ESSAY

THE FRUITS OF OUR LABOR: RESULTS FROM THE FIRST SESSION OF THE 105TH CONGRESS—1997 FEDERAL LEGISLATIVE SUMMARY

BY
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I. INTRODUCTION

Recent congressional sessions have afforded animal issues little time or serious consideration, as the record for 1997 reflects. Many laws related to animal care and protection would ultimately require substantial governmental oversight as well as more protective statutory language in order to be effective. Due to a general disinclination in the current Congress to pass legislation augmenting federal regulatory schemes or committing additional federal enforcement funds to animal issues, it has been difficult for animal protection organizations to secure passage of desirable legislation for animal protection. Because of this situation, organizations have redirected their focus on de-funding programs involving animal cruelty that rely on tax dollars for their operation. Amendments to appropriations bills decreasing budgets for such programs is an effective way to call attention to the programs and to potentially remove their funding. The attention drawn to these programs, regardless of the success or failure of such amendments, has generated tremendous controversy and public pressure to change the current offensive practices. The following summaries discuss legislation that was before the first session of the 105th Congress, the passage or failure of the legislation, and the status of the legislation in the second session, at least up to the publication time of this article.

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II. HOUSE BILL 2159: THE FOX-MILLER AMENDMENT

The Fox-Miller amendment to House Bill 2159 (the 1998 Foreign Operations Appropriation bill)[1] sought to bar the use of American tax dollars from supporting or promoting trophy hunting or the international commercial trade in elephant ivory, elephant hides, and rhino horns.[2] Since 1989, the United States Agency for International Development (USAID) has subsidized the Communal Areas Management Program for Indigenous Resources (CAMPFIRE), a government program for economic development in Zimbabwe.[3] CAMPFIRE relies primarily on the promotion of trophy hunting of elephants and other endangered and threatened species to generate funding for infrastructure projects for local people.[4] USAID pledged over $28.1 million for CAMPFIRE between 1989 and 1997. Over $7 million has already been spent on this program.[5] The rate of return on the funding has been poor, because CAMPFIRE earns only fifty cents from every dollar it receives and spends as little as five to ten cents of that on the local villagers to benefit from the program.[6]

Furthermore, the same organizations that administer CAMPFIRE were actively working to reinstate the ivory trade at the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1989 and 1997.[7] These organizations also supported efforts by foreign governments to weaken the Endangered Species Act[8] by pushing for amendments to allow the import of trophies of endangered and threatened species to the United States.

The Fox-Miller amendment, sponsored by Representatives Jon D. Fox of Pennsylvania and George Miller of California failed by a vote of 159 to 267.[9] A similar amendment, offered by Senators Barbara Boxer of California, Wayne Allard of Colorado, Robert C. Smith of New Hampshire, Robert G. Torricelli of New Jersey, and Patrick J. Leahy of Vermont passed the Senate by a voice vote, but was not included in the final appropriations bill.[10]

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1 H.R. 2159, 105th Cong. (1997) (enacted).

2 143 Cong. Rec. H6726-802 (daily ed. Sept. 3, 1997) (Amendment No. 41 to House Bill 2159).

3 Tracey C. Rembert, *Opening the Ivory Door: An Exercise in Democracy Pits Conservation Against Animal Rights; Controversy Over Management of Zimbabwe's Elephant Population by Communal Areas Management Program for Indigenous Resources*, 9 ASAP 4:22 (1998), *available in* LEXIS, News Library, All news File.

4 *Id.*

5 *Id.*; John Fox, *Communal Areas Management Program for Indigenous Resources* (August 29, 1997) (Congressional press release).

6 Fox, *supra* note 6.

7 Marcus Mabry and Tara Weingarten, *U.S. Funding Africa Trophy Hunt*, THE SEATTLE TIMES, Sept. 5, 1997, *available at* 1998 WL 3251717.

8 16 U.S.C. §§ 1531-1544 (1994).

9 143 CONG. REC. H6808-03 (daily ed. Sept. 4, 1997) (failed Roll No. 359).

10 143 CONG. REC. S7611 (daily ed. July, 16, 1997).

III. HOUSE BILL 408/SENATE BILL 39: THE INTERNATIONAL DOLPHIN CONSERVATION PROGRAM ACT

The International Dolphin Conservation Program Act (H.R. 408),[11] sponsored by Representative Wayne Gilchrest of Maryland, ends the existing embargo on dolphin-deadly tuna and requires only that no dolphins be *observed* dying for tuna to be labeled "dolphin-safe."[12] Yellowfin tuna are often found swimming beneath pods of air breathing spinner and spotted dolphins in the Eastern Tropical Pacific Ocean.[13] The tuna fishing industry has long exploited this phenomenon by setting out mile-long purse seine nets and chasing the dolphins into the nets, thereby capturing the tuna below.[14] Since the 1950s, the tuna fishing industry has killed over seven million dolphins in such nets and many more have suffered during the chase and the encirclement.[15] Some scientists believe that, because of the stress of the chase, more dolphins die after release than die in the nets.[16]

In response to this problem, the Marine Mammal Protection Act,[17] the Dolphin Protection Consumer Information Act,[18] and the International Dolphin Conservation Act[19] were adopted. The Dolphin Protection Consumer Information Act created the "dolphin-safe" label and prohibited the sale of tuna caught with the dolphin encirclement method.[20] The passage of these laws led to a dramatic decline in the number of dolphin deaths from tuna fishing in the Eastern Tropical Pacific Ocean.[21] However, recent interest in the promotion of free trade led to a movement to change these laws so that the term "dolphin-safe tuna" would include tuna caught with the use of encirclement nets. House Bill 408 passed by a vote of 262 to 166[22] in the 105th Congress, despite outcry from the humane movement and several environmental organizations.

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11 H.R. 408, 105th Cong. (1997) (enacted with changes in S. 39, 105th Cong.).

12 *Id.* § 5.

13 1996 MARINE MAMMAL COMMISSION ANNUAL REPORT TO CONGRESS (1997) [HEREINAFTER 1996 MMCAR]; U.S. INT'L TRADE COMM'N, PUB. No. 2547, TUNA: CURRENT ISSUES AFFECTING THE U.S. INDUSTRY 3-1 (1992).

14 1996 MMCAR, *supra* note 13, at 97.

15 Since 1959, an estimated seven and a half million dolphins have died due to purse seine fishing practices in the ETP. Raul Pedrozo, *The International Dolphin Conservation Act of 1992: Unreasonable Extension of U.S. Jurisdiction in the Eastern Tropical Pacific Ocean Fishery*, 7 TUL. ENVTL. L.J. 77, 79-80 (1993).

16 Jennifer Ramach, Note, *Dolphin-Safe Tuna Labeling: Are the Dolphins Finally Safe?*, 15 VA. ENVTL. L.J. 743, 746 (1996).

17 Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407 (1994).

18 Dolphin Conservation Act, 16 U.S.C. § 1385 (1994) *amended by* Pub.L. No. 105-42, 111 Stat. 1122 (1997).

19 International Dolphin Conservation Act of 1992, 16 U.S.C. §§ 1411-1418 (1994), *amended by* Pub. L. No. 105-42, 111 Stat. 1122 (1997).

20 16 U.S.C. § 1385 (1994).

21 *Heated Debate On Dolphins Ahead On House Floor*, NATIONAL JOURNAL'S CONGRESS DAILY, July 30, 1996. Dolphin deaths have declined from 100,000 in 1991 to less than 3,500 last year due to the ban on purse-seine trapping. *Id.*

22 143 CONG. REC. H3139-40 (daily ed. May 21, 1997).

Senate Bill 39, the Senate companion bill, was altered after the successful efforts of Senators Joseph Biden Jr. of Delaware, Barbara Boxer of California, and Robert C. Smith of New Hampshire.[23] However, it does not preserve the integrity of the "dolphin-safe" label. Instead, it proposes a brief period of study of overall populations of the affected species.[24] It contains no assurances that the suffering of individual dolphins will be prevented should an overall population remain unharmed by purse-seine netting.[25] The Senate approved Senate Bill 39 by a vote of 99 to 0.[26] President Clinton signed the bill into law on August 15, 1997.[27]

IV. House Bill 1420: The National Wildlife Refuge System Improvement Act

Currently, the National Wildlife Refuge System (System) is a patchwork of lands created through a patchwork of legislation. The original legislative scheme that created the System did not adequately identify which activities should be allowed or prohibited on these wildlife refuge lands, leaving refuge managers to make such decisions with little guidance.[28] Over time, hunting, commercial trapping, and other recreational activities such as jet skiing were established as compatible with the purposes of various refuges.[29] House Bill 1420, the National Wildlife Refuge System Improvement Act, is meant to alleviate the current problems in the System and establishes conservation as its primary purpose.[30]

House Bill 1420 is a compromise negotiated by Secretary of Interior Bruce Babbitt to address the Administration's concerns with the original 1997 House Bill 511,[31] which elevated hunting and commercial trapping to purposes of the System.[32] The compromise bill contains language mirroring that of an executive order issued by President Clinton on March 25, 1996,[33] stating that hunting, fishing, and other recreational activities are priorities but not purposes of the System.[34] The bill passed both House and Senate and was signed into law by the president on October 9, 1997.[35]

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23 S. 39, 105th Cong. (1997) (enacted).

24 *Id.*

25 *Id.*

26 143 Cong. Rec. S8312 (daily ed. July 30, 1997).

27 143 Cong. Rec. H9862 (daily ed. Oct. 31, 1997).

28 National Wildlife Refuge System Act of 1966, 16 U.S.C. § 668dd (1994), *amended by* Pub.L. 105-57 (1997).

29 Edward J. Heisel, Comment, *Biodiversity and Federal Land Ownership: Mapping a Strategy for the Future*, 25 Ecology L.Q. 229, 240 (1998).

30 H.R. 1420, 105th Cong. (1997) (enacted).

31 H.R. 511, 105th Cong. (1997).

32 143 Cong. Rec. E387 (daily ed. Mar. 5, 1997).

33 Exec. Order No. 12,996, 61 Fed. Reg. 13,647 (1996).

34 *Id.* § 3(a).

35 143 Cong. Rec. H9862-01 (daily ed. Oct. 31, 1997).

V. HOUSE BILL 1202/SENATE BILL 995: THE CAPTIVE EXOTIC ANIMAL PROTECTION ACT

The Captive Exotic Animal Protection Act,[36] sponsored by Representative Brown of California and Senator Lautenberg of New Jersey, would have banned the interstate commerce of tame, exotic mammals and the practice of killing such mammals in a confined area (hunting ranches of one thousand acres or less) for the purpose of entertainment or for a trophy.[37] The bill did not pass in the first session of the 105th Congress. This bill is still pending in 1998.

VI. HOUSE BILL 453/SENATE BILL 850: THE DOWNED ANIMAL PROTECTION ACT

The Downed Animal Protection Act,[38] sponsored by Representative Ackerman of New York and Senator Akaka of Hawaii, was an attempt to end the stockyard practice of dragging, bulldozing, or leaving for dead all animals so weak or injured that they cannot stand or walk.[39] This bill would amend the Packers and Stockyards Act of 1921[40] to prohibit any stockyard owner, market agency, or dealer to transfer or market non-ambulatory livestock.[41] The bill did not pass in the first session of the 105th Congress but is a high priority for animal protection interests for the second session of the 105th Congress. The bill is still pending in 1998.

VII. HOUSE BILL 619/SENATE BILL 263: THE BEAR PROTECTION ACT

The Bear Protection Act,[42] sponsored by Representative Porter of Illinois and Senator McConnell of Kentucky, would prohibit the import, export, sale, purchase, and possession of bear viscera or products that contain them.[43] The demand for such products in East Asia is steadily increasing as the bear population rapidly decreases on that continent. This bill would protect America's bears from the active poaching trade in the United States that is attempting to meet a growing Asian demand for bear parts.[44] The two versions of the Bear Protection Act, House Bill 619 and Senate Bill 263, did not pass in the first session of the 105th Congress, but a uniform system of bear protection is a high priority for animal protection interests, with strong chance of passage in the second session of the 105th Congress. Both bills are still pending in 1998.

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36 H.R. 1202, 105th Cong. (1997); S. 995, 105th Cong. (1997).

37 S. 995, 105th Cong. § 48 (1997).

38 H.R. 453, 105th Cong. (1997); S. 850, 105th Cong. (1997).

39 H.R. 453, 105th Cong. § 318 (1997).

40 7 U.S.C. § 181 (1994).

41 H.R. 453, 105th Cong. § 318 (1997).

42 H.R. 619, 105th Cong. (1997); S. 263, 105th Cong. (1997).

43 H.R. 619, 105th Cong. § 6 (1997).

44 *Id.* § 4.

VIII. House Bill 2351: The Endangered Species Recovery Act

The Endangered Species Recovery Act,[45] authored by Representative Miller of California, focuses on concerns that the Endangered Species Act of 1973 (ESA)[46] doesn't address, such as actively encouraging and ensuring the full recovery of those species. First, this bill addresses improving the science used to develop and implement recovery plans by establishing deadlines for the creation of recovery plans, requiring plans to include objective biological criteria, and mandating articulation of specific management strategies for achieving recovery goals.[47] Requiring federal agencies to implement recovery plans would help ensure that listed species do not remain endangered or threatened indefinitely and that the purpose of the ESA is fulfilled (*i.e.* recovery of the species). Second, this bill is forward looking, giving a high level of consideration to impacts from federal actions that reduce the likelihood of a species' recovery in the wild as oppose to just considering adverse impacts to a species' survival as the current ESA does.[48] House Bill 2351 ensures federal actions will not jeopardize the recovery of listed species. Finally, under House Bill 2351, Habitat Conservation Plans (HCPs) would conform to objective biological goals for species recovery, with measures instituted to monitor the effectiveness of conservation strategies.[49] This bill also emphasizes adaptive management provisions for adjusting conservation strategies based on reasonably foreseeable changes in circumstances.[50] House Bill 2351 further creates a Habitat Conservation Plan Fund to cover the cost of implementing additional conservation measures to address unforeseeable events outside of a landowner's control.[51] Tax incentives and technical assistance to landowners that undertake voluntary species conservation efforts are instituted under this bill, furthering the mission of the recovery of species.[52] This bill is still pending in 1998.

IX. Senate Bill 1180: The Endangered Species Recovery Act

The Endangered Species Recovery Act,[53] introduced by Senators Kempthorne of Idaho, Chafee of Rhode Island, Baucus of Montana, and Reid of Nevada, is not the companion bill to House Bill 2351. Senate Bill 1180 is dramatically different in its focus and language and is considered an evisceration of, rather than an enhancement to, the Endangered Species Act. Section 5 authorizes Habitat Conservation Plans (HCPs) on non-federal lands and codifies the "no surprises" rule that prevents modifications to HCPs when confronted with new scientific information or

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45 H.R. 2351, 105th Cong. (1997).
46 Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1994).
47 H.R. 2351, 105th Cong. § 105 (1997).
48 *Id.*
49 *Id.* § 101.
50 *Id.* § 108.
51 *Id.*
52 *Id.* § 201.
53 S. 1180, 105th Cong. (1997).

changed circumstances which might be critical to a plan's effectiveness.[54] Section 2 creates stringent restrictions on the content of listing petitions, delaying protection for species that scientifically might be considered critically endangered.[55] This would be a dangerous step backwards because currently, many species are at levels below one thousand animals or one hundred plants before they are listed under the current petition requirements. Furthermore, section 2 creates barriers to each new prohibition or protection for a species once it is listed as threatened, demanding additional proof from the Fish and Wildlife Service and National Marine Fisheries Service as justification for any additional protective measures.[56] Section 3 effectively eliminates the requirement for objective biologically based recovery plans by allowing for "functional equivalents" in the form of HCPs, Memoranda of Understanding, and Forest Plans without public notice and comment, without scientific recovery teams, and without recovery goals.[57] Section 3 also imposes complex new recovery planning requirements for listed species, including extensive consideration of socio-economic analysis for recovery alternatives.[58] This section further removes requirements codified under section 7(a)(2) of the ESA for recovery plans, including duties to consult, to minimize impacts on listed species, to avoid jeopardizing an endangered or threatened species, and to avoid adversely modifying critical habitat.[59] Under Senate Bill 1180, once a "recovery plan implementation agreement" is finalized, an action will be allowed to continue for up to five years unmodified, regardless of any unforeseen harmful effects resulting from that action.[60] Finally, section 4 allows any federal agency to continue with an action without consultation for fifteen months after a species becomes threatened or endangered or critical habitat has been designated.[61] This provision inverts the current principle in section 7(d) of the ESA that federal agencies prevent damage by screening proposed actions before implementation. This bill was reported out of Environment and Public Works Committee on October 31, 1997.[62] It is still pending in 1998.

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54 *Id.* § 5.
55 *Id.* § 2.
56 *Id.*
57 *Id.* § 3.
58 *Id.* § 2.
59 Endangered Species Act of 1973, 16 U.S.C. § 1538(a)2 (1994).
60 S. 1180, 105th Cong. § 5 (1997).
61 *Id.* § 4.
62 143 Cong. Rec. S11544-01 (daily ed. Oct. 31, 1997) (Reports of Committees).