106 Misc. 2d 329, 431 N.Y.S. 2d 781 (Ct. Cl. 1980) (citing Restatement of Torts 2d § 506(1))-

(f). It would likewise be illegal to transport members of listed populations in interstate commerce, or to allow them to enter or leave the United States. 16 U.S.C. § 1538 (a)(1).^{6/}

The most fundamental rule of statutory construction is the assumption that Congressional enactments are not to be read to create unreasonable results or absurdities. United Parcel Service v. U.S. Postal Service, 455 F.Supp. 857, 865 (E.D. Pa. 1978).^{7/} We are accordingly of the opinion that a population of Homo Sapiens, no matter how distinct, is not "wildlife" subject to listing under the ESA.

^{6/} Likewise, if humans were "wildlife" within ESA's definition, it would be necessary for travel agents, airlines, and cruise ships to obtain licenses as persons who "engage in the business as an exporter or importer of fish or wildlife." 16 U.S.C. § 1538(d), Humans could only arrive at, or leave, the United States via certain ports designated by FWS as places for importation and exportation of wildlife. 16 U.S.C. § 1538(f). Any person "injurious to ... the interests of agriculture, horticulture, forestry, or wildlife," together with their "offspring", would have to be "promptly exported or destroyed." 18 U.S.C. § 42(a)(1). While the last might be satisfying to agricultural interests, it may raise constitutional questions.

^{7/} But cf. City of London v. Wood, 12 Mod. Rep. 669, 687 (King's Bench 1701) ("An Act Of Parliament can do no wrong, although it can do several things that look pretty odd.").