MIGRATORY BIRD TREATY REFORM ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS

OF THE

COMMITTEE ON RESOURCES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

H.R. 741

MAY 15, 1997—WASHINGTON, DC

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HUNTING AND WILDLIFE HABITAT UNDER MBTA

THURSDAY, MAY 15, 1997

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS, COMMITTEE ON RESOURCES,

Washington, DC.

The Subcommittee met, pursuant to call, at 10:30 a.m., Room 1324 Longworth House Office Building, Hon. Jim Saxton (Chairman of the Subcommittee) presiding.

STATEMENT OF HON. JIM SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY; AND CHAIRMAN, SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS

Mr. SAXTON. Good morning. The Subcommittee will come to order. The subject of today's hearing is H.R. 741, the Migratory Bird Treaty Reform Act of 1997. The measure, introduced by the Full Committee Chairman Don Young, is basically identical to legislation proposed at the end of last Congress.

Due to administrative inaction, inconsistent application of regulations and confusing court decisions, there are those in Congress who believe that it is time to legislatively change certain provisions regarding baiting that have penalized many law-abiding citizens.

In 1918, Congress enacted the Migratory Bird Treaty Act, which implemented the 1916 Convention for the Protection of Migratory Birds between Great Britain and the United States. Since that time, there have been similar agreements signed between the United States, Mexico and the Soviet Union. The Convention and the Act are designed to protect and manage migratory birds, as well as regulate the taking of that renewable resource.

In an effort to accomplish these goals, over the years certain restrictions have been imposed by regulation on the taking of migratory birds by hunters. Many of these restrictions were recommended by sportsmen who felt that they were necessary management measures to protect and conserve renewable migratory bird populations. Those regulations have clearly had a positive impact, and viable migratory bird populations have been maintained despite the loss of natural habitat because of agricultural, industrial or urban activities.

Since the passage of the MBTA and the development of the regulatory scheme, various legal issues have been raised, and most have been successfully resolved. However, one restriction that prohibits hunting migratory birds by the aid of baiting or over a baited area has generated tremendous controversy, and it has not been

satisfactorily resolved. Today's witnesses will enlighten us on the problems they perceive regarding the issue.

During the past three decades, Congress has addressed various aspects of the baiting issue. It has also been addressed by the Law Enforcement Advisory Commission appointed by the Fish and Wildlife Service. Unfortunately, no positive action has resulted from these examinations, and the problems still persist. As a consequence, landowners, farmers, wildlife managers, sportsmen and law enforcement officials are understandably confused.

On May 15, 1996, the House Resources Committee conducted an oversight hearing to review the problems associated with MBTA regulations, their enforcement and the appropriate judicial rulings. It was clear from the testimony at that hearing, as well as previous hearings, that the time has come for Congress to address these problems through comprehensive legislation. I look forward to hearing from our witnesses and their views on this issue.

Mr. Abercrombie.

[Statement of Jim Saxton follows:]

STATEMENT OF THE HONORABLE JIM SAXTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY

Good morning. The Subcommittee will come to order. The subject of today's hearing is H.R. 741, the Migratory Bird Treaty Reform Act of 1997. This measure, introduced by Full Committee Chairman Don Young, is basically identical to legislation proposed at the end of the previous Congress.

Due to administrative inaction, inconsistent application of regulations, and confusing court decisions, there are those in Congress who believe it is time to legislatively change certain provisions regarding "baiting" that have penalized many law abiding citizens.

In 1918, Congress enacted the Migratory Bird Treaty Act, which implemented the 1916 Convention for the Protection of Migratory Birds between Great Britain (for Canada) and the United States. Since that time, there have been similar agreements signed between the United States, Mexico, and the former Soviet Union. The Convention and the Act are designed to protect and manage migratory birds as well as regulate the taking of that renewable resource.

In effort to accomplish these goals, over the years certain restrictions have been imposed by regulation on the taking of migratory birds by hunters. Many of these restrictions were recommended by sportsmen who felt that they were necessary management measures to protect and conserve renewable migratory bird populations. Those regulations have clearly had a positive impact, and viable migratory bird populations have been maintained despite the loss of natural habitat because of agricultural, industrial and urban activities.

Since the passage of the MBTA and the development of the regulatory scheme, various legal issues have been raised and most have been successfully resolved. However, one restriction that prohibits hunting migratory birds "by the aid of baiting, or on or over any baited area" has generated tremendous controversy, and it has not been satisfactorily resolved. Today's witnesses will enlighten us on the problems they perceive regarding this issue.

During the past three decades, Congress has addressed various aspects of the "baiting" issue. It has also been addressed by a Law Enforcement Advisory Commission appointed by the Fish and Wildlife Service. Unfortunately, no positive action has resulted from these examinations and the problems still persist. As a consequence, landowners, farmers, wildlife managers, sportsmen, and law enforcement officials are understandably confused.

On May 15, 1996, the House Resources Committee conducted an oversight hearing to review the problems associated with the MBTA regulations, their enforcement, and the appropriate judicial rulings. It was clear from the testimony at that hearing, as well as previous hearings, that it is time for the Congress to address these problems through comprehensive legislation. I look forward to hearing from our witnesses about their views on H.R. 741.

STATEMENT OF HON. NEIL ABERCROMBIE, A U.S. REPRESENTATIVE FROM HAWAII

Mr. ABERCROMBIE. Thank you very much, Mr. Chairman. I would like to read into the record a statement by the ranking member, Mr. Miller.

One year ago today, the committee held a hearing that provided an excellent example of why we have such strict regulations against hunting over bait under the Migratory Bird Treaty Act. At that hearing, as it did in court, the Fish and Wildlife Service produced compelling evidence demonstrating that in that case people were caught red handed hunting doves over bait and violating a number of other wildlife laws, yet they still claimed to be unaware that the fields they were hunting in were baited. But rather than have their day in court, as they are legally entitled to, they chose to complain to Congress and demand a legislative fix.

Mr. Chairman, people whose eyesight is that poor or who are so unobservant should not be turned loose with guns. I wouldn't want to be out in the woods with them. May I add parenthetically Mr. Miller might not want to be out with the woods with them in any event. But today we have a second round of hearings on the issue and I hope it provides a more balanced look at the real issues.

I favor clear regulations which well-intentioned hunters can comply with reasonable effort, but I oppose any effort to establish a standard of evidence that is impossible for law enforcement agents to satisfy. The migratory bird populations would suffer in that case and we would be rewarding the scoff laws.

My concern with Chairman Young's legislation is that it places an unreasonable burden of proof on the Fish and Wildlife Service, effectively vitiating enforcement of baiting regulations in the field. Moreover, by codifying in law what is now governed through regulation, future changes would require an act of Congress.

I understand that the Fish and Wildlife Service is currently contemplating revisions to the MBTA regulations. I support that process, and I am sure that some revisions are probably long overdue but legislative preemption of that process is not justified. If innocent hunters are being cited, then perhaps enforcement agents and their supervisors need to be educated better as to what constitutes bait and what constitutes a clear violation, but the MBTA has done a good job in protecting migratory bird populations and this legislation would substantially decrease that protection. The result would be that both the wildlife resource and the hunters would ultimately suffer.

Thank you very much, Mr. Chairman.

Mr. SAXTON. Thank you. I ask unanimous consent at this point that other member's statements be included in the record at this point.

[Statement of Hon. Don Young follows:]

STATEMENT OF HON. DON YOUNG, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ALASKA

Mr. Chairman, today is the anniversary of an oversight hearing I conducted last year on our migratory bird "baiting" regulations and an infamous charity dove hunt in Cross City, Florida.

It has been nearly 80 years since enactment of the Migratory Bird Treaty Act (MBTA). During that time, there have been many Congressional hearings, a thor-

ough review of the regulations by the distinguished Law Enforcement Advisory Commission, and an Ad Hoc Committee on Baiting, which has just released its final recommendations. In each case, there has been a recognition that there are serious problems with our "baiting" regulations and that innocent hunters have been unfairly prosecuted.

While it may not be perfect, H.R. 741 will correct these regulations and ensure that law-abiding citizens are not trapped, tried, fined, and burdened with a Federal criminal record for unintentionally violating our baiting regulations.

Before explaining my bill, let me categorically state that I strongly support: the conservation of migratory bird resources; the hunting philosophy of "fair chase", and the citing of those individuals who knowingly hunt "on or over any baited field."

The fundamental change in H.R. 741 is the elimination of the "strict liability doctrine" and the establishment of a "knew or should have known standard."

Under current law, if you are hunting over a "baited field," whether you know it or not, you are guilty. There is no defense and there is no opportunity to present evidence in your case. It does not matter whether there was a ton of grain or a few kernels, whether this feed served as an attraction to migratory birds, or even how far the "bait" is from the hunting site.

This interpretation—if you were there, you are guilty is fundamentally wrong. It violates one of our most basic constitutional protections that a person is innocent until proven guilty. What is interesting is that the strict liability standard applies only in Federal criminal cases involving hunting migratory birds and the spilling of toxic waste.

In addition to removing the strict liability standard, my bill allows defendants to submit evidence in court, including whether the "bait" acted as a lure, and permits the scattering of grains and seeds, if it is done as a "normal agricultural operation." H.R. 741 also defines the term "bait," requires that all fines collected under the MBTA be deposited in an account to purchase additional habitat, and codifies each of the other restrictions on the harvesting of a migratory bird except for baiting.

This is not a radical proposal. Nevertheless, I expect that the U.S. Fish and Wildlife Service will strongly oppose this legislation. They will oppose it because currently there is nearly a 100 percent conviction rate in baiting cases, there is no requirement to collect evidence, and there is no need to prove intent or to demonstrate a defendant's guilt beyond a reasonable doubt.

In a recent article in the Congressional Quarterly, Mr. Keith Morehouse of the U.S. Fish and Wildlife Service argues that H.R. 741 would lead to over hunting.

To be frank, that argument is nonsense. My bill does not affect in any way either bag limits or hunting seasons. Furthermore, if the law enforcement branch of the Service is so committed to the protection of migratory birds, then why did they allow more than 440 doves to be killed in the famous Florida dove hunt. On that day in October 1995, they failed to uphold their fundamental obligation to protect the resource. They did, however, collect over $39,000 in fines.

Today we will also hear from Mr. Vernon Ricker, a recently retired Fish and Wildlife Service agent. Mr. Ricker is quoted as saying, "I could count on one or two hands the ones who didn't know the bait was there."

If that is true, then Mr. Ricker should be supporting my bill because we would be talking about only a handful of innocent people.

Mr. Chairman, it is patently wrong to convict hunters who do not know that a field is "baited," for a few kernels of corn in a sunflower field, and for bait that is over a mile from the hunting site.

It was also wrong for our government to ruin the military career of Mark Cobb, a University of Florida student who was cited by the Service in the Cross City dove hunt. Mark paid his $250 fine, after erroneously being told this was a minor infraction—like a speeding ticket—and would not be part of his permanent record. Since then, Mark has lost his ROTC scholarship and forever has a Federal criminal record. For what it's worth, Mark has stated that "I know what bait is illegal and saw none where I hunted."

I look forward to hearing from our witnesses and would like to warmly welcome our former distinguished colleague from Louisiana, Senator John Breaux, who is certainly well versed on the problems caused by our "baiting" regulations.

LETTER FROM THE SUBCOMMITTEE STAFF TO MEMBERS OF THE SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS

MEMORANDUM

H.R. 741, Migratory Bird Treaty Reform Act of 1997

On Thursday, May 15, 1997, the Subcommittee on Fisheries Conservation, Wildlife and Oceans will conduct a hearing on H.R. 741, the Migratory Bird Treaty Reform Act of 1997. The hearing will be held at 10 a.m. in room 1324 Longworth House Office Building. Those invited to testify include: Members of Congress; the Honorable Bruce Babbitt, Secretary, Department of the Interior; the Honorable James S. Gilmore III, Attorney General, Commonwealth of Virginia; the Honorable Julian M. Carroll, former Governor, Commonwealth of Kentucky; Mr. William P. Horn, Birch, Horton, Bittner and Cherot; Mr. Stephen S. Boynton, General Counsel, Henke and Associates; the Honorable Ron Marlenee, Director of Legislative Affairs, Safari Club International; Mr. R. Max Peterson, Executive Vice President, International Association of Fish and Wildlife Agencies; Mr. Dan Limmer, Regional Executive, National Wildlife Federation; Ms. Susan Lamson, Director of Conservation, Wildlife and Natural Resources Division, National Rifle Association; Mr. W. Ladd Johnson, National Waterfowl Federation; Mr. Terry Sullivan, Secretary, League of Kentucky Sportsmen; and public witnesses.

BACKGROUND

In 1916, the United States and Great Britain (for Canada) signed a Convention for the Protection of Migratory Birds. The fundamental goal of this Convention was to establish an international framework for the protection and conservation of migratory birds.

In fact, under the Treaty, unless and except as permitted by regulations, it is unlawful at any time to "pursue, hunt, take, capture, kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import ... any migratory bird, any part, nest, or egg of any such bird ... included in the terms of the convention between the United States and Great Britain for the protection of migratory birds." The United States has also signed similar agreements with Mexico and the former Soviet Union.

What is a migratory bird? Under the Convention, the term "migratory bird" means all wild species of ducks, geese, brants, coots, gallinules, rails, snipes, woodcocks, crows, and mourning and white-winged doves.

In 1918, the U.S. Congress passed the Migratory Bird Treaty Act (MBTA). This Act became our domestic law implementing the International Convention and it committed this nation to the protection and management of migratory birds. In addition, the Act instructed the U.S. Fish and Wildlife Service to develop *regulations* on the harvest or "take" of this renewable resource. Both the Convention and the MBTA were designed to ensure the proper utilization of renewable migratory bird resources.

U.S. REGULATIONS

In the nearly 80 years since the Congress passed the Migratory Bird Treaty Act, the U.S. Fish and Wildlife Service has issued numerous Federal regulations on how and under what circumstances a hunter may take a migratory bird. For instance, the U.S. Fish and Wildlife Service annually issues regulations establishing the hunting seasons and bag limits (number an individual may kill) for each migratory bird species. These regulations are issued only after an extensive biological review of population levels, reproduction rates, and the amount of available habitat for these species.

Over the years, the Service has also issued regulations, strongly supported by the hunting community, restricting the methods an individual may use to harvest a migratory bird. For example, it is illegal to take a migratory bird by:

- the use of a sinkbox or any other type of floating device that places the hunter beneath the surface of the water;
- the use of a motor vehicle or aircraft;
- the use or aid of live birds or decoys;
- the use or aid of recorded or electronically amplified bird calls or imitations of those sounds; and
- the use of any shot except steel shot, bismuth-tin shot, or other shot approved by the Secretary of the Interior that is nontoxic to waterfowl.

There is no controversy over these regulations, and the enforcement of these restrictions has had a beneficial impact on migratory bird populations for many years. However, there is *one* regulation dealing with the hunting of migratory birds over a "baited field" that has sparked tremendous debate—inconsistent enforcement and conflicting judicial opinions. This has resulted in many cases of unfair prosecution under the Migratory Bird Treaty Act of 1918.

BAITING REGULATION

By way of background, it is interesting to note that Congress has never passed a law that says "this is baiting and this practice is illegal". It is not illegal to "bait" a field or to feed migratory birds. It is, however, strictly prohibited to hunt in such an area. While the U.S. Fish and Wildlife Service has modified its baiting regulations 17 times, there have been no changes in the last 24 years. It is fair to say that virtually no hunter supports the excessive harvest of this resource or the intentional shooting of birds over bait. However, there are a number of troubling aspects to the baiting regulations and how the courts have interpreted those rules.

For instance, if you are hunting over a "baited field" whether you know it or not, you are guilty. There is no defense and there is no opportunity to present evidence in a case. In short, if there is "bait" and the hunter is present, he or she is automatically guilty. It does not matter whether there is a lot or a little bait present, if it has served as an attraction to migratory birds, or how far the "bait" is from the hunting venue.

Over the years, there have been several prominent court cases on these regulations. Three of the most famous are:

U.S. v. Lonergran No. Misc. 89/0468 (E.D. Cal. 1989), This case involved the presence of 13 kernels of corn found in a pond by a law enforcement agent in a 300-acre cornfield;

U.S. v. Twin Ponds Duck Club, where 34 kernels of corn were found in a wheat field next to a freshwater river; and

U.S. v. Orme, 851 F. Supp. 708 (D. MD. 1994), where bait was found almost one mile from the hunting site.

While these are troubling cases, the overriding problem has been the development of the *strict liability doctrine.* Under the doctrine—if you were there, you are guilty—hundreds of innocent hunters have been cited for violating Federal baiting regulations and now have a Federal criminal record.

To date, only the Fifth Circuit Court has shown any willingness to deviate from the strict liability standard. In fact, in *United States v. Dlahaussaye Case, 573, F. 2d 910, 912 (5th Cir. 1978),* the Court found that the U.S. Fish and Wildlife Service must prove that the hunter "should have known" that bait was present at the hunting site. In this case, the Court stated that:

> "We conclude that at a minimum [the bait] must have been so situated that [its] presence could have been reasonably ascertained by a hunter properly wishing to check the area of his activity for illegal devices. There is no justice, for example, in convicting one who is barred by a property line from ascertaining that birds were being pulled over him by bait . . . If the hunter cannot tell which is the means next door that is pulling birds over him, he cannot justly be penalized. Any other interpretation would simply render criminal conviction unavoidable occasional consequence of duck hunting and deny the sport to those such as, say, judges who might find such a consequence unacceptable."

Under current law, those convicted of shooting over a "baited field" are not normally incarcerated, since this a misdemeanor violation; but they must pay fines of several hundred dollars and have had firearms and equipment confiscated. In addition, they have a Federal criminal record. What is interesting is that only in Federal criminal cases involving hunting over a baited field or the spilling of toxic waste does the strict liability standard apply. The usual criminal standards of justice, where a defendant's guilt can only be established after a finding beyond a reasonable doubt, do not apply.

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On May 15, 1996, the House Resources Committee conducted an oversight hearing on Federal baiting regulations and a particular baiting case in Cross City, Florida. In that instance, 88 individuals were cited for shooting over a "baited" 200-acre field that was being used to host a charity dove hunt to benefit the Florida Sheriffs Youth Ranches, Inc. These Youth Ranches exist to help young people who are abused, at risk, or orphans, deal with juvenile delinquency, crime or emotional problems.

One of the individuals cited at the Florida dove hunt was a 20-year-old University of Florida student who paid the minimum $250 fine despite the fact he was serving soft drink refreshments to those participating in the hunt at the time he was cited and was unaware the field might be "baited." After being incorrectly advised that this violation was a minor infraction, the student lost his commission in the Army's ROTC program.

During the Full Committee oversight hearing on Federal baiting regulations, witnesses provided a number of interesting observations. For instance, a representative

of the U.S. Fish and Wildlife Service testified that "the Service is committed to a fair and objective review of this potential baiting issue." The director of the Illinois Department of Natural Resources stated that "hunters feel trapped by regulations that bind them so tightly that, regardless of intent, it is nearly impossible to avoid violating the letter of the law. We need consistency, clarity, and common sense."

Furthermore, the Washington Counsel for the Wildlife Legislative Fund of America argues that "existing regulations regarding the use of bait for take of migratory birds are too subjective, too obscure, and put thousands of law-abiding hunters at risk for potential violations."

Finally, a private attorney who has been involved in dozens of baiting cases testified that "the baiting issue has become more exacerbated due, unfortunately, to the twin prongs of unreasonable administration of the regulations by the U.S. Fish and Wildlife Service's Division of Law Enforcement and the unyielding position of the Federal courts—including U.S. Attorneys—in a joint rush to convict under the doctrine of strict liability in baiting cases."

Following this hearing, the Chairman of the Resources Committee, the Honorable Don Young, introduced H.R. 4077, the Migratory Bird Treaty Reform Act of 1996. While there was no further action on this issue, the general thrust of this legislation was that our wildlife protection laws should not unfairly penalize law-abiding citizens.

MIGRATORY BIRD TREATY REFORM ACT

On February 12, 1997, the Chairman of the House Resources Committee, the Honorable Don Young, the Honorable John Tanner, Co-Chairman of the Congressional Sportsmen's Caucus, and the Honorable Cliff Stearns (R–FL) introduced H.R. 741. The goals of this legislation are to:

- Incorporate into Federal law the existing regulations, except for hunting over a "baited field," that regulate the taking of a migratory bird;
- Allow defendants to submit evidence in court. If the facts demonstrate that a hunter knew or should have known of the alleged bait, then fines and potential incarceration will be imposed;
- Allow the scattering of various substances like grains and seeds, which are normally considered bait, if it is done as a "normal agricultural operation" in a given area, including the use of these substances to feed farm animals;
- Define the term "bait" as the "intentional" placing of the offending grain, salt, or other feed;
- Allow the hunter to introduce evidence at trial on whether or not the alleged "bait" actually acted as a lure or attraction for the migratory birds in a given area; and
- Deposit all fines and penalties collected under the Act in the Migratory Bird Conservation Fund. This money would be used to buy additional habitat for migratory bird populations.

A fundamental goal of this legislation is to provide guidance to farmers, hunters, landowners, law enforcement officials and the courts. Without this legislation, hunters will continue to be unfairly cited in the future, individuals will continue to be denied the opportunity to present evidence in court, the frustration over these regulations will grow, and ultimately fewer people will choose to participate in waterfowl hunting. This will result in the purchase of fewer duck stamps and, therefore, less money to acquire essential wetland habitat for migratory birds in the future.

It is interesting to note that our Federal baiting regulations are unusual because normally a law enforcement agent must prove that there was criminal *intent* to break the law. Under the strict liability doctrine, the conviction rate for those individuals cited for violating our baiting regulations is nearly 100 percent. It will, therefore, not be surprising if the U.S. Fish and Wildlife Service argues that H.R. 741 will make it more difficult to prosecute hunters under these regulations. A fundamental purpose of this hearing is not to examine prosecution rates but to determine whether the strict liability policy is fair to the hunting community and essential to the protection of migratory bird populations.

ISSUES

(1) Doesn't the U.S. Fish and Wildlife Service each year undertake a population assessment of *each* migratory bird species and, based on this scientifically obtained data, establish specific hunting seasons and bag limits for each of the regional flyways?

(2) While the issue of hunting "on or over a baited field" has attracted considerable attention, are there other restrictions on the "taking" of a migratory bird that have sparked controversy?

(3) How does a U.S. Fish and Wildlife Service enforcement agent determine that a particular piece of property is a "baited field"?

(4) What is the *fundamental* priority of the U.S. Fish and Wildlife Service—to protect migratory bird populations or to arrest those shooting over a "baited field"?

(5) How many individuals were cited for hunting migratory birds over a "baited field" in 1995 and 1996?

(6) What was the conviction rate in these cases? What was the percentage of those cited who simply decided to pay their fines and forego further legal action?

(7) Of those who chose not to initially pay their fines, how many of these individuals were able to present evidence in court and what weight was their evidence given?

(8) Is not having to prove intent an essential safeguard for the viability of migratory bird populations?

(9) Since most of our criminal statutes are predicated on the notion that there is a knowing *intent* to violate a particular law, what is wrong with requiring the U.S. Fish and Wildlife Service to prove that an individual *knew or should have known* they were hunting over a baited field?

(10) How close must grain or other feed be to a hunting site to be considered "bait"? For instance, if grain or "bait" is one or two miles from a hunt, can and should that individual be cited under the Migratory Bird Treaty Act when there is no definite proof that "bait" lured a bird to the hunting venue?

(11) Is there any determination made whether grain or "bait" acted as a lure or attraction to migratory birds?

(12) What are considered "bona fide" agricultural practices? Don't these practices differ greatly throughout the United States?

(13) How much money in fines was paid in 1995 and 1996 by those individuals cited for hunting over a "baited field"?

(14) Where was this money deposited and how many additional acres of wetland habitat were purchased from the proceeds of these fines?

(15) Would the goals of the Migratory Bird Treaty Act be promoted by mandating that all fines paid under the Act be deposited into the Migratory Bird Conservation Fund?

(16) What is the status of the Task Force that the U.S. Fish and Wildlife Service and the International Association of Fish and Wildlife Agencies established to address the issue of "moist soil" management?

Mr. SAXTON. And our good friend from Florida, Mr. Stearns, has arrived, so we will proceed at this point with Mr. Stearns' testimony. I understand, Cliff, that some of your constituents have run into problems with this baiting issue, and we are here anxiously awaiting your clarification of some of these issues for us. So you may proceed at your leisure.

STATEMENT OF HON. CLIFF STEARNS, A U.S. REPRESENTATIVE FROM FLORIDA

Mr. STEARNS. Good morning, Mr. Chairman. And let me just say that I appreciate the opportunity to be here. And also good morning to the other distinguished members of the Subcommittee. I think it is important that you hold this hearing, and giving me the opportunity to testify on the Migratory Bird Treaty Reform Act of 1997.

I am here to continue the efforts begun during the 104th Congress to effectively clarify hunting provisions under the Migratory Bird Treaty Act. Gentlemen and ladies, this issue hits close to home in an area I used to represent. As you will recall during the testimony given last year, an incident which occurred in 1995 was cited. In that case, almost 90 sportsmen were cited for violating the Migratory Bird Treaty Act during a charity dove hunt in Dixie County, Florida. Members of this committee have previously heard accounts of this unfortunate incident, and today you will hear about the unfair consequences many innocent encountered.

While I will not take the time to recount every detail of this incident, I will say that many sportsmen were cited and fined about $40,000 for "allegedly" hunting on a baited field. In fact, most of the hunting took place on land which was never even inspected for baiting. And remember, this was a charity dove hunt with distinguished citizens in the area. The U.S. Fish and Wildlife agents did not make their presence known, allowing the hunt to continue for three hours before issuing citations. Keep in mind these citations were delivered without any regard to the actual guilt or innocence of the hunters.

Sadly, many participants have faced tarnished records and threatened careers as a result of the misrepresentation of the current regulations. Even though they did not fully willfully violate hunting regulations, it was easier for many of them to plead guilty and pay their fines. One young man participating in this charity event who attends the University of Florida planned to join the Coast Guard as an officer. With this on his record, he will be joining the Coast Guard, but not as an officer.

Mr. Chairman, this is a perfect example of why H.R. 741 is so necessary. Congress has never passed a law defining what qualifies as a baiting field. While this activity is justifiably illegal, there are various legal interpretations that have—that should be clarified, just simply clarified. In addition, Federal courts have not acted uniformly in cases involving hunting. Under current standards a person is held liable for hunting on a baited field even though that person did not realize the field was baited. This is unfair, as many of my constituents have realized.

Clearly, Congress needs to act by defining what constitutes a baited field. Just as important, we must allow hunters who unknowingly hunt on or near a baited field to offer a defense without presuming them guilty.

This bill addresses the need for clarifying the regulations and establishing standards for enforcement. Under the Migratory Bird Treaty Reform Act, the term "bait" is defined as the intentional placing, exposing, depositing, distributing or scattering of wheat, grain, salt or other feed. I am confident that this comprehensive definition will leave little room for misinterpretation.

There have been other incidents where individuals have been cited for grain being accidentally spilled on public roads, or for luring migratory birds when a handful of corn was found in a wheat field. Again, these are examples of innocent people found guilty under the doctrine of strict liability. H.R. 741 also addresses these issues by allowing hunters to provide evidence as to what degree the bait acted as the lure for migratory birds.

Mr. Chairman, H.R. 741 makes no attempt to undermine efforts to effectively protect and manage migratory birds. In fact, many current regulations were enacted at the recommendation of sportsmen who recognize the importance and necessity of migratory bird conservation. I support these regulations and have no intention in weakening them.

However, as you can see, current law is unclear and interpretations have been inconsistent. I am confident that the Migratory Bird Treaty Reform Act will clarify baiting restrictions in a manner

that protects migratory birds and their habitats while protecting law-abiding citizens from unfair enforcement.

While enactment of this legislation will arrive too late for the hunters in Dixie County, Florida, it will prevent others from facing unfair consequences of being at the wrong place at the wrong time.

Mr. Chairman, I thank you again for this opportunity to testify today, and I look forward to working with my colleagues on this Subcommittee to consider this important legislation.

[Statement of Hon. Cliff Stearns follows:]

STATEMENT OF HON. CLIFF STEARNS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Mr. Chairman and distinguished members of the Subcommittee, I want to thank you for holding this hearing and for giving me the opportunity to testify on the Migratory Bird Treaty Reform Act of 1997.

I am pleased to be here today with my distinguished colleague, Congressman John Tanner, to continue the efforts begun during the 104th Congress, to effectively clarify hunting provisions under the Migratory Bird Treaty Act.

This issue hits close to home, in an area I used to represent. As you will recall during testimony given last year, an incident which occurred in 1995 was cited. In that incident, almost ninety sportsmen were cited for violating the Migratory Bird Treaty Act during a charity dove hunt in Dixie County, Florida. Members of this Committee have previously heard accounts of this unfortunate incident, and today you will hear about the unfair consequences many innocent people encountered.

While I do not intend to recount every detail of this incident, I will say that many hunters were cited and fined almost $40,000 for "allegedly" hunting on a baited field. In fact, most of the hunting took place on land which was never even inspected for baiting. The U.S. Fish and Wildlife agents did not make their presence known, allowing the hunt to continue for 3 hours before issuing citations. Keep in mind, these citations were delivered without any regard to the actual guilt or innocence of the hunters.

Sadly, many participants have faced tarnished records and threatened careers as a result of the misinterpretation of current regulations. Even though they did not willfully violate hunting regulations, it was easier for many of them to plead guilty and pay their fines. One young man participating in this charity event, who attends the University of Florida, planned to join the Coast Guard as an officer. With this on his record, he will be joining the Coast Guard, but not as an officer.

Mr. Chairman, this is a perfect example of why H.R. 741 is so necessary; Congress has never passed a law defining what qualifies as "baiting" a field. While this activity is justifiably illegal, there are various legal interpretations that should be clarified. In addition, Federal courts have not acted uniformly in cases involving hunting. Under current standards, a person is held liable for hunting on a baited field even though that person did not realize the field was baited. This is unfair, as many of my constituents have realized.

Clearly, Congress needs to act by defining what constitutes a baited field. Just as important, we must allow hunters who unknowingly hunt on or near a baited field to offer a defense without presuming them guilty.

This bill addresses the need for clarifying regulations and establishing standards for enforcement. Under the Migratory Bird Reform Act, the term "bait" is defined as the intentional placing, exposing, depositing, distributing, or scattering of wheat, grain, salt, or other feed. I am confident that this comprehensive definition will leave little room for misinterpretation.

There have been other incidences where individuals were cited for grain being accidentally spilled on public roads, or for luring migratory birds when a handful of corn was found in a wheat field. Again, these are examples of innocent people found guilty under the doctrine of strict liability. H.R. 741 also addressed these issues by allowing hunters to provide evidence as to what degree the bait acted as the lure for migratory birds.

Mr. Chairman, let me say that H.R. 741 makes no attempt to undermine efforts to effectively protect and manage migratory birds. In fact, many current regulations were created at the recommendation of sportsmen who recognize the importance and necessity of migratory bird conservation. I support these regulations and have no intention of weakening them.

However, as you can see, current law is unclear and interpretations have been inconsistent. I am confident that the Migratory Bird Treaty Reform Act will clarify

baiting restrictions in a manner that protects migratory birds and their habitats, while protecting law-abiding citizens from unfair prosecution.

While enactment of this legislation will arrive too late for the hunters in Dixie County, Florida, it will prevent others from facing unfair consequences of being at the wrong place at the wrong time.

Mr. Chairman, I thank you again for the opportunity to testify before you today. and I look forward to working with my colleagues on this Subcommittee to consider this legislation.

Mr. SAXTON. Thank you very much, Cliff. Can you stay for a few minutes?

Mr. STEARNS. Sure, happy to.

Mr. SAXTON. We have some questions that we would like to ask, but we would like to have you and Senator Breaux be able to respond to them at the same time. So we will proceed at this point with Senator Breaux's testimony. This is a great pleasure for us to welcome—I want to say back to the committee, but as you can see, the committee structure has changed some since you were here, Senator. But we welcome you to the committee today, and we are interested in what you have to present to us, because we know that you have long been an advocate of fair baiting laws and have worked very hard on this issue over the years. And so you may proceed as you see fit.

STATEMENT OF HON. JOHN BREAUX, A U.S. SENATOR FROM LOUISIANA

Senator BREAUX. Thank you very much, Mr. Chairman and members of the Subcommittee. I appreciate the invitation to make some comments. I will try and be very brief. I congratulate you for holding hearings on this. It seems like some things never go away. I was on the predecessor to this Subcommittee back in 1972. It is hard to believe it was that long ago. The place looks cleaner and nicer, a new coat a paint, a few more flags, pretty much the same pictures it always had, except for Young looking over my shoulder.

Mr. ABERCROMBIE. Mr. Chairman, I was going to remind the Senator there is a looming presence behind him on the wall.

Senator BREAUX. I am kind of afraid of what I might say and what might happen with that picture. But very briefly, I remember—it is really interesting. I remember chairing the Fish and Wildlife Subcommittee many years ago, and had offered the very same legislation that you all are considering today, and this has probably been 15, maybe 20 years ago, because I felt there was something fundamentally unfair to tell American citizens that we are going to hold you criminally liable for something that you may not even have known was there or that you had no knowledge or presumptive knowledge of having committed a crime but we are going to cause you to be criminally liable. It is a big difference from a civil standard on holding somebody responsible for things they may not have known, But to hold an American citizen criminally responsible with all the negative implications, in addition to the penalties, without that person knowing or should have known that what he was doing or attempting to do was in fact a crime, I think, is fundamentally unfair in our society.

I think Congressman Stearns has laid it out very clearly what the problem is. As a hunter and someone who strongly supports the migratory bird conservation programs—I am a member of the Mi-

gratory Bird Conservation Commission. I represent the State of Louisiana, which is at the bottom of the funnel of most of the ducks coming down to Central and Mississippi Flyway. This is a big, important issue in my state. But I would suggest that it is an important issue for all of us as Americans to make sure that the criminal laws of this country are fair.

And what disturbs me—in a typical situation in my state of Louisiana, people are brought to a hunting area the night before. They may have a dinner with the folks at the hunting lodge. They will go out to go duck hunting early in the morning, before daylight. They are put in a blind as a guest on someone else's property that they have never, ever been to in their life. They are sitting in a duck blind and it is dark and first light of day and hunting time becomes available and they start shooting and the guy knocks down the first duck or even doesn't kill the first duck and the Federal agent comes in and puts handcuffs on him and takes him out of the field and charges him with hunting over a baited field.

Now that person, by any stretch of the imagination, did not know that was a baited field. He had never been to that property in his lifetime, never hunted there, never been in the county, may have never been in my State of Louisiana in his life, had no way of knowing by any reasonable standard that that field happened to be baited by someone who may just have wanted to make it a better hunt for the guests that were there.

Now I think that we ought to be as tough and as hard as we possibly can on people who knowingly violate our game laws, people who intentionally bait a field in order to attract migratory waterfowl ought to have the book thrown at them, because they are not playing by fair rules. And there is nobody in this legislation trying to change that. We ought to make those penalties as tough as they should be. If a landowner, for instance, owns the property, the standard of liability for the landowner can be very, very strict. A person who rents the property, the standard should be very, very strict, but I would suggest that the approach of Chairman Young is the proper approach by saying that for hunters the standard should be that they knew or should have known the field was baited in order to be criminally prosecuted and convicted and having to pay a penalty.

Now we had the hearings a long time ago, and I am sure that some of my friends in the Fish and Wildlife Service are going to come back and say well, that is just too difficult for us to enforce, we can't make a case against somebody showing that they had actual knowledge or should have known by reasonable check. I would suggest a response to that is that we are talking about American citizens and their lives and their families who are being subjected to criminal penalties and prosecution. And while it may be a little more difficult for the Service to make a case with this standard, I would suggest that in fairness, under our principles of being innocent until you are shown to be guilty, that standard is not too difficult to reach.

The second point is that there is confusion on the exemption to a baited field, and the exemption is that it is not a baited field under the criminal terms if the field was subject to normal agricultural practices. Now the problem is what is normal agricultural

practices. Is letting a cornfield in Maryland lie and not be harvested and not harvesting it at all, is that normal agricultural practices? It may be in Maryland. It may not be in California. It may be somewhere else, but it is different.

I think that this legislation is correct in saying that the Service should be required to publish in the **Federal Register** a notice for public comment defining what normal agricultural practices are in the region. That is not that difficult to do. They can meet with USDA officials in that area. They know what the normal agricultural practices are in that area. And define a set of rules and regulations so everybody, the commercial hunters, the guides, the individuals can know that this is a normal agricultural practice in this area and therefore we can hunt without worrying about whether our guests and our customers are going to be hauled off to jail because this was not a normal agricultural practice in this agent's interpretation and maybe another agent would have a different interpretation.

So this legislation requires specificity. It requires a clear statement of what normal agricultural practices are. And that would be helpful to the Service. The agents do not know what agricultural practices are. That is not their background. They are wildlife managers, and they do a terrific job and I applaud them. But we have to bring in the agricultural people to define what are normal agricultural practices if in fact that is going to be an exemption to the baited definition.

The final point, and I think it is good, the Migratory Bird Conservation Act, there is a need for additional funds. And I think it is appropriate and fair and proper that all fines and penalties collected under the Migratory Bird Treaty Act be deposited into the Migratory Bird Conservation Fund. You know, probably you will have a lot of people who are busted that would be more willing to pay the fine if they know it is going into the Migratory Bird Conservation Fund and feel a little bit better about it and probably not appeal all of the cases and everything else. But be that as it may, I think it is an appropriate area for the funds to be used. The person guilty would be penalized, and yet the migratory bird program would benefit from it, and I think it is something that would be a good trade.

But I urge you all to try and proceed with this legislation. I think it makes sense. It protects Americans and it still allows the Service to get the job done. Thank you, Mr. Chairman.

[Statement of Senator John Breaux follows:]

STATEMENT OF HON. JOHN B. BREAUX, A SENATOR IN CONGRESS FROM THE STATE OF LOUISIANA

Thank you Chairman Saxton, Mr. Abercrombie and the members of the Subcommittee for inviting me to speak in support of H.R. 741, the Migratory Bird Treaty Reform Act of 1997. Soon, I will introduce companion legislation in the Senate that mirrors Chairman Young's bill.

As a member of the Migratory Bird Conservation Commission, I recognize the importance of protecting and conserving migratory bird populations and habitat.

Eighty years ago, Congress enacted the Migratory Bird Treaty Act, which implemented the 1916 Convention for the Protection of Migratory Birds between Great Britain, for Canada, and the United States. Since then, similar agreements have been signed between the United States, Mexico, and the former Soviet Union. The Convention and the Act are designed to protect and manage migratory birds and regulate the taking of that renewable resource. They have had a positive impact,

and we have maintained viable migratory bird populations despite the loss of natural habitat because of human activities.

Since passage of the Migratory Bird Treaty Act and development of the regulatory program, several issues have been raised and resolved. One has not—the issue concerning the hunting of migratory birds "[b]y the aid of baiting, or on or over any baited area."

A doctrine has developed in the Federal courts by which the intent or knowledge of a person hunting migratory birds on a baited field is not an issue. If bait is present, and the hunter is there, he is guilty under the doctrine of strict liability. It is not relevant that the hunter did not know or could not have known bait was present. I question the basic fairness of this rule.

I do not want anyone to misunderstand me. I strongly support the Migratory Bird Treaty Act. We must protect our migratory bird resources from overexploitation. I would not weaken the Act's protections.

The fundamental goal of the Migratory Bird Treaty Reform Act of 1997 is to address the baiting issue. Under this legislation, no person may take migratory birds by the aid of bait, or on or over bait, where that person knew or should have known the bait was present. It removes strict liability interpretation presently followed by Federal courts.

It also establishes a standard that permits a determination of the actual guilt of the defendant. If the facts show the hunter knew or should have known of the bait, liability, which includes fines and possible incarceration, would be imposed. However, if the facts show the hunter could not have reasonably known bait was present, the court would not impose liability or assess penalties. This is a question of fact determined by the court based on the evidence presented.

Also, the exceptions to baiting prohibitions contained in Federal regulations have been amended to permit an exemption for grain found on a hunting site because of normal agricultural planting and harvesting and normal agricultural operations. This legislation will establish guidelines for both the hunter and the law enforcement official.

The U.S. Fish and Wildlife Service will be required to publish, in the Federal Register, a notice for public comment defining what is a normal agricultural operation for that geographic area. The Service makes this determination after consultation with State and Federal agencies and an opportunity for public comment. Again, the goal of this effort is to provide clear guidance for landowners, farmers, wildlife managers, law enforcement officials, and hunters so they know what a normal agricultural operation is for their region.

In 1934, Congress enacted the Migratory Bird Conservation Act as a mechanism to provide badly needed funds to purchase suitable habitat for migratory birds. Today, that need still exists, and this legislation will require that all fines and penalties collected under the Migratory Bird Treaty Act be deposited into the Migratory Bird Conservation Fund. These funds are essential to the long-term survival of our migratory bird populations.

The Migratory Bird Treaty Reform Act will provide guidance to landowners, farmers, wildlife managers, hunters, law enforcement officials, and the courts on the restrictions on the taking of migratory birds. It accomplishes that objective without weakening the intent of current restrictions on the method and manner of taking migratory birds; nor do the proposed provisions weaken protection of the resource.

Finally, the proposed legislation does not alter or restrict the Secretary of the Interior's ability to promulgate regulations or issue further restrictions on the taking of migratory birds.

Again, I thank Chairman Saxton, Mr. Abercrombie and members of the Subcommittee for this opportunity to be heard, and I urge everyone to join me in supporting the Migratory Bird Treaty Reform Act of 1997.

Mr. SAXTON. Thank you very much. Let me just start with a couple of questions and then turn to the ranking member.

After reading the language in this bill and after hearing both of your explanations and testimony, do you believe it is an accurate statement to say that this bill does not in any way change practices, hunting practices, relative to the practice of baiting? In other words, does this bill in any way give opportunities that don't presently exist under current law to hunters to bait?

Senator BREAUX. I would think the answer, Mr. Chairman, is clearly no. Baiting would still be an illegal practice. It would be subject to criminal penalties for anyone who baits. The only dif-

ference is that someone to be convicted for hunting over a baited field would have to be shown to have known or should have known, actual knowledge or presumptive knowledge, he should have known because this person—for instance, what is presumptive knowledge? A person has been there, has hunted there all of his life. He has hunted there the week before. He was there during the daytime and he had a chance to be out in the field. He saw the field, and by reasonable expectation and inspection, he could have seen the corn sitting out in the middle of the pond right in front of the duck blind. That would be presumptive knowledge, but the bottom line is that baiting, intentional baiting, would be an illegal act under this legislation. It would be a crime that would be subjected to criminal penalties.

Mr. SAXTON. So then—go ahead, Mr. Stearns.

Mr. STEARNS. I would agree. You know, all we are doing is defining what baiting means. We are not saying that what occurs has changed. It is just defining what it means. And the presumptive guilt is the people who are there participating. In this case, you had 90 people. Some of them were sheriffs. Sheriffs of local counties were at this fundraiser, and obviously they had no idea that they were involved with a hunting in a baited field, so they clearly would not be guilty. And all we are doing is not changing the punishment for people who know that it is baited and continually do so, but we are just saying we are defining so that these people, these sheriffs of these local counties who are law-abiding citizens, voted to, elected to enforce the laws, have some prior knowledge before they have to have these penalties placed upon them and put in their record.

Mr. SAXTON. Thank you. I have no further questions at this time. I would just like to point out to the other members that the language in this bill seems to me to be very clear on this point. And on page 6, line 3, it simply reads, "no person shall take or aid in the taking of any migratory bird by the aid of baiting or on or over any baited area where that person knows or should have known through the exercise of reasonable diligence that bait was present." That seems to be pretty clear. We are not in any way intending to loosen or change the practices which have been historic practices that prohibit baiting.

Thank you very much for helping me clear up that point. Mr. Abercrombie.

Mr. ABERCROMBIE. Thank you very much, Mr. Chairman. The key, would both agree, is the page 6—I don't know if you happen to have the bill in front of you, but it does refer to what the Chairman has just gone over. The key is, is it not, the lines on page 6 where the person—starting on line 4, where that person knows or should have known through the exercise of reasonable diligence that the bait was present. That is the key to this, is it not?

Senator BREAUX. Mr. Abercrombie, I think that you have really put your finger on exactly what the key is. That is what is missing in the current practices and the court decisions. When a person comes before a judge, a person can say Judge, Your Honor, I didn't know, I had never been there before, I exercised reasonable practices in my hunting procedures, I looked around, we started shooting at daybreak or 30 minutes after, 30 minutes before, very impor-

tant, and I just could not know that someone a week before had baited this field, I had never been to this county before in my lifetime. That would be something that would be addressed by that line knew or should have known.

Mr. STEARNS. I would just add to that, my colleague from Hawaii, if you were driving out on the turnpike and there were no signs telling you the speed limit and suddenly you went up to 75 miles an hour or even 60 miles an hour and a policeman stopped you and said you should have known that you can't go 60 miles an hour, well, you said there are no signs, I haven't seen any signs, I have no idea. I mean, how could you say that person is guilty if he is on the turnpike going 60 miles an hour when there is no sign.

Mr. ABERCROMBIE. I guess that depends on what county you are in.

Mr. STEARNS. Well, since we have——

Mr. ABERCROMBIE. I have heard of that happening some places in the country, but it wouldn't be right. That would be wrong, I think.

Mr. STEARNS. Yes, and I am trying to draw an analogy.

Senator BREAUX. There is a little bit of a different in Cliff's analogy. I mean, I think he is making a good point, but the hunter that is being, I think, abused by the current law knows it is illegal to hunt over a baited field.

Mr. ABERCROMBIE. Can I address that, Senator?

Senator BREAUX. He knows that. I mean, this hunter knows it is illegal to hunt over a baited field, but by any exercise of reasonable diligence he would not know that this was a baited field.

Mr. ABERCROMBIE. Okay, I would like to address that. The reason that I would is that, as you know, lots of times on committees you are required to vote on things with which you may not be familiar except in the abstract. In this instance, I am one of those persons. When I was younger, there was hunting in the area that I was in, especially for pheasants, and my mom and dad kept me in because people came right through the back yard for those pheasants, so I was not aware of the rather detailed explication in law that existed around baiting and the shooting of birds, which I am now aware of as a result of going through the bill.

If you go to page 7, that is where I have a question then. If the key is the exercise of due diligence or reasonable diligence known or should have known, you go to page 7, part B, line 8, it says "the term baited area means any area where shelled, shucked or unshucked corn, wheat or other grains, salt and other feed whatsoever capable of attracting migratory game birds is intentionally placed, exposed, deposited, distributed or scattered." The reason I bring that up is not to try to put too fine a point on it, but precisely for the reasons you give, how are you supposed to know. Wouldn't it be almost an automatic defense that Fish and Wildlife could not disprove if you simply claim well, I didn't know it was intentional, I thought it was unintentional? How would you deal with that?

Senator BREAUX. You make a good point, Congressman, but the difference is this. There are two things here. One is the person who is doing the baiting would have had to do it intentionally in order to be guilty of baiting a field. The second question is hunting over a baited field. And that is the difference. Assume a field is baited,

what we are trying to address in this legislation is hunting over a baited field, which right now you are guilty of whether you knew it or not. And that is the difference. So if the game agents are going after the person who baited the field, they have to show that it was intentionally baited. And that is not that difficult.

Mr. ABERCROMBIE. Okay, then as someone who has not hunted under these circumstances——

Senator BREAUX. Me neither.

Mr. ABERCROMBIE. [continuing] would it be part of the section on exercising reasonable diligence? Is it the case that hunters ordinarily are able to determine fairly quickly with a reasonable amount of regard for the area whether it looks baited or not? I would have to rely on your experience.

Senator BREAUX. Well, it is not that easy. I mean, if someone baited a pond and a duck blind with corn, it generally shows up very well as soon as the light of day comes on, but still it is not that easy to make that determination. That is why I think you have flexibility in the legislation, knew or should have known. You don't have to prove actual knowledge. I mean, that person would still be liable under our legislation even if they didn't know, but because of a reasonable check of the surrounding areas it was pretty clear that there was a sack of corn sitting in the middle of that pond. That person should have known that that was a baited field.

Mr. ABERCROMBIE. I see. Well, Mr. Chairman, I will stop at this point. I am perfectly willing to take the intention of the legislation on its face as being reasonable. The question is can we write it in such a way as to actually accomplish that flexibility that you mention. That is to say we don't put words into that in effect put it into one side or the other in terms of impossibility or where you make a mockery of it. Your argument today is that the language as presently written essentially makes a mockery of fair play and presumption of innocence, and the question is whether this language as written in the bill right now rectifies that or puts it possibly on the other side where nobody would ever get convicted.

So maybe we should just take another look at it to see what kind of previous case law operates where there are definitions or parameters, boundaries around the point of reasonable knowledge of should know or should have known or a reasonable exercise of diligence. This can't have happened for the first time in the United States in 1997. That kind of question must have been raised thousands or maybe tens of thousands of times in different kinds of cases, so it shouldn't be too difficult to figure out language that will accomplish what you seek.

Thank you very much. I appreciate your helping me with this. Thank you, Mr. Chairman.

Mr. SAXTON. Thank you. Mr. Farr.

Mr. FARR. Thank you very much, Mr. Chairman. I am neither a hunter nor a lawyer, but I can see that this is a very difficult area that needs very careful attention. I mean, the irony here is that we are trying to take the burden off of a person with a gun trying to kill a wild animal and really put the burden more on the animal, because on page 8 of the bill on line 15, 16, it says the terms attraction and attracting mean that the bait was a major contributing factor in luring the migratory birds. It really requires the in-

tent of the bird to be able to prove that the—why the bird went to that particular spot, and I think that that is why you get into difficult problems in trying to draft a law where it essentially, I think, shifts an awful lot of burden of responsibility. Now as I understand, this is regulation now, and with the bill the way it is written we are trying to codify it into Federal law, which then makes it very difficult to change without a Congressional act, and I am just wondering if there is some other way. Shouldn't we just, perhaps, prohibit baiting altogether, ban it?

Senator BREAUX. Congressman—I am sorry, go ahead.

Mr. STEARNS. I was just going to say I think the pendulum has swung here. There have been cases where people have been on fields five miles from the baited fields and have been charged, so obviously they had no idea.

Mr. FARR. Well, wait a minute. That is——

Mr. STEARNS. All I am saying is that——

Mr. FARR. Is that a proper arrest? I mean, there is some responsibility of law enforcement here, too. I mean, it is like probable cause and pulling you over on a highway. They can't——

Mr. STEARNS. Let me give you another example. In this case I gave you, these 90 individuals for a charity fundraiser, the U.S. Fish and Wildlife inspectors presence wasn't known for three hours. They were in and close to the area, but they didn't even, you know, advise these people who thought they were at a charity situation. So I think the pendulum has swung and it is time now to try and bring forth a little more specificity. And I think that is all this legislation does.

Senator BREAUX. Congressman, let me just make a comment on—I don't—you can ask the Fish and Wildlife Service when they present testimony. I don't think that this is a problem for them at all. I don't think—I can't imagine a lot of cases ever being dismissed because they were not able to prove that once a field is baited that it was not a major contributing factor in luring migratory birds there. That is almost a given. If the bait is there, the determination is that if birds was there that was a major contributing factor.

Mr. FARR. Senator, that is precisely my point. Why don't we just prohibit baiting?

Senator BREAUX. Baiting is illegal. It would still be illegal under this bill.

Mr. FARR. It is only illegal if you are going to hunt on bait. It is not illegal——

Senator BREAUX. That is the—which is the only thing which is a criminal violation, is hunting over a baited field. Hunting over a baited field—baiting a field would still be illegal for trying to lure migratory birds there, and a person hunting would still be guilty of a criminal violation if he knew or should have known it was baited.

Mr. FARR. I accept that, but that is not what the law says. It says where the person should have known. It doesn't require that the person really does know. And you pointed out that there is a lot of money being made—I mean, those hunters that came to that area and were put out in the blind. Somebody guided them there. Somebody lured them to spend the night in that lodge. Somebody

who lives there in that spot had responsibility for knowing about——

Senator BREAUX. Oh, absolutely, and that person should be put in jail and should be fined. He has a greater responsibility, the landowner, to protect his property from illegal baiting. The person who runs the hunting club has a greater responsibility than the innocent hunter. That person knew or should have known because it is his property.

Mr. FARR. I agree, and there is nothing in this law that says that. I mean, let us put the strict liability on the person that is making the money from the hunt rather than, as you say, the innocent hunter. But I don't think that is the way this bill is drafted, and I would support that.

Senator BREAUX. The same principles would apply to anybody that is potentially a violator of the law, and the principle is that if you knew it was baited, whether you are the landowner or a hunter who has never been there before or you should have known that it was a baited field. And I would suggest that the person making the money, the landowner or the person running the duck camp, it is a lot easier for them to get nailed under a knew or should have known standard because it is their property.

Mr. FARR. But then if you read the other qualifying language down on Section 2, starting on line 7 on page 6, it sort of, I think, just opens a big wedge in there, taking of all migratory game birds, including waterfowl, is possible where grains are found scattered solely as a result of normal agricultural planting or harvesting. I mean, that——

Senator BREAUX. That is current law.

Mr. FARR. Yes. Is the following section, too, where the taking of all migratory birds except waterfowl, down on line 20 it says or other feed on the land where grown for wildlife management purposes? Is that——

Senator BREAUX. Yes, normal agricultural practices are exempted from baiting. We are saying that there ought to be better guidelines as to what normal agricultural practices are. The problem with the current law is that if it is normal agricultural practice, it is not baiting. We are saying they ought to issue regs as to what constitutes normal agricultural practices in that region.

Mr. FARR. I don't think I am trying to disagree with you. I am trying to figure out how this law could be crafted so that we don't find ourselves every year coming back with exceptions to the law that we are trying to invent today. I mean, you really put an awful lot of burden, it seems to me, here more so on the wildlife management process, perhaps government in this case, that the term baiting has to be intentional. It has to be intentionally placed. It has to prove that the major contributing factor was the bait being put. I mean, there is a really tremendous shift of responsibility here from somebody trying to prove the intent of all of these things, not holding the hunter and the process that got the hunter to the field responsible. It takes the burden off the people with a weapon and puts it on the person with a badge.

Senator BREAUX. I would suggest, Congressman, that when you are talking about a person's individual civil rights and the potential for going to jail with a criminal violation, there should be a

burden on the officers who are enforcing the law to at least show that the person had actual knowledge or even that he knew or should have known. We are talking about a criminal violation here, not a civil penalty. And I would suggest the standards for the law enforcement people should be pretty difficult. This is a criminal charge. A person could go to jail and have his career ruined by doing this, and they should have at least the ability to show that the person at least should have known that he was committing a crime.

Mr. STEARNS. The only thing I would add to it is in this case these 90 people had no knowledge, were there under the assumption that they were going to help a local youth group in a fundraising, and they got—and they all paid their money. They were so intimidated by the process they were scared to go to the courts. They were just—the whole process, they all paid their money. And they have that now as a permanent record. So what the Senator is saying, these people are presumed to be guilty even though they had no prior knowledge, had no idea.

Now, using your interpretation, you could go forward to the fellow who owned the land. That would be a different story, but I think the pendulum has swung here and I think what the Senator is trying to say is under our Bill of Rights, we want to extend to the hunters the Bill of Rights. And under the present Migratory Bird Act, they don't have a full Bill of Rights.

Mr. FARR. Well, my time—let me just say that as I understand under current law, those convicted of shooting over baited areas are not normally incarcerated. I wonder if there have been people incarcerated. It is a——

Mr. STEARNS. These people, these 90 people, citizens including sheriffs, were not incarcerated.

Mr. FARR. And that is a misdemeanor violation, that they have to pay fines of several hundred dollars?

Mr. STEARNS. That is true. They had to pay about $400, $300.

Mr. SAXTON. Mr. Farr, would you yield to me for just a minute?

Mr. FARR. Yes, Mr. Chairman.

Mr. SAXTON. Let me try to put this in perspective. I live in an area where a lot of people hunt, including myself. We hunt waterfowl. And law enforcement officers have a pretty darn good idea in any given region who is baiting and who isn't baiting. When you bait for waterfowl, it is not like you go out and throw a bag of corn in the water and all of a sudden somehow magically the ducks all know it is there and they come get it. This is a long process which may be over a series of weeks and, you know, the baiters will essentially train the ducks that there is bait here and they may even put up a marker someplace so the ducks will be able to easily identify the spot. They will get in their boats, oftentimes in the dark of night, with a couple of hundred-pound bags of corn, scatter it in the boat, scatter it along the way. Law enforcement officers know exactly what to look for, and therefore it is pretty easy to identify who is baiting.

Now let us just say for a minute that some 18-year-old high school person sees this gang of guys out there hunting and he thinks it is pretty neat because there are a lot of birds around, and all of a sudden one day after school without having any idea what-

soever why those birds are there he gets in his rowboat or his canoe and paddles out there, gets in the other guy's blind and has great luck. And all of a sudden the warden comes along and this guy all of a sudden is arrested, charged with and is almost automatically guilty of hunting over bait.

Mr. FARR. Mr. Chairman, is that factual case that happened? I mean, I am—I don't hunt, but I am a fisherman.

Mr. SAXTON. It happens all the time, Sam.

Mr. FARR. You know, there are all kinds of areas where you should know. You don't—you can say you go to the river and you didn't know it was a catch and release river, because we don't have signs all up and down rivers saying everything you catch here you have got to let go. I mean, where in this process is the responsibility for the hunter? I mean, you are spending a lot of money buying a gun and going to a spot. Frankly, I think if the American public knew that public wildlife refuges were allowed hunting they would be appalled by it. You know, we have set up these public lands and we lure the wildlife there and then we shoot them.

Mr. SAXTON. We are talking about private lands here. We are not——

Mr. STEARNS. Mr. Chairman, I just want to——

Mr. FARR. This is all lands, as I understand, both public and private.

Mr. STEARNS. Just to put it in perspective for Mr. Farr, five of the students that were cited in the "allegedly baited field" were not even on the field. So, I mean, that shows you that the interpretation of this law is so broad that you could cite young students who are starting out in life, who are going to the University of Florida, and put a criminal misdemeanor on their record when they were not even on the field, but they were part of these 90 people and they were out, you know, maybe getting a coke or something. And they just swooped in and gave all of them, including these five students, and put a criminal misdemeanor on their record. Their parents had to pay the money. They were not on the baited field, so surely, surely the U.S. Fish and Wildlife in this case overstepped. And these five men, five students now, as they grow up to men are going to say every time they fill out a form there is a criminal misdemeanor because I was supposed to be not on this land and I didn't even know about the land and I wasn't on the land. And where do they go?

Mr. FARR. Well, first of all, I don't think you have to report criminal misdemeanors. If so, every driving speeding ticket is a criminal misdemeanor. Secondly, if I understand this issue, you had 88 people cited at that hunt. 82 paid their fines without dispute. Four were required to appear in court because they had assaulted enforcement officers and two appealed their citations.

Mr. STEARNS. That leaves a lot of people getting criminal misdemeanors. And in some—as you know, some forms you—some applications you do have to check off.

Senator BREAUX. Mr. Chairman, I think the final point Congressman Abercrombie, I think, hit the nail on the head. This legislation doesn't require that the hunter have to have knowledge of the actual baiting to be guilty. It only needs to be required that he should have known by a reasonable exercise of diligence, surveying the

place, checking with neighbors or by any reasonable exercise or normal diligence. If they should have known, even if they didn't, they still would be guilty under this legislation.

Mr. FARR. But, Senator, where is the penalty in here for the provider, for the person that guides them to this spot?

Senator BREAUX. If a person intentionally did it, if the landowner is found to have baited the field, we are not changing any of the penalties there at all. The same penalties that are in the law today.

Mr. FARR. But that person isn't—the person that did that isn't there with the gun, isn't cited.

Senator BREAUX. If someone—if the landowner baited a field that he owns the property of, it is going to be pretty clear that he knew about it because he did it or he should have known about it because it was his own property under his control. That person would be subject to the same penalties after this legislation is passed as before. No change at all.

Mr. FARR. I don't think that the law is strong enough in that point, because it does——

Senator BREAUX. That is another question.

Mr. FARR. The part you are talking about is no person shall take. You have got to have actually been in the action of taking.

Mr. STEARNS. Aiding and abetting.

Senator BREAUX. Oh, no, you don't have to kill a single bird. You can miss every shot you have got and you are still guilty. You don't have to take—you don't have to knock down a single bird to be guilty of hunting over a baited field, just sitting in the blind never firing a shot with a gun is hunting over a baited field.

Mr. SAXTON. Mr. Farr, your actually second five minutes is just about to expire, so we are going to move on to Mr. Peterson.

Mr. ABERCROMBIE. Mr. Chairman, before we do, can I just comment that, Senator Breaux, you are such a reasonable person I fail to understand why the Senate and the House has all this difficulty all the time. We just ought to get together ourselves, I think, and we can settle everything, don't you?

Senator BREAUX. I am trying. We are making some progress.

Mr. PETERSON. It appears to me that if I committed a crime against man or a person, that it is much more difficult to convict me than if I commit a crime of being in the position where I could have shot an animal on a baited field. Is that a fair comparison?

Senator BREAUX. Oh, sure. The other one you have to at least show intent or the presumed intent to convict them for shooting a person, whereas it is absolute strict liability over a baited pond.

Mr. PETERSON. So we have different standards of evidence. And I guess, as I have been listening to this discussion—I am a hunter, lifetime hunter. It appears to me that if you innocently show up in an area that is considered by some enforcement officer a baited field, you are guilty.

Senator BREAUX. Not only that. I didn't mention in my testimony, but, you know, the regs under the Fish and Wildlife Service say that the bait has to have been gone when you are hunting for at least the previous ten days. In other words, if you go hunting and the bait has been gone from that field for nine days, you are still legally liable for hunting over a baited field, even though the bait has been removed for the previous nine days. You may not

have even been in the country nine days before when the field was baited, but you are still guilty.

Mr. PETERSON. You know, I dislike illegal hunters as much as anybody and people who break the game laws, but it seems like—I know in Pennsylvania we made it easier to prosecute those who break game laws. It is much simpler than it is to prosecute someone who hurts people, and I don't understand the logic in that. And I guess the part of giving anybody a criminal record when they are innocent and they have no ability to defend themselves, it appears to me that you have no ability here to defend yourself if you are innocently in a position that was a baited field or had been a baited field nine days ago. That is just wrong.

Senator BREAUX. You have no defense. The reason why so many people just plead guilty to it and pay the fine is because they know under the law they have no defense. Innocence is not a defense. Innocence is not a defense hunting over a baited field.

Mr. PETERSON. I think in this country every law enforcement officer, including game officers and Fish and Wildlife Officers, have the duty to prove you are guilty. And you have—should have the fundamental right to prove you are innocent. That is just what this country is all about, and it appears to me it is obvious this law needs changed.

Mr. STEARNS. Mr. Chairman, I just—something, if I could add to your comments and where you are taking the argument. As Mr. Farr mentioned, two of the people who were cited appealed. They were acquitted. They won their case. So the judge actually agreed, which in a sense agreed with what this legislation is all about. And that is an important point, that when these two students appealed, they won. Now the other people paid from 250 to 500, but remember, these students that went ahead and appealed had to pay for an attorney and they went through all the process and anxiety and they won their case. So I think the courts has almost justified this legislation.

Mr. SAXTON. Thank you. Thank you both very much. We are going to move on to our second panel. We appreciate the very clear explanation that you have given us relative to this issue.

Senator BREAUX. Good luck.

Mr. SAXTON. Thank you. Dr. Bob Streeter, would you come forward please and take your place. Good to see you again, sir. Welcome, and we are obviously interested in hearing your perspective and views relative to this matter. So, Doctor, you may proceed as you wish.

STATEMENT OF ROBERT STREETER, ASSISTANT DIRECTOR FOR REFUGES AND WILDLIFE, U.S. FISH AND WILDLIFE SERVICE

Dr. STREETER. Thank you, Mr. Chairman and members of the Subcommittee. I am Bob Streeter, Assistant Director for Refuges and Wildlife, U.S. Fish and Wildlife Service. I am located here in Washington, D.C., it was good to get to New Jersey also.

Thank you for the opportunity to appear before you here today to discuss H.R. 741, the Migratory Bird Treaty Reform Act of '97. Mr. Chairman, first I would like to thank you, Congressmen Young, Miller, Dingell, Tanner, and your other associates for dem-

onstrating great leadership in developing and sponsoring H.R. 1420, to improve the management of the National Wildlife Refuge System. This was an example of a great spirit of cooperation and synergy between Congress, the Administration and some private citizens that will result in strengthening the National Wildlife Refuge System, and benefiting citizens and wildlife and including to a large degree migratory birds. And it will benefit the migratory bird hunters, bird watchers, and conservation education groups.

However, in the case of H.R. 741, Mr. Chairman, we are opposed, as we believe it could significantly harm our nation's migratory bird resources and negatively impact the millions of hunters and conservation education persons who enjoy these national treasures. The Service does share your concern, however, about modifying portions of the current hunting regulations, as I testified before you one year ago. Although we have been not as speedy as desired in this process, we are working with our state partners to do so.

With your permission, Mr. Chairman, I would like to submit my written testimony to the Subcommittee for the record and then briefly summarize our primary concerns with H.R. 741, if I might be allowed to do so, sir. Thank you.

Mr. Chairman and members of the Subcommittee, our primary concern, overriding all others, is the rigidity that is inherent in formulating hunting rules by statute rather than by regulations. Procedurally, the proposed changes to the Migratory Bird Treaty Act would cause extreme hardship to all sportsmen and sportswomen of this country by creating an inflexible statutory process that could not possibly accommodate the changing wildlife management situations that occur.

H.R. 741 could compromise the Service's ability to manage this very dynamic migratory bird resource and damage our commitments to the four international convention partners for the wise use of these valuable resources. Let me give you one vivid example of this. It relates to the current burgeoning growth of mid-continent snow goose population, which has grown to such a size that these birds are now impacting their breeding grounds, destroying habitat in the frigid arctic, and causing serious depredation problems in Canada and the U.S. in migration and wintering areas.

An international team has recommended several actions, including hunting options that would result in major reductions in the breeding population. Some of these hunting options would include special seasons where electronic calls and bait could be used to attract these very wary birds so that the hunters could assist in this absolutely necessary reduction process. H.R. 741 would prevent the Service and our state partners from even considering such management tools.

H.R. 741 would also make it illegal under any circumstance to use shotguns holding more than three shells for hunting migratory birds. Under the current regulatory approach, however, the Service and its state partners have the flexibility to change these kinds of rules when the situation dictates and involve the public each time in the public review process when they propose those changes. I repeat, our greatest concern is the inflexibility of the statute versus a regulatory process for professional management of such a dynamic resource.

Now, Mr. Chair, a couple of brief points on the specific impacts of the proposed legislation. H.R. 741, in addressing what constitutes normal agricultural practices would load the Service, the states and our hunting public with a tremendous regulatory burden and cost. As we considered this, we determined that we annually would promulgate rules on what constitutes normal agricultural practices. We would likely have to address this on a county-by-county basis in every state and territory of the U.S. This would basically be a veritable Sears and Roebuck catalog of regulations that we would have to publish and print. The cost of doing this as well as the cost of publishing would be a great load on all of us, as well as the hunter. The current process of using the extension service as a resource has worked quite well in an overwhelming majority of cases.

Several sections of this bill in aggregate, not individually but in aggregate, seem tantamount to legalizing baiting. They would replace the strict liability standard with a knows or should have known standard. If that were the only thing, we probably could work with that as discussed, but when you add to that a requirement that government officials have to prove the hunter's intent and you add to that that officials would also have to prove that the bait is an attraction that is a major contributing factor that lured the birds not to the area but within shotgun range, then you have an unreasonable burden on state and Federal officials and it simply would make any baiting rule unenforceable.

[Statement of Robert Streeter may be found at the end of the hearing.]

Mr. ABERCROMBIE. Mr. Chairman, excuse me. Mr. Chairman, may I interrupt for a moment. We do have all your statement. Dr. Streeter, I want to make sure I understand correctly for the benefit of myself and the Chairman, did I understand you correctly to say if the question—the word intentional is a key element here, that you think this can be worked out? Because if that is the case, virtually everything else that you are talking about we can deal with in another context and we don't have to prolong this hearing and have five dozen people come up and testify. If that is the case, we ought to be able to end this hearing and deal with the thing forthwith.

Dr. STREETER. If we have to prove, if Federal law enforcement officials have to prove the intent of the hunter and the intent of the bird——

Mr. ABERCROMBIE. No, no, you don't have to answer for me. I am just saying you said—am I correct that if that is the key element here, that you think that you can—you have some ideas on how this can be addressed and what you think is the right thing to do so that we can deal with this in the criminal/civil side or however we want to work it out? Did I understand you correctly?

Dr. STREETER. Congressman——

Mr. ABERCROMBIE. Because we have got—I am going to be frank with you, we have got something like five panels and 150 hours of testimony, it looks like, we are going to deal with here, but the key, as far as the looming presence is concerned behind you, is the question of intention and criminality and whether that is going to mess people's lives up. And if Fish and Wildlife says that that issue you

believe—if you believe as Fish and Wildlife that this can be addressed in a reasonable way, I am willing to bet that the Chairman can sit down with you and staff and get this worked out.

Dr. STREETER. The knows or should have known standard, I think, could be addressed.

Mr. ABERCROMBIE. Thank you very much. Mr. Chairman, I think that we might be able to cut through an awful lot of extra discussion here if that, in my judgment at least, is the key element here, maybe we can move expeditiously. I am perfectly willing to have everybody put their testimony into the record.

Mr. FARR. If the gentleman will yield. If I may just——

Mr. ABERCROMBIE. Well, the Chairman granted me the time, so——

Mr. SAXTON. If I may, I would just like to ask Dr. Streeter if he would conclude his statement and then we will get to the questions.

Dr. STREETER. Yes, Mr. Chairman, I would, and I would like to just conclude with that statement that our overriding concern is handling what is now in regulations, handling those as a statute and the inflexibility that that would provide for Federal and state professional wildlife mangers.

Thank you very much for being able to provide this.

Mr. SAXTON. Thank you very much. Mr. Farr.

Mr. FARR. Mr. Chairman, I was just going to say that on a day like this I miss the state legislature where you really have a bill with a strikeout language of what you are taking out and the new language put in, because this bill is difficult to understand. But I think the key of what we are supposed to do here in Congress is to write good law. And I think what you have heard today is that the way this law is proposed, and we have been dealing with it one of the few—and I congratulate you for that, because normally we talk in generalities not about specific pages and lines and words—is that the way this bill is drafted it has some unintended consequences that are not good law. You are taking regulations and putting them into statutory law. And I agree with Mr. Abercrombie that I think the burden here on the intent could be easily removed.

But also, Mr. Chairman, in drafting a bill I hope that we will get to the responsibility that Senator Breaux talked about, because it is nowhere mentioned in here as the responsibility of the provider, of the hunting lodge, of the, you know, the people that are on the land. They normally know what goes on in their backyard. And if the problem is that innocent people come into this backyard or come into this field and they don't know but the people around them do know, then let us hold the people accountable for that and use the same language and the same degree of responsibility for the people that are providing the use of that land or providing the person to be there in the first place.

Mr. SAXTON. Sam, we can work this out. My understanding is that under current law there is a section which we are not touching which relates to aiding and abetting or the provider's responsibility. And further, if it would help to clear up the matter, we can strengthen that language, which we have not touched in this bill. But we certainly can address those concerns that you have relative to the so-called provider.

Mr. FARR. I think the should have known language which is key to this bill should be in that, and they ought to strengthen the penalties for them, because they are frankly the ones that are making the money off of this activity and they hold a greater responsibility. You know, the other side of this is that we are also here to protect the wildlife. It is not just to protect the hunter. There is a balance here, and it is our job to draft this in a careful way.

Mr. SAXTON. Thank you very much, Dr. Streeter. We have no further questions at this time.

Panel three of five consists of Mr. Brent Manning, Director of the Illinois Department of Natural Resources, Mr. Bill Horn of Birch, Horton, Bittner and Cherot, and Steve Boynton of Henke and Associates. Welcome aboard. Brent, you may begin.

Mr. MANNING. Thank you, sir, very much. Good morning, Mr. Chairman. I am Brent Manning, Director of the Illinois Department of Natural Resources.

Mr. SAXTON. May I just say I know that many people are accustomed to testifying. That little green light there in front of you will turn red at some point. When it does, we would appreciate you summarizing your testimony at that point.

STATEMENT OF BRENT MANNING, DIRECTOR, ILLINOIS DEPARTMENT OF NATURAL RESOURCES

Mr. MANNING. Thank you, sir. I am Brent Manning, Director of the Illinois Department of Natural Resources, and also representing today the International Association of Fish and Wildlife Agencies. I have been selected as their ad hoc committee chair on the subject of baiting. I thank you for the invitation to testify on behalf of the Association and many sportsmen throughout the United States.

I wish to point out that the Association's ad hoc committee spent almost a year carefully considering the subject before us. The recommendations of the committee were adopted by the Association and forwarded two weeks ago to the U.S. Fish and Wildlife Service for their consideration. We hope the Service will adopt the proposal and publish it for public comment.

I would like to highlight our proposal and briefly compare it with H.R. 741. Please refer to my written testimony for greater detail. And for the sake of clarity I will divide our recommendations into three main subject areas, the first being agricultural crops, the second the management of natural vegetation and the third the issue of strict liability, which we have spent 90 percent of the time on this morning.

First on the subject of agricultural crops, we make the common sense recommendation that hunters who incidentally scatter feed while entering or exiting hunting areas not be cited for baiting. Furthermore, we believe that the current terms "normal" and "bona fide" in reference to certain agricultural techniques are too vague and only have been defined thus far in case law. We recommend replacing those terms "normal" and "bona fide" with the word "accepted", and we define the word accepted. The distinct advantage offered by this approach is that for the first time the regulations would clearly designate a final authority for making such determinations. Comparatively, H.R. 741 in many cases may leave

some doubt about who is ultimately responsible for making that decision.

Second, the management of natural vegetation. Moving to the subject, natural vegetation, the Association very strongly believes that Federal baiting rules were not originally drafted with the intent of preventing hunting over manipulated natural plant communities. However, a more strict interpretation of Federal baiting regulations by the U.S. Fish and Wildlife Service appears to have emerged during the last decade or so. Such an interpretation discourages professional wildlife managers from maintaining or restoring natural wetlands. Therefore, our proposal clarifies the regulations in this regard. H.R. 741 does not address the issue of natural vegetation and thus leave the intent of the existing regulations subject to continued speculation.

The third issue is that of strict liability. On the subject of strict liability, both the Association's recommendation and H.R. 741 reject this aspect of existing regulations. In 1978, the Delahoussaye case, the U.S. Court of Appeals for the Fifth Circuit District rejected a strict liability interpretation of the regulation. Instead, the court required at a minimum that the presence of bait could have been reasonably ascertained by the conscientious hunter. Our recommendation is consistent with that already done Federal ruling. We require that the hunter know or should have had a reasonable opportunity to know that a hunted area is considered baited. That is very simply what the Delahoussaye case says, and it is now applicable in five states in these United States.

H.R. 741 proposes a similar approach. However, as a result of this change, a critical loophole has been created. David Hall, former special agent in charge and advisor to the ad hoc committee on baiting, said the Delahoussaye decision was very workable and allowed him to make good, consistent and reasonable baiting cases. By the way, Mr. Hall has made more baiting cases than any other Fish and Wildlife Service special agent.

We do have a couple of issues of special concern with H.R. 741 that I would like to point out. They are slight differences that I think can be worked out. First, H.R. 741 requires that salt or feed capable of attracting migratory game birds be intentionally scattered. The requirement to show intent by a hunter is a much more difficult standard of proof than the requirement to demonstrate that a hunter should have knowledge that the area was baited. We think this change has the potential to erode the protection of the migratory bird resource.

H.R. 741 also requires the effect of bait be separated in the field from the effects of other important attractants like hunting location and subjective methods such as decoy arrangement and calling expertise. Because the relative attractiveness of the bait must be shown, a much higher standard of proof is again imposed. We believe that may have the potential to create as many problems in this section as it attempts to solve.

Finally, this bill appears to remove an important prohibition in existing regulations. Currently, doves can be hunted over lands where feed has been distributed as a result of alteration for wildlife management purposes provided the alteration does not include redistributing feed after being harvested or removed from the site.

H.R. 741 omits this very important restriction, thus allowing feed to be returned to and scattered on a field after being harvested or removed. We recommend that the prohibition be restored.

In summary, the Association agrees that Federal migratory game bird hunting regulations need clarification. Consistency, clarity and common sense are of paramount importance. We believe strict liability is the heart of the issue before this Subcommittee, and we are willing to participate in a working group to bring our respective proposals together.

The International Association of Fish and Wildlife Agencies appreciates the opportunity to address you today, and I offer my personal assistance in reaching the goal I believe that we all share. Common sense regulations that protect the migratory bird resource and the future of responsible hunting are very important to all of us. Thank you again for allowing me to be here.

[Statement of Brent Manning and additional information may be found at the end of the hearing.]

Mr. SAXTON. Mr. Director, thank you very much. Incidentally, we want to apologize. Our material has consistently referred to you as Brett rather than Brent, and we apologize. And so for the record, Mr. Manning's first name is Brent.

Mr. MANNING. Thank you, Mr. Chairman. And I am very happy that you did not call me Forrest Gump or Elmer Fudd as a journalist just recently did in regard to this issue.

Mr. SAXTON. Nor did we call you late for dinner, right.

Mr. MANNING. Yes, thank you.

Mr. SAXTON. Mr. Horn.

STATEMENT OF WILLIAM P. HORN, BIRCH, HORTON, BITTNER AND CHEROT

Mr. HORN. Thank you, Mr. Chairman. My name is William Horn, and I appreciate the opportunity to appear today before the Subcommittee. I thank you for scheduling this hearing to address a regulatory issue that is long overdue for reform. Existing regulations regarding the use of bait for the take of migratory birds are presently too subjective, too obscure and put thousands of law-abiding hunters at risk for potential violations.

My position on this issue arises from two perspectives. First, I had the privilege to serve as Assistant Secretary of Interior for Fish, Wildlife and Parks under President Reagan, and basically enforced, wrote and signed the migratory bird rules for a number of years. Second, I am also a hunter who struggles with these rules every time I step into a duck blind or set up in a dove field. Reform is needed to end, or at a minimum reduce, the level of struggle associated with efforts by reasonable hunters to comply with these regulations.

Now the sporting community and the Fish and Wildlife Service have long recognized the need for clarification and simplification of these rules. Indeed, the Director's 1990 Law Enforcement Advisory Commission specifically proposed a revisitation of the baiting regulations found at 50 CFR 20.21. In addition, the Commission raised the issue of strict liability as one requiring review and attention and prospective change.

Unfortunately, no action has been taken by the Service to implement this now seven-year-old recommendation. We are persuaded that the committee and Congress ought to act on its own via passage of H.R. 741 to pursue the original recommendations made by the 1990 commission. Now, as Mr. Streeter indicated, these matters could be addressed administratively, but frankly years of inaction by FWS demonstrate that Congressional leadership and action is needed or nothing is going to happen.

Now regarding the law, the first objective is to change this matter of strict liability. I think, as Senator Breaux very eloquently stated, the imposition of strict liability eliminates the ability of a hunter or landowner to mount a defense against charges of illegal baiting. And this is completely contrary to the fundamental premise of American justice that one is innocent until proven guilty. Establishing a standard that requires some reasonable measure of intent or knowledge is more just and equitable, but still enables law enforcement officers to pinch and successfully prosecute genuine wrongdoers.

Another goal of reform must be the creation of objective rules and policies that law-abiding hunters can comply with. As indicated, I have overseen the Fish and Wildlife Service, I have practiced wildlife law, and I have hunted ducks, doves and geese for years, and I still hunt these birds with a great deal of trepidation. I personally scrupulously examine fields before hunting and make pointed inquiries about agricultural practices, yet I still cannot be sure that I am complying with Federal regulations and enforcement policies.

Can an agent find some tiny amount of leftover grain from an earlier legitimate feeding program? Does the agent agree that the agricultural practices used in the field that I am hunting are bona fide? Can the agent determine that baiting has occurred on an adjacent field up to over a mile or more away that I have never seen and cite me for taking birds on their way to that field? All of these determinations are so subjective that even the most diligent and careful hunter can be cited for a violation, notwithstanding their best efforts to comply with the law. That is simply bad public policy. The rules must be remade in a way that the diligent and careful hunter who makes the effort can be assured that he or she is in compliance with the rules.

On the compliance front, I would like to add that it is unfortunate that Fish and Wildlife enforcement personnel are unwilling to provide advice or guidance about baiting. I am aware of many hunt organizers contacting law enforcement from Fish and Wildlife to ask the agents to examine a field and give it a clean bill of health in an effort to comply with the existing baiting regulations. And these organizers are routinely turned down flat. I pose this inquiry: even the IRS is willing to help citizens with tax compliance—why can't the Fish and Wildlife Service help us with migratory bird compliance?

Lastly I would like to bring one other issue to the committee's attention, and ask it to deal with this in the context of legislation or in terms of guidance to the Service. I would be very concerned about efforts by the Fish and Wildlife Service to close hunting in very large zones proximate to farms where waterfowl feeding is oc-

curring. The apparent policy rationale is that the feeding farm, even if it is not hunted, constitutes an illegal lure; it brings birds into a generalized area.

This kind of policy could easily become a tool of the animal rights extremists because aggressive feeding on a few strategically parcels on, for example, the Eastern Shore could close down hundreds of waterfowl hunting locations. I think the committee needs to direct the Service to be extremely careful and not provide anti-hunting zealots a weapon to be used against waterfowl hunters.

Thank you again for the opportunity to address this issue. I think reform of the MBTA, the 20.21 regulations and related policies is necessary to achieve greater objectivity and clarity so that the diligent and careful hunter can comply with the law and applicable regulations and policies. Thank you.

[Statement of William Horn may be found at the end of the hearing.]

Mr. SAXTON. Thank you very much, Mr. Horn. Steve, proceed.

STATEMENT OF STEPHEN S. BOYNTON, HENKE AND ASSOCIATES

Mr. BOYNTON. Thank you, Mr. Chairman. My name is Stephen Boynton. I am an attorney in private practice in the District of Columbia, and I have devoted much of my practice over the past 20 years to wildlife and conservation law. I have tried a number of these baiting cases and handled them from California to Pennsylvania and from South Carolina to Delaware. Mr. Chairman, I have also had the dubious distinction of having been a defendant, an unsuccessful defendant, in a case that went all the way to the Fourth Circuit Court of Appeals. And being a defendant, it catches your attention to know the law very quickly.

I have submitted a rather comprehensive statement, which gives a judicial background that Congressman Abercrombie referred to earlier of having these issues considered before. Some of them have quite considerably. Some of them have been ignored on the basis that any evidence of what the defendant knew, or should have known, is irrelevant. If he is there, the bait is there, get out your checkbook. It is as simple as that.

I would also like to comment on something Congressman Farr said. I think it should be underscored that the primary and singular and most important problem when you face any change to regulations or law is to protect the renewable resource. I think that is a primary consideration. In considering this law, this proposed law carefully, I think some of the issues that have been raised are important. I would like to address those that I have heard this morning and read about.

Number one, the question of whether or not the person actually putting out the feed possibly slipping through in this particular proposed legislation. First of all, as the Chairman mentioned, he could be pulled in as an aider and abetter, which is under the criminal law even though he isn't in the field, even if he isn't there. If he perpetrated the crime, he could be pulled in. But let us assume for a moment that he did put out the feed to bait but the hunter was successful in his defense so that he didn't know or should not have known or did not have a reasonable opportunity.

That means the person putting out the bait with the intent would take a walk, because there is no primary defendant.

Consequently, I would suggest on page 6, line 3, it would be very simple to add the words no person "shall take or assist in the taking." As the Chairman indicated earlier, that would take care of the problem very quickly.

There has been some, in my judgment, wrong interpretation on page 7 of the term baiting means the intentional placing. I think as this has been drafted it doesn't mean you have to prove the intent of the person placing it. It means that the bait was put there purposefully. In other words, we are excluding accidental distribution of seed. I have had cases where, and Congressman Stearns referred to it, where there has been corn found on a public road. Both sides stipulated and it was agreed to it fell off a truck, but it was "bait" within that "zone of influence" and the defendants were found guilty. That is what this section refers to, is that a person is not going to be charged with accidental distribution of seed, which can be proved.

The basic concern that everyone has, and I have heard it and read it, is that they will never be able to make a case under this law. And I think that is nonsense. First of all, this is a criminal violation, and the normal standards in criminal law are beyond a reasonable doubt. That has been eliminated and you are talking about a preponderance of the evidence, which is basically a civil standard. And both sides have a level playing field to come in court. If the defendant cannot prove by a preponderance of the evidence, obviously the government is going to get a conviction.

Now the conviction rates are very substantial. In fact, the previous director of law enforcement, who has since passed away, once bragged that they had a 97 percent conviction rate. And I said I didn't believe that. He came in with his three-inch stack of records to prove it. And I asked him without looking at it how many of them just paid the fine. He was considering that in a conviction rate because there is really no sense going to court unless you have some way under today's standards of either proving you weren't there, which is kind of silly, or that that bait was not bait at all, it was rocks or it was so far away or there is some hook to get away from strict liability. It doesn't happen or very seldom does it happen.

One of the other concerns has been the question of flexibility for the regulatory process. First of all, Congress has the duty to administer the Migratory Bird Treaty Act pursuant to treaty. It has delegated that duty to an executive branch of government, which it has every right to do. However, the Congress has the primary duty. Now these laws have been administered inconsistently throughout the nation. There is actually a Congressional duty under that treaty to make sure they are consistent. And I suggest to you that the Congress not only has the opportunity to change this law but it has the duty to change the law to make it consistent.

As to flexibility—a year ago today we had a hearing, seven years ago the Advisory Commission made a report, twelve years ago then Congressman Breaux held a hearing, twenty four years ago was the last change in the regulation, and the first case in 1939, the

Reese case was 58 years ago. It said that the hunter—the only problem—the hunter must investigate "bait" at his peril. However, today we just don't know what the peril is or where it is. And I think Congress not only has a duty but it has an opportunity to define it. With all the time and treasure that sportsmen put into the conservation of renewable resources, I think it is only fair that it be addressed by the Congress and corrected.

Thank you, Mr. Chairman.

[Statement of Stephen Boynton may be found at the end of the hearing.]

Mr. SAXTON. Thank you very much. I have no questions at this point. Mr. Farr.

Mr. FARR. I wonder if Mr. Boynton has read Mr. Manning's proposed regulations?

Mr. BOYNTON. Yes, I have.

Mr. FARR. What do you think of them?

Mr. BOYNTON. Mr. Manning and I met yesterday for several hours going over that. I have trouble with the word "normal" to change "accepted" as a standard. However we agree that you could use both words, normal and accepted. I had a case where under the current law it says "bona fide agricultural practice." The court said that bona fide wasn't the intent of the person doing it, it was by somebody else's standard. So I had some questions with Mr. Manning. We discussed this and Mr. Manning has made a proposal that he did not refer here to today, but there is—if there can be a standard that is put in with all the input from the Fish and Wildlife Service, from the state fish and game agencies, from the soil conservation districts, and they come out with what is the "normal accepted" standard of agriculture in a given area, I am all for it.

Mr. FARR. I agree with you that there is something that is broken and needs fixing, but I am not convinced that the bill in its present language fixes it in a way that both Mr. Boynton and Mr. Horn talked about. And I appreciate Mr. Manning's diligence on it, and hopefully we can come to some resolution to write a law that will work, not that will cause other problems so we will be back here a year from now.

One of the biggest problems I have is just lack of law enforcement in wildlife management. I happen to have a marine sanctuary out in my district in California that is 200 miles long, and we have one enforcement officer to go from San Francisco to the Mexican border for all marine wildlife management. I mean, it is impossible for him to do his job in any reasonable way. And I find that the local folks think that the fact is we just don't have enough enforcement in game management.

So if we are going to write a law, when it does get enforced, it ought to be enforced properly. And I think that, as you say, the responsibility here is for the renewable resource and what you are learning—the big picture is that loss of habitat and pesticides and so on, the species are all declining. So there is a real—there is a big management responsibility here, and I appreciate your testimony.

Mr. SAXTON. Thank you. Mr. Abercrombie.

Mr. ABERCROMBIE. Mr. Boynton, I have not had the opportunity to examine in detail your testimony, but I will. Am I correct in understanding that you indicate in that testimony previous cases that address the question of intention and known and should have known as it applies in this particular area?

Mr. BOYNTON. In some exhaustive detail, I am afraid.

Mr. ABERCROMBIE. No, no, that is good. Do you agree, then, that if we can solve that—that problem is resolvable? Reasonable people can resolve that and thus move off this 58 years of stasis?

Mr. BOYNTON. I think it is solvable. And as far as the time element, that is in your hands. But yes, I think it is solvable. And most people, although quibbling over some of the other portions of this legislation, those people agree that that standard is too high and should be addressed appropriately. Yes, sir.

Mr. ABERCROMBIE. And one last point about the criminality side. Reference was made earlier, perhaps you heard it, about someone whose application for entrance into military services was compromised by virtue of a conviction in this. So am I correct that when we say a criminal conviction we are talking about something that can adversely effect someone's life goals and so on?

Mr. BOYNTON. That is correct, sir. This specific case, I believe, was Naval ROTC, and he had to put down whether or not he had a criminal conviction. He did, albeit a misdemeanor, it was still there, and he lost——

Mr. ABERCROMBIE. Would you agree that perhaps we then should take up whether we should differentiate in this bill or what comes out of this legislation, perhaps, going to civil penalties rather than criminal penalties where appropriate? Now not getting rid of criminal penalties, because that might be—not accomplish what needs to be accomplished, but perhaps there ought to be some consideration of civil penalties as opposed to criminal penalties where that seems appropriate.

Mr. BOYNTON. I think that could be considered. And I might also add at the hearing 12 years ago that Senator Breaux chaired when he was with the Merchant Marine Committee, there was a suggestion that these penalties remain criminal but be similar to the Juvenile Corrections Act where after a five-year period and there has been no other conviction under the act, they be purged.

Mr. ABERCROMBIE. Okay, thank you very much, Mr. Boynton. It was very valuable.

Mr. BOYNTON. Thank you.

Mr. SAXTON. Thank you all very much. We are going to move to panel four at this point, Dr. Rudolph Rosen representing the Safari Club, Mr. Dan Limmer representing the National Wildlife Federation, Mr. Rollin Sparrowe representing the Wildlife Management Institute, Ms. Susan Lamson of the NRA, National Rifle Association, and of the NRA the Natural Resources Division, Mr. William Ladd Johnson of the National Waterfowl Federation. Welcome.

Mr. Rosen, you may begin. And let me just remind you that there is a five-minute time limit. When the red light goes on, please finish your thought. You may proceed, sir.

STATEMENT OF DR. RUDOLPH ROSEN, EXECUTIVE DIRECTOR, SAFARI CLUB INTERNATIONAL

Mr. ROSEN. Thank you, Mr. Chairman. My name is Rudolph Rosen, and I am Executive Director of Safari Club International. Mr. Chairman and members of the Subcommittee, I do appreciate the opportunity to appear before you today to speak about H.R. 741. I am going to abbreviate my comments, and I ask that the full text of my comments be entered into the record.

My most direct experience with regulation of migratory bird hunting was from 1991 through February of this year when I was responsible for migratory bird management and harvest regulations first for the State of Texas as Director of Fisheries and Wildlife and then for the State of Oregon as Director of the Oregon Department of Fish and Wildlife, and also throughout my life as a hunter of migratory birds.

Safari Club is an international not-for-profit wildlife conservation organization with over 32,000 members, 168 chapters worldwide, and through affiliated organizations, our numbers increase to over one million. All of our members are hunters, and we work to conserve the world's wildlife species and protect the rights of hunters.

H.R. 741 would enact into law a variety of prohibitions dealing with different methods and practices for hunting migratory birds. Hunting migratory birds with the aid of bait is one of those prohibitions, and this bill makes an important clarification in regard to this particular provision in that a person charged with a baiting violation must know or should have known through the exercise of reasonable diligence that bait was present where they were hunting.

We appreciate the leadership of the Chair and others in Congress bringing this bill forward. We support these efforts and we offer our help as the bill moves forward.

The Safari Club supports regulations that conserve migratory bird resources. We also support ethical hunting and a very strict adherence to all wildlife hunting rules and regulations. Our members pledge to follow a code of ethics that includes knowing and following hunting rules and regulations wherever and whenever they hunt. Rules prohibiting baiting of migratory birds and hunting over bait are no exception. Our members do not question the need for these regulations, including the prohibition on baiting. But we have a problem when it comes to the current rule on hunting over bait. The rule has been interpreted and administered for years as a so-called strict liability standard.

It has been the experience of our members that the current rule is often enforced so rigidly that hunters who are innocent of knowingly violating baiting laws are categorically judged guilty. The judgments of various law enforcement officers can vary as to whether the amount and nature of placement of various materials, as well as the handling of crops in agricultural areas amounts to baiting. Once a judgment has been made by a law enforcement officer, the strict liability nature of the baiting violation makes it very difficult for the alleged defender to contest. The costs and time required to argue with an officer's judgment are so high compared to the penalty that most people charged with hunting over bait simply pay the penalty.

Some may feel this is simply an annoyance factor, but our members take pride in the fact that they hunt lawfully and ethically. In one case, there was a move to bar a person from candidacy for the Safari Club presidency because he had paid a penalty for hunting over bait rather than contest it. The Safari Club undertook a detailed inquiry, hearing a number of witnesses, and determined that his action was only a violation because of the strict liability standard of the rule, that he had no intent to hunt with the aid of bait and he had no knowledge that bait had been placed. In this incident, over 25 people were involved, including a very well-known golfer.

Wildlife managers generally seek to develop rules in cooperation with hunting license holders that protect the resource first, and where biologically-based management practices allow, permit hunting within defined limits. Such regulated hunting provides recreational and economic benefits, especially important to rural America where spending on hunting and fishing gives a much needed boost to the local economy.

We understand that wildlife law enforcement acts as a deterrent and this force of deterrent can be very, very effective and necessary in preventing harm to wildlife resources. But the baiting regulations have acted as an entirely different sort of deterrent, because here in addition to deterring would-be baiters, the regulations have acted as a deterrent to ethical hunters. Since hunters can't be assured any field is bait free, in self defense many hunters have given up or have highly limited their hunting activity.

And this is entirely a result, we believe, of how the current rule is written and has, at least in my opinion, little to do with focusing on those truly culpable for baiting or protecting migratory birds. Standards on baiting need to be clear in holding culpable two types of violators, those who bait for the purpose of hunting and those who knowingly hunt over bait or hunt where it is blatantly obvious there is bait drawing birds into shooting range.

As proposed, H.R. 741 focuses the law on the real culprits. Hunters will understand and agree with that kind of law. Hunters will back the Fish and Wildlife Service and the state law enforcement agencies in enforcing this kind of law.

We thank you very much for bringing this forward today.

[Statement of Rudolph Rosen may be found at the end of the hearing.]

Mr. SAXTON. Thank you, sir. Mr. Limmer. Proceed, Mr. Limmer.

Mr. LIMMER. Thank you, Mr. Chairman and members of the Subcommittee, for this opportunity to come before you today. My name is Dan Limmer. I am a Regional Executive with the National Wildlife Federation, working in our Prairie Wetlands Resource Center located in Bismarck, North Dakota. I ask that our formal comments along with attached copy of NWF resolution, which I have with me today, be submitted for the record.

Mr. SAXTON. Without objection. Thank you.

STATEMENT OF DAN LIMMER, REGIONAL EXECUTIVE, NATIONAL WILDLIFE FEDERATION

Mr. LIMMER. Thank you. National Wildlife Federation is the nation's largest conservation education organization, with 45 state af-

filiates and over four million members and supporters. Our members and supporters are people who know and love wild things and wild places and value the ability to learn and benefit from them.

I am here today to address House Bill 741, the Migratory Bird Treaty Act Reform Act of 1997. The National Wildlife Federation opposes H.R. 741 for two primary reasons. First of all, we strongly believe that wildlife management is most appropriately and best accomplished by trained professionals in wildlife conservation and wildlife law enforcement. Wildlife management must retain the flexibility to be able to make timely regulation and rule changes in order to successfully adjust and adapt to unpredictable and highly variable conditions and events.

Secondly, H.R. 741 would in fact weaken existing waterfowl protections by, for example, allowing the use of toxic lead shot to hunt captive reared waterfowl and by expanding the potential for the unethical hunter to bait based on the requirement that would force the field law enforcement officer to prove intent. Such a requirement can be a very difficult thing to prove and could, in fact, severely compromise the enforcement of these regulations.

Mr. Chairman, I have outlined the two basic reasons why the National Wildlife Federation opposes 741, and I would now like to tell the committee those things that we do support. First of all, we strongly urge the U.S. Fish and Wildlife Service to move forward quickly with the review and revision of regulations relative to waterfowl hunting restrictions. Any revised regulation must not allow waterfowl baiting and must adhere to the highest standards of ethical fair chase. National Wildlife Federation supports by resolution clear, concise, easily interpreted and uniformly enforceable hunting rules.

Mr. Chairman, I am also here today as a former wildlife law enforcement officer and wildlife manager with over 16 years experience with the South Dakota Department of Game Fish and Parks, stationed within the heart of the Central Flyway. I can personally attest to the absolute necessity that wildlife management retain the flexibility to deal with changing conditions and that we have regulations in place that will hold the unethical few in check. Without a doubt, if those unethical few are allowed to go forward unrestrained, they will quickly become a significant adverse effect on our migratory bird resource.

And finally, Mr. Chairman, I come to you today as a hunter, conservationist and a father with over 35 years of hunting experience. I have personally witnessed and I abhor unethical hunting methods, and I have come to learn and greatly respect true sportsmanship. I have dedicated my career to protecting and passing down to my children and all of our children, as my father and grandfather did to me, the ability, the opportunity to know, love and enjoy the great privileges that I have.

To be sure, to be successful we must retain the flexibility within management to adapt to change within regulations that are clear, easily understood and consistently and uniformly enforced.

Once again, National Wildlife Federation urges the committee to reject House Bill 741. Thank you very much for this opportunity to testify.

[Statement of Dan Limmer may be found at the end of the hearing.]

Mr. SAXTON. Thank you very much, Mr. Limmer. Dr. Sparrowe, you may proceed. Incidentally, at the conclusion of Dr. Sparrowe's testimony, we are going to have to take a break for a vote, in fact two votes, and then we will return to Susan Lamson. Dr. Sparrowe.

STATEMENT OF ROLLIN SPARROWE, PRESIDENT, WILDLIFE MANAGEMENT INSTITUTE

Mr. SPARROWE. Thank you, Mr. Chairman. The Wildlife Management Institute has extensive experience and involvement in virtually all of the aspects of migratory bird management that have been mentioned today, including past citizens commissions and attention to the baiting issue. I have personal experience for more than 20 years with this through my employment with the Fish and Wildlife Service, during which time I supervised migratory bird management and law enforcement. And I participated in the ad hoc committee with the International on baiting during the past ten months. Perhaps of equal importance, I have been a co-owner and wildlife manager of the Island Creek Gun Club on the Eastern Shore of Maryland for the past 17 years. I have hunted actively in Maryland for 20 years and for 35 years nationwide. I am very familiar with the problems faced by both hunters and law enforcement agents in carrying out the law.

We at the Institute believe that regulations through the established public participatory process are the proper way to make any adjustments that need to be made in these laws. We don't think that H.R. 741 does that in a way that we can support, and we particularly are concerned about the strict liability issue. I won't reiterate the testimony that has been given here. We think the issue needs some attention. We think there are ways it can be addressed. I am heartened by some of the suggestions by others testifying here about how a rule could be processed.

Please note that I referred to a rule, because we still prefer that wildlife management processes proceed with the input from the experienced people around the country and make these changes as needed, rather than have direct intervention by the Congress.

During my participation with the International during the past year, I particularly recommended at each juncture that any change made in these regulations must be measurable in terms of what its impact is. No one can predict what these changes will produce in the way of different kill or impact on the resource. We ought to do that through the system that we have used very successfully for several decades. Any changes are done through the open participatory process with an experiment set up, a requirement for data collection, analysis and then potentially a way out of the situation if we have done something that doesn't fit. That would be very difficult to do under H.R. 741 and a new Federal law.

The various examples of lack of flexibility mentioned earlier I would simply add to. The Eastern United States has a tremendous problem with Canada geese, and this nuisance is going to have to be dealt with just as the snow goose problem, aggressively and probably in ways that are non-traditional. We would hate to have to come back to the Congress for each one of these things. I don't

think the Congress wants to get in the business of managing waterfowl each year.

I have participated in hunting successfully for 20 years in the Chesapeake Bay region, and I would submit that no one has been more vulnerable than me to the embarrassment or the fear of being caught. As Chief of Migratory Birds and Administrator in the Fish and Wildlife Service or my current job, I certainly could not afford it. I have looked over my shoulder when I needed to. I have adjusted my hunting schedule. I have gone home a few times because I didn't like something I saw, but I have been able to live within the law.

The fact that a committee of state biologists and administrators and other organizations have been able to come forward with some initial recommendations through the international leads me to believe that we can get this done through the established management process, and I urge the Congress to let that happen. Thank you, Mr. Chairman.

[Statement of Rollin Sparrowe may be found at the end of the hearing.]

Mr. SAXTON. Thank you. As I stated a few minutes ago, we are going to have to take a break now, and we will come back as soon as we can, but there are two votes, so we will be 15 or 20 minutes. Thank you.

[Recess.]

Mr. SAXTON. Move on to Susan Lamson.

STATEMENT OF SUSAN LAMSON, DIRECTOR OF CONSERVATION, WILDLIFE AND NATURAL RESOURCES DIVISION, NATIONAL RIFLE ASSOCIATION

Ms. LAMSON. Thank you, Mr. Chairman. The NRA appreciates the opportunity to testify on H.R. 741. It was made clear at last year's oversight hearing that the baiting regulations continue to cause problems, problems of inconsistent enforcement and court interpretation exacerbated by ambiguity and confusion on the part of the hunter.

The NRA fully supports H.R. 741 because it makes long-needed changes to the baiting regulations. It will provide the hunter with a law that is clear and reasonable and can be consistently and fairly enforced. At the same time, the bill will continue to protect the resource from excessive harvest. With over two million hunter members, protection of the resource is of vital importance to the NRA, because hunting is wholly dependent upon healthy, sustainable wildlife populations.

It has been suggested that any shortcomings with the baiting regulations can be overcome through the rulemaking process. That may be true, Mr. Chairman, but the Fish and Wildlife Service has already had ample opportunity to seize that initiative. Instead, the Service has given Congress no other choice but to step in, because it hasn't evidenced any sign of resolving the problems on its own.

It has been suggested that H.R. 741 will make it extremely difficult to bring convictions because it would increase the Federal Government's burden of proof. Well, I think that burden should be increased. Under the current regulations, the government's burden is minimal if nonexistent. But the problem is that under the strict

liability standard, the hunter isn't given parameters by which his knowledge or lack thereof is held legally accountable.

H.R. 741 resolves the issue by establishing the reasonable diligence standard and injecting fairness into enforcement by giving the hunter an opportunity to provide a defense in court. It doesn't require the government to prove intent, nor does it call for the traditional standard of proof beyond a reasonable doubt because the bill recognizes that such standards could make it extremely difficult to convict a law breaker.

It has been suggested that there is a danger in amending the regulations through legislation because it will remove agency flexibility, but part of the problem associated with the regulations is that it provides the agency with too much flexibility. For example, the agriculture terms used in regulations have been shown to lack the clarity necessary for a hunter who is not otherwise well versed in agricultural practices to know at all times whether an area is legal to hunt over or not. In the past, the Service has acknowledged that the determination of a baited area is based upon the expertise of law enforcement.

Mr. Chairman, a person of average intelligence should be given a reasonable opportunity to know what is allowed and what is prohibited. The hunter shouldn't have to develop an expertise in agricultural practices, nor rely on law enforcement's interpretation as to whether he is legally hunting or not. The clear definitions and guidance in the bill will resolve that problem and also provide the government with strong proof that a hunter should have known bait was present.

H.R. 741 also injects fairness into the application of the so-called zone of influence. To suggest a hunter be held responsible for knowing why birds are in the hunting venue absent the presence of seed or grain in the area being physically hunted is an unreasonable expectation of hunter responsibility. The hunter hopes to be in a hunting area where birds will be and should not be held accountable for not being suspicious as to why they are there. Hunters should be held accountable, instead, for the condition of the hunting grounds and not for an area of unknown extent.

The bill gives a hunter an opportunity to present evidence in court as to whether the alleged bait acted as a lure but it also preserves the greatest amount of flexibility for the court in its review and for the government in making its case that a hunter knew or should have known.

It has also been suggested that the bill would undercut the principle of fair chase, but we fail to see the relevance of that argument. The bill is not removing the prohibitions against baiting, rather it is designed to ensure that such prohibitions are understood and interpreted such that the outcome is the same, whether it be through the eyes of the law enforcement officer, the hunter or a judge.

There are many hunters who have given up hunting migratory birds rather than risk their reputation on circumstances beyond their control. It is an unfortunate and unacceptable outcome of the regulatory and judicial process. Rules should be uniform, clear and understandable so that a hunter whose intent is to comply can

comply. H.R. 741 achieves that objective without eroding the goals and objectives for migratory bird conservation.

In summary, the migratory bird resource, those charged with protecting it and those who would legally hunt it are all benefited by the Migratory Bird Treaty Reform Act of 1997. Thank you, Mr. Chairman.

[Statement of Susan Lamson may be found at the end of the hearing.]

Mr. SAXTON. Thank you very much, Ms. Lamson. Mr. Johnson.

STATEMENT OF W. LADD JOHNSON, BOARD MEMBER, NATIONAL WATERFOWL FEDERATION

Mr. JOHNSON. Thank you, Mr. Chairman. My name is Ladd Johnson. I am a board member of the North American Waterfowl Federation, which is made up of state waterfowl organizations. I am also chairman of the State of Maryland Waterfowl Commission. I am here to speak to you about the injustices of the present Federal regulations pertaining to the enforcement of baiting migratory birds and the accompanying definitions of normal agricultural practices. Let me acknowledge that I and the people I represent do not support the taking of migratory birds with the aid of bait.

I personally have been a victim of the present regulations and their accompanying judicial interpretations. Twice I have been convicted of taking waterfowl with the aid of bait. In both cases, the bait was found on the property. And in both cases I was a guest of a person who assured me that no bait was present. Arriving before daylight, I was unable to personally observe the presence of bait in the hunt area, let alone the bait being a half a mile away and under several feet of water, but because I was there and the bait was present, I was cited. Both cases resulted in the payment of the imposed fine because the precedent established in the Federal court system pertaining to bait left me no other choice. Probation before judgment is not an option in Federal bait cases, and if the bait was there and I was there, the precedent set found me guilty. Since then, I have only hunted on my own personal farm or with those individuals with whom I have personal knowledge of their operations.

Many persons have fallen victim to the same circumstances that I have. Let me stress again that I and the people I represent do not condone the use of bait in attracting and harvest of migratory birds. The language of the present regulations states if bait is present or has not been removed for a period of ten days prior to hunting, all parties present are guilty in attempting to harvest waterfowl with the aid of bait. Let me also say that feed does not become bait until you choose to hunt over it. A person could arrive on the ninth day after the bait has been removed and still found guilty.

The answer is simple. The landlord or the lessee or those responsible for the actions on the farm or in control of the property are the responsible party to any and all actions that may violate game regulations. Should a violation occur, the party in charge of the action should be cited. The imposed penalty should be placed on them equivalent to all those people present and then possibly doubled.

On the issue of normal agricultural practices, I also have the privilege of administering a national wildlife food planting program which this year should exceed over one million acres. The question of what is a normal agricultural practice that is planted for wildlife could be jeopardized and could be misinterpreted under the present regulations. With this private sector and this private initiative in jeopardy, the language should be clarified.

Moist soil management hasn't been mentioned here today, which is new type of management, particularly for waterfowl. It is economical and very effective in the—in sustaining waterfowl populations. Manipulation in moist soil management is an essential practice to ensure the effectiveness of the moist soil management program. Manipulation of any area under the Federal interpretation can be assumed as creating a baited area.

I and the people I represent support H.R. 741 and its amendments to the Migratory Bird Treaty Act. Let us protect the innocent sportsmen with the same regulations that protect the migratory resource. Thank you, sir.

[Statement of W. Ladd Johnson may be found at the end of the hearing.]

Mr. SAXTON. I would like to thank each of you for obviously very articulate and good testimony. I don't have any questions at this point, and I would just like to thank you each for being here and sharing in some cases your experiences and in other cases your thoughts with us. Thank you very much.

We will now move to our fifth and final panel, Mr. William Boe of Gainesville, Florida; Mr. Vernon Ricker, who is a retired special agent from the Fish and Wildlife Service who currently makes his home in Salisbury, Maryland; Terrance Sullivan, Secretary of the League of Kentucky Sportsmen; Mr. Charles Conner of Germantown, Tennessee; and Mr. Fred Bonner of Raleigh, North Carolina. Welcome, and when you are comfortable, Mr. Boe, you may proceed.

STATEMENT OF WILLIAM BOE, GAINESVILLE, FLORIDA

Mr. BOE. Mr. Chairman and members of the committee, I would like to thank you for the opportunity to be here again. I was here a year ago speaking to the House Resources Oversight Committee about the situation with the Florida hunters, and I am here today in the capacity as the Chapter Advisor to the Alpha Gamma Rho Agricultural Fraternity at the University of Florida.

We had numerous members of that fraternity receive citations in the infamous Florida raid, and Congressman Stearns, I think, was quite accurate in some of his comments in reference to the young men. And I would like to clarify some issues, and I would hope that those who write the laws will listen to what happened to some of these young men to make sure that other people in their situation certainly won't be victims of the confusion and perhaps the overzealous actions which impacted them so hard that day.

I would like to comment very briefly, though, on some of the comments that were put in the record by Congressman Abercrombie that were left with him for Congressman Miller. I have also seen some things in the media that have been published in the Washington area where it keeps getting referred to the fact that the peo-

ple in the Florida raid were caught "red handed". I think this term "red handed" perhaps needs to be better defined. I am somewhat concerned about that.

"Red handed" is confusing when you have five young men hunting on the property of one of their parents, which is an active agricultural production, down the road and separated from the field raided by the Federal agents. The agents came to this field where these boys were and "red handedly" caught them in their own field where they had hunted many times before. When they addressed this issue to the agents, that they were not in the field being raided, they were told, "well, you are close enough as far as we are concerned, that is why we have courts of law, and you can get an attorney and go to court if you so desire."

I met with the parents of all five of those young men. In my testimonial package you have the comments from the parents of one of those people. I hope that is read by every member on this committee, including those that aren't present here today.

I also have the letter from the young man in question, who was denied access to the ROTC program. It was the Army ROTC program. Congressman, right now he is in your home state of New Jersey. He is at the Coast Guard training facility at Cape May. He will do very well there. He, however, is going to be an enlisted man in the Coast Guard Reserve. Following his training in New Jersey, he will go back to the University of Florida. He will graduate, probably, with honors. I will be at his graduation along with his other friends next year. And hopefully at that time he will qualify for officer candidate school within the Coast Guard.

I had the pleasure of going to the ceremony for three of my young men who were commissioned in the Army, and fortunately for them they did not go to that dove hunt or their commissions also would have been interrupted.

Congressman Miller talked about a "legislative fix." Perhaps that is what we are here for today, a "legislative fix." After all, the members of this committee are in a position to fix a very serious problem, and I hope they do so.

Also, one other comment in reference to Mr. Miller's comments that he made. He talked about the people having poor eyesight. I would like to point out the fact I do wear glasses, and I was in that field that day. I hunted in about a two-acre area of the field. There was no grain in the two acres in which I hunted that would have enticed any birds there.

I graduated from a university in the State of Texas where hunting is very popular, and I know what constitutes a large volume of birds flying within an area. There were five of us hunting. Within a two and a half hour period of time, we killed ten birds. There was nothing going on in the part of the field that I hunted in that would reasonably suggest there was bait there, and there certainly was no bait where I was hunting. I know that because I asked the agent that cited me to show it to me. He would not do so. And obviously if it was there, I think he at least could be able to demonstrate the evidence to me.

I would like to share with you the letter provided to me, hand carried by pickup truck from Dixie County right before coming up here. This is from Mr. Bobbie Hatch of Cross City. He is the owner

of the property where the young men got the citations from that was adjacent to the field raided. He was away, but this is his letter to this committee.

"Members of the House Committee, I was angered after returning from the Florida versus Auburn football game to discover that some of my son's fraternity brothers had been fined for hunting on a baited field while on my property. These young men had been invited by my son to come and hunt dove in our field with my permission. My land is rich in dove population and always has been due to the accessibility of fields, cover and water supply which in no part has anything to do with baited fields. These young men came to have a peaceful day hunting on my land, and were then unjustly accused.

I take offense to this happening. If this law reads in any way that these boys were guilty, it is an absurd law and therefore should be changed. Bobby Hatch, Post Office Box 611, Cross City, Florida, phone number 352–498–3712."

And I hope someone has the courtesy of contacting him to find out why he feels the way he does.

From my interpretation and observations of what I saw that day, I saw a very elastic law. I saw a law which in reality is whatever the agents want it to be on any given day. And that law is whatever the judge in a court of law defines, usually in favor of these people.

The reason I did pay my fine a year ago—and a lot of people have said why did all these people pay fines if they are indeed innocent. I went to a friend who was a former state prosecutor that convicted serial killer Ted Bundy, and who also played a major role as states attorney in convicting Danny Rollings, who killed five University of Florida students six years ago. I went to him and I said I would like you to represent me in this situation. He studied the law. His name is Lynn Register. He was a private attorney then. Now he is a Federal prosecutor in Tennessee. He said Bill, as this law is written, if you are there you are guilty. You don't have to see the bait. You don't even have to have any desire to break the law. I recommend you to cut your losses, pay your fine and try to talk to someone to bring some reason to this law so that it will be more practical and more fair to all people concerned.

That is why at my own expense I have come up here twice. I would hope this elastic law would be better defined so it is not quite so elastic to impact the lives and careers of young men who are hunting on adjacent fields, trying to get away from the University of Florida and their studies for just a day or two.

In reality, when my license was taken that day I was indicted, tried and convicted in the field. I was told that someone would investigate my case. I never heard from anyone. The next letter I got was a letter stating you have the option of mailing in your money or perhaps—you can use Visa or Mastercard. It is very convenient, I might add—or you can go to court, and if you go to court and are found guilty, you will pay $500—actually you will pay up to $5000 and possibly spend one year in a Federal prison. Being the fact that I had an ill wife, children with braces, et cetera, et cetera, I thought that was not a very reasonable option at that point in my life.

I do think it is a good option to come up here. I am glad Cliff Stearns listened to some of our concerns. I think he is a good Congressman. He returns his phone calls and he cares about the people within his district, and I think that is what this is about. I am a reasonable person. I like to hunt birds, but I do have good eyesight. I might add I walked point in Vietnam and I never got my boys in an ambush. If grain had been where I was, I would have seen it.

And I would like to entertain any possible questions. I am up here wanting fairness for people and respect for wildlife, and I don't think any was provided in the Florida case.

Clarifying a point made by Cliff Stearns, these two men, two of the boys from the adjacent field. I talked with their parents. One of them was a young man. He was married, just had an infant daughter. He was in his senior year in college. He was already in debt to go to school. He said, "Mr. Boe, I don't have money for an attorney and I am not paying $500 fine for something I didn't do." And I asked what are you going to do? He said, "By God, I am going to go to court and defend myself!" And he did. And the judge acquitted him. He said son, there is no logical reason why you should know what was going on somewhere else. And I praise that judge in Gainesville, Florida for his sense of justice.

Thank you, sir.

[Statement of William Boe may be found at the end of the hearing.]

Mr. SAXTON. Thank you very much, Mr. Boe. Mr. Ricker.

STATEMENT OF VERNON RICKER, RETIRED SPECIAL AGENT, U.S. FISH AND WILDLIFE SERVICE, SALISBURY, MARYLAND

Mr. RICKER. Thank you, Mr. Chairman. I come before you today as a recently retired Special Agent with the U.S. Fish and Wildlife Service, having served 25 of my 28 years on Maryland's Eastern Shore. 17 of those 25 years was served as a Special Agent with the Service, an additional seven years as a Maryland Natural Resources police officer.

When I came on with the State of Maryland and the U.S. Fish and Wildlife Service, the Eastern Shore was in its heyday for illegal waterfowl hunting violations, particularly baiting. The mid–60's through the mid–80's was the peak of migratory waterfowl hunting and outlaw gunning on the Delmarva Peninsula. There was little defense for hunters caught red handed shooting over baited areas and the courts correctly showed no difference to status within the community.

I want to make several important points first. Changing the law is not the solution. During my 28 years in law enforcement, I have heard all types of complaints about the unfairness of baiting laws. I have seen the courts uphold the Migratory Bird Treaty Act and have basically seen the U.S. Fourth Circuit of Appeals in Richmond, Virginia say enough is enough. They have heard these arguments before many times. I am here to tell you that if the strict liability standard is removed from the regulations, it will be devastating. And I repeat, it will be devastating to migratory birds.

I have been involved in apprehending and prosecuting nearly 1000 individuals in my career for hunting on or over baited areas.

I have seen 50 people bait these areas, ten of which I could physically identify. That is 28 years of law enforcement working prime waterfowl areas. The reasons I couldn't identify more individuals would vary from weather conditions, rain, snow, fog, et cetera, reduced lighting, distances and concealment from the individuals baiting the areas. There have been times in my career when individuals have nearly scattered grain on top of me when they were baiting the areas, but I still couldn't identify them.

Oftentimes in my career I personally knew who owned, rented or hunted a particular location being baited or owned a boat similar to what the subject was in that was doing the baiting, but I could still only give a generic description. After seeing the subjects bait an area, they would still deny how the bait got there, even if you find grain in the bottom of the boat. People have a hard time looking an agent in the eye and saying yes, I baited the area yesterday afternoon.

I have seen many hunters standing in shelled corn in soybean fields asking what bait, hunters standing on bushhogged sunflower fields with milo scattered saying I thought it was gravel pellets, hunters on marshes with cracked corn under decoys saying I thought it was just a sandy bottom. Hunters complained to me after they were caught that someone else baited the area. And my response, they also baited the bottom of your boat.

Strict liability is needed because knowledge of bait is too difficult to establish. Hunters have to start being responsible themselves by asking hosts and guides and by inspecting the site. By just saying I didn't know the bait was there doesn't protect migratory birds.

My recommendations to this committee would be to require or mandate the Service to establish annual training to be conducted by the most experienced special agents regarding all types of baiting situations. This type of training could possibly take place on national fish and wildlife refuges whereby actually hunting plots could be established to set up different scenarios. These plots should be both legal and illegal on planted, harvested and manipulated fields to simulate actual field situations. With this requirement, the Service would have a uniform enforcement standard nationwide. It would also better train the less experienced agents and supervisors alike in making prudent decisions regarding questionable baiting situations.

To also increase the penalty for people who have actually been proven to have put the bait out and consider a sum of $10,000.

In conclusion, House Bill 741 may be well intended, but it won't protect migratory birds. I ask that you please leave the regulations, statutes and case law alone and concentrate on better training for all Fish and Wildlife agents. I truly believe it will serve in the best interests of both hunters and non-hunters alike and will continue to protect migratory birds for future generations.

I thank you for the opportunity to comment on House Bill 741.

[Statement of Vernon Ricker may be found at the end of the hearing.]

Mr. SAXTON. Thank you very much, Mr. Ricker. Mr. Sullivan.

STATEMENT OF TERRANCE J. SULLIVAN, SECRETARY, LEAGUE OF KENTUCKY SPORTSMEN, PROSPECT, KENTUCKY

Mr. SULLIVAN. Good afternoon, ladies and gentlemen. I am Terry Sullivan of Prospect, Kentucky. I am a Director of the Harrod's Creek Field and Stream Club and Secretary of the League of Kentucky Sportsmen. I have studied and written a good deal on the subject at hand. As a result, I have come to the conclusion that I cannot safely hunt doves. The rules governing baiting are so confusing, ambiguous and unevenly enforced that I am afraid of unintentionally running afoul of these laws. Make no mistake, there is no greater shame that a hunter can feel than to be a convicted game law violator. I will not take that chance.

For the life of me, I cannot understand why such a small issue has been so difficult to resolve. In my home state of Kentucky, dove hunting comprises about five percent of all hunting and angling activities. It has been the largest source of complaint in the Kentucky Department of Fish and Wildlife. Are dove hunters that much more difficult than other hunters and anglers? I don't think so. The problem lies with the rules.

The definition of what is and isn't a bona fide agricultural operation is ill defined. To some degree it is what an enforcement officer says it is. The rules don't give sufficient weight to regional differences and farming practices and local tradition. If the vagueness of the rules isn't bad enough, this one-size-fits-all approach from Washington makes the problem even worse. Add strict liability provisions which presume guilt and a no-win situation for hunters is created.

At least one leader at the U.S. Fish and Wildlife Service knows this all to be true. Noreen Clough, Director of the Fourth Region, made a landmark decision in 1995. She came to an agreement with the states in her region that the Departments of Fish and Wildlife and the state extension services would decide what is an isn't a bona fide agricultural operation and what is and isn't baiting. Since the implementation of this agreement, baiting citations have reduced markedly. Complaints to the Kentucky Department of Fish and Wildlife have diminished significantly. The problem of uneven enforcement and strict liability and the presumption of guilt still exists. That notwithstanding, Ms. Clough's agreement has been a success.

I believe that the intent of this agreement should be codified into this law. It should take the place of the language calling for meaningful discussion between the Secretary of the Interior and the states with regards to what is and isn't baiting.

The U.S. Fish and Wildlife Service is the appropriate agency to macro manage the dove flock. Their national presence and resources make it possible for them to know the condition of the flock in general. Issues like setting bag limits are appropriate macro management decisions and should be left to the Service. Micro management decisions, such as the determination of what is and isn't baiting, are best made by the people closest to the situation. This division of responsibility makes sense.

I have reviewed the testimony that was given on this subject last year. The overwhelming advice from hunters, writers, association and various experts was to codify simple, even handed and under-

standable laws regarding baiting for migratory fowl. The only people who differed from this opinion were the U.S. Fish and Wildlife Service and other wildlife bureaucrats. It appears that their reason is that by simplifying these laws, removing the doctrine of strict liability and having the presumption of guilt, it will make their job of building a case against the hunter more difficult.

That in and of itself may be the best reason to simplify and clarify these rules. The treaty under which these regulations were drafted was designed first to protect the resource and second the consumptive user of the resource, not to make the job of law enforcement easier. Law enforcement serves people. People do not serve law enforcement.

Finally, I would like to say that the dove flock is in absolutely no danger. From its own pamphlet, the U.S. Fish and Wildlife Service asserts that the flock in the continental United States is 475 million birds, of which approximately 45 million birds fall to hunters guns. I am told that the average life span for a dove is about a year. Given current bag limits, hunting has virtually no impact on the dove flock. The baiting issue has no foundation in conservation of the resource. It is strictly a moral issue.

No one who has testified before this committee last year or at this hearing has asked for more or less stringent rules. We simply ask for rules that we can understand and obey. We simply ask to be presumed innocent, the same as bank robbers and horse thieves. We are not criminals. It appears clear that if Ms. Clough's agreement became the law of this land, this problem would be solved. Maybe then the time and energy that has been wasted on this issue could be turned to more productive issues, and I can get back to dove hunting.

I would like to thank you.

[Statement of Terrance Sullivan may be found at the end of the hearing.]

Mr. SAXTON. Thank you, Mr. Sullivan. Mr. Conner.

Mr. CONNER. Good afternoon, Mr. Chairman. If it please the Chair, I would like to have my remarks that are in print made part of the record, and I will just address a couple of points brought by the Congressman from California.

Mr. SAXTON. That would be fine. Yes, sir.

STATEMENT OF CHARLES CONNER, GERMANTOWN, TENNESSEE

Mr. CONNER. With respect to the changes in the law, I have been hunting waterfowl migratory birds for more than 40 years, fortunately enough, came from the south on a farm where we were able to do this tied directly to production agriculture. Approximately 1979 I became involved with the Federal enforcement of laws that pertain to migratory gamebirds because of the fact that I was publishing a magazine, Waterfowlers World, which dealt strictly with waterfowl.

During the years that have subsequently passed since the late '70's, I began writing about the subject, covering the agents in the field, watching what they did, generally making a study, developing some good friendships along the way and renewing some others. I worked with people that I am sure Mr. Ricker knows and

their sons and other agents that I am sure he is familiar with. These agents have done a commendable job in the field.

The problem is that these agents are going to continue to make good cases, I believe, irrespective of what we are told about the case laws being their only access to it. These are the people that will go and put in the extra time and effort to make sure that the individual who creates the adverse impact on the resource is punished. And I believe that is all we are addressing here, is a fact that we are going to change that a little bit. It is not the unsuspecting lawyer from Memphis that goes out there the first time waterfowl hunting and gets cited because he didn't know an area was baited.

Congressman Ambrose brought up the fact that he didn't want to be in the woods, I believe he said, with a man with a gun who couldn't tell whether he was hunting over a baited field. Well, I beg to differ with him. It is very difficult to tell sometimes. And a lot of that has to do with the agricultural procedure that goes on. That is to say in the South if I am seeding wheat at the rate of three bushels an acre and all of a sudden I start seeding it at 15, I am going to do it for a reason other than to grow wheat. So these are some of the things that I believe this bill addresses that are very needed changes.

In conclusion, I would urge the committee to take heed of the testimony of Congressman Breaux. I found it very on point. I appreciate the committee's time.

[Statement of Charles Conner may be found at the end of the hearing.]

Mr. SAXTON. Thank you very much, Mr. Conner. Mr. Bonner.

STATEMENT OF FRED BONNER, CAROLINA ADVENTURE, RALEIGH, NORTH CAROLINA

Mr. BONNER. Thank you, Mr. Chairman. I am going to go along with a lot of the others here and ask if my testimony, written testimony, be entered in the record, and I will deviate from that just a little bit.

I am a Fish and Wildlife biologist by trade. I have been a deputy game warden over in the State of Delaware. I think I have met Mr. Ricker on several occasions. I would also like to state for the record that I am a former poacher and former baiter from Eastern North Carolina. I put out many a bucket of corn for waterfowl when I was growing up. I don't do that now. I wouldn't be caught dead putting out bait for ducks or geese now, and I certainly wouldn't hunt in a baited field. It is against the law. I am saying this to familiarize you with the fact that I know what I am talking about with it. I have never been caught for baiting and hope I never am, but I am scared to death to go in the field right now because of the fact that it is so easy to be caught for baiting waterfowl when you haven't done anything.

When I was a young biologist over in Delaware, the first week I was there I was invited to hunt in a goose field. The president of Ducks Unlimited for the State of Delaware was the host on this farm. I looked over the goose pond as good as I could. I asked the man, I said please, I am new here, please, there is no bait here. He said certainly not. We went on and hunted that day. The next

day the Federal game wardens raided that pond. Norman Wilder, who was director of Fish and Wildlife at that time, was in there that day, and I guess this was the person that the Fish and Wildlife agents wanted.

What I had not been aware of and no matter how much I would have looked for bait in that situation I would never have known it was there. He was using what is called a duck plate. That is a washtub that you put out in the goose pond full of shelled corn that the geese come in and they feed on it. They go in and take this washtub out, take it to the barn before the hunters get out there. There is no bait there. There is no way you could possibly know it was there. And yet I would have been just as guilty as the other ones were in this case when they raided it to catch Norman Wilder. Bob Halstead, incidentally, Mr. Ricker, was the game warden that was handling that case at the time.

I have—I am currently editor of a magazine in North Carolina. I have a syndicated outdoor column. Several years ago I had a syndicated radio show. It covered Virginia and North Carolina radio networks. I had a call one day from a woman from P.E.T.A. I think everybody knows who P.E.T.A. is. She said Mr. Bonner, we are getting ready to do something we would like for you to give us some publicity on; we are going to take a bucket full of corn and go out in front of every waterfowl blind we can find in North Carolina and Virginia and throw it in front of every blind we can find, then we are going to call the game wardens and tell them what we have done; we haven't broken any law, we are feeding the birdies, perfectly legal, but we are going to shut waterfowl hunting down. I said lady, I am not going to give you any publicity on that, I am sorry.

I don't know whether she did that or whether she didn't do that. I never will know, but my point is that the anti-hunters, the P.E.T.A. bunch, whatever, can literally shut waterfowl hunting down. You are responsible even though all the corn is gone. Ten days after it is gone you can't hunt there. This happens very commonly.

Bill Wagner, Director of Fish and Wildlife in Delaware years ago, somebody had a vendetta against him. The morning before waterfowl season, bright and early in the morning before he ever got out there, they went out there and just threw a bucket full of corn in front of his blind. They put him out of business for a minimum of ten days.

We approached this subject in North Carolina with our North Carolina Waterfowl Resources Commission several years ago. In North Carolina we have a different state law. We are responsible for bait within 300 yards of the blind where we are hunting. Again, we had the no liability—strict liability, rather, standard there, but the State of North Carolina has changed that. If a North Carolina game warden now finds you hunting over a baited area within the 300 yards, you are given a temporary ticket. This ticket is then turned over to his superior and they investigate this case. If you should have known and you made every reasonable effort to see if bait was there, then that ticket is torn up. If you have not looked carefully in the judgment of the game warden's supervisor, then you will get a ticket and the fine is very stiff.

And we are pretty well satisfied with our law in North Carolina. 300 yards is a reasonable thing. You can look there, but can you imagine, that is 600 yards in diameter around your blind you are responsible for. That water might be 20 feet deep out there. How are you going to check this area for bait not that you put there, necessarily, but that somebody else put there that would be out to get you for some reason? And this is happening, and the anti-hunters are going to realize this. They are realizing this and they are using this. They can shut down hunting for migratory birds by doing that.

Thank you, Mr. Chairman.

[Statement of Fred Bonner may be found at the end of the hearing.]

Mr. SAXTON. Well, thank you. I don't know that we need to clarify this situation too much more. I just have to ask Mr. Ricker one question. First of all, I appreciate the job you fellows do. It is difficult and we support you, Mr. Ricker. I just have to mention this one sentence in your written testimony that I noticed when I was reading this before I came over here this morning. It says—the sentence in your testimony says, "have I ever charged someone for hunting over bait that I truly believe they didn't know the area was baited? Yes, but these were very few and far between." I don't understand why anybody would ever charge anybody with baiting where they were convinced that somebody didn't know the bait was there.

Mr. RICKER. The way the law is, the way the law is, it is impossible and it would be impossible to try to determine actually if everybody knew the bait was out. People that bait these areas are not going to tell you if they know the culprit is going to be the only person that baited the area. They are not going to voluntarily tell you yes, I put it there. In my time on, I had a way with people after they were caught it didn't matter whether they would tell me the truth or not, because they were going to be charged anyway. If a fellow had grain in back of his truck, grain in his boat, I had seen him at the area two or three days before, I had watched the birds—we don't have the luxury of having the number of Fish and Wildlife agents on the Eastern Shore, as you saw in my written testimony, that we had back in the '60's and '70's. If we did, then maybe we could do away with the strict liability and we could have a game warden in the sky behind every blind and we could prove what hunters knew. But right now we just don't have that.

Mr. SAXTON. Well, I want you to charge people that are baiting. I mean, that is what this law is all about. We want you to do that. Every member of this committee, I will bet you, wants you to charge people who are baiting, but that is not what this sentence says. This sentence says, "have I ever charged someone for hunting over bait that I truly believed they didn't know the area was baited?"

Mr. RICKER. And I would say yes. I have in my career. I have probably charged people for hunting over bait that truly didn't know. I have caught 1000 people in my career hunting over bait. I have heard the same thing from 1000 people, nobody knew the bait was there.

Mr. SAXTON. Couldn't you issue them a warning or something?

Mr. RICKER. Sir, if we did that, migratory birds would be depleted from the Eastern Shore, which they nearly are.

Mr. SAXTON. The people who you believe truly didn't know the area was baited?

Mr. RICKER. That is correct. That is absolutely correct. They are few and far between. Probably on both hands in my whole career out of 1000 people did I truly really didn't believe they knew the bait was there. But I couldn't prove that they did.

Mr. SAXTON. Well, I am glad there were a few that you charged only that didn't know the bait was there, but I just—I wouldn't have charged any. If I really, truly thought somebody didn't know the bait was there, I will be damned if I would charge them. I don't understand.

Mr. RICKER. The law does not require that. The Fourth Circuit has argued that time after time after time. We can't prove what that individual knows. I am only assuming in my mind they didn't know. Maybe they were good. Maybe they could fake me out. Maybe they truly did know, I don't know, but in my mind, no, I believe there was probably a handful of people or so that I truly charged that didn't know the bait was there. But I could not prove that. Maybe they foxed me.

Mr. SAXTON. Well, I wish I could chat with everybody longer about this, because it is really an interesting and important subject, but I have got to go. We have been here for the better part of three hours, in fact more than three hours, and I have got people waiting for me in my office. So I thank all of you for coming from your homes to be here to share this information and your experiences with us.

[Letter from Stephen Oelrich may be found at the end of the hearing.]

Mr. SAXTON. The hearing is adjourned. Thank you very much.

[Whereupon, at 1:20 p.m., the Subcommittee was adjourned; and the following was submitted for the record:]

[Additional material submitted for the record follows.]A

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105TH CONGRESS
1ST SESSION

H. R. 741

To clarify hunting prohibitions and provide for wildlife habitat under the Migratory Bird Treaty Act.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 12, 1997

Mr. YOUNG of Alaska (for himself, Mr. TANNER, and Mr. STEARNS) introduced the following bill; which was referred to the Committee on Resources

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A BILL

To clarify hunting prohibitions and provide for wildlife habitat under the Migratory Bird Treaty Act.

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 "Migratory Bird Treaty Reform Act of 1997".

SEC. 2. FINDINGS.

The Congress makes the following findings:

(1) The Migratory Bird Treaty Act was enacted in 1918 to implement the 1916 Convention for the Protection of Migratory Birds between the United

1 States and Great Britain (for Canada). The Act was
2 later amended to reflect similar agreements with
3 Mexico, Japan, and the former Soviet Union.
4 (2) Pursuant to the Migratory Bird Treaty Act,
5 as amended, the Secretary of the Interior is author-
6 ized to promulgate regulations specifying when, how,
7 and whether migratory birds may be hunted.
8 (3) Contained within these regulations are pro-
9 hibitions on certain methods of hunting migratory
10 birds to better manage and conserve this resource.
11 These prohibitions, many of which were rec-
12 ommended by sportsmen, have been in place for over
13 60 years and have received broad acceptance among
14 the hunting community with one principal exception
15 relating to the application and interpretation of the
16 prohibitions on the hunting of migratory birds by
17 the aid of baiting, or on or over any baited area.
18 (4) The prohibitions regarding the hunting of
19 migratory birds by the aid of bait, or on or over
20 bait, have been fraught with interpretive difficulties
21 on the part of law enforcement, the hunting commu-
22 nity, and courts of law. Hunters who desire to com-
23 ply with applicable regulations have been subject to
24 citation for violations of the regulations due to the

1 lack of clarity, inconsistent interpretations, and en-
2 forcement. The baiting regulations have been the
3 subject of multiple congressional hearings and a law
4 enforcement advisory commission.

5 (5) Restrictions on the hunting of migratory
6 birds by the aid of baiting, or on or over any baited
7 area, must be clarified in a manner that recognizes
8 the national and international importance of protect-
9 ing the migratory bird resource while ensuring con-
10 sistency and appropriate enforcement including the
11 principles of "fair chase". No baiting restrictions
12 should act as a detriment to the benefits of habitat
13 management including wildlife food crops.

14 **SEC. 3. CLARIFYING HUNTING PROHIBITIONS.**

15 Section 3 of the Migratory Bird Treaty Act (16
16 U.S.C. 704) is amended as follows:

17 (1) By inserting "(a)" after "SEC. 3.".

18 (2) By adding at the end the following:

19 "(b) No person shall take migratory game birds—

20 "(1) with a trap, snare, net, rifle, pistol, swivel
21 gun, shotgun larger than 10 gauge, punt gun, bat-
22 tery gun, machine gun, fish hook, poison, drug, ex-
23 plosive, or stupefying substance;

24 "(2) with a shotgun of any description capable
25 of holding more than 3 shells, unless it is plugged

1 with a one-piece filler, incapable of removal without
2 disassembling the gun, so that its total capacity does
3 not exceed 3 shells;
4 "(3) from or by means, aid, or use of a sinkbox
5 or any other type of low floating device, having a de-
6 pression affording a hunter a means of concealment
7 beneath the surface of the water;
8 "(4) from or by means, aid or use of any motor
9 vehicle, motor-driven land conveyance, or aircraft of
10 any kind, except that paraplegics and persons miss-
11 ing 1 or both legs may take from any stationary
12 motor vehicle or stationary motor-driven land con-
13 veyance;
14 "(5)(A) except as provided in subparagraph
15 (B), from or by means of any motorboat or other
16 craft having a motor attached, or any sailboat, un-
17 less the motor has been completely shut off and/or
18 the sails furled, and its progress therefrom has
19 ceased; and
20 "(B) a craft under power may be used to re-
21 trieve dead or crippled birds (except that crippled
22 birds may not be shot from such craft under power
23 except in the seaduck area, as provided by regula-
24 tions issued by the Secretary of the Interior);

1 "(6) by means or aid of any motor-driven land,
2 water, or air conveyance, or any sailboat used for
3 the purpose of or resulting in the concentrating,
4 driving, rallying or stirring up of any migratory bird;
5 "(7) by the use or aid of live birds as decoys,
6 including on any area where tame or captive live
7 ducks or geese are present, unless such birds are
8 and have been for a period of 10 consecutive days
9 prior to such taking, confined within an enclosure
10 which substantially reduces the audibility of their
11 calls and totally conceals such birds from the sight
12 of wild migratory waterfowl;
13 "(8) by the use or aid of recorded or electrically
14 amplified bird calls or sounds, or recorded or elec-
15 trically amplified imitations of bird calls or sounds;
16 and
17 "(9) while possessing shot (either in shotshells
18 or loose shot for muzzle-loading) other than steel
19 shot, bismuth-tin shot, or such other shot as may be
20 approved as nontoxic by the Secretary of the Inte-
21 rior; this paragraph applies only to the taking of
22 Anatidae (ducks, geese, including brant, and swans),
23 coots (Fulica americana) and any species that make
24 up aggregate bag limits during concurrent seasons

1 with the former in areas designated as nontoxic shot
2 zones by the Secretary of the Interior.
3 "(c)(1) No person shall take any migratory bird by
4 the aid of baiting, or on or over any baited area, where
5 that person knows or should have known through the exer-
6 cise of reasonable diligence that bait was present.
7 "(2) Nothing in this subsection shall prohibit—
8 "(A) the taking of all migratory game birds, in-
9 cluding waterfowl, on or over standing crops, flooded
10 standing crops (including aquatics), flooded har-
11 vested croplands, grain crops properly shocked on
12 the field where grown, or grains found scattered
13 solely as the result of normal agricultural planting
14 or harvesting; or
15 "(B) the taking of all migratory game birds, ex-
16 cept waterfowl, on or over any lands where shelled,
17 shucked, or unshucked corn, wheat or other grain,
18 salt, or other feed has been distributed or scattered
19 as a result of normal agricultural operations or as
20 a result of manipulation of a crop or other feed on
21 the land where grown for wildlife management pur-
22 poses.
23 "(3) As used in this subsection:

1 "(A) The term 'baiting' means the intentional
2 placing, exposing, depositing, distributing, or scat-
3 tering of shelled, shucked, or unshucked corn, wheat
4 or other grain, salt, or other feed that constitutes
5 for such birds an attraction, on or over any areas
6 where hunters are attempting to take migratory
7 game birds.
8 "(B) The term 'baited area' means any area
9 where shelled, shucked, or unshucked corn, wheat or
10 other grain, salt, or other feed whatsoever capable of
11 attracting migratory game birds is intentionally
12 placed, exposed, deposited, distributed, or scattered;
13 such an area shall remain a baited area for 10 days
14 following complete removal of all such corn, wheat or
15 other grain, salt, or other feed.
16 "(C)(i) The term 'normal agricultural oper-
17 ations' includes the growing of crops where harvest-
18 ing does not take place, planting for erosion control,
19 top sowing of crops, and distribution or scattering of
20 grains if such operations are normal in a region, ex-
21 cept that the term shall not include the distributing
22 or scattering of grain or other feed once it has been
23 removed from or stored on a field where grown un-
24 less it is for a normal agricultural operation for feed
25 for farm animals in the region.

"(ii) Any other activity may be considered to be a normal agricultural operation only if the Secretary of the Interior, after meaningful consultation with the director of appropriate cooperative State research, education, and extension services, State fish and wildlife agencies, and State extension agricultural offices—

"(I) determines that the activity is normal within the specific regional area in which it occurs; and

"(II) publishes the determination annually in the Federal Register in conjunction with other migratory bird hunting regulations, after public review and comment.

"(D) The terms 'attraction' and 'attracting' mean that the bait was a major contributing factor in luring the migratory birds to within a reasonable shotgun range given other such factors as the geographic location of the hunting venue, the physical characteristics of the hunting area, and the hunting methods used by the hunters.".

SEC. 4. ACQUISITION OF MIGRATORY BIRD REFUGES.

Section 6 of the Migratory Bird Treaty Act (16 U.S.C. 707) is amended as follows:

1 (1) By redesignating subsection "(c)" as sub-
2 section "(d)".
3 (2) By inserting after subsection (b), the follow-
4 ing:
5 "(c) All fines and penalties assessed and recovered
6 under this provision shall be deposited into the migratory
7 bird conservation fund established under section 4 of the
8 Act of March 16, 1934 (16 U.S.C. 718d).".
9 **SEC. 5. PENALTIES.**
10 Section 6(c) of the Migratory Bird Treaty Act (16
11 U.S.C. 707(c)) is amended as follows:
12 (1) By striking "All guns," and inserting "(1)
13 Except as provided in paragraph (2), all guns".
14 (2) By adding the following at the end:
15 "(2) In lieu of seizing any personal property, (except
16 for machine guns and shotguns restricted under section
17 3(b)2) the Secretary of the Interior shall permit the owner
18 or operator of the personal property to post bond or other
19 surety pending the disposition of any proceeding under
20 this Act.".

TESTIMONY OF DR. ROBERT STREETER, ASSISTANT DIRECTOR FOR REFUGES AND WILDLIFE, U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, BEFORE THE HOUSE RESOURCES SUBCOMMITTEE ON FISHERIES, WILDLIFE, AND OCEANS CONCERNING H.R. 741, MIGRATORY BIRD TREATY REFORM ACT OF 1997, TO CLARIFY HUNTING PROHIBITIONS AND PROVIDE FOR WILDLIFE HABITAT UNDER THE MIGRATORY BIRD TREATY ACT.

May 15, 1997

Good morning, Mr. Chairman and members of the Subcommittee. I am Robert Streeter, Assistant Director for Refuges and Wildlife, U.S. Fish and Wildlife Service, Washington, D.C. Thank you for the opportunity to appear here today to discuss the Service's views on H.R. 741, the Migratory Bird Treaty Reform Act of 1997. Mr. Chairman, the U.S. Fish and Wildlife Service shares your concern for the need to clarify portions of the existing hunting regulation, and we are working with our State partners in order to review these regulations and propose changes as necessary. However, we are opposed to H.R. 741, as it could significantly harm migratory bird resources and the general public that enjoys these migratory birds.

Mr. Chairman and members of the Subcommittee, the U.S. Fish and Wildlife Service has a long and proud history of partnerships with America's recreational hunters. Today, we continue to grow this partnership in a variety of ways. More than half of our Nation's National Wildlife Refuges, created for the conservation of wildlife and its habitat, have been made accessible to the public for regulated hunting. This year, for the first time ever, we authorized a special day during the waterfowl season for young hunters accompanied by an adult to experience a wonderful American tradition. The Service believes that hunting can be a useful management tool and is a legitimate recreational activity

in its own right. Although the Service is committed to its responsibility to provide opportunities for the public to enjoy the privilege of hunting migratory birds, our overriding consideration at all times must remain the welfare of the migratory bird resource.

Federal baiting regulations have been in place since 1935. At the turn of the century, duck and goose populations began a dramatic and alarming decline. This decline was caused by several factors, including drought, extensive destruction and degradation of wetland habitat which eliminated vast nesting and feeding areas, and over harvesting. Sportspersons interested in ensuring the security of migratory game birds advocated the cessation of two prevalent hunting practices which were, at that time, primarily responsible for the over harvest of waterfowl and other birds by hunters: baiting and the use of live decoys. These practices unfairly lure birds to the hunter's gun. After locating bait, waterfowl and other game birds quickly become "addicted" to baited areas, lose their natural wariness, and will repeatedly return to a baited area even while hunters are shooting. Although waterfowl and other migratory bird populations succumb to the cumulative effects of over harvest, contaminants, disease, loss of breeding and wintering habitat and natural feed, baiting is the factor that can most readily be controlled.

Mr. Chairman, the Service's first concern regarding H.R. 741 is that it would formulate guidelines for the hunting of migratory birds by statute, rather than by regulations, and for this as well as other reasons, the Service cannot endorse this legislation. Procedurally, the proposed changes to the MBTA would cause extreme hardship to all sportsmen and sportswomen of this country by creating an inflexible statutory process which could not possibly accommodate changing wildlife

management situations. The 1918 Migratory Bird Treaty Act (MBTA), which implements international treaties for protection and conservation of migratory birds with four of our neighboring countries, authorizes the Secretary of the Interior to determine by regulation "...when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting..." H.R. 741 could compromise the Service's ability to manage this dynamic resource, and its commitment with its four international Convention partners for the wise use of this valuable migratory bird resource. While it certainly takes time to make changes through the regulatory process, that process does allow for change in response to changing conditions, technology and wildlife conditions. Further, the proposed changes would prevent the input of valuable information from our State partners regarding migratory bird management and conservation.

There are several examples where H.R. 741 would restrict the Service's ability to be responsive to conservation and management needs. For example, the population of mid-continent snow geese has grown to such a level that it is significantly impacting its breeding grounds on the fragile Arctic ecosystem. Because of the threat of imminent, irreversible damage, to this ecosystem, an international scientific team working under the Arctic Goose Joint Venture has recommended, among other things, that restrictions on the use of electronic calls and intentional baiting be relaxed during special snow goose-only season to increase harvest. H.R. 741 would prevent the Service from working with the Arctic Goose organization and promulgating a special rule to allow the use of electronic calls and intentional baiting for this purpose. H.R. 741 would also make it illegal, under any circumstances, to take migratory gamebirds with shotguns capable of holding more than three shells. Currently, if the situation warrants, such as when the abundance of the species presents social

and ecological problems, the Service can change these rules to allow for the take with more than the three shot shell restriction. H.R. 741 would restrict the flexibility needed to effectively manage migratory bird populations which may require flexibility and adjustment.

H.R. 741 will liberalize migratory bird baiting laws and result in more birds being killed as a result of baiting. The liberalization of the statute, the baiting regulations, or the legal definitions contained in those regulations could result in overharvest of migratory birds, specifically waterfowl. Re-examination and adjustment of the hunting regulations and the implementation of shorter hunting seasons and lower daily bag limits might then be required. Furthermore, liberalization of the baiting regulations could promote and encourage an inequity whereby those with the greatest financial motivation and resources, such as individual or private hunting clubs and commercial hunting operations, would benefit the most at the expense of the wildlife resource and the common hunter. Also, the liberalization of the baiting regulations, amounting to the elimination of the traditional "fair chase" hunting standard, could provide the anti-hunting segment of society a new platform to pursue for closure of all hunting activities.

H.R. 741 would require enforcement officers to prove that a hunter "knows or should have known through reasonable diligence" that an area was baited rather than the strict liability standard under current long standing law. Furthermore, the term "reasonable diligence" is not defined and therefore the new standard is unclear and open to interpretation.

The courts have continually stated that hunters have a responsibility for determining whether

the area they will hunt has been baited. Today's hunters are aware of the Federal regulations for the hunting of migratory game birds, including baiting, in effect since 1935, or they certainly should be. This information is distributed by and widely available from both state and Federal agencies. It is, nevertheless, the responsibility of the hunter to inspect an area and inquire about its suitability for hunting. Our law enforcement agents and the courts make tremendous effort to identify individuals responsible for baiting, as well as to determine when an innocent hunter could not have known about any bait. When in question, however, we err on the side of the resource, but this conservation has always been supported as in the general interests of both hunters and hunting.

H.R. 741, would also redefine "baiting" and "baited area." For example, in Title 50 CFR 20.21(i), baiting is defined as the "placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed so as to constitute for such birds a lure, attraction or enticement to, on, or over any areas where hunters are attempting to take them;..." H .R. 741 would omit the terms "lure" and "enticement" and include the term "intentional" before the word "placing." The addition of the term "intentional" would make this section extremely difficult to enforce, as intent on the part of the hunter would be extremely difficult to prove. For example, individuals could claim that any spillage regardless of the quantity was unintentional, such as when grain is being transported by ranchers or farmers in trucks or trailers to various storage points. However, such "spillage" could be used to attract migratory game birds for hunting purposes -- which is illegal baiting.

In addition, Section 3(c)(3) of H.R. 741 would amend the definition of "baiting" and "baited

area" by adding terms "attraction" and "attracting" and requiring that bait be "a major contributing factor in luring the migratory birds." Under these new definitions, the enforcement officer would have to prove that the presence of bait was a contributing factor for the presence of migratory birds in a hunting area, given such other factors as the geographic location of the hunting incident, the physical characteristics of the hunting area, and the hunting methods used by the hunter. The Service believes that the officer would have to prove that ducks landing on a baited pond would not be doing so *except* for the presence of bait. Because ducks and other migratory game birds utilize ponds and other waterways for any number of reasons, including feeding, resting, and safety, federal and state enforcement officers would simply not be able to provide objective, quantitative information to prove how birds react to each baiting situation.

H.R. 741 would also redefine agricultural operations in relation to baiting. The term "bona fide agricultural operations or procedures" found in current baiting regulations 50 CFR 20.21(i)(2) would be replaced by H..R. 741 by the term "normal agricultural operations" which would serve as the bench mark standard in defining agricultural operations in relation to baiting. This section would require the Secretary of the Interior to publish annually in the Federal Register a list of agricultural practices which would be considered "normal agricultural operations" within a region. This would be an extremely complex procedure as it would require consultation with Cooperative State Research, Education and Extension Services; State fish and wildlife agencies; and State extension agricultural offices each year for every county in the United States. A substantial amount of funding would be required to implement this requirement for both federal and state agencies. In addition, the term "normal agricultural operations" is an extremely broad term as proposed, and would allow hunting

over crops and placement of grains *not* associated with agricultural planting or harvesting, erosion control practices, top sowing of grains, and scattering of grain for feed for farm animals as is current practice. The difficulty in distinguishing a baiting situation from a "normal agricultural operation" would be extremely difficult if not impossible and would undermine the protections afforded to migratory birds both when they are occupying winter habitats and when foraging during migration.

The North American Wetlands Conservation Fund was established to receive funds collected as fines and penalties under the Migratory Bird Treaty Act to be used for the location, ascertainment and acquisition of areas for migratory bird refuges. However, the majority of the funds collected under the Act are deposited into the General Treasury. H.R. 741 attempts to correct this situation through legislation. This is an administrative problem and the Service is currently working with the Central Violation Bureau to correct this oversight.

Section 5 of H.R. 741 would require the posting of bonds or other securities in lieu of seizure of evidence (except for machine guns). This provision would allow persons suspected of violating this Act to keep contraband and other related evidence of the crime in their possession. Service officers would not have the evidence nor could they testify in court that the evidence which the suspected violator brings to court is relevant to the investigation.

Finally, Chairman Young's cover letter which accompanied the proposed legislation mentioned that collected funds from fines paid under the MBTA could be used for law enforcement

purposes. The Service does not believe that it is good policy for a law enforcement program to obtain revenues from its enforcement actions, as it may give the impression that such enforcement is motivated by financial reasons.

Mr. Chairman, this concludes my written statement. I appreciate the opportunity to testify before this Subcommittee. My staff and I would be happy to work with you, others Members of the Subcommittee, and your staffs to identify possible alternative solutions for clarifying baiting regulations.

TESTIMONY ON H.R. 741
BEFORE THE HOUSE COMMITTEE ON RESOURCES' SUBCOMMITTEE ON FISHERIES, CONSERVATION, WILDLIFE AND OCEANS

by Brent Manning, Director
Illinois Department of Natural Resources
for the International Association of Fish and Wildlife Agencies
May 15, 1997

Good morning, Mr. Chairman. I am Brent Manning, Director of the Illinois Department of Natural Resources and Chairman of the International Association of Fish and Wildlife Agencies' (International Association) Ad Hoc Committee on Baiting. Thank you for the invitation to testify today on behalf of the International Association on the important issue of regulating the hunting of migratory game birds.

I wish to begin my comments by pointing out that the International Association's Ad Hoc Committee on Baiting has spent the last 10 months carefully and thoroughly considering the issue at hand. The committee is comprised of individuals with diverse expertise in this subject. They represent the disciplines of biology, law enforcement and policy administration. These individuals also represent state fish and wildlife agencies and several non-governmental conservation organizations. The recommendations of the committee were adopted by the International Association and forwarded two weeks ago today to the U.S. Fish and Wildlife Service (Service). We provide a copy of these recommendations with our statement for your information and use. We hope the Service will adopt the proposal and publish it for public comment.

I would like to take a few minutes to highlight our proposal and briefly compare it with H.R. 741. For the sake of clarity, I will divide the International Association's recommendations for changing federal migratory bird baiting regulations into three main subject areas: 1) agricultural crops, 2) the management of natural vegetation and 3) the issue of strict liability.

1) Agricultural Crops

The International Association believes that current federal waterfowl baiting regulations for the most part adequately address concerns about inappropriately manipulating agricultural crops. Both H.R. 741 and our proposal leave the existing baiting regulations pertaining to the alteration of agricultural crops essentially intact. However, the International Association feels that some common sense clarification is needed to ensure that it is legal to hunt over a field of stalks disced, chopped or otherwise manipulated after harvest. We also recommend that hunters who incidentally scatter feed, grain or other agricultural seeds while entering or exiting hunting areas or while placing decoys or retrieving downed birds not be cited for baiting or for hunting over a baited area. H.R. 741 does not address either issue.

Furthermore, the International Association believes that the term "normal" in reference to "normal agricultural planting and harvesting" is too vague. We recommend replacing the word "normal" with the term "accepted." We define "accepted" in this context as "techniques used by agricultural operators in the area solely for agricultural purposes and approved by the state fish and wildlife agency after consultation with the Cooperative State Research, Education and Extension Service; Natural Resources Conservation Service and the U.S. Fish and Wildlife Service". The distinct advantage offered by this approach is that, for the first time, the regulations would clearly designate a final authority for making such determinations. Conversely, H.R. 741 retains the term "normal" and does not indicate who is ultimately responsible for that determination.

The International Association also recommends using the word "accepted" in place of the term "bona fide" in reference to "agricultural operations or procedures". The term "bona fide" means "in or with good faith; honestly, openly and sincerely." We consider that definition too open to interpretation and thus unnecessarily vague. H.R. 741 apparently recognizes the same shortcoming, but instead substitutes the word "normal" for "bona fide". For some "normal agricultural operations", H.R. 741 requires the Secretary of Interior to consult with state fish and wildlife agencies and the USDA prior to making a determination and to publish that determination annually in the Federal Register. However, the bill leaves doubt about who is ultimately responsible for making that determination in the case "of planting for erosion control, top sowing of crops, and distribution or scattering of grains if such operations are normal in a region. . . ". We believe it should be the state fish and wildlife agency after consultation with the U.S. Department of Agriculture and the Service.

The International Association and H.R. 741 also address a situation somewhat outside of conventional agriculture. Both proposals recommend an exemption for hunting migratory game birds, except waterfowl, over areas that have been properly seeded for the purposes of soil stabilization. In the case of soil stabilization practices, the International Association defines "accepted" as "techniques used in the area solely for soil stabilization purposes and approved by the state fish and wildlife agency after consultation with the Cooperative State Research, Education and Extension Service; Natural Resources Conservation Service and the U.S. Fish and Wildlife Service". H.R. 741 includes "planting for erosion control" under the category of "normal agricultural operations" and does not specifically indicate who determines which such operations are "normal".

2) Management of Natural Vegetation

The International Association believes that federal baiting rules were not drafted with the intent of preventing hunting over manipulated natural plant communities. However, a more strict interpretation of federal baiting regulations by the U.S. Fish and Wildlife Service appears to have emerged during the last decade or so. Today, the manipulation of natural vegetation by wetland managers and hunters places waterfowl hunters in jeopardy of violating these regulations. Such an interpretation discourages managers from maintaining or restoring natural wetlands. We

believe that water-level manipulation, mowing, shredding, discing, roller chopping, grazing, burning, trampling, herbicide treatment, wetland-associated plant propagation techniques and other similar practices do not create the kind of lure or attraction to waterfowl typically associated with the dumping of grain. We believe these actions do not constitute baiting and hunters should not be prohibited from hunting over natural vegetation thus altered. Our proposal clarifies the regulations in this regard.

We recommend treating the alteration of agriculturally improved varieties of wetland plants (like certain millets) more strictly. In wetland situations, improved varieties of natural plants can, under ideal conditions, outproduce their wild counterparts. However, seed retention rarely rivals that of truly agricultural crops like corn or wheat. Consequently, improved varieties of wetland plants represent a category of vegetation somewhere between agricultural crops and natural vegetation. In recognition of this difference, we recommend that certain wetland plants that have been planted (as opposed to grown naturally) cannot be hunted over during the 10-day period immediately following alteration. Two specific periods for such alteration (without requiring complete removal of all feed) are identified in our proposal. We further recommend these plants be designated by the U.S. Fish and Wildlife Service in their annual migratory bird hunting regulations. This approach is much more restrictive than rules pertaining to alteration of natural vegetation but just slightly less restrictive than the rules pertaining to the alteration of agricultural crops. H.R. 741 does not address the issue of natural vegetation or its improved varieties and thus leaves the intent of the existing regulations in this area subject to speculation.

3) Strict Liability

Both the International Association's recommendation and H.R. 741 reject the "strict liability" aspect of existing regulations. Currently a hunter who has no knowledge of a baited situation and who cannot reasonably determine the presence of bait (or that hunted birds are influenced by bait) can be cited. In an attempt to address every intentional violator, existing regulations compromise the truly innocent hunter. The U.S. Court of Appeals for the Fifth Circuit rejects a strict liability interpretation of the regulation, requiring at a minimum that the presence of bait could reasonably have been ascertained by the conscientious hunter. According to the court, strict liability renders criminal conviction "an unavoidable occasional consequence of duck hunting," thereby denying the sport to those who would find unacceptable on their record the odd conviction [United States v. Delahoussaye, 573 F.2d 910, 913 (5th Cir. 1978)]. Because the regulation is founded on an international agreement, we believe it should not mean one thing in some states and something distinctly different in other states. We therefore recommend the hunter be required to know or have had a reasonable opportunity to know that a hunted area is considered a baited area. Similarly, H.R. 741 requires that the person "knows or should have known through the exercise of reasonable diligence that bait was present." The specific language in H.R. 741 was considered earlier by the International Association's ad hoc committee. However, the ad hoc committee ultimately revised its proposal to more closely reflect the Delahoussaye decision.

We would like to point out that as a result of both proposals, a property manager could, with impunity, place bait to entice migratory game birds to the gun without the knowledge of hunters. If hunters could not reasonably determine the presence of bait, then no one could be held accountable. Therefore, the International Association recommends a new violation of the Migratory Bird Treaty Act. Specifically, we recommend that it should be "unlawful for any person to place or direct the placement of bait" for the purpose of causing hunters to take migratory game birds by the aid of baiting or on or over the baited area. We believe H.R. 741 fails to close this critical loophole.

Migratory Game Birds Other Than Waterfowl (e.g., doves)

As I stated earlier, our definitions of "agricultural planting, . . .", "agricultural operations or procedures", and "soil stabilization practices" provide needed clarification for determining which techniques are "accepted". Our proposal simply allows state fish and wildlife agencies to define what is currently referred to as "normal" or "bona fide" with respect to these practices. The definitions do not further restrict or liberalize federal regulations relative to the hunting of doves or other "webless" migratory birds. We do, however, expand on existing regulations by clarifying that hunting doves over areas appropriately seeded for purposes of soil stabilization is not prohibited. Although our proposal and H.R. 741 are very similar in this regard, we believe our definitions more clearly and uniformly indicate who is responsible for determining which practices are "accepted".

H.R. 741 and Our Proposal - Significant Differences of Special Concern

Despite many basic similarities, there are a few key areas where we consider the differences between our proposal and H.R. 741 of special concern. First, H.R. 741 requires that salt, grain or other feed capable of attracting migratory game birds be intentionally scattered. Requiring an officer to demonstrate intent on the part of a hunter is a much more difficult standard of proof than requiring an officer to demonstrate that a hunter should have known an area was baited. We believe requiring intent will result in more guilty hunters going free. In our opinion, this has the potential to erode protection of the migratory game bird resource.

H.R. 741 also requires the effect of bait on migratory game birds to be separated in the field from the effects of other important attractants like hunting location and hunting methods, which could include such subjective factors as decoy arrangement and calling expertise. Because the relative attractiveness of the bait must be demonstrated, a much higher standard of proof is imposed. Perhaps the new requirement is intended to demand that more than a few kernels of corn or grains of other feed be present in order to constitute bait. However, we believe existing regulations require more than the simple presence of bait. Before feed can be considered bait, it must serve as an attractant to migratory game birds. It also appears H.R. 741 may require that bait be located on the property being hunted. By requiring that the bait attract or lure migratory birds "within a reasonable shotgun range" the so-called "zone of influence" is greatly reduced, perhaps to a distance of less than 60 yards. Primarily because a much higher standard of proof is

imposed, we believe the current bill has the potential to create as many problems in this area as it attempts to solve.

Finally, H.R. 741 appears to remove an important prohibition in existing regulations. Currently, migratory game birds other than waterfowl can be hunted over lands where feed has been distributed as a result of alteration for wildlife management purposes - provided the "alteration for wildlife management purposes does not include redistributing grain or other feed after being harvested or removed from the site where grown." This bill omits the very important latter restriction, thus allowing grain or other feed to be returned to and scattered on a field after being harvested or removed. This omission may have been an oversight. Regardless, we recommend the existing prohibition be restored.

In summary, the International Association agrees that federal migratory game bird hunting regulations need clarification. However, H.R. 741 as introduced is not entirely consistent with our recommendations. In some respects the current bill falls short of our goals. In other respects, it goes well beyond clarifications and improvements we consider necessary to balance resource protection, enforcement and common sense. I would like to state again that the International Association's recommendations are the result of 10 months of ad hoc committee deliberations. We are pleased with the product, yet we recognize that no regulation is perfect and even the best ones can come to require fine tuning over time. Both H.R. 741 and our proposal recommend numerous changes. The probability that some of these changes will need modification after implementation is high. Our collective abilities to respond with timely improvements will be greatly hampered if the regulations are placed in statute. Therefore, in the interest of resource protection, we strongly recommend that these regulations not be codified in law.

On behalf of the International Association of Fish and Wildlife Agencies, I would like to again thank you for the opportunity to address this subcommittee. It appears that H.R. 741 and our proposal are on converging paths. I wish to conclude by offering my assistance in reaching what I believe is a goal we share - common sense regulations that protect the migratory game bird resource and the future of responsible hunting. Thank you.

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May 1, 1997

Mr. John Rogers, Acting Director
U.S. Fish and Wildlife Service
Dept. of the Interior
1849 C Street, NW
Washington, DC 20240

Dear John:

I am pleased to transmit to you herewith the final recommendations of the Association's ad hoc Committee on Baiting relative to changes we believe are necessary and appropriate to the regulations in 50CFR20.21. As you know, the State fish and wildlife directors continue to believe that the first and highest priority of regulations regarding means and methods of take must be conservation of the migratory bird resource. Within that context, however, we sincerely believe that these recommendations reflect proposed changes that are necessary to modernize the regulations vis-a-vis the use of agricultural practices for migratory bird conservation, and to bring consistency to the application of the hunter's liability by adopting the standard of the Delahoussaye language from the federal Fifth Circuit. Explanatory notes and commentary are also contained in this package.

As you know, the Committee was comprised of a diverse body of individuals with expertise in this subject area from the disciplines of biology and law enforcement, policy administrators, and representatives from the conservation NGO community. The ad hoc committee deliberated assiduously over these recommendations with the result, we believe, of a consensus position which satisfies objectives of both migratory bird conservation and clarity and consistency for law enforcement officers in the federal and state agencies and sportsmen and women nationwide.

We ask for your thorough and favorable consideration of these recommendations and that these ultimately be submitted to the Federal Register as a FWS proposal for public review and comment. Concurrently, the committee recommends, and the Association concurs, that the USFWS give serious consideration to increasing penalties for violations of these regulations to create a more effective deterrent.

Thank you for your serious consideration of these recommendations.

Sincerely,

R. Max Peterson
Executive Vice President

cc: State Fish and Wildlife Directors

gt/wp/c/gary/rogers.ltr

International Association of Fish & Wildlife Agencies' Ad Hoc Committee on Baiting

% Brent Manning, Chair, Illinois Department of Natural Resources, 524 S. 2nd, LTP, Springfield, Illinois 62701-1787
phone: 217/782-6302 ** fax: 217/785-9236

To: Duane Shroufe, President, IAFWA

From: Brent Manning, Chair, Ad Hoc Committee on Baiting

Date: April 29, 1997

Subject: Final Recommendations of Ad Hoc Committee on Federal Waterfowl Baiting Regulations

Enclosed are the final waterfowl baiting recommendations of the Ad Hoc Committee on Baiting. Although the committee's recommendations address dove baiting regulations in part, the committee may deliberate further on baiting regulations for "webless" migratory game birds.

Our recommendation consists of four parts. The first part is a three-page Executive Summary. The second part is the proposed regulatory language (four pages). The third part is a line-by-line explanation of the regulatory language (six pages). This explanation is provided to ensure readers understand the committee's intent. The fourth and final part is the committee's general rationale for the recommendations that pertain specifically to the management of natural vegetation (moist-soil management).

It is my understanding that the committee's proposal has the endorsement of the International Association of Fish and Wildlife Agencies (IAFWA). I would appreciate the IAFWA forwarding our recommendation to the U.S. Fish and Wildlife Service (Service) as soon as possible. The committee is willing to provide any additional information or clarification desired by the IAFWA or the Service.

The committee wishes to thank you and IAFWA staff for the assistance and support we received. On behalf of Vice-Chair George Meyer and myself, I wish to thank the committee members and technical/support staff for their generous contributions and sacrifices. A special thanks goes to Paul Lenzini, IAFWA Legal Counsel, for the substantial number of hours he graciously expended assisting the committee since September 1996. We could not have completed this portion of our charge without him. Again, please let me know if any member of the committee can be of further assistance.

BM:JMV:jmt
Enclosures
cc: Max Peterson, Executive Vice-President, IAFWA
Roger Holmes, Chair-Executive and Migratory Wildlife Committees
IAFWA Ad Hoc Committee on Baiting Members and Technical/Support Staff

Executive Summary

PROPOSED FEDERAL BAITING REGULATIONS CHANGES

Recommendations of the International Association of Fish and Wildlife Agencies'
Ad Hoc Committee on Baiting
29 April 1997

Agricultural Crops

The Ad Hoc Committee on Baiting believes that current federal waterfowl baiting regulations for the most part adequately address concerns about inappropriately manipulating agricultural crops. However, the committee feels that some clarification is needed to ensure that it is legal to hunt over a field of stalks disced or chopped (or otherwise manipulated) after harvest. The committee also recommends that hunters who incidentally scatter grain or other agricultural seeds while entering or exiting hunting areas or while placing decoys or retrieving downed birds not be cited for baiting or hunting over a baited area.

Furthermore, the committee believes that the term "normal" in reference to "normal agricultural planting and harvesting" is too vague. The committee recommends replacing the word "normal" with the term "accepted." The committee defines "accepted" to mean "techniques used by agricultural operators in the area solely for agricultural purposes and approved by the state fish and wildlife agency after consultation with the Cooperative State Research, Education and Extension Service; Natural Resources Conservation Service and the U.S. Fish and Wildlife Service". The term "accepted" is similarly used and defined in reference to "agricultural operations or procedures."

The committee also addresses a situation somewhat outside of conventional agriculture. An exemption for hunting over areas that have been seeded for the purposes of soil stabilization has been added. In the case of soil stabilization practices, "accepted" means "techniques used in the area solely for soil stabilization purposes and approved by the state fish and wildlife agency after consultation with the Cooperative State Research, Education and Extension Service; Natural Resources Conservation Service and the U.S. Fish and Wildlife Service".

Management of Natural Vegetation

It is the belief of the committee that federal baiting rules were not drafted with the intent of preventing the manipulation of natural plant communities. However, a new interpretation of federal baiting regulations appears to have emerged (see the 1991 report to the International Association's Migratory Wildlife Committee by the Ad Hoc Subcommittee on Baiting Regulations). In some cases, the manipulation of natural vegetation by wetland managers and hunters has placed waterfowl hunters in jeopardy of violating these regulations. Such an interpretation discourages managers from maintaining or restoring natural wetlands. The

committee believes that such practices as water-level manipulation, water circulation techniques, impounding water, ditching, salinity control, mowing, shredding, discing, roller chopping, grazing, burning, trampling, flattening, herbicide treatment, and wetland-associated plant propagation techniques do not create the kind of lure or attraction to waterfowl typically associated with the dumping of grain. The committee believes these actions do not constitute baiting and hunters should not be prohibited from hunting over natural vegetation thus altered.

The committee treats the alteration of agriculturally improved varieties of some wetland plants (like certain millets) differently. In wetland situations, improved varieties of natural plants can, under ideal conditions, outproduce their wild counterparts. However, seed retention rarely rivals that of truly agricultural crops like corn or wheat. In recognition of this difference, the committee recommends that certain wetland plants that have been planted (as opposed to grown naturally) cannot be hunted over during the 10-day period immediately following alteration. Two specific periods for such alteration (without requiring complete removal of all feed) are identified in the proposal. These plants are to be designated by the U.S. Fish and Wildlife Service in their annual migratory bird hunting regulations.

Strict Liability

The committee does not endorse the "strict liability" aspect of existing regulations. Currently a hunter who has no knowledge of a baited situation and who cannot reasonably determine the presence of bait (or that hunted birds are influenced by bait) can be cited. In an attempt to address every intentional violator, the regulations compromise the truly innocent hunter. The U.S. Court of Appeals for the Fifth Circuit rejects a strict liability interpretation of the regulation, requiring at a minimum that the presence of bait could reasonably have been ascertained by the conscientious hunter. According to the court, strict liability renders criminal conviction "an unavoidable occasional consequence of duck hunting," thereby denying the sport to those who would find unacceptable on their record the odd conviction. United States v. Delahoussaye, 573 F.2d 910, 913 (5th Cir. 1978). Because the regulation is founded on an international agreement, it should not mean one thing in some states and something distinctly different in other states.

The committee therefore recommends the hunter be required to know or have had a reasonable opportunity to know that a hunted area is considered a baited area. Additionally, this change will effectively reduce the "zone of influence" in many cases because the further hunters are from the actual bait, the less likely they are to have a reasonable opportunity to determine its presence.

However, a property manager could, with impunity, place bait to entice migratory game birds to the gun without the knowledge of hunters. If hunters could not reasonably determine the presence of bait, then no one could be held accountable. Therefore, a new violation of the Migratory Bird Treaty Act is recommended. The committee recommends that it should be "unlawful for any person to place or direct the placement of bait" for the purpose of causing hunters to take migratory game birds by the aid of baiting or on or over the baited area.

Migratory Game Birds Other Than Waterfowl (e.g., doves)

The committee has not conclusively dealt with regulations regarding the baiting of "webless" migratory game birds. However, the definitions of "agricultural planting, ...", "agricultural operations or procedures", and "soil stabilization practices" provide needed clarification for determining which such practices are "accepted". The new definitions simply allow state fish and wildlife agencies to define what is currently referred to as "normal" or "bona fide" with respect to these practices. The definitions do not further restrict or liberalize the regulations relative to dove hunting. The committee intends to decide whether to advise further regulatory change for "webless" migratory game birds no later than May 1997.

29 April 1997

Definition of "Baiting"

(Proposal to revise definition of "baiting" in 50 CFR 20.21(i))

"Baiting" means the placement of salt, grain or other feed capable of attracting migratory game birds, in such a manner as to serve as an attractant to such birds to, on or over areas where hunters are attempting to take them by:

(1) placing, exposing, depositing, distributing or scattering in such manner salt, grain or other feed grown off-site;

(2) redistributing in such manner grain or other feed after being harvested or removed from the site where grown;

(3) altering in such manner agricultural crops including millet planted for non-agricultural purposes ("planted millet") and other vegetation planted for non-agricultural purposes as designated in federal migratory bird hunting regulations ("designated planted vegetation") other than by accepted agricultural planting, harvesting, or manipulation after harvest. For purposes of this paragraph (3), "planted" means sown with seeds that have been harvested, and shall not include alteration of mature stands of planted millet or of other designated planted vegetation; or

(4) gathering, collecting or concentrating in such manner natural vegetation, planted millet or other designated planted vegetation following alteration or harvest.

Redistribution, alteration or concentration of grain or other feed caused by flooding, whether natural or man-induced, shall not constitute baiting. Except as provided in paragraph (4), alteration of natural vegetation on the site where grown shall not constitute baiting. With respect only to the taking of waterfowl, except as provided in paragraph (4), alteration of planted millet or other designated planted vegetation more than 10 days prior to the opening date of:

(1) the first special September waterfowl season locally in effect shall not constitute baiting; and

(2) the first regular waterfowl season locally in effect shall not constitute baiting for that season and all subsequent waterfowl seasons.

29 April 1997

Definition of "Baited Area"

(Proposal to revise definition of "baited area" in 50 CFR 20.21 (i))

"Baited area" means any area containing salt, grain or other feed, referred to in the definition of baiting and identified as baiting. Such area shall remain a baited area for 10 days following complete removal of such salt, grain or other feed.

29 April 1997

Definition of "Accepted Agricultural Planting, Harvesting and Manipulation after Harvest"

(Proposal for new definition in 50 CFR 20)

"Accepted agricultural planting, harvesting and manipulation after harvest" means these techniques used by agricultural operators in the area solely for agricultural purposes and approved by the state fish and wildlife agency after consultation with the Cooperative State Research, Education and Extension Service, Natural Resources Conservation Service and the U.S. Fish and Wildlife Service.

Definition of "Accepted Agricultural Operations or Procedures"

(Proposal for a new definition in 50 CFR 20)

"Accepted agricultural operations or procedures" means techniques used by agricultural operators in the area solely for agricultural purposes and approved by the state fish and wildlife agency after consultation with the Cooperative State Research, Education and Extension Service, Natural Resources Conservation Service and the U.S. Fish and Wildlife Service.

Definition of "Accepted Soil Stabilization Practices"

(Proposal for a new definition in 50 CFR 20)

"Accepted soil stabilization practices" means techniques used in the area solely for soil stabilization purposes and approved by the state fish and wildlife agency after consultation with the Cooperative State Research, Education and Extension Service, Natural Resources Conservation Service and the U.S. Fish and Wildlife Service.

29 April 1997

Hunting Methods

(Proposal to revise 50 CFR 20.21 (i))

Migratory birds on which open seasons are prescribed in this part may be taken by any method except those prohibited in this section. No persons shall take migratory game birds:

*****

(i) By the aid of baiting or on or over any baited area, where the person knows or reasonably should have known that the area is a baited area.

It shall be unlawful for any person to place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing or allowing any person to take or attempt to take migratory game birds by the aid of baiting or on or over the baited area.

However, nothing in this section shall prohibit:

(1) The taking of all migratory game birds, including waterfowl, from a blind or other place of concealment camouflaged with natural vegetation;

(2) The taking of all migratory game birds, including waterfowl, on or over standing crops, flooded standing crops (including aquatics), flooded harvested croplands, grain crops properly shocked on the field where grown, or grains, agricultural seeds, planted millet or other designated planted vegetation found scattered solely as the result of

i. accepted soil stabilization practices or accepted agricultural planting, harvesting or manipulation after harvest; or

ii. entering or exiting of areas by hunters or of normal hunting activities such as decoy placement or bird retrieval if reasonable care is used to minimize the scattering of grains, agricultural seeds, planted millet or other designated planted vegetation; or

(3) The taking of all migratory game birds, except waterfowl, on or over any lands where salt, grain or other feed has been distributed or scattered as the result of accepted soil stabilization practices or accepted agricultural operations or procedures, or as a result of alteration of a crop or other feed on the land where grown for wildlife management purposes: *Provided*, That alteration for wildlife management purposes does not include redistributing grain or other feed after being harvested or removed from the site where grown;

EXPLANATION OF RECOMMENDATIONS FOR REVISING FEDERAL MIGRATORY GAME BIRD BAITING REGULATIONS (50 CFR Part 20)

Proposed by the International Association of Fish and Wildlife Agencies' Ad Hoc Committee on Baiting 29 April 1997

Definition of "Baiting"

Lines 7-9 - These lines are not intended to mean anything fundamentally different from similar language in existing regulations. The terms "salt, grain or other feed" are substituted for "shelled, shucked, or unshucked corn, wheat or other grain, salt or other feed". The substitute language is shorter and just as inclusive. The shorter language is used throughout this proposal for consistency and to avoid the erroneous interpretation that different terms for describing baiting elsewhere in the regulations are intended to have different meanings. The words "lure" and "enticement" in current regulations are considered synonymous with the term "attractant" and have therefore been deleted from this proposal.

Lines 11-12 - The words "placing, exposing, depositing, distributing or scattering" are taken directly from existing regulations. The phrase "in such manner" is intended to refer to lines 7-9 to ensure that the "grain or other feed" must be capable of attracting migratory game birds, and these actions ("placing, exposing, depositing...") must serve as an attractant to such birds where hunters are attempting to take them. The phrase "in such manner" in lines 14, 17 and 25 is intended to serve as a similar reference. The words "grown off-site" are new. The addition is intended to restrict paragraph (1) to regulating the placement of bait brought from another location. Paragraphs (1) and (2) are separated to ensure the distinction between them is clear.

Lines 14-15 - The words "redistributing" and "after being harvested or removed from the site where grown" are new. Paragraph (2) is intended to prohibit hunters from harvesting a crop then redistributing the grain in the same field where grown in an attempt to circumvent paragraph (1). Again, paragraphs (1) and (2) are separated to emphasize the distinction between bringing in feed from another site and redistributing feed on the site where grown. Note that in some cases the act of redistributing feed is not defined as baiting (lines 28-38). In all cases (except flooding) the act of bringing in feed from another site is defined as baiting.

Lines 17-21 - The word "altering" was selected because it better describes the actions intended than does the term "manipulation" (as defined by Black's Law Dictionary, 6th edition; and Webster's Unabridged Dictionary). These lines build on paragraphs (1) and (2) by clarifying specifically that the alteration of agricultural crops (other than by accepted agricultural planting, harvesting, or manipulation after harvest) constitutes baiting. Exemptions for planting and harvesting are in current regulations. The exemption for "manipulation after harvest" is new and

is added to ensure that practices such as discing or mowing stubble following harvest and removal of the grain/feed are not prohibited. Defining baiting to include the alteration of millet (or certain other plants) planted for non-agricultural purposes is a clarification of existing regulations. These plants are treated specifically and separately in this proposal because certain alterations of them are later exempted from the definition of baiting (see lines 30-38).

The terms "planted millet" and "designated planted vegetation" are new and are first defined here. They are used again later in the proposed regulations. These definitions essentially create a new class of plants that are treated somewhat differently than either agricultural crops or natural vegetation. Under certain circumstances they can be altered and hunted over in ways that agricultural crops cannot. However, the authorized alterations are not as liberal as those for natural vegetation.

Lines 21-23 - The word "planted" is defined solely for the purposes of paragraph (3). The definition is proposed to guard against an undesired interpretation. The undesired interpretation is that the act of discing a stand of planted (by man) millet (or other designated plants) with developed/mature seed heads constitutes "planting" a subsequent generation of volunteer plants of the same type. Such an interpretation could then prevent hunting over the volunteer generation after alteration. The desired interpretation is that the subsequent volunteer generation be treated the same as natural vegetation (i.e., it can be altered and legally hunted over immediately).

Lines 25-26 - Paragraph (4) defines as baiting any activity that concentrates feed from natural vegetation, planted millet or other designated plants after alteration or harvest. This paragraph closes a potential loophole (created in lines 14-15) that could allow individuals to mow natural vegetation (e.g., smartweed) or planted millet, etc. and then rake the vegetation into piles in front of hunting blinds as long as the feed was not harvested or removed from the site where grown. Lines 14-15 prevent redistribution after harvest or removal, but they do not prevent concentration following alteration. However, nothing in paragraph (4) is intended to prevent such legitimate management activities like discing a field of natural vegetation or planted millet following mowing. These types of activities do not concentrate feed.

The committee adopted the following working definition for "natural vegetation": "Any non-agricultural, native, or naturalized, plant species that grows at a site from existing seeds or other propagules, or in response to planting."

Lines 28-29 - The sentence beginning on line 28 clarifies that flooding itself does not constitute baiting, even if the flooding results in the redistribution, alteration or concentration of grain or other feed.

Lines 29-30 - The committee believes the alteration of natural vegetation is not baiting and that federal baiting rules were not intended to prevent hunting over altered natural plant communities (with the exception of feed concentrated after alteration to attract migratory game birds to

hunters). However, a new interpretation of federal baiting regulations appears to have emerged (1991 report to the International Association's Migratory Wildlife Committee by the Ad Hoc Subcommittee on Baiting Regulations). In some cases, the alteration of natural vegetation by wetland managers and hunters has placed waterfowl hunters in jeopardy of violating these regulations. Such an interpretation discourages managers from maintaining or restoring natural wetlands (see attachment "A Rationale for the Clarification of Federal Migratory Bird Regulations Concerning Moist-Soil Management"). There are many wildlife management practices necessary, even critical, to the maintenance and enhancement of wetland plant communities. Most of these practices are legitimate "alterations" that should not be defined as baiting. The committee believes that with respect to natural vegetation, such practices as water-level manipulation, water circulation techniques, impounding water, ditching, salinity control, mowing, shredding, discing, roller chopping, grazing, burning, trampling, flattening, herbicide treatment and wetland-associated plant propagation techniques do not create the kind of lure or attraction to waterfowl associated with the alteration of agricultural crops or the dumping of grain. The committee believes these actions do not constitute baiting and hunters should not be prohibited from hunting over natural vegetation thus altered.

Lines 30-38 - These lines treat the alteration of planted, agriculturally improved varieties of some wetland plants differently than natural vegetation or agricultural crops. In wetland situations, improved varieties of natural plants can, under ideal conditions, outproduce their wild counterparts. However, seed retention rarely rivals that of truly agricultural crops like corn or wheat. In recognition of this difference, the committee recommends that certain wetland plants that have been planted (as opposed to grown naturally) cannot be hunted over during the 10-day period immediately following alteration. These plants are to be designated by the U.S. Fish and Wildlife Service in their annual migratory bird hunting regulations (planted millet is already specifically designated in this proposal).

Lines 30-31 - "With respect only to the taking of waterfowl" is added because the committee did not intend this language to apply to all migratory game birds (including doves) as does the remainder of the definition of "baiting".

Line 32 - This line requires a 10-day waiting period before hunting after altering such designated planted vegetation.

Lines 34-38 - These lines further restrict hunting following alteration of planted millet (and other designated planted vegetation). Hunting (without removal of feed) is allowed after only two such alterations of these plants each waterfowl season. The first alteration must occur more than 10 days prior to the first special September waterfowl (duck, goose, etc.) season locally in effect. The second such alteration must occur more than 10 days prior to the first regular waterfowl (duck, goose, etc.) season locally in effect. The second alteration is provided to address those cases where there is a long period of time (up to several months) between the first special September waterfowl season and the first regular waterfowl season in a given locale. The proposal allows state fish and wildlife agencies to publish the two specific "cutoff" dates for

legal alteration of such vegetation, a significant advantage in terms of public understanding. Alterations that occur at other times would be treated the same as alterations of agricultural crops - altered areas would be considered baited for 10 days following complete removal of all feed.

Lines 37-38 - "and all subsequent waterfowl seasons" means the remainder of the current waterfowl season which may extend into the next calendar year (but not later than the close of the framework for migratory game birds which is currently March 10). It does not mean waterfowl seasons beginning the following late summer or fall.

Definition of "Baited Area"

Lines 46-49 - These lines are not intended to mean anything fundamentally different from similar language in existing regulations. See the explanation for lines 7-9 for the terms "salt, grain or other feed". The reference to "the definition of baiting and identified as baiting" on lines 46-47 eliminates the need to repeat here language in the baiting definition.

New Definitions of "Accepted Agricultural Planting, Harvesting, Manipulation after Harvest"; "Accepted Agricultural Operations and Procedures"; and "Accepted Soil Stabilization Practices"

Lines 58-81 - These definitions are added to designate a specific authority for determining which of these practices are "acceptable". The terms "normal" and "*bona fide*" in existing regulations are not defined and thus considered too vague. To guard against unintended interpretations, the regulations require consultation with other experts (e.g., USDA, USFWS) to ensure that determinations are appropriately linked solely to agricultural or soil stabilization practices. Activities or practices conducted for non-agricultural or non-soil stabilization purposes are regulated elsewhere in 50 CFR 20. Many states will no doubt choose to adopt specific rules to aid enforcement. State fish and wildlife agencies can also confidently publish examples of allowable practices.

"Hunting Methods"

Lines 94-95 - The phrase "By the aid of baiting or on or over any baited area" is in existing regulations. The committee does not endorse the "strict liability" aspect of existing regulations and therefore adds "where the person knows or reasonably should have known that the area is a baited area". Currently a hunter who has no knowledge of a baited situation and who cannot reasonably determine the presence of bait (or that hunted birds are influenced by bait) can be cited. In an attempt to address every intentional violator, the regulations compromise the truly innocent hunter. The U.S. Court of Appeals for the Fifth Circuit rejects a strict liability interpretation of the regulation, requiring at a minimum that the presence of bait could reasonably have been ascertained by the conscientious hunter. According to the court, strict liability renders criminal conviction "an unavoidable occasional consequence of duck hunting," thereby denying the sport to those who would find unacceptable on the their record the odd

conviction. United States v. Delahoussaye, 573 F.2d 910, 913 (5th Cir. 1978). Because the regulation is founded on an international agreement, it should not mean one thing in some states and something distinctly different in other states. The committee therefore recommends the hunter be required to know or have had a reasonable opportunity to know that a hunted area is considered a baited area.

Lines 97-99 - This is new language. Without this sentence, a property manager could, with impunity, place bait to attract migratory game birds to the gun without the knowledge of hunters. As a result of the new language in lines 95-96, if hunters could not reasonably determine the presence of bait, then no one could be held accountable. Therefore, a new violation of the Migratory Bird Treaty Act is recommended. The committee recommends that it should "be unlawful for any person to place or direct the placement of bait" for the purpose of causing hunters to take migratory game birds by the aid of baiting or on or over the baited area.

Line 103-104 - These lines were added to provide clarification. Paragraph (4) (lines 25-26) defines the concentration of natural vegetation as baiting. It is possible to interpret "concentration" to include camouflaging a place of concealment with natural vegetation. That is not the intent of paragraph (4). Lines 103-104 preclude that undesired interpretation.

Lines 106-110 - These lines are similar to the language in existing regulations (except for the addition of "agricultural seeds, planted millet or other designated planted vegetation"). Because "grains" can be more narrowly defined than the committee desired, "agricultural seeds" is added. The intent is to include such crops as peas, soybeans and peanuts (which are not technically "grains"). The committee adds "planted millet or other designated planted vegetation" to provide for the qualified scattering of such feed.

Lines 112-113 - See explanation for lines 17-21 and 58-81. "Accepted" replaces "normal" in reference to "normal agricultural harvesting and planting" because the committee believes that the term "normal" in existing regulations is too vague. "Accepted" is defined in lines 58-81. The committee also addresses a situation somewhat outside of conventional agricultural planting, operations or procedures. An exemption that allows hunting of all migratory game birds over areas that have been seeded solely for the purposes of soil stabilization is added.

Lines 115-118 - The committee recommends that hunters who incidentally scatter feed while entering or exiting hunting areas (or while placing decoys or retrieving downed birds) not be cited for baiting or hunting over a baited area. Requiring "reasonable care" to "minimize the scattering of grains ..." is intended to prevent abuse of this exception. The committee does not condone the excessive or unnecessary scattering of feed (agricultural grains/seeds, planted millet or other designated planted vegetation) by hunters on the way to or from the hunting area or during the hunt. Lines 115-118 are not intended to allow the creation of "shooting holes" or other similar activities in agricultural crops, planted millet or designated vegetation. Decoys can be placed in these types of vegetation only if reasonable care is used to minimize the scattering of such feed. Again, this exception applies specifically to agricultural crops and seeds, planted

millet and other designated planted vegetation. Such alteration of "natural vegetation" is allowed (see lines 29-30).

Lines 120-126 - In paragraph (3), "salt, grain or other feed" is substituted for terminology in existing regulations for consistency throughout the baiting regulations (see explanation for lines 7-9). A new activity, "accepted soil stabilization practices", is added to the regulations to provide hunting opportunity in areas (like reclaimed mined land) where legitimate and desirable soil conservation efforts have unnecessarily prevented the taking of webless migratory game birds by hunters. The term "accepted" replaces the term "*bona fide*" in reference to "agricultural operations or procedures" because "*bona fide*" is considered too vague. Black's Law Dictionary (6th edition) defines "bona fide" as "In or with good faith; honestly, openly and sincerely; without deceit or fraud." The new term "accepted" is defined and provides for a clear and final authority in making determinations, a considerable improvement upon existing regulations. In lines 123-124, the word "alteration" is substituted for "manipulation" (used in existing regulations) to be consistent with language used in the definitions of "baiting" and "baited area". The committee believes that the term "alteration" as defined both in Black's Law Dictionary and in Webster's Unabridged Dictionary better fits these regulations than does the term "manipulation" (also see explanation for lines 17-21).

A Rationale for the Clarification of Federal Migratory Bird Regulations Concerning Moist-Soil Management

A Report of the Ad Hoc Committee on Baiting
International Association of Fish and Wildlife Agencies

Introduction

Modern habitat management has replaced the widespread loss of natural habitats through moist-soil management, which is the manipulation of soil, water, and vegetation to (1) encourage production of moist-soil plants for use by wildlife, (2) promote the production of invertebrate and vertebrate food sources, (3) control undesirable plants, and (4) increase biological diversity. Management of moist-soil areas include water level manipulation, mowing, grazing, burning, and other practices.

Intensive management of such wetlands is needed to replace the functions and values of wetlands that have been extensively altered. Land use changes across large landscapes have altered natural water regimes to the point where they cannot be restored. Managers must maximize the value of remaining wetlands if waterfowl populations are to be sustained at historic levels. The needs for active manipulation vary greatly between major areas such as the Central Valley of California, coastal wetlands in Texas, marshes of the Great Lakes, or Mississippi River habitats in Illinois and surrounding states.

Baiting regulations were enacted in 1935 to halt the practice of shooting waterfowl that were attracted to large amounts of grain added to the hunted area. Regulations were enacted to protect the birds from overshooting and to retain the tradition of fair chase in hunting. The practice of baiting birds for hunting is an ethical problem and not one of population management. "Baiting", as defined in the federal hunting regulations, for example is legal in many other countries, such as Canada. Harvest regulations, such as adaptive harvest management, length of seasons, etc. are the tools used to control harvest and manage waterfowl populations.

Various interpretations of the federal migratory bird baiting regulations have resulted in conflict between state and federal agencies and confusion among landowners and hunters. Of special concern is the recent application of the baiting rules by conservation law enforcement personnel to certain management practices involving natural vegetation. The U.S. Fish and Wildlife Service (Service) has expressed a willingness to resolve this conflict and confusion. Towards that end the Service has requested a recommendation on this topic from the International Association of Fish and Wildlife Agencies (IAFWA). To provide that recommendation IAFWA formed an Ad Hoc Committee on Baiting (Appendix 1). After several meetings, the Committee has come to an agreement on a recommendation (Appendix 2). The purpose of this document is to explain the rationale behind that recommendation.

Recommendation of the Ad Hoc Committee on Baiting

The Committee's recommendation states:

Any manipulation of natural vegetation should be permitted at any time and this manipulation should not constitute baiting.

To reach agreement on this recommendation, the Committee developed the following definitions:

1. Natural Vegetation
"Any non-agricultural, native or naturalized, plant species that grows at a site from existing seeds or other propagules, or in response to planting."

2. Moist-Soil Habitat
"A managed or unmanaged wetland within which natural vegetation (as defined) establishes and grows in response to mud-flat conditions or shallow water."

3. Moist-Soil Habitat Management
"The practice of manipulating soil, water, and/or natural vegetation (as defined) in moist-soil habitats to: (1)encourage production of moist-soil plants for use by wildlife, (2) promote the production of invertebrate and vertebrate animals, and/or (3) control undesirable plants."

4. Wildlife Management Practices
"Normal wildlife management practices applied singly or in combination to manipulate vegetative cover and species composition on areas of aquatic plants and native and naturalized moist-soil plants include, but are not limited to, water-level manipulation, water circulation techniques, impounding water, ditching, salinity control, mowing, shredding, discing, roller chopping, grazing, burning, trampling, flattening, herbicide treatment, plant propagation and management of native and exotic wetland-associated animals."

5. Baiting (as it applies to the manipulation of natural vegetation)
"...alteration or use of natural vegetation grown on site shall not constitute baiting, 1) except there shall be no alteration of millet or any other plant designated by code by the Service, within 10 days of hunting in the year it is planted."

The Management Question

Baiting as it was defined in 1935:

"...shall mean the placing, exposing, depositing, distributing, or scattering of shelled, shucked, or unshucked corn, wheat or other grain, salt, or other feed so as to constitute for such birds a lure, attraction or enticement to, on, or over any areas where hunters are attempting to take them."

This definition seems fine as long as natural vegetation is excluded. The regulation addressed only agricultural crops. However, recent interpretations have extended the interpretation to natural vegetation. Therefore, the management question of this paper is whether the widescale reduction in natural habitats throughout North America, and the supplanting of natural habitats by moist-soil management, should lead to revision of the 1935 law to match current management need.

The immediate question becomes whether any manipulation of natural vegetation during a hunting season constitutes baiting. It is the opinion of the majority of the professional waterfowl management community that moist-soil management does not constitute baiting, thus the recommendation of the Ad Hoc Committee. And even if it did provide an attraction, Dr. Frank Bellrose, a leading authority on waterfowl ecology, and other waterfowl managers, have noted that baiting does not impact waterfowl populations; habitat management does, thus the reason for the North American Waterfowl Management Plan. Changes in habitats, waterfowl management, and the status and needs of current populations have led habitat managers increasingly to practice the principles of moist-soil management, simply because it provides the best habitat for waterfowl in the absence of a functional, natural wetland.

Moist -Soil Management: Why is it Important?

Moist-soil management for wildlife is based on a sound scientific understanding of plant ecology and the natural ebbs and flows of seasonal water abundance that characterize many wetland systems. The basic premise of "moist-soil management" is to manipulate soil and water to promote the production of foods and cover for wildlife in seasonally-flooded wetlands. The techniques that are applied have their basis in the natural responses that plants and other organisms have to changes in their environment. Managers emulate natural water regimes and plant responses in a wide variety of wetland types by creating mudflat conditions, which stimulates plant growth. The practice is now common place and accepted by wetland managers throughout the world.

Two questions are commonly asked about why moist-soil management should, or should not, be encouraged. First, why do we need to intensively manage wetlands to create wildlife habitat? Second, why can't we just plant agricultural crops to replace natural foods formerly found in destroyed or degraded wetlands?

The answer to the first question is that intensive management is needed to replace functions and values of wetlands that have been altered extensively by man. The extreme land-use changes within individual basins and across large landscapes, have often altered natural water regimes to the point where they are no longer functional. Further, the abundance and diversity of wetlands have been destroyed in so many areas that managers must maximize the value of the remaining wetlands if we are to restore and sustain waterfowl populations at historic levels as well as other wetland-dependent wildlife species.

Moist-soil foods such as seeds, tubers, rootlets, plant stems, and invertebrates were historically available, and used by wildlife, in seasonal wetlands. Moist-soil plants provide essential nutritional requirements for specific annual cycle events such as high energy for migration and protein for molt. In addition plant structure also is important to provide optimum conditions for foraging and thermal cover. Consequently, moist-soil management is a proven and efficient strategy to provide many required resources for a wide variety of wetland wildlife.

In many areas where wetlands have been destroyed or degraded, agricultural lands and foods can, and do, partly replace lost food resources. However, moist-soil plants and foods generally are more desirable to waterfowl for several reasons. First, on seasonally flooded sites moist-soil plants have the potential to consistently produce more pounds (and diversity) of food per acre over a series of years than common agricultural crops such as corn, milo, soybeans, and barley. This is not the case on sites that are well drained and intensively managed for cereal grains as rowcrop seed production usually will be higher than native plant seed production. However, when sites are low, have poor drainage and poor fertility, or have high salinities, native vegetation has an advantage over rowcrops. This diversity and consistency of production on wet or saline sites is one of the primary advantages of moist-soil plants over rowcrops.

Another factor is seed size. Rowcrops tend to have large seeds that are produced in abundance and waterfowl can locate and consume these large seeds very rapidly. Due to the much smaller size of moist-soil seeds, waterfowl tend to use moist-soil sites at a more constant but moderate rate over a long time period. This lower use for a longer time period adds up to the same or more use days than on rowcrop fields.

Moist-soil seeds also are more nutritionally complete than grains. Seeds and tubers of moist-soil plants are more resistant to decay when flooded and, thus, are available to waterfowl for longer periods of time than grains. Finally, moist-soil vegetation management is more economical than management of agricultural crops.

Moist-soil management is improving constantly as new information on plant-animal relationships and basic plant ecology becomes available. The central philosophy in moist- soil management is to use the natural ecological characteristics of plants to which waterfowl and other birds are adapted to provide for the seasonal needs of the birds. Wetland managers are leaders in applying modern principles of holistic management for a diversity of species across entire landscapes and regions. Moist-soil management practices emulate natural conditions and maximize efficiencies of time and funds; features which make good ecological and economic sense.

Management of Moist-soil Habitat

Moist-soil management techniques promote growth of various species of native vegetation adapted to wetland habitats. These techniques are used typically by managers on waterfowl

staging and wintering areas to produce diverse plant food resources including seeds, tubers, and browse that meet the constantly changing nutritional demands of life cycle events. Furthermore, decomposing moist-soil vegetation promotes the production of invertebrates. These invertebrates provide protein food of critical nutritional importance for many wetland wildlife during various life cycle events. Some species such as shorebirds require high protein foods daily whereas other groups such as waterfowl have fluctuating demands for protein depending on life cycle events.

Moist-soil areas are among the complex of habitats required by waterfowl. Historically, moist-soil habitat occurred naturally where flooding was too prolonged to allow woody plants and trees to become established on sandbars, mudflats, margins of permanent wetlands, or in shallow basins with seasonal flooding. Openings in forested wetlands created by storms also were pioneered by moist-soil species. Managers attempt to mimic these natural conditions to stimulate moist-soil plant production.

Moist-soil plants do not require deep tilling, fertilizers, herbicides, and similar techniques. Usually, the only requirement is that the soil be kept moist by natural rainfall or by pumping to flood temporarily or briefly the vegetation after it has reached a height of about 10 cm. The depth of flooding is usually less than 5 cm. Sometimes soil disturbance is necessary to reinvigorate a stand of moist-soil vegetation or to control undesirable plants. Overall, though, management costs are much lower compared to row crop production.

Most row crops suffer significant reductions in yield during drought or extremely wet periods. However, among various moist-soil plants, there are species that produce good seed crops regardless of weather conditions. Also, many seeds of native moist-soil plants can last for months or years underwater, whereas some cereal grains start to deteriorate after just a few days.

Ducks and other wildlife eat seeds from a variety of moist-soil plants. Annual grasses that produce copious quantities of seeds are sought by managers, including barnyard grass (wild millet), sprangletop, and panic grass (panicum). other plants of value include some of the sedges, smartweeds, and spikerushes.

It is usually not necessary to seed a site to establish moist-soil plants because a natural "seed bank" is almost always present in the soil to provide a source of plants. When land is restored or converted to moist-soil management, the strategy is to create the proper combination of soil temperature and moisture necessary to stimulate germination of desired species. Producing conditions favorable for desirable plants may require removal of dense surface litter, redistribution of the seedbank by tillage, or control of undesirable monotypic vegetation communities.

Sometimes moist-soil areas with exposed soils are invaded by undesirable species such as cocklebur or Chinese tallow. In well designed management systems, the infrastructure allows manipulations to control the timing, depth, and duration of flooding. This flexibility enables the

control of conditions that promote the production of desirable plants and the control of undesirable plants. For example, some noxious invaders like cocklebur can be controlled by flooding when they are small (i.e., 2-4 cm). Plant succession is a common phenomenon in moist-soil systems. As time passes, more perennial and/or woody plants that lack good food production become more common. Swamp smartweed, cattail, bulrush, aster, boneset, buttonbush, cottonwood, and willow are common invaders that compromise food production and must be controlled to assure good food production. When this occurs, vegetation control is required to reinvigorate the area by mowing, discing, shredding, burning, herbicidal treatments, or two or more of these in combination. All treatments must be followed by proper water management regimes to stimulate the return of desirable vegetation.

After a seed crop has been produced and is ready for consumption by wildlife, the best flooding and drawdown regime is determined by the management objectives for the site. If hunting is the objective, flooding should be timed to occur just ahead of migration through the region to assure that habitat is available for the birds. Similar considerations affect the timing and duration of drawdowns. For example, spring drawdowns concentrate invertebrates for migrant ducks and shorebirds and keep soil moisture at desirable levels for germination of desirable plants. Rapid early drawdowns export nutrients and provide rapidly changing foraging conditions for only a few days. Most management prescriptions call for landowners to leave at least portions of the impoundments flooded until spring migration has passed. However, timing and rate of drawdown also influence the species composition of plants for the next growing season.

Some Examples of Moist-soil Management

Some of the earliest work in defining the principles of moist-soil management was done by Kadlec in Michigan marshes and further explored by Meeks in work done in the marshes of Lake Erie. Much of our current understanding of moist-soil management is the result of studies done Fredrickson and his students in Missouri wetlands.

Moist-soil management is particularly important in the Illinois River valley because sedimentation has destroyed natural waterfowl habitats in that area. Waterfowl managers have emphasized the importance of migration areas as an extension of wintering grounds for ducks. Providing good food and habitat (such as moist-soil plants) in migration areas gives ducks more options in the case of food shortages on the wintering grounds and enhances duck survival and fertility and egg production in the following spring.

In California's Central Valley, 95% of the historic wetlands have been destroyed, mainly for agricultural purposes. The Valley continues to winter 60% of the migratory waterfowl in the Pacific Flyway. Due to the lack of habitat, resource agencies and private land managers have come to recognize the need for a variety of waterfowl food plants and habitat conditions to meet the needs of migratory birds. Moist-soil management is most important in maintaining these remaining wetlands in optimum habitat condition and in providing the important vegetative

diversity required by wildlife. In these wetlands, soil disturbance, summer irrigations, and mowing are the principal management practices used.

In the major waterfowl wintering areas of the rice prairies of Texas, the Lower Mississippi Valley, and the Lowcountry of South Carolina, moist-soil management is the single, most important practice used to enhance natural habitat in these and other areas. Moist-soil practices provide abundant seeds in a shallow water environment, replacing some of the food resources lost in these areas when forested and palustrine wetlands have been converted to agricultural production.

Issue Analysis

The waterfowl management community is united upon the premise that no practice should be allowed which affords either undue advantage to the hunter, or constitutes a threat to controlling and managing legal harvest. Benefits to waterfowl management of being able to foster food growth late in the season in areas like California or Texas, where birds have to be maintained on these habitats for many months after hunting, are so great that the benefits may be judged to outweigh any perceived temporary advantage, if there is any.

The best judgment of many waterfowl biologists is that overall management benefits to waterfowl are so great from the now widespread practice of moist-soil management that even manipulation of it during the hunting season should not be considered baiting. There is no evidence that it constitutes an "excessive attraction," nor that it would lead to overharvest, which already is addressed by harvest regulations.

This does not appear to match the documented problem with piles of grain, or even freshly cut grain, in providing a bonanza of food that attracts waterfowl in a way that makes them highly vulnerable to shooting. There is a major difference in how seeds are retained on native versus agricultural crops. An important attribute for which agricultural crops are selected is seed retention. In fact, retention is so good for some species (corn) that you can harvest months after the crop is mature. Moist-soil plants have an entirely difference strategy. For some species there is a more distinct flowering period, but seed retention is poor. Seeds tend to drop as soon as they are mature. Likewise, seeds are not held tightly once maturity is reached, thus any disturbance such as wind, contact, etc. causes the seed to fall easily. Natural plants also fall over more quickly and are already generally available to waterfowl at relatively low stalk height.

Conclusion

The primary objectives of baiting regulations should remain the protection of the resource, continuing to support needed habitat management to maintain the waterfowl resource, ensuring the maintenance of fair chase in hunting, to simplify and clarify the baiting law where possible,

to make it easier for well-meaning hunters to stay in compliance with the law, and to make interpretation of on-the-ground situations as unambiguous as possible for law enforcement.

It is the opinion of the majority of the professional waterfowl community that moist-soil management is absolutely necessary for the future welfare of North America's migratory waterfowl and necessary for the success of the North American Waterfowl Management Plan. Current interpretations of the baiting provisions of the migratory bird hunting regulations are preventing wetland managers from practicing moist-soil management. The intent of baiting regulations should not be to prevent management that helps ensure the well-being of waterfowl and other wetland wildlife resources. Moist-soil management needs to be encouraged rather than discouraged by the Service through its application and interpretation of baiting regulations. Accordingly, the recommendation passed by the Ad Hoc Committee of the IAFWA, that allows any manipulation of natural vegetation at any time, provides the Service a method to amend the federal waterfowl hunting regulations so that wetland managers, both private and public, can continue to provide the best habitat possible for our valuable waterfowl resource without fear of violating the law.

STATEMENT OF WILLIAM P HORN
BEFORE THE SUBCOMMITTEE ON FISHERIES, WILDLIFE AND OCEANS
COMMITTEE ON RESOURCES
U.S. HOUSE OF REPRESENTATIVES
MAY 15, 1997

Mr. Chairman:

My name is William P. Horn and I appreciate the opportunity to appear before the Committee.

We thank you for scheduling this hearing to address a wildlife regulatory issue that is long overdue for reform. Existing regulations regarding the use of bait for the take of migratory birds are too subjective, too obscure, and put thousands of law abiding hunters at risk for potential violations. Please understand my position, however, I DO NOT support baiting as a technique for the hunting of migratory birds -- I DO support the establishment of clear objective rules -- in statute or regulation -- that a reasonably diligent hunter can understand and comply with. No one can say that the existing regulations and policies satisfy this reasonable requirement.

My position on this issue arises from two perspectives. First, I had the privilege to serve as Assistant Secretary of the Interior for Fish, Wildlife, and Parks. Second, I am a hunter who struggles with these rules every time I step into a duck blind or set up in a dove field. Reform is needed to end, or at a minimum, reduce the level of "struggle" associated with efforts to comply..

The sporting community, and the U.S. Fish and Wildlife Service (FWS), have long recognized the need for clarification and simplification of these rules. The Director's 1990 Law Enforcement Advisory Commission specifically proposed a revisitation of the regulations at 50 CFR 20.21 (see Section IV, Recommendation 6). Moreover, the Commission raised the issue of "strict liability" and the Service's discretion to not prosecute unknowing violations.

Unfortunately, no action was taken to implement this recommendation. We are persuaded that the Committee ought to act on its own to pursue the original recommendations made by its own 1990 Commission.

Reform of the Migratory Bird Treaty Act, 20.21 regulations and associated policy should focus on four goals. First, the purpose of the baiting regulations ought to be clearly stated. I would recommend that this purpose be as follows: to restrict the use of bait in order to guard against excessive take of migratory birds and to enhance sporting conduct, recognizing the principles of fair chase, by protecting against practices that turn otherwise wild migratory birds into unwary targets on par with barnyard chickens. Conservation of

migratory birds is the goal -- not the compilation of arrest statistics or the execution of high profile busts.

Second, the law must be changed to eliminate strict liability. The imposition of strict liability eliminates the ability of a hunter or landowner to mount a defense against charges of illegal baiting. This is completely contrary to the fundamental premise of American justice: one is innocent until proven guilty. Establishing a standard that requires some measure of intent or knowledge is more just and equitable but still enables law enforcement officers to pinch and successfully prosecute genuine wrongdoers.

The third goal must be the creation of objective rules and policies that hunters can comply with. I have overseen the FWS, practiced law in this field for years, hunted doves, ducks, and geese for years and still hunt these birds with a great deal of trepidation. I scrupulously examine fields before hunting and make pointed inquiries about agricultural practices. Yet I still cannot be sure that I am complying with FWS regulations and enforcement policies. Can an agent find some tiny amount of leftover grain from an earlier legitimate feeding program? Does the agent agree that the agricultural practices used in the field are bona fide? Can the agent determine that baiting has occurred on an adjacent field that I have never seen and cite me for taking birds on their way to that field? All of these determinations are so subjective that even the most diligent and careful hunter can be cited for a violation. That is bad public policy. The rules must be remade in a way that the diligent and careful hunter who makes the effort can be assured that he or she is in compliance with those rules.

Objectivity regarding the determination of bona fide agricultural practices is also necessary. I commend the Southeast Region of the FWS for its policy decision to defer to the states regarding what constitutes agricultural practices within each respective state. This is clearly an area where one federal prescription cannot fit all the circumstances. Moreover, deferral to the states does assist the diligent hunter to comply with the rules. I have found state fish and wildlife personnel generally willing to offer specific guidance and advice regarding what are legitimate agricultural practices. This enables diligent hunters to take to the field with a high degree of assurance that they are following the law.

In contrast, FWS enforcement personnel are unwilling to provide similar advice or guidance. I am aware of hunt organizers contacting FWS to ask agents to examine a field and give it a clean bill of health in an effort to fully satisfy the 20.21 regulations. These organizers have been turned down flat. Even the IRS is willing to help citizens with tax compliance -- why can't FWS help with migratory bird regulations compliance?

The Committee should also be extremely concerned with attempts by FWS to close hunting in very large zones proximate to farms where waterfowl feeding is occurring. The apparent policy rationale is that the baited farm, even if it is not hunted, constitutes an illegal lure that brings birds into an area. This kind of policy could easily become a tool of animal rights extremists. Aggressive feeding/baiting on a few strategically located parcels

on Maryland's Eastern Shore could close down hundreds of waterfowl hunting locations. In the strongest terms, the Committee should direct FWS to be very careful and not provide anti-hunting zealots a weapon to be used against America's waterfowl hunters.

Fourth and last, FWS needs to exercise greater discretion regarding those who unknowingly and unwittingly violate the baiting proscriptions. If illegal baiting is going on, the perpetrators -- organizers, hosts, guides, etc. -- should be the targets. They ostensibly are the ones engaged in the illegal activity as they would have knowledge of the baiting. The unknowing but otherwise diligent hunter should not bear the brunt of the prosecution.

I have heard FWS complain that it lacks discretion in these cases; I respectfully disagree. It managed to exercise enormous discretion for over 60 years in Alaska regarding spring harvest of migratory waterfowl; the number of prosecuted violators can be counted on your fingers. If FWS has this discretion for direct contravention of the Migratory Bird Treaty Act, it clearly has the discretion not to prosecute unknowing violations of regulations or enforcement policy.

Thank you again for the opportunity to address this issue. Reform of the Migratory Bird Treaty Act, the 20.21 regulations and related policies is necessary to achieve greater objectivity so that the diligent and careful hunter can comply with the law and applicable regulations and policies.

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TESTIMONY

BEFORE THE

SUBCOMMITTEE ON FISHERIES, WILDLIFE AND OCEANS

OF THE

HOUSE COMMITTEE ON RESOURCES

HOUSE OF REPRESENTATIVES

105TH CONGRESS
1ST SESSION

ON

H. R. 741

THE MIGRATORY BIRD TREATY REFORM ACT OF 1997

MAY 15, 1997

BY

STEPHEN S. BOYNTON
Vice President and General Counsel

MR. CHAIRMAN:

My name is Stephen S. Boynton. I am an attorney in private practice in Washington, DC and, through this practice and other activities, I have been actively involved in wildlife and marine resource conservation issues for many years. I presently serve Vice President and General Counsel to the conservation consulting firm of Henke & Associates, Ltd. I am also Vice President of the World Conservation Trust-IWMC and President of the International Foundation for the Conservation of Natural Resources. Finally, Mr. Chairman, I have been a hunter of migratory birds for more years than I care to relate.

I sincerely appreciate the opportunity to appear and present testimony before the Subcommittee on Fisheries, Wildlife and Oceans of the House Resources Committee on H.R. 741- The Migratory Bird Treaty Reform Act of 1997.

I. INTRODUCTION

This much needed legislation would amend the Migratory Bird Treaty Act (MBTA) that implemented the Convention for the Protection of Migratory Birds signed in 1916 between the United States and Great Britain (for Canada). 39 Stat. 1702 (Aug. 16, 1916), T.S. 628, 16 USC §§703 *et seq.* Specifically, H.R. 741 addresses the abuses, inconsistencies, confusion and, indeed, injustices experienced by sportsmen, land owners, farmers, and law enforcement officials by the administration and prosecution regarding the prohibitions against hunting migratory birds "[b]y the aid of baiting, or over a baited area." 50 CFR §20.21(i).

Until the oversight hearings held last year before the House Resources Committee, the Congress had not reviewed this issue since oversight hearings in 1984 before the former Subcommittee on Fisheries, Wildlife Conservation and the Environment of the House Merchant Marine & Fisheries Committee. U.S. House of Rep., 104th Cong., 2d Sess., Serial No. 104-69, Oversight Hearings-The Migratory Birds and FWS (May 15, 1996); U.S. House of Rep., 98th Cong., 2d Sess., Serial No. 98-44 (Fish & Wildlife Misc.-Part 5) (Feb. 28, 1984). As result of the

hearing held in 1996, H.R. 4077 was introduced on September 12, 1996 and is basically the same bill that we are discussing today. Introduction in 1996 of this bill was most useful as it engendered much discussion and comment throughout the nation. However, until the introduction of this legislation, *nothing* of a positive nature had developed regarding the issues that have been under discussion in the Congress and the Executive branch of government for almost sixty (60) years! Even after a Law Enforcement Advisory Commission, constituted by the Fish and Wildlife Service (FWS) of the U.S. Department of Interior in 1990, found the enforcement and regulations regarding baiting were "confusing" and "too complex," no effort was made to any initiate reform. Rather, in point of fact, the baiting issue has become more exacerbated due, unfortunately, to the twin prongs of unreasonable administration of the regulations by FWS Division of Law Enforcement and the unyielding position of the federal court system--including U.S. Attorneys--in a joint rush to convict under the doctrine of strict liability in baiting cases.

In my considered judgment, the time has truly come for the Congress to address this issue in a positive fashion and to provide legislative guidance to the sportsman, law enforcement officials, and the courts through the passage of H.R. 741. The judicial record and the history wildlife law enforcement on this issue has graphically demonstrated that the courts and the law enforcement officials have not, and in far too many cases, conscientiously will not, provide the clarity necessary to disentangle the puzzle of baiting regulations that face the sportsmen in their attempts to legally gun for migratory birds.

My vantage point of experience to make these observations is that, as an attorney in private practice, I have been involved in representing many individual sportsmen and incorporated sportsmen's clubs in baiting cases throughout the nation. In addition, in the theme of "physician, heal thyself," I was a defendant in a baiting case that I unsuccessfully took to the court of appeals. *United States v. Boynton, et al.*,63 F.3d 337 (4th Cir. 1995).

First and foremost, the point needs to be underscored that the sportsmen, the law enforcement officials and, indeed, the Members of the Congress, all share the basic concern reflected in the MBTA that renewable migratory bird resources must be protected from over

exploitation by the implementation of appropriate management and enforcement policies. No sportsmen I know would disagree with that premise. The disagreement and frustration are due to the absence of clear and appropriate regulations coupled with reasonable wildlife enforcement.

II. JUDICIAL BACKGROUND

It would be useful to fully understand the background of the MBTA and the cases that have addressed the issue of baiting to apprciate the need for reform embodied in H.R. 741.

In 1920, the Supreme Court upheld the constitutionality of the Convnetion for the Protection of Migratory Birds as well as the MBTA implementing it. *Missouri v. Holland,* 252 U.S. 544 (1920). Various challenges have been made to the Act since that decision[1] but none so consistently as the attacks on the regulation that prohibits hunting "[b]y the aid of baiting, or over a baited area." 50 CFR §20.21(i). The controversy basically centers on a total departure from the Anglo-American concept in the common law that the government must prove criminal intent of a defendant beyond a reasonable doubt before a conviction can take place. However, since 1939, it has been determine that no *scienter,* or guilty knowledge, that the area has been baited is required to prove a violation of the regulation:

> There appears no sound basis here for an interpretation that the Congress intended to place upon the Government the extreme difficulty of proving guilty knowledge of bird baiting on the part of persons violating the express language of the applicable regulations...but it is more reasonable to presume that Congress intended to require that hunters

[1]*See, e.g.; Bailey v. Holland,* 126 F.2d 317 (4th Cirri. 1942)-challenge that closing hunting on private property next to a federal wildlife refuge was a "taking" of private property; *Cochrane v. United States,* 92 F.2d 623 (7th Cir. 1937)-challenge of authority to limit the means of taking waterfowl; *National Rifle Ass'n v. Kleppe,* 425 F.Supp. 1101 (D.D.C. 1976)-challenge of non-toxic shot regulation. There was also a marathon of litigation challenging the closing of lands to hunting next to a preserve in Illinois. *See, Landsden v. Hart,* 168 F.2d 409 (7th Cir. 1948), *cert.den.*, 335 U.S. 858 (1948); *Landsden v. Hart,* 180 F.2d 679 (7th Cir. 1951), *cert.den.*, 340 U.S. 824 (1951); *Sickman v. United States, 184 F.2d 616* (7th Cir. 1950), *cert.den.*, 314 U.S. 939 (1951); *Bishop v. United States,* 126 F.Supp. 449 (Ct.Cl. 1954).

> shall investigate at their peril conditions surrounding the fields in which they seek their quarry. *Untied States v. Reese*, 27 F.Supp. 833, 835 (W.D.Tenn 1939); *see also, United States v. Schultze*, 28 F.Supp. 234 (W.D. Ky.1939).

Resting upon this single point of reasoning of speculation on what Congress intended, a vast inverted pyramid of law has developed following this case regardless of various factual patterns *or, indeed, the innocence, in fact, of the defendants involved.*[2] Even though the innocence may be established by the evidence and specifically acknowledged by the court that a defendant did not know, or could not have reasonably known, the alleged bait was present, guilt will attach. For example, the court in *United States v. Catlett*, 747 F.2d 1102 (6th Cir. 1984) pointed noted that the defendants did not intend to hunt over bait and had not placed any bait in the gunning area. The court, however, did not hesitate to *"reluctantly"* affirm a conviction of the *"unfortunate"* defendants.[3] (Emphasis added) *Id.* at 1103. Justice? Hardly.

There have been a few cases that have departed from the strict liability doctrine. In *Allen v. Merovka*, 382 F.2d 589 (10th Cir. 1967) certain private land owners who were surrounded on three sides by a state waterfowl refuge where a bird feeding program was undertaken, brought an action to stop the state from prohibiting hunting on their land. They were successful in obtaining an order restraining state officials from prohibiting hunting on their land. *Allen v. McClellan*, 75 N.M. 400, 405 P.2d 405 (1965). Thereafter, the federal officials sought to post the land as "baited" since the adjoining refuge area had corn crop that had been knocked down to feed migrating waterfowl. The landowners went to federal court to restrain the federal officials from

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[2]*See, e.g., United States v. Hogan, 89 F.3d 403 (7th Cir. 1996); United States v. Orme*, 51 F.3d 269 (4th Cir. 1995) aff'd. without a pub. opin. *United States v. Diez*, 851 F.Supp. 708 (D.Md.. 1993); *United States v. Van Fossan*, 889 F.2d 636 (7th Cir. 1990); *United States v. Engler*, 806 F.2d 425 (3d Cir. 1986), *cert.den.*, 481 U.S. 1019 (1987); *United States v. Green*, 571 F.2d 1 (6th Cir. 1977); *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971); *Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966), *cert.den.*, 386 U.S. 943 (1967); *United States v. Ardoin*, 431 F.Supp. 234 (W.D.La. 1977).

[3]It must be noted that a jury trial is not available to the defendants in these cases since the offense is statutorily considered a "petty offense". 18 USC §1(3). The Supreme Court has held that a jury is only required when the offense is considered to invoke "serious" consequences. *Duncan v. Louisiana*, 391 U.S. 145 (1968). *See, United States v. Ireland*, 493 F.2d 1208 (4th Cir. 1973).

preventing hunting on their land. The court avoided the constitutional issue of state property rights versus federal regulatory authority by rejecting the strict liability doctrine. They held that the hunters should not be liable for the acts of third parties by stating that "[t]he prohibited acts refer to those of the hunter, not to the independent and unrelated acts of others." [4] 382 F.2d at 591.

The *Allen* decision was followed, in part, in the case of *United States v. Bryson*, 414 F.Supp. 1068 (D.Del. 1974) as far as prohibiting the taking of migratory birds "by the aid of baiting" but followed the strict liability for taking "on or over a baited area." The phrase "on or over a baited area" is vague in definition but the courts have risen to the occasion by speaking of a "zone of influence" that defines a geographical extent of the "baited area." *See, United States v. Manning*, 787 F.2d 431, 437 (8th Cir. 1986). In terms of "how far is far," the "zone of influence" is limited "only by the capacity of bait placed anywhere within it to act as an effective lure for the particular hunter charged." *United States v. Chandler*, 753 F.2d 360, 363 (4th Cir. 1985). Thus, when a wildlife official gives an "expert" opinion that the alleged bait would be an attraction for the birds to come to the gunning site of the hunters, since the "bait" is there, you are guilty of violating the regulations--regardless of intent or even knowledge, a reasonable opportunity to know of its existence or an evaluation of whether the "bait," in fact, would be the dtermining factor in birds being within gunning range.

In *United States v. Jarman*, 491 F.2d 764 (4th Cir. 1974) the defendants hunted doves in a field that was separated from three others by a road and a hedgerow. It was undisputed that the hunting field was not "baited" but there was grain on the other fields. The court had no trouble in

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[4] *But see, Bailey v. Holland*, 126 F.2d 317 (4th Cir. 1942) noted above and cases cited in note 1 *infra*. The baiting regulations were changed after the *Allen* case to exclude the taking of migratory game birds *other than waterfowl* over areas where feed has been distributed as a result of manipulation of a crop for wildlife management purposes. 38 Fed.Reg. 22021 (Aug. 15, 1973). The Fish & Wildlife Service presently has a Notice of Intent and Request for Comment to remove the waterfowl regulations from the general regulations regarding migratory birds and seek public comment regarding "artificial manipulation" of any vegetation to attract waterfowl for hunting purposes. 61 Fed.Reg. 11805 (Mar. 22, 1996).

finding that the division by a road and hedgerow was not a factor and that all four fields were in the "zone of influence."

In *United States v. Orme,* 51 F.3d 268 (4th Cir. 1995), *aff'ming without a pub. opin. United States v. Diez,* 851 F.Supp. 708 (D.Md. 1994), the hunting venues were stipulated to be 4,899 feet and 2,790 feet from the alleged bait. The court determined on the basis of the agents testimony that the hunters were in the "zone of influence." Based on the strict liability doctrine that since the alleged bait was in the "zone of influence," the defendants were guilty. This case now stands for the proposition that a hunter has a duty to reconnoiter one-half to one mile around his blind to determine if there is a baiting problem.[5] As another court has observed, " 'the baited area' is as exact as the subject matter permits" and "[t]here is no *scienter* requirement to mitigate the indefiniteness of the term 'baited area' or the 'zone of influence' concept...." *United States v. Manning,* 787 F.2d 431, 438 (8th Cir. 1987). Unfortunately, under the current state of the law, this incredible imprecise "guideline" is "as good as it gets." And, apparently, the FWS, prosecuting attorneys and the courts want to leave that way. Clearly, such inexplicit guideline should not be the state of affairs for the sportsmen who wants to legally hunt migratory birds.

Only one court has had the presence to at least put reason into the regulatory scheme by holding "that a minimum form of scienter-the 'should have known' form-is a necessary element of the offense." *United States v. Delahoussaye,* 573 F.2d 910, 912 (5th Cir. 1978).

> We conclude that at a minimum [the bait] must have been been so situated that [its] presence could have been reasonably ascertained by a hunter properly wishing to check the area of his activity for illegal devices. There is no justice for example,

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[5]There was also grain found on a public road that divided the blind sites. The court ignored the pubic road issue by sating, again, that how it came to be there was irrelevant. 831 F.Supp. at 711. This case now stands for the proposition that the hunter knew *or should have known* that there was 'bait" on public road. First of all, no hunter would think of looking on a road for possible grain. Secondly, this offense took place on the Eastern Shore of Maryland where most blinds are in walking distance from a paved road. Now to have anyone arrested for gunning over or with the aid of bait, all one has to do is go down a road, find a blind in a field, shovel out some corn, and call the wildlife law enforcement officials.

> in convicting one who was barred by a property line from ascertaining that birds were being pulled over him bybait.... If the hunter cannot tell which is the means next door that is pulling birds over him, he cannot justly be penalized. *Any other interpretation would simply render criminal conviction an un-avoidable occasional consequence of duck hunting and deny the sport to those such as, say, judges* [6]*who might find such a consequence unacceptable.*[7] (Emphasis added). *Id.* at 912-913.

The observation of the court that criminal conviction becomes an "unavoidable occasional consequence" of hunting migratory birds has become, sadly, an established pattern. So much so, that many hunters have left the field because of the *uncertainty* of the " what and where" that constitutes bait in their hunting venues and the *certainty* that they will be convicted regardless of their innocence. [8] The latter point under the majority case law is irrelevant. Given the time and treasure sportsmen have given to the conservation of renewable resources in this nation, this is a extremely sad state of governmental administration.

In the case I mentioned above where I was a defendant, the issue concerned the exception under the regulations where hunting is permitted when grain is "scattered solely as the result of normal agricultural planting or harvesting" or "distributed or scattered as the result of *bona fide* agricultural operation." 50 CFR §20.21(i). In this case, the landowner had distributed grain "screenings"[9]around a pond in early August in an effort to help bind the soil of a leaking pond.

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[6]Although one could readily insert "Congressmen" here, the appropriate insertion would be "men, women and young people."

[7]The *Delahoussaye* case has been followed in the Fifth Circuit by *United States v. Sylvester,* 848 F.2d 520 (5th Cir. 1988). In *United States v. Angueira,* 951 F.2d 12 (1st Cir. 1988), the court stated that "[w]e assume for the present purposes that *scienter* is required [for violation of the baiting regulation]." 951 F.2d at 15. However, in this case it was found that the defendants knew of the "bait" and, consequently, left "for another day a determination of that issue." *Id.*

[8]*See, Beware of the Baiting Laws,* Reiger, George, *Field & Stream* (Dec. 1994); *Dove Hunting By Seedy Standards,* Phillips, Angus, *The Washington Post* (Sept. 10, 1995); *Waterfowl-Baiting Laws Should Be Re-examined,* Bonner, Fred, *Washington (N.C.) Daily News* (Dec. 20, 1992).

[9]Screening: a. an undesirable material that has been separated from usable material by means of a screen or sieve: *screening of imperfect grain.* (Emphasis in the original) Random House Dict. of Eng. Lang. (2d ed.) Although "imperfect" for sale, the seeds were capable of germinating.

This was a practice was followed for six (6) years. Due to lack of rain, some grain was still present when the field was hunted a month later. Defendants maintained that this was a *bona fide* agriculture practice and introduced evidence that such top seeding was a "normal" agriculture practice in that geographical area. Although the courts said that this was a "close case," (which is about as comforting as being "reluctantly" found guilty and considered an "unfortunate" defendant as in the *Catlett* case mentioned above) and *specifically found* that the land owner had no intent to spread bait as the word is used, the defendants were found guilty. The court agreed with the FWS that the method used by the landowner was not *bona fide* or normal, *since it was not the "best" method to retard erosion as defined by the local County Soil Conservation Service*. Thus, in the collective wisdom of the court of appeals it was determined that after several thousand years of use, the Latin phrase *"bona fide"* does not mean the good faith of the person doing the act, but means good faith and without fraud as determined by a third party. In this case, what is the best agriculture practice as the FWS as determined under guidelines prescribed by the County Soil Conservation Service. The legal leap in logic was admittedly done to keep a consistent ruling that baiting cases must be determined on a strict liability doctrine. *Untied Sates v. Boynton, et al.*, 63 F.3d 337 (4th Cir. 1995).

In the case of *United States v. Brandt*, 717 F.2d 955 (6th Cir. 1993), the court made an appropriate and logical distinction for interpreting the regulations when a *bona fide* agriculture practice is being considered by stating:

> [I]t is not to distinguish between orthodox and unorthodox practices, but to distinguish between areas to which birds are attracted as a consequence of farming, and areas to which birds *are intentional lured by baiting. Id.* at 958

In sum, the intent of the person undertaking the agricultural act *is* relevant. The Magistrate Judge in the *Boynton* case, however, took the position that it would be a problem on "how to prove it; how the government would ever prove a case to this." *United States v. Boynton, et al.*, Doc. No. 94-005K/S94-0131, TR., p. 33 (Mar. 24, 1994). The court of appeals

was not as subtle; they just said they declined "to follow a subjective measure of the grain scatterer's intent to determine if the planting or operation is 'normal' or '*bona fide*'" and blithely imposed strict liability that basically renders the exceptions meaningless. 63 F.3d at 345.

Although the *Boynton* case is a perfect example of trying to put the round peg of strict liability into the square hole of reasonable regulation enforcement, there are several other points in the case that bear review.

First of all, the Magistrate Judge agreed with the FWS that a crop for harvesting must be contemplated to come under the exception. The district court overruled that position and was upheld by the court of appeals. Strike one for the FWS.

In further confusion, the court of appeals found that a pamphlet entitled *What Is Legal,* issued by the FWS and distributed to hunters to supposedly make clear what the regulations actually meant, was "to some degree contradictory." 63 F.2d at 342-343. Strike two for the FWS. And, "[b]because the [FWS] has interpreted its own regulations in an ambiguous manner, [the court] must resolve the ambiguity." *Id.* This was strike three for the FWS but the defendants still lost the game and the law enforcement agent involved was specifically honored by the FWS for her involvement in the case.

If this case stands for any logical inquiry, however, it might be: *if the FWS and the courts cannot agree on what the regulations means, how the h— is sportsmen expected to know?* Unfortunately, the answer is that he or she is not; it is what the court or the FWS law enforcement officials say it is at any given time in any given situation. As was said in the first case that ever considered the issue, "hunters shall investigate at their peril...." *United States v. Reese,* 27 F.Supp. 833, 835 (W.D.Tenn 1939). The only problem with that statement is that today there is no uniform guideline as to exactly what is, and where is, the "peril " they are to investigate!

In another baiting case, an action was brought against an incorporated duck club and two individual hunters where thirteen (13) kernels of corn were found in a pond over which they were hunting. *United States v. Lonergran,* No. Misc. 89-0468 (E.D. Cal. 1989). There are two interesting points in this case. First of all, the pond was in the approximate center of a 3400 acre

working farm where corn was the main crop. A fresh water stream flowed into and out of the pond and a beaver dam had been constructed where corn stalks were used in construction. Obviously, it would not be surprising to find *some* corn in the pond. Clearly a question of reasonableness in wildlife law enforcement was at issue. The President of the Club was, however, Baron Hilton, of Hilton Hotels, and many of Club's members were well-known West Coast personalities. I am confident this case was brought because of the high visibility of the defendants and, since the "bait" was there, under the strict liability doctrine, it was expected that a plea would be entered or conviction would take place at trial. The defendants chose to go to court, however, and the Magistrate Judge appropriately issued a "not guilty" order at the conclusion of the trial. Such a circumstance is, however, extremely rare.

Another case I believe was brought, in part, because of the high visibility of the one of the defendants was *United States v. Orme*, 851 F.3d 268 (4th Cir. 1995), *aff'ming without a pub. opin.*, *United States v. Diez*, 851 F.Supp. 708 (D.Md. 1994). Osbourn "Os" Owings owned a farm on the Eastern Shore of Maryland where many prominent state and federal officials and other prominent guests had hunted over the years. *For over thirty (30) years*, Mr. Owings had a feeding program for waterfowl where he placed grain on his farm from the time waterfowl migrated in the fall until they left in the spring. He also left standing corn in his fields and built two fresh water ponds on his farm that was surrounded on two sides by the Choptank River. In short, an ideal hunting venue. He was very proud of his feeding program and even wrote about it in a hard cover autobiography. *The Wizard Is Os* (1990). For years, federal and state law enforcement officials were aware of his feeding program. They even banded waterfowl on his property over the years. As mentioned earlier in this testimony, the hunting venues were stipulated to be 4,899 feet and 2,790 feet from the feeding program.

The last day of the waterfowl season in 1993, federal and state wildlife law enforcement officials arrested all hunters gunning from the two blind areas. Mr. Owings was 81 years old and did not hunt that day but was charged with aiding and abetting in the baiting. He passed away

prior to trail but the person helping Mr. Owings was found guilty under the "since-it-is-there, you're -guilty-of-hunting-over-bait" strict liability doctrine. The "zone of influence" in this case was, according to the witnesses for the government, basically from horizon -to- horizon. All the other issues of legal standing crops, fresh water ponds, lack of hunting pressure, and other attributes that made the farm attractive to waterfowl were ruled irrelevant to the imposition of the strict liability doctrine. Intent of the hunters was ignored and the person helping Mr. Owings place the feed on the property was fined $5000.00 and required to spend thirty (30) days in prison on a work release program. Again, justice? Not by any standard..

It is unfortunate that at present, the FWS Division of Law Enforcement's recipe for these cases is basically the philosophy of the Queen of Hearts in Lewis Carroll's *Alice's Adventure in Wonderland*: "Sentence first-- verdict afterward." Under the strict liability doctrine, the verdict is all too predictable.

III. LEGIALTIVE REFORM-H.R. 741

The issue before this Committee, then, is where do we go from here? The above cases clearly indicate there has been a continuing serious problem for sportsmen for many years. It is a recognized circumstance that there are many, many other instances where hunters are, in fact, innocent of actual wrong-doing but choose to pay the fine rather than incur the costs and time in contesting the charges in court that they know they will anyway. These instances are not "reported" other than the "conviction rate" of baiting cases maintained by the Department of Justice and Department of Interior.

At least one person in the FWS has recognize the problem but still oppoese this legislation. Dr.Keith Moorehouse, a biologist with the FWS, was quoted as saying that "[t]he language in the regulations is not consistently clear" candidly and accurately acknowledging that

"[i]interpretation varies from one law enforcement agency to another." [10]*Conservation News From Washington* (April 15, 1996).

The approach for any reform is, in my judgment, totally in the hands of the Congress. The majority of courts have clearly indicated they will not alter their position on strict liability. The FWS will not, or cannot, correct the problem through administrative regulatory reform. In fact, I would suggest that the Division of Law Enforcement has no interest in addressing the problem since convictions are ready made for any factual pattern involving a question of bait. Further, at the oversight hearings last year Robert Streeter, Assistant Director for Refuges and Wildlife of the FWS, under which law enforcement is administered, stated in a response from the Chairman if the laws should be changed on baiting that:

> I do not believe the law should be changed. Regulations, when they have been found to be unclear, should be changed such s the case of the baiting regulations right now, we are in the process of reviewing those regulations, sir, and revising them. *Id.* Oversight Hearings at 45 (May 15, 1996).

That statement was made one year ago today. It was seven (7) years ago in June that the Law Advisory Commission of the FWS said that changes were necessary, twelve (12) years ago when another Congressional hearing was held on the issue, and twenty-four (24) years ago that the last regulatory change on baiting was addressed in the regulations, and fifty-eight (58) years

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[10]During the litigation in the *Boynton* case, I received an anonymous telephone call from someone identifying himself as being with the Fish & Wildlife Service. He stated that as a result of the case, at least one Regional Director instructed the staff to determine what were "normal agricultural practices" actually undertaken by the farmers in that area. That information would be the basis of "normal agricultural practices" and not what an outside agency might say is the "best" agricultural practice that was the determining factor in the *Boynton* case. Again, a conflict in enforcement of the regulations.

Many commentators have also recognized the problems. *See, e.g., Illegal Waterfowl Hunting*, Gray, Brian and Kaminski, 48 Journ of Wild. Mgt. (Supp. July 1994); *The Anti-Baiting Regulation Pursuant To The Migratory Bird Treaty Act: Have the Federal Courts Flown the Coop, Or Is The Regulation For The Birds*, Schmatz, Arther E., 14 Geo. Mason Law Rev 407 (1991); *Of Birds and Men: The Migratory Bird Treaty Act*, Sjostrom, Craig D., 26 Idaho Law Rev. 371 (1990); *The Resurrection and Expansion of the Migratory Bird Treaty Act*, Coggins, George C. and Patti, Sebastian T., 50 U. Colo. Law Rev. 165 (1983);

since the court said they knew that Congress wanted it that way. Congress should not permit this circumstance to continue.

In fact, since the Supreme Court has declined to address the problem of a uniform application of the regulations in the courts, it is suggested that the Congress has constitutional obligation relative to the appropriate implementation of the Convention for the Protection of Migratory Birds. In *United States v. Catlett,* 747 F.2d 1102 (6th Cir. 1984), a petition for *certiori* was filed in the Supreme Court but was denied. *Catlett v. United States,* 471 U.S. 1074 (1985). Justice White, however, supported the petition by quoting with approval the language in *United States v. Delahoussaye* that noted that, since the baiting regulations were founded on an international treaty entered into by *all* the United States, the regulations " 'should not mean one thing in one state and another elsewhere' " 573 F.2d at 913 (5th Cir. 1978). Consequently, I believe this Committee has, not only the opportunity to implement needed reform, but also the duty to initiate the constructive and substantive effort embodied in H.R. 741to establish order where confusion now reigns.

There are those who have been critical of the proposed legislation for placing into statute what should be in regulation, thereby, removing the flexibility of the regulatory process. First of all, Congress has the initial duty to administer the MBTA but has delegated its role to the Secretary of Interior for the implementation of appropriate regulations. However, proper administration of the Act *is* ultimately the responsibility of Congress. Consequently, if it is demonstrated to the Congress that the regulatory process has not been appropriate and the agency in charge has no intention of making the appropriate changes, it has the duty to act. When an agency has basically done nothing for almost a quarter of a century, it is inflexibility at its worst.

It has been questioned whether other prohibitions now contained in regulation should be incorporated in statute as reflected in Section 3 of the bill. The prohibitions, most of which were recommended by sportsmen, have been in existence for many years and are not in controversy. Therefore, there would seem to be no objection to having them reflected in the statute that is attempting to comprehensively "clarify hunting prohibitions...." under the MBTA.

The bill specifically addresses the confusion as it relates to exemptions under prohibitions for agricultural activities by requiring the FWS, after review in an area, to publish specifically what is a "normal agricultural operation" in a given geographical area as outlined in Section 3(C)(ii)(I and II). When accomplished, hunters, law enforcement officials, land owners and farmers will have a specific guideline. Such does not exist today.

It must also be underscored that the provisions of the bill do not expand the opportunity for illegal baiting. Rather, it defines what the term "baiting" actually means in law and is directed to define the activities of the intentional wrong-doer. Those persons can, and obvioulsy should, be appropriately prosecuted. To oppose this correction in the law seems to advocate the continued practice of fining innocent sportsmen.

It has been printed that a former wildlife law enforcement official has stated that in his career he "could count on two hands the [defendant-hunters] who didn't know the bait was there." *Congressional Quarterly*, p. 806 (April 5, 1997). It is interesting that a federal magistrate stated in the Congressional hearing in 1984 that in his career he had only "one or two cases" where he thought the defendants may have been innocent because they did not know the bait was "there." *Id.* Oversight Hearing at 174 (Feb. 28, 1984). First of all, I sincerely doubt the accuracy of the statements, but, more importantly, since proof on that issue has been deemed irrelevant, how would they know? H.R. 741 provides the opportunity for defendants to determine that fact by evidence, not prejudicial conjecture.

Finally, there has been objection to eliminating the strict liability standard on the premise that there cannot be cases made by the law enforcement officials and the government cannot make cases under this standard. This is a specious argument for several reasons.

First of all, the standard is not the traditional criminal law standard required in virtually every other course of criminal conduct: proof beyond a reasonable doubt. Rather, the proposed standard in Section 3 (9)(c)(1) is basically a civil standard of a proof by a preponderance of the

evidence to be determined by the trier of fact in court. [In such misdemeanor cases it would be the judge].[11] It is quite true that the law enforcement officials and the U.S. Attorneys will have to do more investigative work. So be it. Currently, strict liability cases do not require much proof - "There is bait, you are there, get out your check book". To avoid criminal records for persons that can offer evidence to prove their innocence certainly does not seem an untoward responsibility of government officials. Under this standard, the defendant will have an opportunity to present his evidence of innocence and, if it is wanting, he will be found guilty. Today, his evidence is limited to 1) whether or not he or she was there, and 2) whether or not there was, in the opinion of the law enforcement official, bait present-regardless of amount or, indeed, within the observable horizon. Intent, knowledge, or whether or not the "bait" in fact lured the migratory bird to the area given other factors, or whether or not a third party thinks the agricultural activity is "normal" regardless of the intent or common practice of the person undertaking the activity, are all irrelevant under current standards. This is unfair as well as unreasonable. The bill provides a level judicial playing field for all parties.

Finally, Mr. Chairman, there has been opposition to the bill on the ground that it will somehow harm the resource. This is certainly a serious charge and should be considered carefully. Examination of this objection, however, fails to provide any rational foundation for concern.

First of all, actual hunting over or with the aid of bait is still illegal. The bill only clarifies what is the legal and illegal activity concerning "bait." It is no manner expands the opportunity to "bait." Secondly, in order to "harm" the resource, such an objection presumes that the annual migratory bird harvest will somehow become excessive. This circumstance can only happens if the set bag and season limits are exceed-an illegal circumstance that is obviously "available" today under the current regulations.

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[11] *Supra*, note 3.

In sum, Mr. Chairman, H.R. 741 appropriately addresses the issues that have been raised by inconsistent court decisions, confusing regulatory interpretations, inconsistent enforcement, lack of clear guidelines for farmers and landowners relative to appropriate agricultural practices where is it legal to hunt migratory birds, and, most importantly, provides an opportunity for hunter-defendants to prove their innocence in a court of law.

I sincerely hope the Congress will act swiftly on the passage of this legislation. As a wise walrus once said: "The time has come...."

Thank you.

Safari Club International

A NON-PROFIT ORGANIZATION • DEDICATED TO CONSERVING WILDLIFE AND PRESERVING HUNTING

TESTIMONY OF
SAFARI CLUB INTERNATIONAL

Before the Subcommittee on Fisheries Conservation,
Wildlife and Oceans,
Committee on Resources
United States House of Representatives

on May 15, 1997

On the

MIGRATORY BIRD TREATY REFORM ACT OF 1977
H.R. 741

Submitted by Rudolph Rosen
Executive Director, Safari Club International

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My name is Dr. Rudolph Rosen and I am Executive Director of Safari Club International. Chairman Saxton and members of the Subcommittee: I appreciate this opportunity to appear before you to speak about H.R. 741, the Migratory Bird Treat Reform Act of 1997.

During my career, both in state government and in conservation organizations, I have had many opportunities to become familiar with the conservation of migratory birds and the laws and regulations governing migratory bird hunting. My most direct experience with regulation of migratory bird hunting was from 1991 through February of this year, when I was responsible for migratory bird management and harvest regulations, first for the State of Texas, as Director of the Division of Fisheries and Wildlife, and then for Oregon, as Director of the Oregon Department of Fish and Wildlife.

The Safari Club is an international not-for-profit wildlife conservation-education organization with over 32,000 members and 168 chapters world-wide, and through affiliated organizations our numbers increase to over 1 million. All of our members are hunters and we work to conserve the world's wildlife species and protect the rights of hunters.

H.R. 741 would enact into law a variety of prohibitions dealing with different methods and practices of hunting for migratory birds. These are derived from the federal regulations that are currently in place on migratory birds. Hunting migratory birds with the aid of bait is one of those prohibitions. The bill makes an important clarification in regard to this particular provision, in that the person charged with a baiting violation must know, or should have known through the exercise of reasonable diligence, that bait was present where they were hunting. An exception to the prohibitions makes it clear that hunting on or over areas that have been subjected to normal agricultural practices does not constitute baiting. The terms "baiting," "baited area," and "normal agricultural operations" are defined.

We appreciate the leadership of the Chair and others in Congress in bringing forward this bill, especially to change certain very specific regulations on "baiting." We support your efforts here today to focus on honing the language of this bill. We offer our help as the bill moves forward and we strongly encourage that such action continue.

Based on past experience, an update of baiting regulations is long overdue, and years of controversy have yet to result in common sense changes that would help enlist the support of hunters as well as ensure that maximum protection of migratory birds from the adverse effects of baiting continues. The current

regulations were written by the Fish and Wildlife Service and its predecessor agencies under provisions of the Migratory Bird Treaty Act. Specifically at issue for Safari Club is the confusion and implicit culpability of hunters under the strict liability standards of the current regulations and the definition of what constitutes "baiting" being interpreted too broadly for judicious and practical application.

The Safari Club supports regulations that conserve migratory bird resources. We also support ethical hunting and a strict adherence to all wildlife hunting rules and regulations.

Safari Club members pledge to follow a code of ethics that includes knowing and following hunting rules and regulations, wherever and whenever they hunt. In fact we have an active ethics committee and detailed procedures for the expulsion of members who violate wildlife conservation laws and the ethics of the hunting community. We also deny the many benefits of our organization, including participation in our annual convention and advertisement in our publications for those who violate wildlife conservation laws and hunting ethics.

Rules prohibiting baiting of migratory birds are no exception. Our members do not question the need for regulations, including a prohibition on baiting, which may create an unfair advantage to the hunter and impact too greatly on a localized basis on migratory bird resources. Our members also agree hunting is an important wildlife management tool.

Wildlife managers generally seek to develop rules in cooperation with hunting license holders that protect the resource first, and where management practice allows, permit hunting within defined limits. Such regulated hunting provides recreational and economic benefits, especially important in rural America where spending on hunting and fishing give a much needed boost to the local economy.

In total, the regulations throughout should first and foremost be protective of the migratory bird resource. Where hunting is allowed, no aspect of the regulations should in any way lead to discouraging ethical hunters from participating in legal hunting activities. The regulations need to be understandable, adaptive to change, and make sense to the average hunter and to the average landowner who is managing crops and lands according to the most current management methods applicable for the locality—neither hunter nor land manager should be uncertain or skeptical about what constitutes prohibited baiting for the purposes of hunting migratory birds. And, as with any regulation, enforcement should be consistently applied and courts of law should be able to consistently interpret the intent of the law and in a manner that makes sense to those charged.

We have a problem, however, when it comes to the current rule on hunting over bait. That rule has been interpreted and administered for years as a so-called strict liability standard. This means that a sportsman can be convicted of hunting with the aid of bait even if he had no responsibility at all for placing the bait and had no knowledge whatsoever that there was bait in the area. Although we have expressed our concerns to the U.S. Fish and Wildlife Service in the past, there has been no effort to revise this rule.

It has been the experience of our members that the current rule is often enforced so rigidly that hunters innocent of knowingly violating baiting laws are categorically judged guilty. And the judgments of various law enforcement officers vary widely as to whether the amount and nature of placement of various materials, as well as the handling of crops and agricultural areas, amount to baiting. Once a judgment has been made by a law enforcement officer, the strict-liability nature of the baiting violation makes it very difficult for the alleged offender to contest the issue. The cost and time required to argue with an officer's judgment are so high compared to the penalty that most people charged with hunting over bait simply pay the penalty.

This may seem like a minor matter, but besides the fact that it is inherently unfair if there has been no culpability, it has other costs as well. For one thing, a law enforcement "sweep" of an area that the officers believe to be baited is certainly a disruption of an activity that is otherwise completely legal. Many times, the firearms of everyone in the area are confiscated by the officers, creating a myriad of hassles and annoyances. We are pleased to see that H.R. 741 has specifically addressed this issue by limiting the opportunity for the seizure of lawful weapons.

Beyond the annoyance factor, there is also the concern that many hunters have over being convicted of or admitting to a violation of wildlife conservation laws. Our members take pride in the fact that they hunt lawfully and ethically.

In one case, there was a move to bar a person from candidacy for the Safari Club presidency because he had paid a penalty for hunting over bait rather than contest it. We undertook a detailed inquiry, hearing a number of witnesses, and determined that his action was only a violation because of the strict liability interpretation of the rule, and that he had no intent to hunt with the aid of bait and no knowledge that bait had been placed. In this incident which involved about 25 people, a well known golfer was cited as well.

Wildlife law enforcement acts as a deterrent and this force of deterrence can be very effective and necessary, as an example the decoy deer that catch many a would be poacher acts to deter the unethical hunter who might otherwise take an easy shot across a road or during nighttime. But the baiting regulations have acted as an entirely different sort of deterrent, because here in addition to

deterring would be baiters, the regulations have acted as a deterrent to ethical hunters whose hunting experience has been curtailed for fear of the unknown—hunters can not be assured any field is bait free so in self defense many hunters have given up or have highly limited their hunting activity. This is entirely a result of how the current rule is written and has, in my opinion, little to do with focusing on those truly culpable for baiting.

Standards on baiting need to be clear in holding culpable two types of violators: 1) those who bait for the purpose of hunting and 2) those who knowingly hunt over bait or hunt where it's blatantly obvious there is bait drawing birds into shooting range.

As proposed by H.R. 741, let's focus the law on people who demonstrate intent to break the law. Hunters will understand and agree with this kind of law. Hunters will back the Fish and Wildlife Service and so will the state wildlife agencies.

People and Nature: Our Future is in the Balance
NATIONAL WILDLIFE FEDERATION
8925 Leesburg Pike • Vienna, VA 22184-0001 • http://www.nwf.org/

TESTIMONY SUBMITTED TO:

Subcommittee on Fisheries Conservation, Wildlife and Oceans
Committee on Resources

U.S. HOUSE OF REPRESENTATIVES

Prepared by:

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Regional Executive
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and

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Presented by:

Dan Limmer
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National Wildlife Federation

May 15, 1997

We appreciate this opportunity to testify before the House Subcommittee on Fisheries Conservation, Wildlife and Oceans regarding H.R. 741, the Migratory Bird Treaty Reform Act of 1997. The National Wildlife Federation (NWF) is the nation's largest conservation education organization. Founded in 1936, NWF works to educate, inspire and assist individuals and organizations of diverse cultures to conserve wildlife and other natural resources and to protect the Earth's environment in order to achieve a peaceful, equitable, and sustainable future.

This nation is fortunate to have a rich avian diversity of over 600 native species, ranging from hummingbirds and warblers, to ducks and geese, to our national symbol, the magnificent bald eagle. Birds have been and continue to be a tremendous historic, aesthetic, recreational and economic resource to the United States and its citizens. Of particular relevance to today's hearing are waterfowl and waterfowl hunting. In 1991, over three million people hunted for migratory birds according to the National Survey of Fishing, Hunting, and Wildlife-Associated Recreation conducted by the U.S. Fish and Wildlife Service (Service).

The conservation of this nation's migratory bird resources has long been of interest to NWF. We worked with the Service to prohibit the use of toxic shot in waterfowl hunting because of the mortality caused to birds, especially waterfowl and birds of prey, by the ingestion of spent lead shot. We annually provide comments to the Service in the setting of the Federal Migratory Bird Frameworks for late season waterfowl hunting. And NWF is a strong supporter of the North American Waterfowl Management Plan, having been participants in habitat partnership projects and currently seated on the Prairie Pothole Joint Venture Management Board.

NWF also played a key role last year in the passage of strong conservation programs in the 1996 Federal Agriculture Improvement and Reform Act. These conservation programs can impact land stewardship practices on over one billion acres of private cropland, pasture and rangeland across our nation. The reauthorization of the Conservation Reserve Program, in particular, will continue the retirement of up to 36.4 million acres of environmentally sensitive lands and provide unprecedented wildlife, water quality and soil erosion benefits to our nation. A large majority of these acres will consist of relatively undisturbed grassland habitats in the Midwest, plains, and northern prairie states and therefore continue to provide critical nesting habitat for many species of migratory birds, especially waterfowl.

NWF is here today not only because of our interest in conserving the migratory bird resource, but also because of our long-standing support for properly regulated hunting, trapping and fishing. Our nation's migratory bird resource must be

properly protected to provide a continuing rich and diverse avian heritage for future generations.

H.R. 741, the Migratory Bird Treaty Reform Act of 1997 and the subject of today's hearing, concerns the regulations for hunting of migratory birds. Relevant to this are the recommendations of the International Association of Fish and Wildlife Agencies' Ad Hoc Committee on Baiting (Committee), of which Dr. Doug Inkley of NWF is a member. With a few exceptions, we generally concur with the Committee's findings and recommendations for regulatory changes specific to waterfowl baiting, and which have been provided to the Service.

The Committee recommended that reference to "normal" agricultural practices and operations (relative to manipulated fields that can be legally hunted) be changed to use the term "accepted." These "accepted" techniques would be those used solely for agricultural purposes and approved by the relevant state fish and wildlife agency, after consultation with the Cooperative State Research, Education and Extension Service; Natural Resources Conservation Service; and the U.S. Fish and Wildlife Service." The term "accepted" is appropriate as it more accurately reflects the process of approving agricultural practices. However, it is imperative that in determining accepted agricultural practices, the state fish and wildlife agencies secure the concurrence of the other listed agencies. As the Migratory Bird Treaty Act vests in the federal government legal responsibility for the management of migratory birds, it is appropriate then that the U.S. Fish and Wildlife Service have oversight authority on what is an "accepted" agricultural practice. Furthermore, federal oversight and concurrence will facilitate consistency among states, thereby facilitating interpretation and compliance by hunters.

Although in testimony to the House Committee on Resources on May 15, 1996 NWF voiced concern that the manipulation of natural vegetation could possibly create a baited situation, we now support the Committee recommendations allowing manipulation of native vegetation, while restricting the manipulation of certain wetland plants that have been planted rather than grown naturally.

Provisionally, we also support the Committee's recommended changes concerning a person's knowledge that a hunted area is baited. At present, a hunter who has no knowledge of a baited situation or that hunted birds are influenced by bait can be found in violation of the baiting regulations. The proposed change would require that "the person knows or reasonably should have known that the area is a baited area." We believe that this would help protect the truly innocent hunter and not compromise the control or management of legal harvest. We support hunting regulations that adhere to sound management principles and high ethical standard and oppose any changes that would facilitate baiting.

Finally, NWF endorses new language proposed by the Committee that would make it "unlawful for any person to place or direct the placement of bait" for the purpose of causing hunters to take migratory game birds by the aid of baiting or on or over the baited area.

We concur with the Service implementing these changes through regulations. Concurrently, it is essential that the Service monitor the impact and effectiveness of the changes to ensure that the intended purposes are achieved without undesirable consequences,

With respect to H.R. 741, NWF opposes this bill because changes to migratory bird regulations are most appropriately established within the regulatory rather than legislative arena. These regulations require complex analysis and implementation, with special knowledge by trained professionals in wildlife conservation and law enforcement. Furthermore, the Service needs the flexibility, which is impossible to obtain in the legislative process, to make necessary regulatory adjustments as dictated by unpredictable and highly variable environments and conditions inherent to the management of the migratory bird resource. Managers must be able to adjust quickly in order not to compromise the control or management of legal harvest.

We further oppose H.R. 741 because it would inappropriately loosen restrictions on the hunting of migratory birds. For example, it would legalize the use of toxic shot, such as lead, for the hunting of captive reared waterfowl. If approved, this provision would allow wild birds to be exposed to this lead, with resultant mortality to native waterfowl and predators of those waterfowl. Another concern we have with the bill is that it adds the word "intentional" to the definition of baiting. Intent on the part of the hunter can be extremely difficult to prove, thereby compromising the enforcement of the regulations.

Of relevance to today's hearing is the 1996 NWF resolution "Interpretation of Fish and Wildlife Laws" (copy attached). The resolution "urges federal and state agencies charged with the responsibility for conserving, managing, and protecting fish and wildlife resources to develop **clear, concise, easily interpreted and uniformly enforceable** fish and wildlife regulations..." (emphasis added). The genesis of this resolution is the fact that "the strong enforcement of fish and wildlife laws is an essential component of fish and wildlife conservation" and "the public has the right to expect that fish and wildlife regulations will be unambiguous, relatively easy to interpret, and applied consistently in all areas across the country." Accordingly, we urge that all wildlife enforcement agencies strive towards regulations that facilitate compliance by people involved in wildlife related recreation and, ultimately, to enhance wildlife conservation.

Another critical component of law enforcement is education. Fish and wildlife agencies and their law enforcement branches should be engaged fully in educating the public about all fish and wildlife associated regulations, and the reasons for those regulations. This will enhance the desire of wildlife associated recreationists to comply with the regulations, decrease violations, and improve conservation.

Thank you again for this opportunity to testify.

RESOLUTION NO. 13
1996

INTERPRETATION OF FISH AND WILDLIFE LAWS

WHEREAS, the strong enforcement of fish and wildlife laws is an essential component of fish and wildlife conservation; and

WHEREAS, the complexity of fish and wildlife laws and the involvement of many agencies in fish and wildlife enforcement can lead to misunderstanding and difficulty for the law-abiding sportspersons to comply with; and

WHEREAS, the joint management and enforcement of migratory birds by both federal and state agencies increases this complexity even more; and

WHEREAS, sportspersons may be abandoning hunting and fishing activities for fear of unwittingly violating fish and wildlife laws or policy; and

WHEREAS, the public has the right to expect that fish and wildlife regulations will be unambiguous, relatively easy to interpret, and applied consistently in all areas of the country;

NOW THEREFORE, BE IT RESOLVED that the National Wildlife Federation in its Annual Meeting assembled March 1-3, 1996 in West Palm Beach, Florida, urges federal and state agencies charged with the responsibility for conserving, managing, and protecting fish and wildlife resources to develop clear, concise, easily interpreted and uniformly enforceable fish and wildlife regulations within their respective jurisdictions.

Testimony By
Dr. Rollin D. Sparrowe, President
Wildlife Management Institute
Before The
Subcommittee on Fisheries Conservation, Wildlife & Oceans
U. S. House of Representatives
Washington, D.C. 20515
May 15, 1997

Mr. Chairman:

The Wildlife Management Institute (WMI) appreciates an opportunity to provide testimony on H.R. 741, the Migratory Bird Treaty Reform Act of 1997. The Wildlife Management Institute is a non-profit organization dedicated to improving wildlife management in America. Our organization has been involved for decades in migratory bird treaties, legislation, implementation of management programs, past citizens' committees on baiting and waterfowl feeding, and other aspects of migratory bird management. We participate directly with state, provincial, and federal waterfowl management agencies annually in Canada and the United States in the conduct of banding programs and other activities which support international management programs for migratory birds.

I have extensive personal experience with these issues from my 22 years with the U.S. Fish and Wildlife Service in which I supervised migratory bird management, and later as an administrator responsible for law enforcement. My staff and I participated in the Ad Hoc Committee on Baiting formed through the International Association of Fish and Wildlife Agencies (IAFWA) during the past year.

Perhaps of equal importance, I have been a co-owner and wildlife manager for the Island Creek Gun Club near Centreville, Maryland for 17 years. I have actively hunted migratory birds in Maryland for over 20 years, and nationally for over 35 years. I am familiar with the problems faced by hunters, land managers, and enforcement agents.

WMI understands concerns about the difficulty that even conscientious hunters can have in complying with baiting laws. Past officers at WMI served on special citizens' committees on baiting regulations, similar committees that dealt with waterfowl feeding, and WMI staff have listened to or participated in congressional hearings on the subject of baiting laws for more than 20 years. For example, I attended the oversight hearing by the House Resources Committee on May 15, 1996 and listened carefully to all of the testimony.

The first part of the 1996 hearing reviewed the Florida Charity Dove Hunt and the actions taken by the U.S. Fish and Wildlife Service concerning that hunt. Statements established that a group of persons hunting on a heavily baited field were cited for breaking the baiting laws, and that the events regarding the Florida situation have no relationship to confusion by the public regarding wording of Fish and Wildlife Service regulations. Statements made by Fish and Wildlife Service agents and representatives at the meeting, photographs and descriptions of activities, and

responses to questioning by the Resources Committee, all led to the conclusion that an illegal and inappropriate hunt was intercepted by the Service and appropriately shut down. The circumstances which led to entering the field with 10 Service Agents, their acknowledged courteous treatment of those they apprehended, and their careful explanation of the circumstances which led to a several hour delay before acting at the site, seem plausible and responsible. The circumstances surrounding the Florida Charity Dove Hunt as presented at last year's hearing offer no reason to justify congressional intervention in the law enforcement processes of the Fish and Wildlife Service.

Through long experience, we at the Institute believe that legislation is not the best way to resolve problems for sportsmen in obeying hunting laws. Regulations are a more appropriate mechanism to resolve these issues. The reason some of these problems have not easily been solved in the past is that some situations which place burdens on the hunter cannot be rectified without unduly hindering enforcement in protection of the resource. We agree with the recommendations of the special citizens committee on baiting regulations back in 1970, that the burden of baiting liability should not rest solely with unsuspecting hunters. The record of the House Merchant Marine and Fisheries Subcommittee hearings in 1984 confirm that liability should be more broadly assumed by not only hunters, but possibly landowners, guides and others involved in waterfowl hunting. H.R. 741 does not extend this burden in that manner.

On the strict liability issue, the stated principle objective of H.R. 741, proposed changes relax responsibility of participants too far to adequately protect the waterfowl resource. There is justification to consider testing wider implementation of the concept of requiring the hunter "to know or have a reasonable opportunity to know" a hunted area is considered baited. One federal court has successfully used that standard. However, such a change should be offset by making it "unlawful for any person to place or direct the placement of bait for the purpose of causing hunters to take migratory birds over bait." This would more clearly share liability among participants, yet its effect on resource protection is not known. Further, requiring that bait be "intentionally placed," and that it be demonstrated to attract birds "within a reasonable shotgun range" are standards too difficult for law enforcement to prove. In any case, any new risk to the migratory bird resource should be a careful management decision based on data, not an inflexible law.

Many of us who regularly participate in migratory bird management programs have been involved in discussions of the need to modify some of the wording in 50 C.F.R., Part 20.21 which deal with baiting regulations. Discussions have focused recently on changes in agricultural practices, innovations in management of natural vegetation for waterfowl, and regional differences in both habitats and hunting activities. I personally participated in the IAFWA ad hoc committee on baiting, and support its recommendations as a mechanism to communicate with the U.S. Fish and Wildlife Service about considerations for changes in regulations. I did not, and do not, support the work of the committee in the context of designing legislative language that would be inflexibly written into federal law, and that could not be changed from time-to-time to fit

management needs. This is a serious drawback to having the Congress legislate what should be a more flexible process driven by management experience.

The established process for changing regulations is through open public dialog initiated through *Federal Register* notices, with orderly comment periods and processes for exchange of information. Literally hundreds of the most experienced migratory bird managers in state and federal agencies and non-government organizations are organized to provide input each year through this process. These are the same processes which allow appropriate setting of migratory bird hunting regulations on an annual basis. That public process was opened by the Service on Friday, March 22, 1996 to consider habitat management related to baiting laws, and stimulated the IAFWA committee activity. Introduction of their recommendations into that legally established, public process is the way in which regulatory changes should occur.

In my participation with the IAFWA committee, I have consistently recommended that any major regulatory change, whether for strict liability or habitat management, should be made on an experimental basis with a requirement for data. Migratory bird management has used such a process effectively for decades to cope with new requests, reconsideration of programs, and changes in regulations dictated by acquisition of new data and knowledge about the management needs of migratory bird populations. There is no reason to abrogate this public process at this time.

Waterfowl management has been enhanced by implementation of Adaptive Harvest Management, which allows data to be analyzed and regulatory options to be discussed largely outside the demanding 11th-hour period for setting regulations. An adaptive process means that managers can learn from year to year based on the data that come from seasons conducted under the regulatory process. They can adjust regulations based on new information to benefit birds and hunters. This adaptive approach must be preserved, and cannot work effectively if legislative mandates dictate management processes.

The examples of resident Canada geese in the eastern United States, and Arctic nesting snow geese demonstrate one pitfall of establishing law instead of regulation. To control nuisance Canada geese in urban areas, and reduce mid-continent overpopulation of snow geese which are damaging northern habitats, drastic and unconventional means may soon be necessary. Establishing current Fish and Wildlife Service regulations as federal law, as in H.R. 741, would require coming back to Congress to enable needed management action.

As a property owner and an active hunter in the Chesapeake Bay region for 20 years, I have personally been able to cope with existing laws without any special help from anyone. No one was more vulnerable than I in hunting actively on the Eastern Shore while I was Chief of the Office of Migratory Bird Management with the Fish and Wildlife Service, or in higher administrative positions. Needless to say, convictions for illegal migratory bird hunting would not sit well in my current employment. By using common sense, being aware of adjacent hunting activities, and being careful where I hunted, I have been able to live within the letter of the law.

On occasions, I have been compelled to walk away from a hunt when I didn't like something that I saw. I have had to adjust to unusual changes in bird activity, even though I had no knowledge of the origin, by simply moving away from it. As a hunter, a property owner, and a public official, I have been able to take appropriate steps to avoid problems.

Relief from perceived oppressive baiting laws is not a big issue with the great majority of migratory bird hunters. In fact, the calls I have received since the hearing on May 15th last year, have largely been concerned about liberalization of baiting regulations. Whatever is done must be done carefully, through a public process, and should not be legislated. The fact that a committee of state biologists and administrators and other organizations have been able to agree upon the recommendations through the IAFWA ad hoc committee, is testimony to the fact the management process can do what is needed. Whether actual changes in regulations are enacted should be the result of deliberations based on data, through the Flyway Councils and nongovernment entities through the public process. I urge the committee to allow that process to work and continue the track record of effectively dealing with migratory bird hunting regulation.

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TESTIMONY

of

SUSAN LAMSON

Director, Conservation, Wildlife and Natural Resources
Institute for Legislative Action
National Rifle Association of America

on

HR 741, MIGRATORY BIRD TREATY REFORM ACT of 1997

before the

House Resources SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AND OCEANS

May 15, 1997

Mr. Chairman, my name is Susan Lamson and I am the Director of the Division of Conservation, Wildlife, and Natural Resources of the National Rifle Association of America (NRA). The NRA appreciates the opportunity to testify on HR 741, the Migratory Bird Treaty Reform Act of 1997. With over 2 million hunter members, it is of vital importance to the NRA that our migratory bird resource is conserved and enhanced. Hunting is wholly dependent upon healthy, sustainable wildlife populations. Likewise, it is in the interests of the NRA membership that laws and regulations pertaining to hunting, especially those carrying criminal sanctions, be enforced fairly and consistently throughout the nation.

A year ago today, the House Resources Committee held an oversight hearing on the implementation of the baiting regulations under the Migratory Bird Treaty Act and found at 50 CFR Part 20.21. It was made clear at the hearing that, since their implementation in the 1930's, these regulations continue to cause problems. The problems stem from inconsistent court interpretations, ambiguity and confusion over what constitutes bait, and the absence of guidance to the hunter in determining the spatial boundaries of his responsibilities to safeguard against hunting over bait.

The NRA fully supports HR 741 because it makes long-needed changes to the baiting regulations. It is clear that the changes will continue to protect migratory bird populations from excessive harvest, but at the same time HR 741 will provide the hunter with a law that is clear and reasonable and can be consistently and fairly enforced.

In a critique of the legislation, it has been suggested that any shortcomings with the baiting rules can be fixed more effectively through the federal rulemaking process. Mr. Chairman, that may be true, but the Fish and Wildlife Service (FWS) has already had ample opportunity to take that initiative in light of the concerns publicly raised by the hunting community over time. Several Congressional hearings have been held on the need to reexamine these regulations. Additionally, in 1990 the Law Enforcement Advisory Commission, established by the FWS, recommended that a task force be created to review these regulations "in an effort to clarify and simplify" them.

In 1991, FWS published a notice of intent in the Federal Register to review 50 CFR, including Part 20. The NRA submitted comments to that notice recommending that the strict liability standard be replaced with the standard of "reasonable diligence" that is now incorporated in HR 741. We also encouraged FWS to act on the Advisory Commission's recommendation. We were amazed and disappointed that when FWS published a supplemental notice of review in 1993, no mention was made in the comment summary that a recommendation was made to amend the baiting regulations. And, again, in 1996, when FWS published a notice of intent regarding the moist soil management issue, the NRA recommended that the focus be broadened to include all issues surrounding the migratory bird regulations.

The FWS has had this past year to initiate the regulatory reform process, recognizing that Chairman Young expressed his intent last Spring to address this issue legislatively. FWS has given the Congress no other choice but to step in and act as the necessary "task force," because

the FWS has never evidenced any sign of resolving the problems through the rulemaking process.

It has been suggested that the number of hunters "snagged" by the baiting regulations has been relatively small, thus negating the need for change. Mr. Chairman, no conscientious, conservation minded hunter wants to be cited for any hunting violation. Aside from the federal and state criminal penalties that apply, such situations have ruined reputations unjustly. If the wording of the regulations and their enforcement were operating appropriately, then there would have been no reason for the Advisory Commission to recommend to FWS that a task force be created. The testimony last Spring would also seem to discount the observation that a "small" number of hunters have been unfairly charged under the enforcement of the baiting regulations.

It has been suggested that HR 741 will make the baiting regulations unenforceable, that it would be extremely difficult to convict those who hunt over bait because it would *increase* the federal government's burden of proof beyond presenting evidence that there was bait and the hunter was present. Under the current regulations, most, but not all, courts have interpreted the prohibition of hunting over bait as a strict liability rule - that is, if a law enforcement officer says the hunting area is baited and an individual is hunting in that area, he or she is guilty - on the spot - of violating the regulations. The government's burden of proof is minimal, if nonexistent.

Under current regulations, a hunter is not given parameters by which his knowledge or intent, or lack thereof, is held legally accountable. Hunters know that hunting over bait is illegal, but do they know that they can be held liable for hunting over bait even if the baited area is a mile away? That is an unreasonable expectation of hunter responsibility.

HR 741 establishes the standard of "reasonable diligence" whereby the government must show that a hunter knew, or should have known, that he was hunting over bait. Unlike strict liability, the standard of "reasonable diligence" reflects a fundamental judicial tenet: one is innocent until proven guilty. HR 741 injects fairness into enforcement by giving the hunter an opportunity to provide a defense with evidence in court. By doing so, it does not require the government to prove *intent* on the part of the hunter. HR 741 recognizes that such a standard could make it extremely difficult to convict a lawbreaker. Furthermore, the bill does not call for the traditional criminal standard of "proof beyond a reasonable doubt." This is reasonable and fair to all concerned.

Concern has been expressed that the diligence standard would result in "undue latitude in interpretation." We do not believe that passage of HR 741 will create "loopholes" in the law. However, the NRA would welcome the opportunity to work with the Congress, the FWS, and all other interests in developing a definition of "reasonable diligence" if concerns persist.

It has been suggested that there is a danger in amending the regulations through legislation because the administrative rulemaking process provides the agency with needed flexibility. However, much of the problem associated with inconsistent enforcement and judicial interpretation of the regulations is that it provides the agency with too much flexibility, resulting

in total confusion to all concerned.

For example, the terms "agriculture planting and harvesting" and "bona fide agriculture operations or procedures" have been shown to lack the clarity necessary for a hunter, who is not otherwise well versed in agricultural practices, to know at all times whether seed, grain or other substance present in the hunting area is legal to hunt over or not. In the past, FWS has acknowledged that the determination of a baited area is based upon the *expertise* of law enforcement. Even one former law enforcement officer admitted that there are hunters who wouldn't know what bait was if they were standing in it. A person of average intelligence should be given a reasonable opportunity to know what is allowed and what is prohibited. The hunter shouldn't have to develop an expertise in agricultural practices, nor solely rely on law enforcement's interpretation at any given time as to whether he is legally hunting or not. Additionally, clear definitions and guidance on what does and does not constitute bait provides the government with strong proof that a hunter "should have known" bait was present. HR 741 clarifies and simplifies these agricultural terms - exactly meeting the objectives of the Commission when it recommended the creation of a task force.

The so-called "zone of influence" is another outcome of the regulations' ambiguous language that has resulted in different judicial rulings. The "zone of influence" apparently encompasses an area of any size within which a law enforcement officer determines that bait has lured birds to a hunter. HR 741 injects fairness into the application of "zone of influence" by allowing an individual cited for hunting over bait to provide a defense in court as to whether the alleged bait was a major contributing factor in luring birds within gunning range.

I return to my earlier comments with respect to "reasonable diligence" and what is a reasonable level of expectation of the responsibility of the hunter in going afield. To suggest that a hunter be held responsible for knowing why birds are in the hunting venue, absent the presence of seed or grain in the area being physically hunted, is patently unfair. The hunter hopes to be in a hunting area where birds will be and should not be held accountable for not being suspicious as to why they are there. Hunters should be held accountable, instead, for the condition of the hunting grounds. Hunter liability should be imposed in a geographic area in which the hunter can reasonably conduct an investigation, not an area of unknown extent. Nonetheless, HR 741 does not establish spatial boundaries of the hunter's legal responsibility. Instead, it simply gives the hunter an opportunity to present evidence in court as to whether the alleged bait acted as a lure. It provides an opportunity for a defendant to present evidence on the issue. That opportunity is not available today. The language of the bill preserves the greatest amount of flexibility for the court in its review and for the government in making its case that a hunter knew, or should have known, that he was hunting "on or over a baited area."

It has also been suggested that HR 741 would undercut the principle of "fair chase," making migratory birds a much easier target. In its support of the bill, the NRA is well aware that should hunters exceed the harvest expectations built into the setting of seasons and bag limits, they could experience reduced days and bag limits in the next hunting season. But we fail to see

the relevance of the "fair chase" argument. HR 741 is not removing the prohibitions against baiting. Rather, it is designed to ensure that such prohibitions are understood and interpreted such that the outcome is the same whether it be through the eyes of the law enforcement officer, the hunter, or a judge.

Picture, if you will Mr. Chairman, a hunter in his blind one cold November day who is hunting in the knowledge that he is acting as a conscientious, ethical, and legal hunter. He has a valid hunting license and affixed to it is a current federal Duck Stamp and, depending on which state he is in, probably a state waterfowl conservation stamp. His shotgun is plugged. He is using, and only has in possession, nontoxic shot. Although he has been assured by the landowner, farmer, professional guide, or his host that no bait is present, before beginning to hunt he surveyed the area in which he planned to hunt and immediately around his blind for any signs of bait. He began hunting at dawn and has legally bagged 2 mallards. Unfortunately, he will be cited that day because a law enforcement officer found corn piled in a wheat field a half mile away on another farm and charged him with hunting over a "baited area." The corn may have been placed there for purposes of feeding birds, or illegally by someone whose intent was to hunt over bait, or by an anti-hunter whose intent was to close down hunting in a broad geographic area, or it was inadvertently mixed in with the wheat seed. Although such circumstances have been drawn from actual court cases, none of them were deemed relevant in the enforcement of the regulations. The hunter will be lucky if his shotgun isn't confiscated and he's not charged with the maximum fine or a jail sentence.

As the court acknowledged in *United States v Delahoussaye, 573 F.2d 910, 912 (5th Cir. 1978)*, unless a hunter can be held to a reasonable standard of responsibility, criminal conviction can become an unavoidable consequence of duck hunting. There are many hunters who have given up hunting migratory birds rather than risk their reputation on circumstances beyond their control and that is an unfortunate and unacceptable outcome of the regulatory and judicial process. Rules should be uniform, clear, and understandable so that a hunter whose intent is to comply, can comply. HR 741 achieves that objective without eroding the goals and objectives for migratory bird conservation.

With respect to other provisions of the bill, the NRA supports the codification of the remaining prohibitions found in 50 CFR Part 20.21 pertaining to the manner and methods of hunting migratory birds. Sportsmen and women are dedicated to the sustainable use of our wildlife resources and have long supported the concept of "fair chase" embodied in the current regulations. The NRA also applauds the enhancements to our migratory bird resource built into HR 741 by requiring that payment of fines for violating these regulations be deposited in the Migratory Bird Conservation Fund for habitat acquisition.

In summary, HR 741 resolves the ambiguity and confusion that exists in the enforcement and judicial interpretation of the current regulations. It also protects innocent hunters from the doctrine of strict liability under the regulations by allowing them to provide evidence for their defense in court. This legislation does not allow the use of bait in migratory bird hunting, thus

preserving the fundamental principle of "fair chase." It does not weaken any of the protections for our migratory bird resource, nor does it make any changes to the other regulations affecting the manner of hunting migratory birds. Most importantly, it does not permit intentional violators to escape prosecution. It clarifies and makes uniform important definitions to the benefit of farmers, landowners, and hunters. Furthermore, HR 741 will materially assist law enforcement officers who have been subjected to accusations of bad judgment, harassment of hunters, and misapplication of priorities in protecting the resource by providing a law that can be applied consistently and fairly. The migratory bird resource, those charged with protecting it, and those who would legally hunt the resource are all benefitted by the Migratory Bird Treaty Reform Act of 1997.

W. LADD JOHNSON
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Good Morning - Mr. Chairman
Ladies and Gentlemen of the Committee

My name is W. Ladd Johnson, I am here to provide testimony that may assist you in eliminating the injustices of present federal regulations pertaining to the enforcements of baiting of migratory birds and in the defining of "normal agricultural practices" as it is interpreted within the "baiting" regulations.

As a member of the board of the North American Waterfowl Federation, an organization made up of state waterfowl assocation. I am representing some of those members. I also represent and administer perhaps the nations leading private conservation food plot program which we will expand on later. I also am Chairman of the State of Maryland Waterfowl Advisory Committee.

I have personally been the victim of the present regulations and their accompanying judicial interpretation. Twice I have been convicted of "attempting to harvest migratory waterfowl by the use of bait". In each case, I was the guest of a host that had informed me that there was and had not been any bait placed on the property. In both cases, bait was in fact found on the property; a long distance from where I was actually hunting. Arriving to the hunt before day light, I was unable to personally observe the presence of bait in the hunt area, let alone one-half mile away. I could only rely on the assurances of my host. Both cases resulted in payment of the imposed fine. Because of the precedent established by the Federal Court system on baiting violations, I was informed "If you want justice in a migratory bird arrest, do not take it to court". Since that time, I have not hunted anywhere but on my personal farm or with individuals with whom I have personal knowledge of their operations.

Let me acknowledge that I and the people I represent do not condone the taking of any game by the use of bait. We do ask that the vague language presently in use be refined. It is our position that if bait is present when hunting is taking place, someone should be responsible for it being there. Those persons in control of the land being hunted, whether they be an owner or leesee, should know the activities of hunting procedures on their lands. Guest or other invitees should not be expected to know the operations of the property, exemplified by "If the bus driver is arrested for a traffic violation, one does not arrest all the passengers". Therefore, those in control of the property should be the only ones subject to arrest and prosecution.

The issue of normal agricultural practices is also of special concern. We have the privilege of administering perhaps the nations largest wildlife and waterfowl food plot program. This year the program should provide close to one million acres of food plot plantings. Utilizing out-of-date seed from national seed companies, the seed is made available free of charge, except for freight and handling to the participant. All of the food plots are planted and left standing for wildlife and waterfowl, a practice that legally allows hunting over the planted areas. However, federal interpretation of this program varies as to what is a normal agricultural practice in its planting and use. Correspondingly,

manipulations inclusive of entering on foot or vehicle, retrieval of down game by man or dog, or excessive natural damage, may violate federal regulations. Because of past and present interpretation of baiting and manipulation, Food Plot Program's future could be jeopardized.

"Moist Soil Management" a new program for managing wetland areas has also been addressed in the proposed regulatory changes. Manipulation of the wetland area is the most important practice in maintaining the effectiveness of "Moist Soil Management, therefore it should be made part of the regulation.

In conclusion, we support HR 741 and its amendments to the Migratory Bird Treaty Act with the testimony we have provided.

Hearing Statement
William K. Boe to U.S. House Subcommittee on
Fisheries Conservation, Wildlife, and Oceans
Longworth House Office Building
Washington, D.C.
May 15, 1997

It is with sincere appreciation that I respond to the invitation of Subcommittee Chairman Jim Saxton to address the reforms being provided the American public with HR 741, The Migratory Bird Treaty Reform Act of 1997. I especially appreciate the diligence and wisdom provided by Congressman Don Young, Congressman Cliff Stearns, and Congressman John Tanner in their sponsorship of HR 741. I acknowledge the challenges they have encountered in their efforts to change an institutionalized law that many powerful groups wish to maintain in its existing but flawed form.

It has been said, "...they sow the wind, and they shall reap the whirlwind." These words of established wisdom can apply to the current liability standard for the prosecution of migratory bird "baiting" cases whereby persons can be punished for laws they have no intention or knowledge of violating. The product of such actions is a whirlwind of financial loss, damaged reputation, career destruction, and a cynicism to federal authority and enforcement priorities.

My testimony centers on an encounter with U.S. Fish and Wildlife agents October 13, 1995, when they intervened in a charity dove hunt in Dixie County, Florida, sponsored by Florida Senator Charles Williams. My observations of that event are recorded in my testimony to the House Resources Committee on May 15, 1996. It is not my purpose to repeat that testimony but to present the consequences of the Federal actions as applied to University of Florida agricultural students who received fines that day even though most of them were hunting on an adjacent property never determined to be baited.

The students were members of the Alpha Gamma Rho fraternity at the University of Florida. They were present to assist with providing refreshments to hunters and food preparation and serving. Since revenues beyond event expenses are provided to the Florida Sheriff's Youth Ranch, the assistance was a fraternity philanthropic activity. When U.S. Fish and Wildlife agents raided the hunt in combat attire, citations were issued in mass to anyone within the Sanchez Field, the mile-square area in which the charity event occurred. Several students who were delivering refreshments into the field to hunters received citations even though they never saw bait on the field or had reason to believe the field was baited. As a chapter advisor to the fraternity, I myself was fined and I never saw any bait in the two-acre area that I hunted within. Agents, when asked by me, refused to identify the location of the alleged bait in relationship to where I had been hunting. To them, it was irrelevant that I had not seen grain while hunting, had no reason to believe the field was baited, or had any intent to violate the law.

Most of the University of Florida students who were detained for questioning (and all subsequently fined) were hunting in an adjacent field owned by one of the student's parents. That field was in active agricultural use and the frequent site for fraternity camping trips, fishing trips, hunting activities, and cookouts. When the students told the agents they were on separate land to that being raided by the agents, the students were informed that they could "get a lawyer and go to court". The Federal agents never inspected the field or even claimed it was baited... it was, however, in "the vicinity" of an alleged baited field, and the current law enabled the fines to be levied. Two of the students, unable to afford the massive fines and unconvinced that they had committed a crime, defended themselves in Federal court in Gainesville, Florida. To the courtroom

disappointment of the Federal prosecutors, the students were acquitted! However, the other students, intimidated by the citation letters, paid their fines despite reservations that the citations were justified.

As a consequence of the fines, Mark Cobb of Lake City, Florida, was unable to continue with the Army ROTC Officer Training Program at the University of Florida. He has now entered the U.S. Coast Guard Reserves as an enlisted man. Letters from Mark and his parents accompany this hearing statement.

I hope each committee member reviews the written and oral statements provided the House Resources Committee last year by Chad Clemons, a student who successfully defended himself from the U.S. Fish and Wildlife Service accusations. Chad is now a vocational agriculture public school teacher intensely respected by students, staff, and parents for his teaching skills and courtroom courage. Unfortunately, Chad's success confronting the power of U.S. Fish and Wildlife is unusual. Career disruption and financial hardships were the most obvious products of the student fines. Less obvious, but more significant, is a lack of trust in a Federal agency and those who defend vague laws that enable young adults to be punished severely for crimes that exist only on paper.

I am pleased that an attempt is being made to write a law with the requirement that the U.S. Fish and Wildlife Service must prove that an individual knew or should have known that he/she was hunting on a baited field.

I have evaluated concerns expressed by wildlife advocacy groups and Federal agencies regarding HR 741 and believe their opposition is primarily spirited misinformation. We have been provided passionate pleas for preservation of a flawed law, eloquent compassion for migratory birds, and indifference or contempt to the spirit of justice.

HR 741 will protect migrating birds with specific definitions regarding illegal bating. HR 741 provides strong enforcement procedures that are reasonable and fair. To be guilty, a hunter must have the intent to violate the law and must knowingly engage in an illegal act in order to be punished. Is this not the true spirit of American justice? Individuals who use good judgement and knowingly hunt on unbaited fields will be able to do so without the fear of intimidation of Federal agents issuing them citations because an illegal field may be "somewhere down the road," "nearby," or in the next County. For a legal change, a person is held responsible for his/her own actions and not the actions of unknown persons hunting elsewhere.

HR 741 is needed. I never again wish to see careers destroyed by Federal agents exploiting a vague law for reasons unrelated to wildlife preservation. I wish not to see again students fined while hunting in a family farm simply because somewhere else a person may be breaking a law. I wish never again to witness the intimidation of young adults with the threat of massive fines or imprisonment if they do not accept punishment without resistance for a law they did not knowingly violate. And I never again wish to hear of a Federal employee telling a University of Florida agricultural student, "If you don't like what we're doing, get a lawyer and go to court." That is not the spirit of American justice although it may now be standard operating procedure for the U.S. Fish and Wildlife Service.

It is time to replace rhetoric with reason.

It is time to make it possible for citizens to obey a law they wish to respect.

It is time to affirm that hunting is a legitimate sport and not an activity to be destroyed through Federal agents exploitations of an unreasonable law, and propaganda tactics of groups hostile to hunting altogether.

It is time for a new law that will protect wildlife and respect the rights and dignity of legitimate hunters.

As an advisor to young men at the University of Florida who wish to be productive, responsible citizens and to be able to knowingly obey Federal laws, I request your support of HR 741.

Thank you,

William K. Boe

William K. Boe
Gainesville, Florida

THE FLORIDA SENATE
Tallahassee, Florida 32399-1100

SENATOR CHARLES WILLIAMS
4th District

COMMITTEES:
Governmental Reform and Oversight, *Chairman*
Banking and Insurance
Commerce and Economic Opportunities
Judiciary
Rules and Calendar
Ways and Means, Sub. A (General Government)

JOINT COMMITTEE:
Joint Administrative Procedures, *Alternating Chairman*

April 25, 1997

The U.S. House of Representatives
The Honorable Members of the Subcommittee on
Fisheries, Wildlife and Oceans
Room 805, O'Neill House Office Building
Washington, DC 20515

Dear Committee Members:

More than a decade ago, your Subcommittee held hearings regarding the Federal "baiting" regulations under the Migratory Bird Treaty Act. Unfortunately, the regulations were not changed to provide needed protection for sportsmen. Since then, there have been numerous incidences where innocent sportsmen have been prosecuted for unknowingly violating these regulations.

I experienced first hand how lives can be negatively impacted by this flawed legislation. On October 13, 1995, I hosted a charity dove hunt to benefit the Florida Sheriffs Youth Ranches, a non-profit organization that assists troubled and abused children in the State of Florida. Agents from the U.S. Fish and Wildlife Service entered the field after more than three hours of hunting and cited 88 individuals for allegedly hunting over a baited field. We were shocked and amazed by their allegations. Because you might be familiar with the details of the incident and that you will be hearing detailed testimony from Mr. Bill Boe, one of those cited at the hunt, I will spare you details.

In an effort to make the federal game laws better and more fair, a contention of those cited at the dove hunt traveled to Washington last year and gave testimony. We relayed to the members of the Committee how many good names had been tarnished and numerous careers placed in jeopardy because of the ordeal. The Agents, upon discovery of apparent bait, should have stopped the hunt instead of waiting hours until hundreds of dove were killed and some $39,000 in fines had accumulated. This whole situation could have been easily resolved if the regulations were constructed in such a manner as to allow for protection of wildlife and sportsmen. We were appreciative of the chance to testify on this matter and looked forward to future legislation being filed in Congress to address our concerns.

REPLY TO:
☐ 102 Dowling Avenue, Live Oak, Florida 32060 (904) 364-7777 FAX (904) 758-1542
☐ 250 Senate Office Building, Tallahassee, Florida 32399-1100 (904) 487-5017 FAX (904) 921-4165

TONI JENNINGS
President

ROBERTO CASAS
President Pro Tempore

Committee Members
Page Two
April 25, 1997

Fortunately, legislation is pending in Congress to bring fairness and common sense to the federal game laws. On May 15, 1997, there will be a hearing of your Subcommittee on HR 741, Migratory Bird Reform Act of 1997, sponsored by Representatives Don Young, Cliff Stearns, and John Tanner. This legislation will provide for improved protection for both sportsmen and wildlife. Unfortunately, my schedule will not permit me to testify before you. However, as I stated previously, Mr. Bill Boe will testify on the matter and speak in support of HR 741. Mr. Boe will detail how this ordeal has impacted the lives of those cited at our dove hunt from the community leaders to the college students. I know Bill will do an excellent job and even though I won't be there in person, I appreciate your efforts.

I want to thank you for allowing the citizens an opportunity to have input in developing policies that govern our lives. When HR 741 is presented to your committee for a vote, I hope that each of you will offer your support and work diligently for its passage. The sportsmen of this country are stewards of the environment and deserve fair treatment. Passage of HR 741 will provide improved protection for sportsmen and wildlife.

Again, thank you for your diligence on this matter and I look forward to the passage of HR 741. If you have any questions, please don't hesitate to contact me.

Sincerely,

Charles Williams

Charles Williams
State Senator, District 4

Students, U.S. rep call for reform of baited fields law

By SARAH EISENHAUER
Alligator Writer

When UF agriculture senior Mark Cobb agreed to help with a charity dove hunt Oct. 15, 1995, he had no idea the event would significantly affect his life.

While at the event in Dixie County, Cobb and 87 others were cited for hunting in a baited field, thereby violating the U.S. Migratory Bird Treaty Act.

A baited field has some sort of seed on the ground, which is not a cash crop and attracts birds, Cobb said.

Although Cobb said he did not shoot any birds, the U.S. Wildlife Service fined him and others, including Alachua County Sheriff Steve Oelrich.

"None of us knew we were breaking the law," Cobb said. "To me (the field) wasn't baited, but wildlife officers had different stories."

Cobb thought the federal fine would be treated like a speeding ticket and would be erased when he paid it. But it remains on his record, and because of the fine Cobb will join the Coast Guard this summer as an enlisted man instead of an officer.

"I think this law needs to be rewritten so the person in charge of the field should be held responsible and not the hunters," he said.

And reforming this law is exactly what a group of U.S. representatives, including U.S. Rep. Cliff Stearns, R-Ocala, have proposed to do with the Migratory Bird Reform Act of 1997, which is set to go before the U.S. House of Representatives subcommittee on fishery, wildlife and oceans May 15.

In a written statement, Stearns said Congress never has passed a law defining what qualifies as "baiting" a field.

"Under current standards, a person is held liable for hunting on a baited field even though that person did not realize that the field was baited," Stearns said. "This is unfair."

Stearns also said Congress needs to define what constitutes a baited field if hunting on it is illegal.

He said he invited several UF students and others who were fined at the 1995 charity dove hunt to testify in front of the House Resources Committee last year. He added that their input was useful in developing the new reform legislation.

Bill Boe, UF chapter adviser for Alpha Gamma Rho fraternity, testified at the hearing last year and said the current law is vague and needs to be changed.

"It's a real problem. It's an awkward law," Boe said.

David G. Cobb
P. O. Box 514
Lake City, Florida 32056

April 21, 1997

Honorable Members
U. S. House of Representatives
Subcommittee on Fisheries, Wildlife, and Oceans

Gentlemen:

Thank you for the opportunity to comment on what I believe were extreme actions by Federal Game Officers and on the unfair laws under which they acted. These actions were a life changing event for my son, Mark Cobb.

Mark was asked to assist with a charity dove hunt being sponsored by Florida State Senator Charles Williams. He and a number of his fraternity brothers were offered the opportunity to participate in the hunt in exchange for their assistance. After hunting for some time, the hunt was raided by Federal Game Officers and Mark was charged with hunting in a baited field. Mark is an experience hunter and would recognize bait if he saw it. Not having seen any bait and knowing the caliber of people that were at the hunt, he was taken totally by surprise by this charge. Based partially on my advice and the strong threat of more severe punishment, Mark decided to pay the $250 fine and put the event behind him. Little did we know that his plans to enter the United States Army through the ROTC program would be derailed by this charge and fine.

I recognize and respect the need to protect migratory birds from over hunting. However, the actions and results in this case are a poor use of federal resources and an overly severe punishment for a group of hunters that did not have any intent or knowledge of breaking the law. These hunters did not know there was bait in the field, if indeed there was. If the purpose of the law is to protect wildlife, why did the game officials let the hunt go on for an extended period before the raid? It is my belief that this hunt was targeted for maximum publicity, not to protect the wildlife population. In the process, a large group of people, who had no knowledge that they were violating any laws, were dramatically impacted.

While it is too late to remove the damage done to my son's future plans, I would appreciate any action on your part that might prevent others from having similar negative experiences in the future.

Sincerely,

David G. Cobb

Honorable Members
US House of Representatives
Subcommittee on Fisheries, Wildlife, and Oceans

Gentlemen:

I was invited to participate in a charity dove hunt in the fall of 1995. I was to help with snacks and drinks, but I was also allowed to hunt. The hunt was located in three fields with me in the largest. The hunt began around noon, I did not start hunting until approximately 4 p.m. After about an hour of hunting I was approached by a gentleman in camouflaged fatigues, pistol belt, and pistol. The gentleman requested my hunting license and asked me to unload my shotgun. I was neither told who he was or why he was asking for this information. I assumed from his dress that he was a wildlife officer. I proceeded to ask what I was doing wrong and was given no other information than to go to a stand of trees and wait for my ticket to be written. For over an hour I had no information as to what I was doing wrong, as far as I knew had obeyed all laws.

I was eventually informed that I had been hunting on a baited field. I know what bait is illegal and saw none where I hunted. I was told the field I was hunting in was 800 acres so there is no way I could have examined the entire field. A fellow hunter asked an officer where the bait was because he had seen none as well. The response was that the field had been baited three weeks prior to the hunt so the field is considered baited whether there is any there or not. When asked how he knew this the officer claimed to have been watching the field for a month. If the officers knew that the field was baited almost a month before the hunt why did they let the hunt proceed uninterrupted for almost an entire day. Further more if they are here to protect the wildlife why did they allow us to kill the game birds for an entire day. Approximately 60 people were ticketed that day if every hunter killed his limit of twelve that equals to 720 birds.

I received a ticket with a fine of $250. My home town is Lake City, Florida which is very near to Cross City, where the hunt was located. I know many of the people involved. So upon receiving my ticket I asked many people what they were going to do. Many said that they were just going to pay there fine and be done with it. So upon this advice this is what I did. I also asked if I paid it would it be on my record and I was informed no this was like a speeding ticket. If I paid the fine it would be like it never happened.

It was at this time that I was entering the Army ROTC program at the University of Florida. At this time I had to fill out lots of paper work that asked many questions. One question asked if I had ever been convicted of a federal offense of $250 or more. I asked if the dove hunt counted and was told that yes it did but not to worry because there would be absolutely no problem in acquiring a waiver form. I spent a semester in the program and was on my way to a summer camp to make up for the time I had missed as a freshman and sophomore. After the camp I would come back as a reserve officer in the Army. Unfortunately, about a week before I left for the camp I was informed that my waiver had been denied. I was told that this was due to recent cut backs. I am now enlisted in the

United States Coast Guard Reserve and everything is running smoothly. However, I was to join the Army as an officer, but must join the Coast Guard as an enlisted man. This is not bad but it is a kind of demotion to drop from an officer to the enlisted ranks.

In conclusion, I am very concerned with our environment and natural habitats and I think we should do our best to preserve them. But we should also make laws fair and just for the people of our great nation. If the officials knew that a field was baited the hunt should be stopped before it takes place and only the person responsible for the baiting should be punished, not the innocent unknowing individuals. The law claims ignorance is not an excuse, this is fine in things such as speeding, but in a situation such as this how am I supposed to know if the individual baited the field a month before I hunt on it. Laws are not a means for profit but a means to punish people that knowingly break them. I think we should take another look at our hunting laws and try to make fair for the hunters and the game but not a way to play political games at our citizens expense.

Sincerely,

Mark Cobb

Dixie County Advocate

Hearing On Migratory Bird Treaty Reform Act To Be Held May 15

by Terri Langford

The Subcommittee on Fisheries Conservation, Wildlife and Oceans will be holding a legislative hearing on Thursday, May 15, 1997 on the Migratory Bird Treaty Reform Act of 1997. UF Fraternity Advisor, William Boe, will be testifying at the hearing, focusing on an incident that occurred in October of 1995 where UF students were issued citations at a dove hunt here in Dixie County.

There were six students in all who were invited guests for a fundraising hunt hosted by state Senator Charles Williams on behalf of the Florida Sheriff Youth Ranches, Inc. Over 91 participants attended the dove hunt. Because of the large number of guests, the six students were invited by fellow UF student and Dixie resident, Rob Hatch, to hunt on his family's property which joins the property being used for the fundraiser itself.

It was during the hunt that federal agents issued numerous citations to persons participating in the hunt, alleging that the area had been baited. Senator Williams, Dixie Sheriff Larry Edmonds and Alachua County Sheriff, Steve Oelrich, were just a few of the public officials who were issued citations that day.

In January of 1996, Chad Clemons, one of the university students who attended the hunt and issued a citation, was acquitted of the charge by U.S. Magistrate Richard Belz. The fact that the Hatch land was fenced and was several hundred feet from the alleged "baited" field was the determining factor for the acquittal. Although Clemons won his battle, many of the other students paid their fines in order to keep from having a federal offense recorded against them.

Many questions were raised during Clemons' trial as well as many of the adults hunting on the adjacent property. U.S. Representative, Cliff Stearns, 6th District, Florida brought those concerns before Don Young, Chairman of the House Resources Committee which resulted in the Migratory Bird Treaty Reform Act of 1997.

The purpose of the upcoming hearing is to obtain additional testimony in order to clarify several of the provisions whose goal is to replace the strict liability standard for the prosecution of migratory bird "baiting" cases with the requirement that the U.S. Fish and Wildlife Service must prove that an individual knew or should have known that he/she was hunting on a baited field.

Boe noted that there will be a host of wildlife advocate at the hearing in order to keep the law "as is." Boe feels that the law in its present form leaves too much to the officers' interpretation, and is not specific enough. The language which will replace those sections of the law in questions will be a dramatic improvement, according to Boe.

Sub-Committee
Fishing, Wildlife and Oceans

Reference: House Resolution 741 April 24, 1997

Honorable Members,

Thank you for the opportunity to present a side of this many sided problem.

In November, 1995, I was a participant in a dove hunt hosted by Senator Charles Williams for the Florida Sheriff's Youth Ranch at the "Sanchez Field" in Dixie County, Florida.

As a former State Wildlife Officer, I was cautious as I entered the field and took my stand that there might possibly be bait, so I looked very carefully for thirty to sixty yards around the area I had chosen to hunt and found no sign of any bait. Approximately two hours after I had taken my stand, I was presented with a citation for hunting over a baited field. Two weeks later, I received a notice that made me feel like I had committed a crime of the greatest magnitude. The letter inferred that if I chose to contest the charge, it could result in six months in jail, $5,000.00 fine, five (5) years probation, and loss of hunting privileges for life.

Honorable members, I had no idea that the field was baited and if I had, I would not have participated in the hunt. It was after receiving a notice to appear, that I began to look at the law as written, i.e., there is no way a person could check the field ten (10) days prior to the event and even if I had, I would never have seen any bait in the area that I hunted. As a matter of fact, I have yet to speak with anyone that was on that 1000 acre field that observed any bait. In addition, I have read that an individual can be held accountable even if they are not on the baited field, but on land adjacent to a baited field, where there would be no way to observe or detect any bait.

I believe in the protection and preservation of migrating game and for that matter, all species. I, also, believe there is a more equitable way to allow lawful hunting. This episode has left a bitter feeling about our antiquated U.S. Fish and Wildlife laws, not only with me, but other sportsmen and conservationists as well. Something must be done to correct these antediluvian laws.

Thank you for the opportunity to share my opinions and if I may be of service, please contact me.

Sincerely,

John W. Pelham

JWP:pml

STATEMENT GIVEN BY:

VERNON GEORGE RICKER
(Retired Special Agent)
U.S. Fish & Wildlife Service

May 15, 1997

Honorable Don Young, Chairman
House Committee on Resources
1324 Longworth House Office Bldg.
Washington, DC 20515-6201

Dear Mr. Chairman:

I come before you today as a recently retired special agent with the U.S. Fish & Wildlife Service having served 25 of my 28 years on Maryland's Eastern Shore. Seventeen of those 25 years were served as a Special Agent with the service and an additional seven years as a Maryland Natural Resources Police Officer. My long career in wildlife law enforcement began with the State in November 1969 assigned to Somerset County on Maryland's lower Eastern Shore. In January, 1977, I left the State to become a Special Agent with the Service and was first assigned to Cambridge, MD. I was transferred to Jonesboro, Arkansas in September, 1979 and then returned to Maryland's Eastern Shore in January 1983 with my career ending with retirement on March 31, 1997.

As you can see from the locations of my duty stations, they were all in heavily hunted migratory bird areas. When I first came on with the State of Maryland and with the U.S. Fish & Wildlife Service , the Eastern Shore was in its hay day for illegal waterfowl hunting violations, particularly baiting. The mid-60's through the mid-80's was the peak of migratory waterfowl hunting and out-laws gunning on the Del-Mar-Va (Delaware, Maryland & Virginia) Peninsula.

I was taught by some of the most experienced waterfowl enforcers this country has ever known - the likes of Willie J. Parker, Lawrence Thurman, Leo Badger, William Richardson, Darcy Davenport and the late William Kensinger, all retired U.S. Fish & Wildlife Service Special Agents. All the above named agents did it the hard way. They would stay in the marshes all day and night in all types of adverse weather conditions to apprehend out-law gunners. They were instrumental in establishing one of the best Federal Courts in the country for migratory bird violators. This was done by bringing good solid cases time after time, showing the court true dedication and determination of Fish & Wildlife Agents to protect this nations natural resources from abuse.

The Eastern Shore has been and still is a playground for the rich and famous and politicians alike. During my career, I have seen the number of Fish & Wildlife Special Agents go down from eight to one and I contribute that to the hard work and good job of the agents assigned there. There was virtually no defense when one would be charged for migratory bird violations and the federal courts showed no mercy regardless of individual status in the community. The only remedy to this aggressive enforcement program was to transfer individuals, restrict funding and not fill vacancies. Even with these restrictions, the job, somehow, still seemed to get done with the great help of Maryland Natural Resources Police.

CHANGING THE LAW IS NOT THE SOLUTION

During my 28 year career in Law Enforcement, I have heard all types of complaints about the unfairness of baiting laws. I have seen court uphold the MBTA (Migratory Bird Treaty Act) and have basically seen the U.S. 4th Circuit of Appeals in Richmond, VA say enough is enough. They have heard these arguments before, many times. I guess, if all else fails - change the law. I'm here to tell you that if this strict liability standard is removed from the status it would be devastating for migratory birds. With my experience with the State of Maryland and U.S. Fish & Wildlife Service and never having lost a case in Maryland Federal Court, I feel extremely comfortable in making this statement. My career as an enforcer has ended, but the love and respect for migratory birds hasn't and that's why I took my time and effort to come before you today.

During my career, I have been involved in apprehending and prosecuting nearly 1,000 individuals for hunting on and over a baited area. Of these nearly 1,000 cases, I probably have witnessed 50 areas physically being baited. Out of those 50 areas that I witnessed being baited, I could only identify maybe 10 people that I could actually raise my right hand and say, "Yes, that was the person that I saw baiting the areas".

The reasons that I couldn't identify more individuals, vary from weather conditions (snow, rain, fog, etc.), reduced lighting, distance and concealment from individual's baiting areas. There have been times in my career where individuals have nearly scattered grain on me while baiting areas and I still couldn't identify the subjects. Often times I personally knew the subject that owned, rented or hunted a particular location being baited and owned a boat similar to what the subject was in, however, I still could only give a generic description. Yes, in some of these situations, I knew who the individual was but, couldn't say beyond a reasonable doubt in a court of law.

Many of you are probably in disbelief that I have only actually witnessed some 50 areas being baited in my 28 year career. I want to remind you that my career started in 1969 when hard work and long surveillances was the norm, not like today's priority - paperwork. More often, then not, my days consisted of working 15 hours beating and banging out on the Chesapeake Bay and its marshlands in all types of weather conditions. I can honestly say that I spent as much time in the field as any Fish & Wildlife Special Agent and you see the low numbers of actually witnessing an area being baited. More importantly, you see that actually identifying the subject is next to impossible. Today's Special Agents have more administrative responsibilities that requires much of their time to be spent in the office.

PROVING KNOWLEDGE

After actually seeing subjects bait an area, they will still deny how the bait got there, even if you find grain in their boats. People have a hard time looking an agent in the eyes and saying, "Yes, I baited the area yesterday afternoon". Have I ever charged someone for hunting over bait that I truly believed they didn't know the area was baited? Yes, but these are few and far between. Of all my bait cases, a very few people probably didn't know the area was baited and most of those people wouldn't know what constitutes a baited area anyway. I have seen hunters standing in shelled corn in soybean fields asking, "What bait", hunters on bushogged sunflower fields with milo scattered, saying, "I thought that was gravel pellets", hunters on marshes with cracked corn under decoys saying, I though it was just a sandy bottom", hunters complaining to me after they were caught that someone else baited their hunting site and my response, "They also baited the bottom of your boat".

Page 4

Over the course of my career, I have heard many judges, time after time, tell defendants that they should be more careful picking hosts, friends, hunting companions, club members, etc. The minimum that a guest should do is ask the host has the area ever been baited and look around yourself to see if anything looks out of the way. I believe that in most situations, they really don't want to know the answer to that question; therefore its never asked. If guest would get assurances from their hosts that area being hunted isn't now baited or has ever been baited and they are eventually charged, then I would consider civil actions. This seed has been planted for years, but to my knowledge never pursued, even in cases where agents actually witnessed the host bait the area the night before they hunted. Most undercover operations conducted by Fish & Wildlife Agents clearly show that illegal activity is spoken openly among hunters, even right down to what to say if apprehended.

Hunters have to be responsible themselves by asking their host and questioning why they have more birds than adjoining properties or why has the field recently been cultivated, etc.

DEFINITIONS

Page 7(A)(B) -
<u>intentional</u> - Should not be included in any baiting regulations, simply because it would be impossible for enforcement agents to determine intent. (Example - I didn't know my corn sack had a hole in it. The grain must have spilled off my farm truck when I drove the decoys out to the goose pit. I've been having problems adjusting my corn picker, etc.). I've had words with hunters on adjoining farms and they must have set me up.

Page 7(C)(1) -
<u>feed for farm animals</u> - leaves a big loop-hole in the law. A farmer with one chicken running around the yard could argue that the shelled corn out in the field near his goose pit is for his farm animal, etc.

Page 8(D) -
the <u>bait was a major contributing factor</u> in luring the migratory birds to within a reasonable shotgun range, again, this is totally unenforceable. How can Congress expect an agent to say what grain on a particular day acted as the major contributing factor. Birds will certainly eat different grains according to weather and temperature changes.

Page 8(D) cont. -

reasonable shotgun ranges - cases have been proved, many times in both state and federal courts, that bait as much as one mile away acts as a lure and attraction. I'm aware of a case involving Canada geese several years ago on the Eastern Shore of Maryland. The bait was seen being put out by use of a farm tractor with a seeder attached. As the grain was being scattered across the field, the agent said the Canada geese looked like Seagulls following a farm tractor plowing the field. Here the distances was nearly one mile from some of the hunters and grain location. The farm was holding several thousand Canada geese because of this bait. The case was finally upheld by the U.S. 4th Circuit of Appeals and the very next year, the same farm had less than fifty Canada geese every time I flew over it.

Another case that I made in 1983 that was also upheld in the U.S. 4th Circuit Court of Appeals involved a large coastal barrier marsh island. Two of three ponds hunted was baited with shelled corn. I watched someone bait the pond several days prior to the season. I went to the area several times to document the number of black ducks which reached several hundred. The only area out of thousands of acres of marsh land that held any ducks was the baited ponds. On the opening day, as shooting began, the ducks would go from one pond to the other. The ponds were approximately 500 yards apart and because Black ducks were a priority species, I elected to stop the duck hunt. My point being that bait is deadly from distances of a mile or more, not shotgun range. (See recommendations).

RECOMMENDATIONS

To require or mandate the service to establish annual training (to be conducted by the most experienced Special Agents), regarding all types of baiting situations. This type of training could possibly take place on a National Wildlife Refuge whereby actual hunting plots could be established to set up different scenarios. These plots should be both legal and illegal on planted/harvested and manipulated fields to simulate actual field situations. With this requirement, the Service would have an uniform enforcement standard nationwide. It would better train the less experienced agents and supervisors, alike, to make a more prudent decision regarding questionable baited situations.

Increase the penalties for people who actually have been proven to have put the grain out. Consider a $10,000 minimum with mandatory 30 days in jail on second offense, up to 6 months.

If Congress doesn't think baiting is a serious threat and lure to waterfowl from long distances (outside of shotgun range), then I would ask that Congress get the Fish & Wildlife Service to conduct such test on a National Wildlife Refuge. Since Cedar Island, VA is now part of the National Fish & Wildlife Refuge System, this would be an ideal location for such an experiment.

In conclusion, HR 741 may be well intended, but it won't protect migratory birds. I ask that you please leave the regulations/ statutes and case law alone and concentrate on better training for all Fish & Wildlife agents. I truly believe it will serve in the best interest of both hunters and non hunters, alike, and will continue to protect migratory birds for future generations.

Thank you for the opportunity to comment on House Bill H.R. 741.

Sincerely,

Vernon G. Ricker

Vernon G. Ricker

TERRANCE J. SULLIVAN
Secretary of the League of Kentucky Sportsmen
Director and Past President, The Harrod Creek Field and Stream Club, Inc.
Kentucky's 1995 Conservation Communicator of the Year
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May 1, 1997

The Honorable Jim Saxon
United States Representative
Chairman, House Subcommittee on Fisheries,
Conservation, Wildlife and Oceans
Room 805
O'Neil House Office Building
Washington, D. C. 20515

Dear Congressman Saxon:

I wish to submit this letter as my written testimony for the hearing on HR. 741 regarding the clarification of hunting prohibitions under the Migratory Bird Treaty Act. I am also giving oral testimony at the hearing.

I have been an avid hunter and angler for thirty five years. I am a director of the Harrod's Creek Field and Stream Club, the secretary of the League of Kentucky Sportsmen, a seventeen thousand member confederation of Kentucky sportsmen and women. I have written extensively on the outdoor subjects. I hold a bachelor's degree and have done post graduate study. I own and run a small business. With all of this experience and education, I am afraid to hunt doves I have not done so for fourteen years, because I cannot understand the rules. It is indeed a sad situation when an educated man with years of experience is afraid to engage in a lawful activity because the rules are too vague, contradictory and complex. The regulations regarding baiting are sufficiently ambiguous to put anyone hunting doves at risk of violating them. The fear of being convicted of a game law violation which could not reasonably have been foreseen has driven many hunters from the dove field. Make no mistake about it, there is no more shameful thing to a hunter than to be a convicted game law violator.

The rules further confound the hunter in that they are written for national application. Regional practices, geological differences and local customs are not considered. The rules are the same for Walla Walla Washington and Weechie Wachiee, Florida. Clearly, there are distinct regional difference between the agricultural practices of these areas. A good example of this problem cropped up in the fall of 1995. Lourcey J. Sams, Jr. of Midland Texas and his hunting guests were cited for hunting over a baited field. The field was a pasture adjacent to a stock pond. Mr. Sams supplemented the natural forage using a practice unique to west Texas. Dried cattle manure, containing undigested corn, is spread in the field. The cattle have the somewhat unappetizing habit of breaking open the cow manure and eating the corn. While I am not supportive of all forms of recycling, this is a time honored practice for the supplemental feeding of cattle in west Texas. By any measure, it would be considered a bona fide agricultural process. Any measure, that is, except that of the US Fish and Wildlife Service. Mr. Sams and his party were arrested for hunting over a baited field. Ultimately, the charges were dropped, but only after Mr. Sams, at great personal expense, proved to the USFWS that indeed cattle would recycle corn in this manner. While listening to Mr. Sams relate this story to me, two things became apparent. The first was that had the agents of the USFWS and the US Attorney who had been flown in from

Washington to prosecute these folks bothered to acquaint themselves with local agricultural practices, both Mr. Sams and the taxpayers would have saved a lot of money. The second thing is that Mr. Sams had to prove his innocence. In the American justice system, a person is innocent until proven guilty. In this instance, such a person is required to prove his innocence. It seems to me that hunters should be treated with at least the same deference as drug dealers and rapists, who are given the presumption of innocence..

In 1995 Noreen Clough of the USFWS's southeast region reached agreement with the states in the region that the determination of bona fide agricultural practices for the determining what is and isn't baiting would be done by the State. This agreement makes sense. Who knows better what are and aren't normal agricultural processes and what constitutes baiting in Kentucky than the Kentucky Department of Agriculture and the Kentucky Department of Fish and Wildlife? This is an authority that should be clearly be devolved from the Federal government to the several states. Ms. Clough should be congratulated for this agreement. It should be the law of the land for all states.

HR.. 741, as crafted, directs the Secretary of the Interior (or his designee, I'm certain) to have "meaningful consultation" with the appropriate cooperative state research, education and extension services to determine what is a bona fide agricultural operation. This is a big improvement over what we now have. It does not, however, mandate that the Secretary will abide by the results of such "meaningful consultation". HR741 should go further. It should devolve the determination of "bona fide agricultural practices" to the states. The USFWS should be removed from this particular loop.

The USFWS is the organization that should be charged with the macro management of the migratory bird flock. It has the nationwide presence, the knowledge and resources to deal with the overall issues regarding the flock. These issues include setting bag limits. This is its' appropriate job. The micro management of the flock should be done at the state level where the peculiarities of each region can be taken into account. This includes what is and isn't baiting. The USFWS should be less jealous of what it perceives to be its "turf".

Another facet of baiting regulations that should be considered is that their very imposition is an attempt to legislate hunter ethics. In the US the flock of doves is estimated to be 475,000,000. Of this number, an estimated 45,000,000 fall to the hunter's gun. Doves have an average life span of about 11 months. Hunting pressure has had absolutely no negative impact upon the dove flock. In fact, hunting is inconsequential to the dove flock. The USFWS has wisely set a limit of twelve birds per hunter per day. Most hunters do not achieve the limit, much less exceed it. Bait or no bait, the fact is that most hunters go home with less than a limit of birds. It is incomprehensible to me that so much time, effort, bad will and angst is spent on an issue of so little consequence. Clearly, hunting either over bait or not hunting over bait has no effect on the dove population. Why then does the USFWS feel it must impose rules to make the sport more "sporting"? Following that logic if people began to became more proficient wing shots, the UFSWS might feel compelled to limit hunters to smaller gauge guns. They've already done that with the ten gauge maximum. Why not make 20 gauge the maximum gun size? It is the place of the USFWS to determine the sustainable harvest, not to make ethical decisions for sportsmen.

I have been told by the officials of the Kentucky Department of Fish and Wildlife dove hunting amounts to about five percent of all of the hunting and fishing activities in the state, but accounts for fifty percent of the citations issued by the department. This is not due to the fact that dove hunters are more likely to violate game laws than other hunters and anglers, but speaks directly to the complexity and vagueness of the present laws. Dove hunters are no more or less honest than any other form of hunter. Further, it is the only significant point of contention between the KDFWR and the USFWS. Why should such a small issue be such a large bone of contention?

Society tends to hold bad laws in contempt. This contempt will ultimately spill over into a contempt for all law. Society also tends to hold bad law enforcement in contempt. Similarly, such contempt for unfair enforcement becomes a contempt for all enforcement. This committee has an opportunity to create legislation that will correct vagueness and inequities in the present regulations, make compliance with the law far simpler and will help the USFWS resurrect to some degree its image which has been badly tarnished in the eyes of many sportsmen. I hope that it will capitalize on this opportunity. It is fashionable to blame the USFWS for the present situation. I hope that such bashing is not the purpose of this hearing. Congress, itself, must bear a significant part of the blame. The USFWS enforces the vague regulations it has. It is the job of Congress to pass laws. I hope that it will pass a good one here. Sportsmen and women throughout the country are not asking for more stringent laws, nor are they asking for less stringent laws. They are asking for laws that can be understood. They are asking for laws that have relevance in their part of the country. In this light, I believe that the Lourcey Sams story is far more indicative of the problem than the other horror stories raised.

I thank the committee for the opportunity to address it in this manner and in person. I hope that this information and my testimony will help the committee draft a law that will work to the benefit of both the hunters and the birds.

Cordially,

Terrance J. Sullivan
Secretary, League of Kentucky Sportsmen

Before the U. S. House of Representatives
Committee on Resources
Subcommittee on Fisheries Conservation, Wildlife and Oceans

The Testimony of Charles S. Conner
H.R. 471 - The Migratory Bird Tready Reform Act of 1997
Longworth House Office Building Room 1324
Washington, D.C. May 15, 1997

I first want to thank Chairman Don Young, Subcommittee Chairman Jim Saxton, and the other distinguished Congressmen who are members of this Committee, for allowing me to appear today.

As I have previously expressed to Chairman Young, it is my most sincere, personal feeling, that your legislative efforts to clarify the federal regulations with respect to hunting migratory birds through the Migratory Bird Tready Reform Act of 1997 as found in H.R. 741, is a very worthwhile endeavor. And your effort is appreciated by a majority of those who hunt migratory birds.

What I have to offer the Committee today, with respect to this legislation, is personal experience derived from more than 40-years afield in the Central, Mississippi and Atlantic Flyways. That experience comes from hunting with commercial guides, government officials and sportsmen, young and old, from virtually every walk of life. It comes from working with refuge managers, law enforcement and sportsmen's' groups. In addition, I have more than 30-years of direct contact with agriculture and agribusiness. And the changes incorporated in this legislation, as I view them, will bring a tremendous amount of equity to the legal framework that governs the way hunters may pursue migratory waterfowl and game birds in the United States.

Until now, neither regulatory reform or prevailing case law has provided an equitable means of dealing with those individuals who willfully harvest more than their fair share of our migratory resources with total disregard for either federal law or sporting ethics. Equally important, bad law has resulted in the prosecution of individuals who were innocent.

Specifically, the legal framework that now determines what is "baiting," with respect to the taking of migratory birds, and subsequently those regulations that govern the we may harvest some wildlife species, may have been touted by some as a tool of wildlife management. However, the legal doctrine of strict liability should not be applied to *all* those individuals who are found were an alleged "baiting" violation has taken place.

Strict liability standards should be reserved for acts that pose a real danger to public welfare. Furthermore, to make prosecution more equitable, "intent" must be made a necessary element of guilt for those found hunting migratory birds with the lure of "bait."

With respect to the "zone of influence doctrine" as derived from case law, some of which came from judicial findings involving hunters along the Mississippi Flyway, the north-south corridor used by more than half of North America's migratory birds. Having helped bait and band some of the waterfowl that travel this pathway, I must conclude that with respect to "bait," waterfowl are with very few exceptions, site-specific feeders. And in the field this means that any so-called "zone of influence" can vary widely, depending on weather conditions, species and available feed, among other factors.

In the same manner that migratory birds often fly directly over others that are gregariously feeding on the ground below with total disregard for both their numbers as well as their feeding chatter - actual observation has indicated that on some days waterfowl can appear to be influenced from miles away. But as is often the case, those same birds will pass within a few hundred feet of the others, apparently unaffected by what appears to be an "attracting" food source.

Blanket application of the "zone of influence" doctrine can result in unfair prosecution because there is no reasonable way for the average hunter to determine whether or not his or her activity is within that zone. And because it is not possible to consistently determine the depth or breadth of such a zone, and whereas that dimension constantly changes with time, H.R. 741 offers a more consistent legal foundation for determining whether or not there was in fact a "baiting" violation.

Where the courts and the Department of the Interior/U.S. Fish and Wildlife Service disagree on what constitutes "normal agricultural operations" this legislation properly incorporates the resources of the U.S. Department of Agriculture through its cooperative extension service personnel with the respective state wildlife agency to determine the norm within a region.

While farmers in Arkansas and Louisiana do not normally store rice in the field after harvest, nor do corn growers on the Eastern Shore of Maryland normally dump their production in a place accessible to migratory birds, farming in Nebraska and the Dakotas is vastly different. Because of the larger amounts of feedgrain involved and the generally dryer weather conditions during and after the harvest, piles of grain are frequently found in the open, all over the upper Midwest.

Planting times also differ widely among the States because of more favorable weather and reduced incidence of crop disease. And the normal windows of planting opportunity do not always coincide with the seasonal framework for migratory birds, as set by the Secretary of the Interior.

In my experience, the determination of "normal" agricultural activity can generally be made through existing documentation and personnel found in government offices at the state level. And as a result, there should be no real impact on the budgets of the agencies involved. While there will be some variations in cultural practices because of constraints on the time and financial condition of the farmer, and those same producers do from time-to-time incur accidental in-field spillage, H.R. 471 affords a reasonable determination of what may constitute "baiting" before the hunter goes afield. Giving definition to standard and accepted agricultural practices will make allegations of bait "attracting" and/or an "attraction," determinable matters of legal fact. And regular publication in the *Federal Register* should prove to be sufficient notice for all who hunt migratory birds.

In conclusion, migratory birds constitute one of this nation's most valuable wildlife resources. The "Duck Stamp" Act or Migratory Bird Conservation Act of 1934 afforded the federal government the financial means to purchase suitable habitat for migratory birds. And since that time, those funds have been used to acquire very valuable lands for the National Wildlife Refuge System.

One of the most important tracts to migratory birds of the Mississippi Flyway is found in Louisiana, the home state of Congressman W. J. (Billy) Tauzin. But whether we talk about the Delta, Cache River, Reelfoot or the Crab Orchard National Wildlife Refuge, nearly all of these are suffering from a lack of funding, and consequently contain under-utilized habitat.

It is fitting and proper for H.R. 471 - The Migratory Bird Tready Reform Act of 1997 - to designate all fines and penalties payable into the migratory bird conservation fund, because just as Chairman Young has so aptly stated: *"These funds are essential to the long-term survival of our migratory bird populations."*

The Migratory Bird Tready Reform Act of 1997 addresses some needed changes in federal law and these alterations should also enable more efficient management of North America's migratory bird resources. And the efforts of this Committee, are a means to that end.

Testimony of Fred Bonner
Outdoor Writer and Biologist
7220 Cleveland School Road
Garner, N.C. 27529
Phone (919)779-9750 or (800) 849-2747

First of all I'd like to thank you for the privilege of talking to you today on the subject of baiting migratory birds. It's a subject about which I have given many lectures and written many outdoor columns.

I feel very well qualified to speak to you about this because I am, literally, a professional outdoorsman. I hold a degree in Wildlife Management from North Carolina State University. I am a writer, photographer, wildlife manager, consultant, hunter and fisherman and, of course, a waterfowl hunter.

Let me state up-front that I have never been charged with any wildlife violation. I'm saying this so that no one will be able to say that I'm here on a "sour grapes" vendetta.

I do, however, have a lot of experience in the wildlife management and enforcement field. I am a former Fish and Wildlife Biologist and Deputy Environmental Protection Officer (Game Warden) for the state of Delaware.

I grew up in eastern North Carolina where baiting ducks was practically a way of life if you hunted waterfowl. To put out corn for ducks was about the same as putting out decoys when I was growing up.

That was a long time ago. Today, I wouldn't be caught dead putting out bait for waterfowl and I wouldn't even think about hunting where I thought that bait was present. It's against the law and I'm scared to death that I might , inadvertently get caught up in such a violation. I'm telling

you this to establish the fact that I understand baiting and the problems that go along with it.

I'll not bore you with specific examples of innocent waterfowl hunters and how they accidentally got caught up in a baiting violation. I could fill a book with these stories. I will, however, talk in general terms that will apply to all waterfowl hunters.

Many waterfowl hunters that I know are leaving the sport because they're afraid of getting a ticket for a baiting violation. It's not hard to do. Waterfowl hunting is the only form of hunting I know of where a hunter , not only possibly but probably, will be issued a citation for baiting if he hunts much. No matter how hard he tries to "stay clean", if he's in the field much, under existing federal regulations, sooner or later he's going to be involved in a baiting case. He's not going to intentionally do this, he's going to blunder into some bait that someone else put there or someone is going to set him up.

Several years ago I was the Outdoor Editor for the North Carolina and Virginia News Networks. We had about 135 radio stations that carried my daily radio show on hunting and fishing. One afternoon I had a phone call from one of these animal rights activist that told me that she wanted me to give her some publicity on something that their group was going to do. They planned to go into coastal North Carolina and Virginia and throw a bucket of shelled corn in front of every waterfowl blind that they could find. They then planned to notify the game wardens that the blinds were baited.

I refused to give her any publicity on this matter and the conversation ended there. I really don't know whether or not they carried their threats out. My point is that by baiting blinds, the anti-hunters can (and will) very effectively shut waterfowl hunters down. The chances are

that the hunters wouldn't even know that they'd been "set up" until the game wardens had given them a ticket.

I'm sure that all of us realize that, in baiting cases, ignorance of the presence of bait is no excuse.

It's not unusual at all for one hunter to shut another down (for many reasons) by throwing bait in front of his blind. Even if you carefully clean up every scrap of bait, legally, you can't hunt there for ten days after all the bait is gone.

There are cases where non-hunters who own farms have shut neighboring farms and waterfowler hunters down by baiting their own ponds so that they could enjoy just watching the birds. These non-hunters were not breaking a law but they were effectively stopping their neighbors from hunting waterfowl. Technically, the waterfowl would have been going to or from the bait source if they passed over the farm where hunting is allowed on their way to the bait. It's not hard to get a citation for shooting with the aid of bait when the bait source may be miles away from where you're hunting. How in the world are you supposed to know about this?

It's not against the law to bait waterfowl but it is illegal to shoot over or with the aid of bait. Non-hunters, anti-hunters, animal rightist and unethical hunters take full advantage of this and set up conscientious waterfowl hunters. It's happening, and it scares the Hell out of a lot of us.

An acquaintance of mine has a son-in-law that's a federal game warden. This person is an avid waterfowl hunter but he's afraid to hunt from a stationary blind because he's afraid that somebody is going to set him up. Officials with the North Carolina Wildlife resources Commission are experiencing the same thing. They're not

waterfowl hunting any more because they're fearful of a set-up.

Since I received this invitation to testify before this committee, I've sent out hundreds of queries to other waterfowl hunters asking their ideas on waterfowl baiting. I've also gone on the internet to ask my fellow waterfowl hunters to share their ideas with me. The replies that I've received are overwhelmingly in favor of reforming the baiting regulations so that innocent hunters are protected. In fact, out of all these queries, only one hunter was in favor if leaving the existing regulations alone and he did a turn-around once he realized just how vulnerable he was to being caught up in a violation.

Much to my surprise, most of the replies that I've received are in favor of full legalization of baiting and strict (very strict) enforcement of the daily bag limits. The replies support H.R. 741 but they don't feel that this bill goes far enough.

Let's face it, if you have enough money to build a shallow water impoundment that can be drained in the summer, planted in a grain crop then flooded when the hunting season rolls around, you can legally hunt over it. This is nothing short of legalized baiting by the more wealthy of the waterfowl hunters. Very few waterfowl hunters can afford this kind of hunting and, if they want to compete with this, they're forced to resort to baiting (illegal in their case).

Several years ago we met with the North Carolina Wildlife Resources Commission and managed to get them to re-define our waterfowl baiting regulations. These are now much more reasonable. I wish that the federal regulations were so.

Under North Carolina regulations, a waterfowl hunter is responsible for bait if it's within 300 yards of his blind. If

a game warden finds what he feels is a baiting violation, he writes the hunter a temporary ticket pending further investigation by one of his superiors. If the investigation reveals that the hunter had made a reasonable effort to check for bait before he hunted and found none, the violation is waived. If, however, the officers feel that the hunter could have checked more thoroughly and should have known that bait was present, the ticket stands and the fines are substantial.

The key word under our state law is "intent". Did the hunter intend to lure the waterfowl into shotgun range with bait? Our wardens must show that the hunter who they've accused of baiting had the intent to break the law. This is not the case under existing federal regulations and I feel that this is wrong, very wrong.

Even with a 300 yard rule in effect, how many hunters would have time to check a 600 yard in diameter area around their blinds in the pre-dawn hours before the hunting hours begin? By considering intent, the waterfowl hunter has some degree of protection.

Under federal regulations all traces of bait must be gone for at least ten days prior to the area's being hunted. How on earth would a hunter know that bait may have been present 9 days before he hunted there?

One of our favorite ways to hunt waterfowl in North Carolina is to paddle a boat through some of our winding creeks and rivers and jump shoot ducks as you surprise them. How on earth are you supposed to check for bait along miles of creeks before you hunt there? You can't do it and, believe me, you're highly subject to blundering into a baiting situation if you do this.

Defining bait is another matter again. I have in my office an internal memo from the U.S. Attorneys with the U.S. Fish and Wildlife Service that states that if a hunter is

going to his blind and steps on naturally growing grasses or weeds that have seeds on them and accidentally bends them to the ground, that this can be construed as baiting. I don't know of any cases being made under these circumstances but this illustrates the "state of mind" for many federal game wardens.

I, and many other outdoor writers, have been trying to get the Fish and Wildlife Service to do something about the unjust baiting regulations for years and, as near as I can determine, they've made few (if any) changes in at least twenty years. Most waterfowl hunters that I've talked with feel that it is time for Congress to take this matter into their hands and change the present baiting regulations into laws that will give innocent hunters some protection. We've waited for a long time and we feel that now is the time for Congress to make this move. We just wish that you'd take H.R. 741 a few steps further and legalize baiting for all hunters.

I feel sure that nearly every one of you Congressmen has friends and acquaintances that have been accused of baiting migratory birds. I also feel sure that, in most cases, the accused parties were innocent. It's a real shame that most of the time the accused baiters choose to simply pay the fine without ever going to court and hope that the matter is soon forgotten. In many cases the hunters find that it's cheaper to do this than it is to hire an attorney, take several days to travel and go to court and fight the charges.

It's widely known that hunters who stand accused of shooting over bait are guilty until proven innocent and it's an expensive proposition to fight these charges in court. In short, many waterfowl hunters that stand accused of shooting over bait can't afford to fight the charges. With taxpayers dollars backing them, the Government can afford

to prosecute but the hunters don't have the kind of money it takes to defend themselves. They have no choice but to plead "guilty" and pay the lesser amount..

None of us are advocating the wholesale slaughter of waterfowl as some would have you believe. For the most part, we hunters are conservationist of the first order. I can't disagree with the ideas that many have expressed to me regarding the legalization of baiting and strict enforcement of bag limits. If we're to let the wealthy few hunt their legally baited ponds, why not let everyone bait and be done with it?

Thank you, Fred Bonner

SHERIFF **STEPHEN M. OELRICH**

Alachua County Sheriff's Office
Post Office Box 1210 • Gainesville, Florida 32602-1210

April 28, 1997

The Honorable James Saxton, Chairman
Subcommittee on Fisheries, Conservation
of Wildlifes and Oceans
Room 805
House Office Building Number One
Washington, D.C. 20515

Dear Chairman Saxton:

On Friday, October 13, 1995, I, along with some 90 plus other citizens of Florida, had a very negative experience with agents of the U.S. Wildlife Service which needs to be brought to the attention of your committee.

In September, 1995, I, along with some 300-400 other citizens, received an invitation through the mail from State Senator Charles Williams regarding his second annual benefit dove hunt. The invitees included sheriffs of several surrounding counties, local ranchers, utility managers, state officials and local elected county office holders as well as college students and just folks. The hunt also involved the donation of funds by sponsors and any money left over was to benefit the Florida Sheriffs Youth Ranches; a charitable organization devoted to assisting troubled young people throughout Florida. Several fields were to be utilized as well as a lunch and cold drinks provided. In short a wholesome family-style outdoor experience was anticipated by all.

Instead, what the participants encountered as the hunt was about over can only be described as a heavy handed, over-reaction by agents of the U.S. Wildlife Service. As the hunt wound down, over a dozen wildlife agents wearing camouflage and military boots descended upon us. The agents demanded hunting licenses and even driver licenses, confiscated birds, took information of anyone on the field and stated we all were in violation of Federal Law. Was this murder, mayhem or assault? What warranted this intense focus of federal force on an agricultural field in Dixie County, Florida? The agents stated that the wrong kinds of seeds were on the ground. The violation was of shooting over a baited area. Later, I heard that words were exchanged as the realization as to what the federal people were up to sunk in. I would describe the mood on the field that day as ugly and tense. I never knew there was any bait on this field.

The Honorable James Saxton
April 28, 1997
Page Two

Approximately 30 days later I received a letter and citation through registered mail charging me with taking migratory birds over a baited area. The fine was for $525 unless I wanted to go to court in which I could face six months in prison, $5,000 fine, and five years probation with my hunting privilege revoked. All this for what started out as outdoor recreation with good people serving a charitable organization. Four Florida Sheriffs were on the field that day along with the Regional Director of the State Game and Fish Commission, Clerks of the County Courts and several people in leadership positions in their communities all sharing in their embarrassment at this treatment from federal officers. Newspaper coverage was extensive throughout the state concerning both the raid and the reaction by its victims. I believe this whole episode was both unnecessary and heavy handed. The agents stated they had observed this field for several days determining that it was unlawful. Instead of making a telephone call or sending one agent to notify participants a dozen agents lay in wait for unknowing citizens to arrive into their web. The field had been photographed and surveillance performed with federal aircraft. I don't feel the birds were baited that day, I believe law abiding citizens were baited, trapped, tried and fined, then extorted into pleading and paying for a "violation" of a law that does not require intent or even knowledge to violate. The reason the federal agents say they use such tactics; because they can!

I urge your committee to review both this law and the tactics of a federal agency that appears to be out of control. I would be pleased to provide additional information.

Sincerely,

Stephen M. Oelrich
Sheriff