

2007 LEGISLATIVE REVIEW

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REVIEW EDITOR'S NOTE

It is my pleasure to introduce the tenth annual edition of *Animal Law's* Legislative Review. This review surveys animal-related legislation at both the federal and state level from 2007 through early 2008. The animal-friendly legislation approved this past year illustrates the growing trend of legislators legally recognizing both wildlife and companion animals and working to protect them. Of course, as is true of most years, some legislation was also introduced that would adversely impact non-human animals and the efforts of their human advocates.

Ms. Paula Walker reports on federal legislation from the first session of the 110th Congress, including the Canadian Seal Hunt Resolution, which urges an end to Canada's brutal annual seal hunt; two proposed amendments to the Marine Mammal Protection Act that would change the Act's provisions on lethal taking of protected animals to allow lethal removal of sea lions preying on endangered salmon populations at the Bonneville Dam; the Charitable Remainder Pet Trust Act, which would amend the Internal Revenue Code to recognize creation of pet trust funds to fund the care of companion animals after the death of their owners; and the Human and Pet Food Safety Act, which would institute safety measures to protect both people and their animals from contaminated food products.

Reporting on state action, Ms. Rita Yonkers discusses recent state legislative developments, such as laws that would expand the protection of elephants in captivity and set standards for their care and treatment; laws calling for payment of non-economic damages, such as loss of companionship, by defendants accused of injuring companion animals; laws providing for the imposition of civil penalties in lieu of criminal charges for first-time animal cruelty offenders; laws specifically prohibiting the sexual abuse of animals; and laws that would make it more difficult to pass local ballot initiatives, a common method used to enact animal protections.

Perhaps the most notable recent event in the animal law field came on February 11, 2008, with the death of Representative Tom Lantos (D-CA).¹ During his twenty-eight years in Congress, Lantos was active in promoting animal-related legislation and was a founder and co-chair of the Congressional Friends of Animals Caucus.² Lantos has been prominently featured in prior editions of *Animal Law's* Legislative Review due to his introduction in Congress of numerous animal-related bills and resolutions during his years in office.³

It is my hope that this Legislative Review will serve as not only a review of the legislative developments over the past year, but also as a means to educate anyone interested in animal law issues. By analyzing the most recent legislative developments, *Animal Law* hopes that lawmakers and others interested in animal issues will gain valuable knowledge that will guide future legislative efforts and inform the de-

¹ The Online Office of Congressman Tom Lantos, *Tom Lantos, 1928-2008*, http://www.lantos.house.gov/index.php?option=com_content&task (site no longer available) (on file with *Animal L.*); U.S. Dept. of St., *Death of Congressman Tom Lantos, Statement by Secretary Condoleezza Rice*, <http://www.state.gov/secretary/rm/2008/02/100253.htm> (Feb. 11, 2008).

² Office of Congressman Tom Lantos, *supra* n. 1; Humane Socy. U.S., *Tom Lantos: A Lifetime of Devotion to the Humane Movement, Distinguished Lawmaker to be Honored Posthumously by The Humane Society of the United States*, http://www.hsus.org/press_and_publications/press_releases/tom_lantos_honored_posthumously_021108.html (Feb. 11, 2008).

³ Humane Socy. U.S., *supra* n. 2. To recognize Lantos' lifetime of dedication to the humane movement, the Humane Society of the United States plans to posthumously bestow upon him its highest honor, the Joseph Wood Krutch Medal. *Id.*

velopment of the animal law field. As always, *Animal Law* welcomes any comments or suggestions for future editions of *Legislative Review*.

Blair E. McCrory
Legislative Review Editor

I. FEDERAL LEGISLATION

A. *Marine mammals*

1. *Canadian Seal Hunt Resolution*

In the spring of 2007, in response to the Canadian government's decision to launch commercial seal hunting off the east coast of Canada, both the U.S. House of Representatives and the U.S. Senate proposed resolutions urging the Canadian government to end the "cruel and needless commercial hunt."⁴ On March 22, 2007, Senator Carl Levin (D-MI) introduced Senate Resolution 118 (Sen. Res. 118), co-sponsored by Senators Joseph R. Biden Jr. (D-DE) and Susan M. Collins (R-ME), urging the government of Canada to end its commercial seal hunt.⁵ On May 22, 2007, Representatives Tom Lantos (D-CA) and Christopher Shays (R-CT) introduced House Resolution 427 (H. R. Res. 427), with the identical objective of urging an end to Canada's commercial seal hunt.⁶

In 2003, the Canadian government approved the largest seal hunt quota in history—one million seals over a three year period.⁷ By the close of the 2004–2005 seal hunt, which launched on November 15, 2004, more than three hundred thousand harp seals had been killed.⁸ The Humane Society of the U.S. estimates that somewhere between one million and one-million-three-hundred-thousand seals have been killed since 2003, not counting the seals who escaped to die under the

⁴ H.R. Res. 427, 110th Cong. 3 (July 30, 2007) (enacted) (available at <http://www.gpoaccess.gov/>, search "GPO Access Sources by Branch," select Congressional Bills, select Browse Bills by Congress and/or type of legislation, select 110th Congress (2007–2008): House Bills: HRes, search "seal hunt," select H.Res. 427 (eh) PDF); Sen. Res. 118, 110th Cong. 3 (Mar. 22, 2007) (available at <http://www.gpoaccess.gov/>, search "GPO Access Sources by Branch," select Congressional Bills, select Browse Bills by Congress and/or type of legislation, select 110th Congress (2007–2008): Senate Bills: SRes, search "seal hunt," select S.Res. 118: PDF).

⁵ Sen. Res. 118, 110th Cong. at 3.

⁶ H.R. Res. 427, 110th Cong.; Humane Socy. U.S., *Fact Sheet, S. Res. 118 – H. Res. 427, A Bipartisan Call to End the Canadian Commercial Seal Hunt* [¶ 3], http://www.hsus.org/web-files/PDF/legislation/110_sealhunt_sres118_hres427.pdf (accessed Apr. 13, 2008).

⁷ Humane Socy. U.S., *supra* n. 6, at [¶ 1].

⁸ *Id.* at [¶ 3]. The Humane Society also makes a distinction between the commercial hunting that the resolutions address and aboriginal hunting, stating "The Humane Society of the United States takes no issue with subsistence seal hunting undertaken by aboriginal people. Our concern is exclusively with commercial seal hunting carried out by commercial fishermen, who participate in several fisheries throughout the year." *Id.* at [¶ 7].

ice.⁹ The last time such a quota was achieved, in the 1950s and 1960s, nearly two-thirds of the existing harp seal population was exterminated.¹⁰

As simple resolutions, neither the House nor Senate Canadian seal hunt resolutions are binding legislative actions.¹¹ Simple resolutions do not require the approval of both Houses, are not presented to the President for approval, and as such, do not become law.¹² The force of a resolution is strictly as an official statement of opinion of the legislative body.¹³

Almost identical in language,¹⁴ both resolutions state their foundation as follows: 1) the international community is vehemently opposed to the hunt and has made this opinion clear to the Canadian government by banning imports of seal skins and seal products;¹⁵ 2) the hunt is cruel and inhumane;¹⁶ and 3) the Canadian government's

⁹ H.R. Res. 427, 110th Cong. at 2.

¹⁰ Humane Socy. U.S., *supra* n. 6, at [¶ 3].

¹¹ Lib. Cong., THOMAS, *How Our Laws are Made, Simple Resolutions*, "Simple Resolutions," <http://thomas.loc.gov/home/lawsmade.bysec/formsfaction.html#simple> (accessed Apr. 13, 2008); *see also* GPO Access, *Congressional Bills: Glossary*, "Simple Resolutions," <http://a257.g.akamaitech.net/7/257/2422/13feb20061331/www.gpoaccess.gov/bills/glossary.html> (last updated July 11, 2006) (noting that simple resolutions do not have the force of law); *see also* United States Senate, *Glossary, Simple Resolution*, http://www.senate.gov/reference/glossary_term/simple_resolution.htm (accessed Apr. 13, 2008) (noting that simple resolutions are "nonbinding").

¹² *Id.*

¹³ *Id.*

¹⁴ Sen. Res. 118, 110th Cong. at 3-4 ("Now, therefore, be it *Resolved*, That the Senate urges the Government of Canada to end the commercial hunt on seals that opened in the waters off the east coast of Canada on November 15, 2006."); H.R. Res. 427, 110th Cong. at 3 ("Now, therefore, be it *Resolved*, That the House of Representatives urges the Government of Canada to end the commercial hunt on seals.").

¹⁵ Sen. Res. 118, 110th Cong. at 1 (citing the 1983 European ban on seal products and the U.S. Marine Mammal Protection Act (MMPA) as evidence of the strong international opposition to the hunt). In 1983, the European Union expressed its extreme outrage at the cruelty of the seal hunt by banning the import of whitecoat and blueback seal skins. *See* Intl. Fund for Animal Welfare, *Italy Temporarily Bans Imports of Canadian Seal Products*, <http://www.ifaw.org/ifaw/general/default.aspx?oid=161335> (Apr. 13, 2008) ("In 1983, the European Union introduced a ban on seal products derived from whitecoats (newborn harp seals, less than 12 days old) and bluebacks (young hooded seals, less than one year old)."); *see* The Canadian Arctic Resources Committee (CARC), *Northern Perspectives, The Anti-sealing Campaign* ¶¶ 2-3, <http://www.carc.org/pubs/v14no2/index.html>; select The Anti-Sealing Campaign (accessed Apr. 13, 2008) ("In 1983, in response to immense public support for ending the seal harvest and intense public pressure on European parliamentarians, the Council of Ministers of the European Economic Community (EEC) approved a directive banning the importation of skins of harp and hooded seal pups for two years."). Since 1972, as a result of the Marine Mammal Protection Act, the United States has banned all imports of seal products into the United States. Sen. Res. 118, 110th Cong. at 1.

¹⁶ Sen. Res. 118, 110th Cong. at 2 (stating that the majority of pups killed are so young, between twelve days and twelve weeks of age, that they haven't even eaten their first solid meal or taken their first swim; per veterinary reports almost half of them are skinned alive; that the method of killing (clubbing or shooting) is "inherently cruel," and

justification for the hunt is based on the faulty premise that seals threaten the recovery of the cod population.¹⁷

The Canadian government counters these claims by pointing to the fact that it has been illegal to hunt the “whitecoats,” pups younger than twelve days old, since 1987.¹⁸ The Canadian Department of Fisheries and Oceans (DFO) asserts, therefore, that the animals hunted are “self-reliant, independent animals.”¹⁹ The DFO also maintains the animals are not really skinned alive; it suggests that the movement observers of the seal hunt witness is strictly a reflex reaction after the seal is clubbed to death, not the motions of a live animal.²⁰ Further, the DFO asserts that the method of killing by clubbing is not inhumane and barbaric, but rather, when done properly, is as humane as the method of killing used in most slaughterhouses—a practice it contends is acceptable to “the majority of the public.”²¹ The DFO denies that its decision to allow an expanded seal hunt is based on a belief that seals are contributing to the depletion of the cod stock.²² Rather, the DFO maintains that the quota is set on “sound conservation principles,” and that it sets quotas to “ensure the health and abundance of the seal herds.”²³ Additionally, the DFO disclaims allegations that seal hunting is not an economically viable industry, surviving only on substantial government subsidies.²⁴ Instead, the DFO avers that seal hunting is economically viable, citing statistics demonstrating that the 2006 hunt was one of the “most profitable in memory,” with the price

that many are wounded only to “escape beneath the ice where they die slowly and are never recovered”).

¹⁷ *Id.* at 3. The resolution claims the Canadian government justifies the “expanded seal hunt” on the basis that the seals are “preventing the recovery of cod stocks.” *Id.* However, the resolution goes on to negate this justification by citing the 1994 report by two Canadian scientists finding that overfishing is the cause of the depleted cod stocks, not seal predation, and that the seal blamelessness is the consensus of the “international scientific community.” *Id.* Furthermore, the resolution holds that the seals prey on other predators of cod and therefore are a necessary element in the complex marine system environment contributing to the recovery of the cod. *Id.*

¹⁸ Fisheries and Oceans Canada, *Fisheries and Aquaculture Management: Seals and Sealing in Canada: Canadian Seal Hunt, Myths and Realities*, “Myth #1,” http://www.dfo-mpo.gc.ca/seal-phoque/myth_e.htm (last updated Feb. 22, 2008). The term “whitecoat,” which refers to baby harp seals, comes from the white coat the babies are born with, which generally lasts an average of two to three weeks. *See e.g.* CNN, *Mass Seal Hunt Sparks Outrage*, <http://www.cnn.com/2004/WORLD/americas/04/12/newfoundland.seals/index.html> (posted Apr. 12, 2004) (“Ottawa has since banned the killing of baby seals. Hunters must now wait until pups are at least 12 days old, when they have been weaned and begin to shed their white coats.”).

¹⁹ Fisheries and Oceans Canada, *supra* n. 18, at Myth #1.

²⁰ *Id.* at Myth #2 (“Sometimes a seal may appear to be moving after it has been killed; however seals have a swimming reflex that is active—even after death. This reflex gives the false impression that the animal is still alive when it is clearly dead—similar to the reflex in chickens.”).

²¹ *Id.* at Myth #3.

²² *Id.* at Myth #4.

²³ *Id.* at Myths #4–#5.

²⁴ *Id.* at Myths #6–#7.

per pelt up seventy-seven percent over the 2005 price.²⁵ Furthermore, the DFO contends the sealing industry has not been subsidized since 2001.²⁶ With regard to accusations of inadequate government oversight to control the hunt and ensure humane slaughter methods, the DFO asserts that the “seal hunt is closely monitored and tightly regulated.”²⁷ Finally, the DFO counters claims that the majority of Canadians do not support the hunt by citing a 2005 survey estimating that sixty percent of Canadians favor a responsible hunt.²⁸

Anti-sealing organizations provide contradictory data, stating that the Canadian government has “spread much misinformation.”²⁹ HSUS claims that while direct Canadian government subsidies did in fact cease in 2001, indirect subsidies continue from the Norwegian government, which provides “significant financial assistance” to a Norwegian company purchasing eighty percent of the annual sealskin take.³⁰ The International Fund for Animal Welfare (IFAW) presents “documentary evidence”—two veterinary reports, and videos—which it maintains “simply [do] not support claims by the Canadian government that the hunt is ‘humane’ or ‘well regulated.’”³¹ With regard to the DFO’s statement that only self-reliant, independent seals are hunted because Canadian law prohibits hunting “whitecoats,” anti-sealing supporters point to the misleading nature of those statements because the baby loses its white coat somewhere between twelve and fourteen days after birth.³² According to opponents, on that thirteenth or fifteenth day, the seals are hardly independent or self-reliant, and yet they are “fair game.”³³

As of this writing, Sen. Res. 118 is still pending.³⁴ H. R. Res. 427, on the other hand, has passed.³⁵ Upon its introduction, Sen. Res. 118 was referred to the Senate Committee on Foreign Relations and has

²⁵ Fisheries and Oceans Canada, *Fisheries and Aquaculture Management: Seals and Sealing in Canada: Facts About Seals—2007*, http://www.dfo-mpo.gc.ca/seal-phoque/reports-rapports/facts-faits/facts-faits2007_e.htm (last updated Apr. 27, 2007).

²⁶ Fisheries and Oceans Canada, *supra* n. 18 at Myth #7.

²⁷ *Id.* at Myth #8.

²⁸ *Id.* at Myth #9.

²⁹ Humane Socy. U.S., *About the Canadian Seal Hunt*, http://www.hsus.org/marine_mammals/protect_seals/about_the_canadian_seal_hunt/ (accessed Apr. 13, 2008).

³⁰ *Id.*

³¹ Intl. Fund for Animal Welfare, *Government Subsidized Cruelty*, <http://www.ifaw.org/ifaw/general/default.aspx?oid=129307> (accessed Apr. 13, 2008) (stating also that one of the veterinary reports was commissioned by the Canadian government).

³² Canadian Broadcasting Center, *The Atlantic Seal Hunt—FAQs*, <http://www.cbc.ca/news/background/sealhunt/> (Mar. 29, 2007).

³³ *Id.*

³⁴ Lib. Cong., *THOMAS*, <http://thomas.loc.gov/bss/>; *select* 110th Congress, *search* “seal hunt,” *select* S.RES.118, *select* Text of Legislation (accessed Apr. 13, 2008).

³⁵ Lib. Cong., *THOMAS*, <http://thomas.loc.gov/bss/>; *select* 110th Congress, *search* “seal hunt,” *select* H.RES.427, *select* Text of Legislation (accessed Apr. 13, 2008); H.R. Res. 427, 110th Cong. at 3.

not reemerged.³⁶ H. R. Res. 427 was referred to the House Committee on Foreign Relations during the same session it was introduced and on June 26, 2007, that committee agreed to seek consideration under suspension of the rules.³⁷ On July 30, Representative Lantos, the resolution's sponsor, moved to suspend the rules and agree to the resolution.³⁸ On that motion, the resolution was agreed to by a voice vote without objection.³⁹

2. *Bonneville Dam Sea Lions—A Multi-State and Federal Controversy*

The Bonneville Dam, located within the Columbia River Gorge, on the Columbia River in Oregon, is the site of an unusual ecological dilemma, wherein two protected species—seals and sea lions (collectively referred to as sea lions) and wild salmon⁴⁰—compete for legal protection.⁴¹ The situation pits the Marine Mammal Protection Act (MMPA), under which sea lions are protected, against the Endangered Species Act (ESA), which protects the wild salmon. Both acts aim to prevent the potential species extinctions that might result from continuing to allow certain current human practices to go on unabated.⁴²

This ecological conundrum of competing protected species and multi-state interests comprised of fishing economies, sports-fishing, commercial fishing, and subsistence fishing, representing state, tribal, commercial, and private parties,⁴³ has instigated legislative proposals

³⁶ Lib. Cong., *supra* n. 34.

³⁷ Lib. Cong., *supra* n. 35. Under suspension rules, which are generally reserved for non-controversial, bi-partisan legislation, floor debate is limited to forty minutes and no amendments to the bill or resolution may be offered. Elizabeth Rybicki, *CRS Report for Congress: Suspension of the Rules in the House: Principle Features*, <http://www.rules.house.gov/Archives/98-314.pdf> (updated Dec. 8, 2006).

³⁸ Lib. Cong., *supra* n. 35.

³⁹ *Id.*

⁴⁰ Wash. Dept. of Fish & Wildlife, *WDFW Statement Presented by Regional Director Guy Norman at a Sea Lion Press Conference Sponsored by Congressmen Brian Baird and Doc Hastings*, http://wdfw.wa.gov/wlm/sealions/wdfw_statement.htm (Oct. 16, 2006).

⁴¹ USA Today, *Sea Lions Show Salmon What Endangered Really Is*, http://www.usatoday.com/news/nation/2007-04-16-sealions_N.htm (accessed Apr. 13, 2008). ("It's a rare instance of one protected species, sea lions under the Marine Mammal Protection Act, preying on another protected species, chinook salmon listed under the Endangered Species Act.")

⁴² Marine Mammal Protection Act, 16 U.S.C. § 1361(1) (2000); Endangered Species Act, 16 U.S.C. § 1531(a)(1)–(2) (2000).

⁴³ Brand Oregon, *State of Oregon Seafood Commissions*, <http://www.oregon.gov/BRANDOREGON/commissions.shtml> (accessed Apr. 13, 2008) ("The Oregon Salmon Commission was created by an act of the Oregon Legislature in 1983. The Commission's primary functions are marketing and promotion of Oregon Salmon, and the commitment to a sustainable industry for generations to come. . . . The Oregon commercial salmon industry is made up of fishermen and women—many of them third and fourth generation boat owners—who operate small, independent businesses."); U.S. Sen. Diane Feinstein, *Commerce Secretary Gutierrez Declares Commercial Fishery Failure for*

to amend the MMPA to allow for broader discretion in applying lethal methods to control a hungry and clever pinniped⁴⁴ population.⁴⁵ The stated objective of the authors of these proposals is the recovery and survival of the economically valuable and endangered wild salmonid⁴⁶ stock.⁴⁷

The uneven hierarchical system of species jeopardy at play under the ESA contributes to the difficulty of the problem. Although Steller sea lions are listed under the ESA as “endangered” and “threatened,”⁴⁸ they are a small percentage of the feasting Bonneville diners.⁴⁹ The main culprits are the California sea lions, which comprise the majority of the opportunistic diners.⁵⁰ Sea lion populations have rebounded

Pacific Salmon Fisheries, <http://feinstein.senate.gov/06releases/r-fishery-fail.htm> (Aug. 10, 2006) (stating that a substantial drop in the commercial salmon catch in 2006 resulted in a call for disaster relief for the fisheries economies of California and Oregon); Columbia River Inter-Tribal Fish Commn., *Sea Lions and Salmon*, <http://www.critfc.org/sealion/sealion.html> (accessed Apr. 13, 2008); Joseph B. Frazier, *States Seek Lethal Sea Lion Removal*, http://www.livescience.com/animals/060922_ap_sealion_salmon.html (Sept. 22, 2006) (states are working with the Army Corps of Engineers and the Columbia River Tribes); ESPN Fishing, *Enough With Fish-Stealing Sea Lions, Already!*, http://sports.espn.go.com/outdoors/fishing/news/story?page=f_fea_OR_first-hazing-marine-mammals_MF (Jul. 11, 2006) (regarding sports fishing interests, “It’s now so far out of control that it’s threatening the sport-fishing industry”); Timothy Gardner, *Surge in Sea Lion Numbers Angers Fishermen*, Reuters (Nov. 21, 2005) (available at http://www.enn.com/top_stories/article/3095) (demonstrating that for private parties and commercial fishermen tempers are rising over the sea lions).

⁴⁴ “Pinniped” refers to animals “belonging to the *Pinnipedia*, a suborder of carnivores with limbs adapted to an aquatic life, including the seals and walruses.” *Webster’s Third New International Dictionary* 1720 (Philip Babcock Gove Ph.D., ed., 3rd ed., Merriam-Webster Inc. 1986).

⁴⁵ Joseph B. Frazier, *supra* n. 43; Erik Robinson, *Bonneville Sea Lions May Come Under Fire*, *The Columbian* (Clark County, Washington) (Jan. 06, 2008) (available at http://www.columbian.com/news/localNews/2008/01/01062008_Bonneville-sea-lions-may-come-under-fire.cfm); Les Blumenthal, *States Seek Permission to Kill Salmon-Gobbling Sea Lions*, <http://www.klamathbasincrisis.org/fishermen/predators/statesseekpermission041707.htm> (Apr. 15, 2007).

⁴⁶ “Salmonid” refers to fish “belonging or pertaining to the family *Salmonidae*, including the salmons, trouts, chars, whitefishes, etc.” *Webster’s Third New International Dictionary*, *supra* n. 44, at 2004.

⁴⁷ Congressman Brian Baird Newsroom, *Baird, Hastings Take Aim at Sea Lions Preying on Endangered Salmon; Lawmakers Unveil Bipartisan Endangered Salmon Predation Prevention Act*, http://www.house.gov/list/press/wa03_baird/SeaLion101606.html (Oct. 16, 2006).

⁴⁸ U.S. Fish & Wildlife Serv., *USFWS Threatened and Endangered Species System (TESS)*, http://ecos.fws.gov/tess_public/SpeciesReport.do?groups=A&listingType=L&mapstatus=1;search=sea-lion (accessed Apr. 13, 2008).

⁴⁹ Joseph B. Frazier, *Agency OKs the Killing of Sea Lions at Bonneville Dam*, *The Seattle Times* (Mar. 17, 2008) (explaining that Steller sea lions tend to feed on sturgeon, not salmon).

⁵⁰ Wash. Dept. of Fish & Wildlife, *supra* n. 40. See also USA Today, *supra* n. 41, and Columbia River Inter-Tribal Fish Commn., *supra* n. 43 (both citing the California sea lion as the main problem); Joseph B. Frazier, *supra* n. 49 (referring to the California sea lion as the problem and exempting the Steller sea lions because they primarily prey on other than salmon); The Columbia Basin Fish & Wildlife News Bulletin, *NOAA Releases Draft Plan to Remove Salmon-Eating Sea Lions*, <http://www.cbbulletin.com/free/>

since the enactment of the MMPA,⁵¹ and because of this, California sea lions are no longer listed under the ESA.⁵² Salmon on the other hand, a “keystone” species and an essential component of the ecology of many Pacific Northwest states,⁵³ continue to decline, despite ESA protection.⁵⁴ Four of the five species of Pacific Northwest wild salmon are listed per the ESA as endangered⁵⁵ or threatened⁵⁶ and are therefore regulated under the ESA.⁵⁷

The survival of salmon is an issue that galvanizes and aligns the advocacy of commercial fisherman and conservationists alike.⁵⁸ Reportedly, even the Oregon Humane Society gives cautious acknowledgement to the political pressures shaping the demands for taking more severe measures against the predating sea lions.⁵⁹ Despite

255331.aspx (the draft plan is specific to controlling the California sea lion); Michael Milstein, *Plan Calls for Killing Sea Lions at Bonneville Dam*, *The Oregonian* (Jan. 17, 2008) (available at http://blog.oregonlive.com/breakingnews/2008/01/plan_calls_for_killing_sea_lion.html) (explaining that the plan targets California sea lions for lethal control, explaining that their numbers are “booming”).

⁵¹ USA Today, *supra* n. 41 (“Sea lions, reduced to about 50,000 when Congress passed the protection act in 1972, have flourished: More than 300,000 now roam the Pacific coast.”).

⁵² U.S. Fish & Wildlife Serv., *supra* n. 48.

⁵³ Idaho St. U., *ISU Professor Studies Relationship Between Pacific Salmon, Nez Perce Culture*, IUS Headlines, <http://www2.isu.edu/headlines/?p=286> (accessed Apr. 13, 2008) [hereinafter *Idaho State U.*] (“Pacific salmon and steelhead are ‘keystone’ ecological wildlife species to the Pacific Northwest, where, according to the Washington Department of Natural Resources, more than 130 wildlife species depend on Pacific salmon for part of their diet. . . . Pacific salmon can be considered a keystone species in other ways, such as how vital they are to the regional economy of Northwest commercial salmon fishing or to the local economy of a town like Riggins, Idaho, where sport fishing brings in tourists’ dollars.”).

⁵⁴ USA Today, *supra* n. 41 (“Chinook salmon are the losers. Their numbers have been declining for years because of commercial and sport fishing, loss of habitat and the difficulty of negotiating dams on the Columbia and its tributaries.”); Wash. Dept. of Fish & Wildlife, *supra* n. 40.

⁵⁵ Endangered is defined as “[a]n animal or plant species in danger of extinction throughout all or a significant portion of its range.” U.S. Fish & Wildlife Service, *Endangered Species Glossary*, <http://www.fws.gov/Endangered/pdfs/glossary.pdf>, 4 (revised Apr. 2005).

⁵⁶ A plant or animal species is threatened, as defined by the ESA, if it is “likely to become endangered within the foreseeable future throughout all or a significant portion of its range.” *Id.* at 10.

⁵⁷ The U.S. Fish & Wildlife Service, which administers the Endangered Species Act, lists species of salmon: chinook, chum, coho, and sockeye as “T” threatened or “E” endangered. U.S. Fish & Wildlife Serv., *USFWS Threatened and Endangered Species System (TESS)*, http://ecos.fws.gov/tess_public/SpeciesReport.do, search “salmon” (accessed Mar. 30, 2008). All of these are prized in commercial ventures, tribal interests, and the sports fishing industries contributing to the economic welfare of the Pacific Northwest. Pacific Salmon Foundation, *Salmon Species* ¶ 1, <http://www.psf.ca/05salmon/05species.html> (accessed Feb. 11, 2008); see also Idaho St. Univ., *supra* n. 53 (stating that salmon are a “keystone species.”).

⁵⁸ Save Our Wild Salmon, *Coalition Challenges Bush Administration Salmon Plan Seeks Improved River Conditions for Salmon This Summer*, <http://www.removedams.com/library/lib-detail.cfm?docID=384> (Mar. 21, 2005).

⁵⁹ USA Today, *supra* n. 41.

HSUS's assertion that sea lions are unfairly targeted as a scapegoat for the harm to salmon that is actually created by human practices,⁶⁰ the Oregon Humane Society has stated that because interests in preserving salmon are so powerful and compelling, they will not oppose lethal control of the sea lions—provided reliable evidence exists that all non-lethal options have been exhausted prior to choosing killing as the method of control.⁶¹

a. *The Marine Mammal Protection Act and the Endangered Species Act*

The MMPA⁶² was enacted in 1972 to take corrective action to prevent the extirpation of marine mammal species, many of which were faced with the possibility of extinction due to human activities.⁶³ The ESA was enacted in 1973⁶⁴ for the same purpose, but for species other than marine mammals.⁶⁵

Congress makes clear in the preamble to the MMPA that the stakes are high—the extinction of a marine resource valuable to the world economically, ecologically, and aesthetically.⁶⁶ The preamble states that the threat of extinction of marine mammal species is a direct result of human activities.⁶⁷ Because current “knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully” is “inadequate,” Congress advises that immediate steps be taken to prevent or eliminate activities that further the course of their extinction.⁶⁸ It also advises the international community to engage in developing the solutions needed to protect this valuable resource.⁶⁹

The preamble to the ESA puts forth an equally compelling imperative. Focused on fish and wildlife other than marine mammals, and recognizing that specific species have already become extinct as a direct result of human activities, the ESA preamble pledges the United States to undertake conservation policies and actions, in concert with international initiatives, to prevent the further extinction of fish and

⁶⁰ Humane Socy. U.S., *Salmon and Sea Lions in the Pacific Northwest*, http://www.hsus.org/marine_mammals/marine_mammals_news/salmon_and_sea_lions_in_the.html (Mar. 20, 2007).

⁶¹ USA Today, *supra* n. 41, at [¶ 17]. (“The Oregon Humane Society won’t oppose killing Bonneville sea lions if the states show that other measures have failed,’ Executive Director Sharon Harmon says. ‘I recognize the political reality,’ she says. ‘We could end up with no salmon while we discuss the issue to death.’”).

⁶² 16 U.S.C. § 1361.

⁶³ *Id.* at §1361(1).

⁶⁴ 16 U.S.C. § 1531.

⁶⁵ *Id.* at § 1531(a)(1)–(2).

⁶⁶ 16 U.S.C. § 1361(6) (“marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic . . .”).

⁶⁷ *Id.* at § 1361(1).

⁶⁸ *Id.* at § 1361(2)–(4).

⁶⁹ *Id.* at § 1361(4).

wildlife at risk of extinction.⁷⁰ Through the preamble, the legislature underscores its imperative with a statement of policy that it is the obligation of Congress and all its agencies to use their authorities to further this objective.⁷¹

The heart of the current issue is that the clever sea lions, which have for many years feasted at the fish-ladder buffet, in 2004 developed new behaviors that are taking a higher toll on the migrating salmon.⁷² The sea lions have discovered how to actually enter the fish ladders, instead of waiting opportunistically at the base of the ladders.⁷³ The U.S. Army Corps of Engineers calculated that by 2005 the sea lions' consumption of salmon had tripled.⁷⁴

b. Proposed Amendments to the Marine Mammal Protection Act

Against this backdrop of competing protections, competing interests, unusual alliances, and high tempers, two bills were submitted in the House of Representatives in 2007, proposing amendments to the MMPA's current provisions on lethal taking of marine mammals for the specific purpose of controlling sea lions that predate on salmon at the Bonneville Dam. On February 13, 2007, Representative Don Young (R-AK) introduced H.R. 1007,⁷⁵ and on March 29, 2007, Representative Brian Baird (D-WA) introduced H.R. 1769.⁷⁶

At issue in particular is the MMPA's "zero mortality goal."⁷⁷ The MMPA declares a complete moratorium on the taking of all marine mammals as of its enactment, subject to a few very specific excep-

⁷⁰ 16 U.S.C. § 1531(a)(4)–(5).

⁷¹ *Id.* at § 1531(c)(1) ("It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.")

⁷² Witt Anderson, U.S. Army Corps Of Engineers Northwestern Division, *Congressional Meeting on Impediments To Returning Adult Salmon Columbia River Basin*, http://www.salmonrecovery.gov/research_reports_pubs/Congressional_Testimony/doc/PendletonMtgCorpsStatement02-06.pdf (Feb. 21, 2006).

⁷³ *Id.* Anderson stated in his testimony that,

[i]n 2004, for the first time, a sea lion entered the adult passage fishways, either in search of fish or just exploring. For many years sea lions have been swimming nearly 140 miles up the Columbia River to Bonneville Dam, during the spring migration of salmon, steelhead and other anadromous fish. . . . But in 2004 the new behavior surfaced and by 2005 a few of these animals had learned to find and enter the fish ladders at Bonneville Dam.

⁷⁴ *Id.* at 2–3. ("The amount of fish eaten by sea lions has increased every year since studies were undertaken by the Corps, from 0.4 percent (1,010 fish) of the total spring salmon run in 2002, to 3.4 percent in 2005 (2,920 fish).")

⁷⁵ H.R. 1007, 110th Cong. (Feb. 13, 2007) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1007ih.txt.pdf).

⁷⁶ H.R. 1769, 110th Cong. (Mar. 29, 2007) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1769ih.txt.pdf).

⁷⁷ 16 U.S.C. § 1371(a)(2). The zero mortality goal text of the MMPA is most commonly referred to, however, as "section 102," which is a reference to the corresponding public law number. Pub. L. No. 92-522, § 102, 86 Stat. 1032 (1972).

tions.⁷⁸ Although these exceptions include “incidental taking in the course of commercial fishing,”⁷⁹ the MMPA concludes that regardless of these exceptions, the overriding goal is still “zero mortality.”⁸⁰ Under the current MMPA, people must use nonlethal methods to deter marine mammals from damaging fishing gear or catch, and those methods may not seriously injure or result in the death of the animal.⁸¹

Efforts to curb the sea lions’ take of salmon at Bonneville Dam by nonlethal methods so far appear to have no effect.⁸² The number of sea lions dining at the dam continues to increase and the number of salmon taken is also on the rise.⁸³ The nonlethal tactic of hazing⁸⁴ appears to have had no significant deterrent effect, despite the increase in hazing action, the intensity of the action, and the period of time permitted for hazing.⁸⁵ Efforts to identify and deal directly with individual nuisance animals have also failed to yield the desired results.⁸⁶ Some of the other nonlethal deterrent methods are considered cruel in themselves and, when applied to endangered animals, like the Steller sea lions, could result in court action to prohibit their use.⁸⁷

⁷⁸ *Id.* at §1371(a) (“There shall be a moratorium on the taking and importation of marine mammals and marine mammal products, commencing on the effective date of this chapter, during which time no permit may be issued for the taking of any marine mammal and no marine mammal or marine mammal product may be imported into the United States except pursuant to limited exception.”).

⁷⁹ *Id.* at §1371(a)(2).

⁸⁰ *Id.* (“In any event it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.”).

⁸¹ *Id.* at §1371(a)(4)(A).

⁸² Wash. Dept. of Fish & Wildlife, *supra* n. 40.

⁸³ *Id.*

⁸⁴ Hazing, while not legally defined, is used synonymously with “harass.” To haze is “to harass with unnecessary or disagreeable tasks.” *Webster’s Third New International Dictionary*, *supra* n. 44, at 1041. The MMPA defines harassment as “any act of . . . torment, or annoyance” that “has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” 16 U.S.C. § 1362(18)(A)(ii).

⁸⁵ See Wash. Dept. of Fish & Wildlife, *Oregon and Washington to Expand Sea Lion Control Efforts in the Columbia River*, <http://wdfw.wa.gov/do/newreal/release.php?id=mar1706b> (Mar. 17, 2006) (discussing increased sea lion deterrence efforts); see also Vince Patton, *KGW.com, Aggressive Sea Lion Hazing to Begin at Bonneville Dam*, http://www.kgw.com/environment/stories/kgw_022707_env_sea_lion_hazing.2cb60dc.html (Feb. 27, 2007) (“Unlike last year’s hazing which staggered on for four days followed by four days off, this year the harassment will blitz the sea lions from dawn to dusk, seven days a week from March 1 through the end of May. The only breaks will come at night.”).

⁸⁶ Rick Bowmer, *Crafty Sea Lion Confounds Engineers*, http://www.usatoday.com/news/offbeat/2006-03-31-sealion_x.htm (last updated Apr. 1, 2006).

⁸⁷ Env. News Serv., *Judge Halts Hot Branding of Stellar Sea Lions*, <http://www.ensnewswire.com/ens/may2006/2006-05-31-05.asp> (May 31, 2006) (noting that in a separate ruling unrelated to the Bonneville dam controversy, hot branding Steller sea lions

While nonlethal methods fail to deter the salmon-eating sea lions, tempers and frustration over the situation on all sides are rising. Some opponents of the bill express their hostility toward those who want to kill the sea lions.⁸⁸ There are reports that both anglers and biologists are “increasingly frustrated” with the toll they perceive the sea lions are taking on the endangered salmon population.⁸⁹ Some tribes are reported to be “outraged” at the sea lions that are eating what they claim to be “sacred fish.”⁹⁰ There are also reports of fishermen taking matters into their own hands because they are frustrated with the ineffectiveness of nonlethal deterrence, convinced that stronger measures are needed, and fed up with waiting for the government to take effective measures.⁹¹

H.R. 1007’s primary goal is to amend the MMPA to repeal the zero mortality goal and to modify the goal for reducing takings resulting in death or serious injury.⁹² The findings stated in the preamble of this bill⁹³ are based on the precept that the MMPA’s goal was to sustain marine mammal populations at their optimum sustainable level, and

for identification, and the subsequent invasive research, have been prohibited by court order because of their potential to hurt the animal and detrimentally affect the population as a result). See also Cassandra Profita, *Culprits Marked for Life*, *The Daily Astorian* (Astoria, Or.) (Oct. 3, 2006) (available at <http://www.dailyastorian.info/main.asp?SectionID=2&SubSectionID=398&ArticleID=36729>) (stating that the Oregon Department of Fish and Wildlife is using branding to track sea lions movement at the Bonneville dam).

⁸⁸ Hal Bernton, *Snacking Sea Lions Scarfing Up Sparse Columbia Chinook Salmon Run*, *The Seattle Times* (Apr. 14, 2005) (available at http://seattletimes.nwsourc.com/html/localnews/2002241109_damlion14m.html) (one angler who likes the sea lions reported that he “almost got in a fistfight” with other anglers who were throwing stones at the sea lions to scare them away because they think the sea lions scare the fish away even if they don’t eat them).

⁸⁹ See Milstein, *supra* n. 50, at [¶¶ 12–17] (“Anglers and biologists have grown increasingly frustrated with sea lions that swim up the Columbia to Bonneville Dam, where they feast on salmon gathering to climb fish ladders upriver. . . . [this is] especially galling to fishermen who take extra care with wild salmon, releasing them back into the river. . . . ‘If we don’t begin to sanely control this situation, fishermen are going to lose their cool and start shooting. . . . We need some common sense out there. People are at the boiling point.’”) (quoting Dennis Richey, Executive Director of Oregon Anglers).

⁹⁰ USA Today, *supra* n. 41, at [¶ 18] (“Four Indian tribes on the lower Columbia that have strong cultural connections to chinook salmon are ‘outraged’ that sea lions are eating their sacred fish, says Charles Hudson, spokesman for the Columbia River Inter-Tribal Fish Commission. Salmon are ‘highly prized for ceremonial functions, including funerals, weddings and other celebrations,’ he says.”).

⁹¹ Joseph B. Frazier, *SignOnSanDiego.com*, *Signs Emerge of Vigilante Approach to Protected Sea Lions*, Assoc. Press (Apr. 19, 2007) (available at <http://www.signonsandiego.com/news/nation/20070419-1635-wst-sealionshot.html>) (reporting that a fisherman shot a sea lion that stole a salmon off his fishing line).

⁹² H.R. 1007, 110th Cong. at § 2. Unlike H.R. 1769, this bill has no short title. Its long title is “A Bill to amend the Marine Mammal protection Act of 1972 to repeal the long-term goal for reducing to zero the incidental mortality and serious injury of marine mammals in commercial fishing operations, and to modify the goal of take reduction plans for reducing such takings.” *Id.*

⁹³ *Id.* at § 1.

so long as annual removals do not threaten this level, lethal methods of control should be allowed when warranted.⁹⁴ H.R. 1007 asserts that marine mammals “have reached historic levels [and] are impeding the recovery of endangered species and threatened species through predation or competition in the ecosystem,” and that the principles of ecosystem management are undermined by giving marine mammals the “preeminent position” implicit in retaining the zero mortality goal.⁹⁵

H.R. 1769, titled “The Endangered Salmon Predation Prevention Act,” aims to provide a temporary measure to expedite the permitting process by which the Secretary of Commerce (Secretary)⁹⁶ can approve the removal of problem animals by lethal methods.⁹⁷ In this expedited process, the Secretary would respond to a request for a permit to lethally remove a California sea lion “on the [w]aters of the Columbia or its tributaries” within thirty days,⁹⁸ where nonlethal methods have failed to protect the salmon from California sea lion predation.⁹⁹ The bill would also increase the number of animals that can be lethally taken per permit and holds the potential to increase the number of permits issued.¹⁰⁰

Proponents are convinced nonlethal deterrents have been and will continue to be ineffective.¹⁰¹ They assert that wild salmon populations are in decline at least in part due to sea lion predation¹⁰² and that, in any event, although sea lion predation may not be the cause of the

⁹⁴ *Id.* at § 1(1)–(2).

⁹⁵ *Id.* at § 1(5)–(6).

⁹⁶ 16 U.S.C. § 1362(12)(A)(i)–(ii).

⁹⁷ H.R. 1769, 110th Cong. at § (3)(k).

⁹⁸ *Id.* at § 3(k)(3)(B).

⁹⁹ *Id.* Currently, the MMPA provides up to one hundred and five days for the Secretary to issue a permit for lethal taking. 16 U.S.C. § 1389(c)(1)–(4). Within fifteen days of receiving the application, the Secretary will determine if further study is warranted. *Id.* If it is, the Secretary will appoint a Pinniped-Fishery Interaction Task Force with up to sixty days to receive public comment and come to a recommendation on the matter. *Id.* Upon receiving the recommendations from the Task Force, the Secretary has up to thirty days to make a decision to “approve or deny” the permit. *Id.*

¹⁰⁰ H.R. 1769, 110th Cong. § 3(k)(3)–(8) (explaining the permit process and the limitations on takings, under which the Secretary may issue multiple permits to a single “eligible entity, each permit allowing the taking of up to ten California sea lions, but limiting use to one permit per fourteen-day period per entity” and defining an “eligible entity” as “each of the State of Washington, the State of Oregon, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation”).

¹⁰¹ Wash. Dept. of Fish & Wildlife, *supra* n. 40.

¹⁰² *Id.* at [¶ 12] (“Needless to say, this is a very unnatural situation that requires active intervention to restore nature’s balance. It is vitally important to restore a balance in the Columbia River between the overly abundant California sea lion population and the endangered and threatened salmon and steelhead populations.”); *see also* Wash. Dept. of Fish & Wildlife, *Washington and Oregon Expand Hazing Efforts to Deter Sea Lions from Preying on Salmon, Steelhead*, <http://wdfw.wa.gov/do/newreal/release.php?id=mar0207b> (Mar. 2, 2007) (explaining the effects of sea lion predation).

overall wild salmon decline, it is certainly preventing wild salmon recovery.¹⁰³

Opponents argue that the MMPA already has a sufficient mechanism for allowing lethal taking when necessary¹⁰⁴ of “individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks.”¹⁰⁵ They oppose culling numbers of sea lions, as H.R. 1769 proposes to allow.¹⁰⁶ Opponents also argue that the lethal take mechanism should not be used to support the repeal of the zero mortality goal¹⁰⁷ and that there is no data to substantiate the claim that the sea lions are having a “significant negative impact,”¹⁰⁸ because such an impact can only be attributed to the activities of humans.¹⁰⁹ Given that, opponents contend, focusing on the sea lions will actually be to the detriment of the salmon by diverting time and resources away from solving the real problems—dams and overfishing.¹¹⁰ Additionally, opponents point out that allowing lethal taking could be dangerous to humans by giving fishers, who are likely unskilled at handling firearms, the license to shoot at

¹⁰³ Andy Parker, Wash. Dept. Fish & Wildlife, *Columbia River Sea Lions, What would happen if California sea lions were allowed to continue foraging in the lower river?* <http://wdfw.wa.gov/wlm/sealions/questions.htm> (accessed Apr. 13, 2008).

¹⁰⁴ Humane Socy. U.S., *Scapegoating Seals and Sea Lions*, http://www.hsus.org/marine_mammals/what_are_the_issues/commercial_fisheries_and_marine_mammals/scapegoating_seals_and_sea_lions/ (accessed Apr. 13, 2008).

¹⁰⁵ 16 U.S.C. § 1389(b)(1) (2000) (emphasis added).

¹⁰⁶ See Ltr. from Sharon B. Young, Marine Issues Field Director, to Donna Darm, Asst. Regional Administrator, Natl. Marine Fisheries Serv., *Section 120 Application for Oregon, Washington and Idaho [72 FR 4239]* (Mar. 15, 2007). See also Sharon B. Young, Marine Issues Field Director, Humane Socy. U.S., *Testimony on H.R. 1769, Before the Committee on Natural Resources, Subcommittee on Fisheries, Wildlife and Oceans U.S. House of Representatives 2-3* (Washington, D.C., Aug. 2, 2007) (stating that HSUS must oppose H.R. 1769 because it proposes issuing permits for culling the sea lions versus taking single, specifically identified animals as the MMPA originally intended). The reference in this letter to “Section 120” is a synonymous reference to 16 U.S.C. § 1389. “Section 120” is most commonly used when referring to this particular section of the MMPA. “Section 120” refers to the public law number counterpart for the U.S.C. designation. Pub. L. No. 92-522 § 120, 108 Stat. 562 (1994).

¹⁰⁷ Humane Socy. U.S., *supra* n. 104.

¹⁰⁸ Natl. Oceanic & Atmospheric Assn., *Final Report and Recommendations of the Marine Mammal Protection Act, Section 120 Pinniped-Fishery Interaction Task Force: Columbia River November 5, 2007, Appendix B, Minority Opinion*, “The Decline and Recovery of Fish,” <http://www.nwr.noaa.gov/Marine-Mammals/Seals-and-Sea-Lions/Sec-120-TF-Rpt.cfm>; *select* Appendix B, Minority Opinion (accessed Feb. 20, 2008); Humane Socy. U.S., *supra* n. 104.

¹⁰⁹ Humane Socy. U.S., *Killing Calif. Sea Lions Won't Save Endangered Salmon Population, Says The Humane Society of the United States*, http://www.hsus.org/press_and_publications/press_releases/killing_calif_sea_lions.html (Dec. 4, 2006).

¹¹⁰ The Humane Society asserts that,

NMFS's preoccupation with lethal removal of seals and sea lions has caused more harm to depleted fish stocks than any number of marine mammals could ever do. By diverting precious resources and time away from the true causes of the fish declines, NMFS has only exacerbated the real problem—human mismanagement of natural resources and fish populations.

will to protect their gear and catch.¹¹¹ Furthermore, they assert that even if sea lions are taking some toll, we do not have the ability to correctly identify the real offenders and that lethal taking under the proposed expedited process may result only in needlessly killing animals without eliminating the individuals taking the most salmon.¹¹²

Neither bill has been enacted as of this writing. After its introduction, H.R. 1007 was referred to the House Committee on Natural Resources, which in turn referred the bill to the Subcommittee on Fisheries, Wildlife and Oceans, where it remains.¹¹³ H.R. 1769 was also referred to the House Committee on Natural Resources and also sits with the Subcommittee on Fisheries, Wildlife and Oceans.¹¹⁴ The Subcommittee has held hearings on the bill, but no reports have been made public through the Congressional Record and no further decisions have been published.¹¹⁵

Humane Socy. U.S., *supra* n. 104, at ¶ 7. See also Humane Socy. U.S., *supra* n. 109 (quoting the U.S. Army Corps of Engineers' testimony that sea lions are not responsible for lowered fish populations). The article states:

The U.S. Army Corps of Engineers estimates California sea lions eat only 3 percent to 4 percent of the salmon near Bonneville Dam, while state laws allow fishermen to catch up to 50 percent of the returning fish in any season . . . Testifying before Congress, the Corps, which manages the [Bonneville] dam, stated that in addition to overfishing, the dam itself is adding to the demise of fish populations which was initially brought on by mining, logging, agriculture and degradation of their habitat from human encroachment. . . . Salmon stocks have been declining in the Pacific Northwest for more than 100 years. At times over the years, it has been legal to kill large numbers of seals and sea lions, but still the decline continued. In comparison, salmon stocks in wild rivers of Alaska that also are eaten by seals and sea lions have not suffered similar declines.

Id. at [¶¶ 4–5].

¹¹¹ Humane Socy. U.S., *supra* n. 104, at ¶ 5 (“Given the shooting skills of the average commercial fisherman, who undoubtedly spends little time on a shooting range, the possibility that a stray bullet could accidentally hit a pleasure-boat passenger or an endangered Steller sea lion is very real.”).

¹¹² An Action Alert on the In Defense of Animals Web site stated:

Even though the Bonneville Dam task force was provided with information that shows some sea lions eat many more salmon than others, the criteria for killing a sea lion is any animal who has been seen eating salmonids between January 1st and May 31st of any year, and has been seen below the dam for any 5 days (either consecutively, or within a season or over multiple years). This low threshold means that those killed may not even be those who eat the most fish.

In Def. of Animals, *In Defense of Animals Northwest Update, News/Action Alerts, Bonneville Sea Lions Need Our Help NOW!*, http://ga0.org/indefenseofanimals/notice-description.tcl?newsletter_id=12662681 (accessed Apr. 13, 2008).

¹¹³ Lib. Cong., *THOMAS: Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; search “zero mortality,” select Bill Number search “H.R. 1007,” select All Congressional Actions (accessed Apr. 13, 2008).

¹¹⁴ Lib. Cong., *THOMAS: Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; search “sea lion,” select Bill Number search “H.R. 1769,” select “All Congressional Actions” (accessed Apr. 13, 2008).

¹¹⁵ *Id.*

While these bills are awaiting further Committee action, the Bonneville Dam controversy continues. Currently, Washington, Oregon, and Idaho have submitted requests for permits to use lethal control methods.¹¹⁶ On March 18, 2008, NMFS granted the permits to kill up to eighty-five sea lions at the Bonneville Dam starting this spring.¹¹⁷ On March 24, 2008, the Humane Society of the United States and the Wild Fish Conservancy filed suit to stop NMFS from killing the sea lions at the dam.¹¹⁸

B. Companion Animals

1. Charitable Remainder Pet Trust Act

When a non-human creature inherits twelve million dollars the nation takes notice. Such is the case of Trouble, the Maltese pooch. This tiny canine¹¹⁹ is now among the wealthiest of “Americans” after inheriting a multi-million dollar trust fund from owner, hotelier Leona Helmsley.¹²⁰ Though the majority of Americans are unlikely to bequeath such behemoth sums to their beloved pets, pending legislation would make it possible for pet owners to provide for their pets in their wills and also to set up pet trust funds. The federal tax code does not currently recognize the validity of either action.¹²¹

On May 24, 2007, Representatives Earl Blumenauer (D-OR) and Jim Ramstad (R-MN), introduced the CHARITABLE REMAINDER PET TRUST ACT (PET TRUST ACT) to revise the Internal Revenue Code to allow for the establishment of trust funds with pets as beneficiaries.¹²² If enacted, the Pet Trust Act would provide for the continued care of a pet who outlives its owner, and upon the death of the animal beneficiary, allow for the allocation of the remainder to a charity of the owner’s

¹¹⁶ Frazier, *supra* n. 43.

¹¹⁷ Erik Robinson, *Feds Give OK to Kill Salmon-Scarving Sea Lions*, *The Columbian* (Mar. 19, 2008) (available at http://www.columbian.com/news/localNews/2008/03/03192008_Feds-give-OK-to-kill-salmon-scarving-sea-lions.cfm).

¹¹⁸ Humane Socy. U.S., *The HSUS and Wild Fish Conservancy File Suit to Stop Sea Lion Killing at the Bonneville Dam*, http://www.hsus.org/press_and_publications/press_releases/hsus_and_wild_fish_conservancy_sue_to_stop_sea_lion_killing_032408.html (Mar. 27, 2008).

¹¹⁹ Maltese measure eight to ten inches high and weigh six to nine pounds. Dog Breed Info Center, *Maltese*, <http://www.dogbreedinfo.com/maltese.htm> (accessed Apr. 13, 2008). The American Kennel Club (AKC) classifies the Maltese as a “toy breed.” Amer. Kennel Club, *Maltese Breed Standard*, <http://www.akc.org/breeds/maltese/index.cfm> (accessed Apr. 13, 2008).

¹²⁰ Alan Feuer, *Helmsley, Through Will, Is Still Calling the Shots*, 156 N.Y. Times B2 (Aug. 30, 2007).

¹²¹ Doris Day Animal League, *Animal Facts 2007, Charitable Pet Trust Act*, <http://www.ddal.org/pdf/factsheets/pettrustfacts.pdf> (accessed Apr. 13, 2008).

¹²² Lib. Cong., *THOMAS: Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; search “charitable remainder,” select All Congressional Actions (accessed Apr. 13, 2008); 153 Cong. Rec. H5923 (daily ed. May 24, 2007); 153 Cong. Rec. E1147–48 (daily ed. May 25, 2007).

choice.¹²³ If passed, the Pet Trust Act will alter the federal tax code to include pet trusts among the trusts recognized by the code as valid.¹²⁴

The potential to create trusts with animal beneficiaries already exists at the state level, but not at the federal level.¹²⁵ Thirty-nine states and the District of Columbia already allow pet owners to include their pets' long term care as part of their estate plan.¹²⁶ The Internal Revenue Code, however, designates such trusts as either enforceable or unenforceable, depending on the jurisdiction in which the trust was created, but stipulates that "the transfer would not be deductible for income, gift, and estate tax deduction purposes; therefore, no qualified charitable remainder trust would exist."¹²⁷ According to HSUS, the ability to provide for the care of a companion animal in this way is vital, considering the staggering statistic that three to four million companion animals are euthanized each year due to lack of care.¹²⁸

Proponents support the bill as a means of ensuring cherished pets are well taken care of in the event of the owner's death or incapacitation, as well as sheltering the remaining funds for transfer to the owner's favored charities after the pet's passing.¹²⁹ Approximately fifty-eight million American households share their lives with companion animals.¹³⁰ Of these, it is estimated that roughly twenty percent include their pets in their wills.¹³¹ Currently, however, legal methods for backing up the choice to do so vary from state to state. Not all states allow owners to set up trusts for pets or to include them in their wills.¹³² Also, the amount of time that trusts remain active may be limited.¹³³ In any event, regardless of state provisions, the federal tax code does not recognize pet trusts as valid trusts.¹³⁴ These legal uncer-

¹²³ Humane Socy. U.S., *Charitable Remainder Pet Trust Act*, http://www.hsus.org/legislation_laws/federal_legislation/companion_animals/2007_charitable_remainder_pet_trust.html (accessed Apr. 13, 2008).

¹²⁴ H.R. 2491, 110th Cong. § 1 (May 24, 2007) (available at <http://www.gpoaccess.gov/bills/search.html>; *select* 110th Congress, *search* "pet trusts," *select* H.R. 2491:PDF).

¹²⁵ Humane Socy. U.S., *Support the Charitable Remainder Pet Trust Act*, https://community.hsus.org/campaign/FED_2007_pettrust (accessed Apr. 13, 2008); Humane Socy. U.S., *Sacred Trust: Charitable Remainder Pet Trust Act*, http://www.fund.org/news/pet_trusts_july2007.html (Jul. 23, 2007).

¹²⁶ Humane Socy. U.S., *Support*, *supra* n. 125, at ¶ 1 ("As part of their estate planning, in these jurisdictions individuals can assign their pets a permanent guardian and make provisions for veterinary care, food, water, and companionship.").

¹²⁷ Planned Giving Design Center, *H.R. 1796: Charitable Remainder Trusts for Pets* 3, "Points to Ponder," <http://www.pgdc.com/usa/item/?itemID=47434> (accessed Apr. 13, 2008).

¹²⁸ Humane Socy. U.S., *Sacred Trust*, *supra* n. 125.

¹²⁹ *Id.* at 2.

¹³⁰ Doris Day Animal League, *supra* n. 121, at [¶ 1].

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* ("[T]he federal tax code does not recognize the validity of these trusts. The Internal Revenue Code views companion animals as 'property,' and one piece of property cannot hold title to another. Therefore the federal government does not allow a companion animal to be the sole beneficiary of either a will or a trust.").

tainties lead proponents to herald the Pet Trust Act as the answer to an owner's concern for ensuring that a cherished pet is adequately cared for when the owner is no longer able to do so.¹³⁵ Proponents point to other benefits as well, such as the federal tax break owners receive by establishing such a trust, the benefit to society of relieving in some part the burden of caring for abandoned or orphaned animals, and the "peace of mind" that comes with the knowledge that one's pet will receive adequate care.¹³⁶ There does not appear to be any organized opposition to passage of the Pet Trust Act.

The Pet Trust Act was referred to the House Committee on Ways and Means upon its introduction in the House on May 24, 2007.¹³⁷ The next day, the bill's co-sponsor, Representative Blumenauer, made the introductory remarks to the Committee.¹³⁸ The Pet Trust Act has not re-emerged from Committee.¹³⁹

2. *Human and Pet Food Safety Act*

In the face of continued pet food recalls,¹⁴⁰ in September 2007,¹⁴¹ the Senate approved portions of the Human and Pet Food Safety Act of 2007 (Food Safety Act) in the form of an amendment to the separately pending Food, Drug, and Cosmetic Act, H.R. 3580.¹⁴² As a result, the Food and Drug Administration (FDA) is now required to set standards for pet food processing and ingredients in order to avert another rash of animal illnesses and deaths like the one that preceded the advent of this bill.¹⁴³

¹³⁵ *Id.* at "The Solution."

¹³⁶ Doris Day Animal League, *supra* n. 121.

¹³⁷ Lib. Cong., THOMAS: *Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; select 110th Congress; search "charitable remainder pet trusts," select All Congressional Actions (accessed Apr. 13, 2008).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Humane Socy. U.S., *Recalled Pet Food and Treats*, http://www.hsus.org/pets/pet_food_safety_center/recalled_pet_food_and_treats.html (accessed Apr. 13, 2008); FDA, *Pet Food Recall (Melamine)/Tainted Animal Feed*, <http://www.fda.gov/oc/opacom/hottopics/petfood.html> (updated Feb. 6, 2008); see also e.g. FDA, *FDA Expands Its Nationwide Warning About the Risk of Botulism Poisoning From Certain Castleberry's Food Products and Dog Food*, <http://www.fda.gov/bbs/topics/NEWS/2007/NEW01670.html> (revised July 26, 2007) (listings of pet food recalls).

¹⁴¹ Humane Socy. U.S., *Our Pets Deserve Safe Food*, https://community.hsus.org/campaign/FED_2007_pet_food (accessed Apr. 13, 2008) ("In September, Congress approved several elements of a human and pet food safety bill introduced by Sen. Richard Durbin (D-Ill.) and Rep. Rosa DeLauro (D-Conn.), which became law as part of a broader package of FDA reforms.").

¹⁴² Lib. Cong., THOMAS: *Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; search "H.R.3580," select H.R.3580, select All Information (accessed Apr. 13, 2008); Lib. Cong., THOMAS: *Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; search "H.R.3580," select H.R.3580, select Text of Legislation, select H.R. 3580.EH., select SEC. 1002. ENSURING THE SAFETY OF PET FOOD (accessed Apr. 13, 2008).

¹⁴³ *Id.* at Title VI (Sec. 602); Humane Socy. U.S., *Our Pets Deserve Safe Food*, https://community.hsus.org/campaign/FED_2007_pet_food (accessed Apr. 13, 2008).

Senator Dick Durbin (D-IL) originally introduced the Food Safety Act in the Senate on May 2, 2007, as Sen. 1274.¹⁴⁴ On the same day, Representative Rosa DeLauro (D-CT) introduced its companion, H.R. 2108, in the House.¹⁴⁵ While portions of the bill have already been enacted as amendments to the Federal Food, Drug, and Cosmetic Act, key portions are still pending, including a mandatory recall authority and certification of foreign food systems.¹⁴⁶

Provisions of the Food Safety Act yet to be enacted include: 1) a mandatory requirement for persons to notify the Secretary of Health and Human Services (Secretary)¹⁴⁷ when they reasonably suspect violations of the Act are occurring or have occurred;¹⁴⁸ 2) a provision granting the Secretary the authority to remove the food from the supply chain or otherwise control its distribution upon such notification;¹⁴⁹ 3) a provision granting the Secretary the authority to visit foreign countries to assess the food safety programs, including pet food safety programs, or to conduct investigations when a food violation is uncovered;¹⁵⁰ 4) a provision authorizing the Secretary to work with companies to ensure "efficient and effective communications" during a recall, including collecting and aggregating information from those companies, using communications networks (electronic or otherwise) to expedite disseminating information to the public;¹⁵¹ and 5) a provision authorizing the Secretary to set processing, ingredient, and labeling standards, as well as establish an "early warning surveillance system" to detect pet food contaminations and illness outbreaks from pet food.¹⁵²

No organized opposition to the Food Safety Act appears to exist. The lack of opposition is not surprising, considering that the risks to both human and animal health of taking no corrective action are so obvious as to garner support for protective action from all segments of society.¹⁵³ The FDA states that they "support any change that would

¹⁴⁴ Sen. 1274, 110th Cong. (May 2, 2007) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s1274is.txt.pdf).

¹⁴⁵ H.R. 2108, 110th Cong. (May 2, 2007) (available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2108ih.txt.pdf).

¹⁴⁶ *Supra* n. 140.

¹⁴⁷ U.S. Food & Drug Admin., *FDA Organization* ¶ 1, <http://www.fda.gov/opacom/7org.html> (accessed Apr. 13, 2008) (stating that the "FDA is an agency within the Department of Health and Human Services").

¹⁴⁸ Sen. 1274, 110th Cong. § 417.

¹⁴⁹ *Id.* at § 418.

¹⁵⁰ *Id.* at § 419.

¹⁵¹ *Id.* at § 3.

¹⁵² *Id.* at § 4.

¹⁵³ Rick Weiss & Nancy Trejos, *Crisis Over Pet Food Extracting Healthy Cost*, <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/01/AR2007050101918.html> (May 2, 2007); David S. Martin, *Lawmakers Push for Change in Food Safety Oversight*, <http://www.cnn.com/2007/HEALTH/05/17/food.safety.law/index.html> (May 18, 2007).

make food safer.”¹⁵⁴ Many businesses also take a sober view and support these measures.¹⁵⁵

The specters of sizeable litigation,¹⁵⁶ product recalls,¹⁵⁷ and catastrophic revenue declines¹⁵⁸ await businesses in the food supply chain that run afoul of the public’s expectation to be kept safe from preventable injuries and illness.¹⁵⁹ As the Food Safety Act’s title indicates, that expectation extends to animals as well.¹⁶⁰ Concerned about the risks associated with non-passage of the Food Safety Act and feeling a sense of urgency, Representative DeLauro declared:

After the countless recalls, alerts and advisories from the past year, along with the latest CDC [Centers for Disease Control and Prevention] numbers showing increases in various food-borne illnesses, the evidence is clear our food safety system is collapsing and one of the main agencies charged with protecting it, is asleep. . . . This needs to change immediately—it is time to transform the FDA from the toothless agency it has become to one that takes the proactive steps necessary to protect our food supply and the public health.¹⁶¹

Furthermore, Senator Durbin and Representative DeLauro stated:

[The] [CDC] estimate that as many as 76 million people suffer from food poisoning each year. Of those individuals, approximately 325,000 will be hospitalized, and more than 5,000 will die. With emerging pathogens, a population at high risk for food-borne illnesses and an increasing volume of food imports, this situation is unlikely to improve without decisive action.¹⁶²

¹⁵⁴ Martin, *supra* n. 153, at [¶ 22].

¹⁵⁵ *Id.*; Kevin T. Higgins, *Food Safety Crisis*, http://www.foodengineeringmag.com/CDA/Articles/Cover_Story/BNP_GUID_9-5-2006_A_1000000000000228758 (Jan. 1, 2008).

¹⁵⁶ Univ. of Md., *Pet Food Contamination—Expert Q&A*, <http://www.newswise.com/articles/view/529416/> (Apr. 26, 2007).

¹⁵⁷ Higgins, *supra* n. 155.

¹⁵⁸ According to the Food Safety Center:

These events followed close after the most-widely discussed food safety catastrophe this year. Beginning in March 2007, pet food manufacturers recalled more than 100 brands of cat and dog food after receiving complaints about cats and dogs that developed kidney failure from eating pet food. For weeks after, new brands were pulled from shelves as processors tracked the tainted wheat gluten.

Caroline Smith DeWaal, Dir. Food Safety Center for Science in the Public Interest, *Testimony . . . before the House Appropriations Subcommittee on Agriculture, Rural Development, Food and Drug Administration, and Related Agencies* (Washington D.C., Sept. 25, 2007) at 3 (available at http://cspinet.org/foodsafety/housestatement_long_92507.pdf).

¹⁵⁹ E.S. Mundell, U.S. News, *U.S. Food Safety: The Import Alarm Keeps Sounding*, <http://health.usnews.com/usnews/health/healthday/080115/us-food-safety-the-import-alarm-keeps-sounding.htm> (Jan. 15, 2008).

¹⁶⁰ U.S. Senator Dick Durbin, *Durbin, DeLauro Introduce New Food Safety Bill in Wake of Widening Recalls*, <http://durbin.senate.gov/record.cfm?id=273386> (May 1, 2007).

¹⁶¹ *Id.* at [¶ 4] (quoting Rep. DeLauro).

¹⁶² *Id.* at [¶ 5].

Animal welfare organizations champion the Food Safety Act for its potential to protect companion animals and their human owners.¹⁶³ Businesses favor the Food Safety Act's proactive requirements that will prevent them from getting caught in the crossfire of pet food recalls, food contamination, and all the potential hazards associated with those events.¹⁶⁴ Owners of companion animals concerned with their animals' welfare are mobilizing around the country to call for legislative action to improve the quality and safety of human and pet food.¹⁶⁵

Both bills were referred to Committee the day they were introduced, but neither bill has seen further action.¹⁶⁶ In the Senate, Sen. 1274 was read twice and referred to the Committee on Health, Education, Labor, and Pensions, where it remains.¹⁶⁷ Upon its introduction, H.R. 2108 was referred to the House Committee on Energy and Commerce, and then on to the Subcommittee on Health, where it, too, currently remains.¹⁶⁸

II. STATE LEGISLATION

A. Regulation of Captive Elephants

In September 2003, a former circus elephant handler and various animal rights organizations sued the Ringling Bros. and Barnum & Bailey Circus (Ringling Bros.) under the citizen-suit provision of the

¹⁶³ Humane Socy. U.S., *The HSUS Praises Passage of Legislation to Protect Pet Food Safety*, http://www.hsus.org/press_and_publications/press_releases/passage_legislation_protect_pet_food_safety_fda_amendment_092107.html (Sept. 21, 2007); Mich. Humane Socy., *Human and Pet Food Safety Act*, http://www.michiganhumane.org/site/News2?page=NewsArticle&id=8543&news_iv_ctrl=1402 (accessed Apr. 13, 2008); People for the Ethical Treatment of Animals, PETA's Action Center, *Urge Your Representative to Pass the Pet and Human Food Safety Act!*, http://getactive.peta.org/PETA/alert-description.html?alert_id=9854667 (accessed Apr. 13, 2008).

¹⁶⁴ Higgins, *supra* n. 155 (addressing the change in anti-regulatory stance that big business held prior to the onslaught of massive recalls in 2007 this article states, "Pro-regulatory voices were somewhat muted at the Halloween symposium held in Washington, DC. FMI, the supermarket trade group, wasn't so reserved in its post-Thanksgiving call to extend mandatory recall authority to the FDA and USDA. More surprisingly, the Grocery Manufacturers Association seconded the motion in Congressional testimony in early December").

¹⁶⁵ PRLog, *Announcing U.S. Pet Owners for Pet Food Safety eMarch*, <http://www.prllog.org/10044998-announcing-us-pet-owners-for-pet-food-safety-emarch.html> (Jan. 9, 2008).

¹⁶⁶ Lib. Cong., *THOMAS: Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; search "human and pet food safety act," select H.R. 2108; select All Congressional Actions (accessed Apr. 13, 2008); Lib. Cong., *THOMAS: Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; search "human and pet food safety act," select S. 1274; select All Congressional Actions (accessed Apr. 13, 2008).

¹⁶⁷ Lib. Cong., *THOMAS: Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; search "human and pet food safety act," select S. 1274; select All Congressional Actions (accessed Apr. 13, 2008).

¹⁶⁸ Lib. Cong., *THOMAS: Advanced Bill Summary & Status Search for the 110th Congress*, <http://thomas.loc.gov/bss/>; search "human and pet food safety act," select H.R. 2108; select All Congressional Actions (accessed Apr. 13, 2008).

Endangered Species Act, alleging that the Ringling Bros.'s use of bullhooks, forcible separation of baby elephants from their mothers, and chaining of elephants for long periods of time constitute an unlawful take of an endangered animal.¹⁶⁹ The lawsuit has brought considerable public attention to the way elephants are treated in the circus and, in particular, to use of the training device known as a "bullhook" or "ankus."¹⁷⁰

A bullhook, or ankus, is a club made of wood or metal with a metal hook on the end, which trainers use to guide elephants.¹⁷¹ The plaintiffs in the lawsuit say the instrument is used as a weapon to keep the elephants submissive.¹⁷² A former circus employee who witnessed a bullhook being used on an elephant said, "[a] man took the [bullhook] and swung it like a baseball bat into the elephant's ear canal and pulled down with all his body weight. This beating lasted for 30 to 45 minutes. She [the elephant] bled profusely from the entire side of her head."¹⁷³ Ringling Bros. officials deny the abuse allegations and say that such conduct is certainly inconsistent with their training policies.¹⁷⁴ Furthermore, they contend that the bullhook is a tool approved by the United States Department of Agriculture and is used simply to lead the animal, in the same manner as reins on a horse or a leash on a dog.¹⁷⁵ However, opponents of the bullhook point out that using a bullhook to control a dog would qualify as animal abuse in every state.¹⁷⁶

In 2007, four states, including the Ringling Bros.'s co-owner P.T. Barnum's home state of Connecticut, considered legislation banning both the possession of bullhooks and their use on elephants, as well as creating new rules regarding certain other practices common in circuses and zoos.¹⁷⁷

¹⁶⁹ *Am. Socy. for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 502 F. Supp. 2d 103, 105 (D.D.C. 2007).

¹⁷⁰ See Annya Lott, *Rep. Story Unswayed by "Elephant" in Corner* [¶¶ 1-3, 20], <http://www.amherstbulletin.com/story/id/64215/> (Oct. 26, 2007) (detailing public attention surrounding a proposed bill subsequent to the Ringling Bros. and Barnum & Bailey Circus litigation).

¹⁷¹ *Id.* at [¶ 7].

¹⁷² *Compl. for Declaratory and Injunctive Relief* [¶¶ 1, 2, *Am. Socy. for the Prevention of Cruelty to Animals*, 502 F. Supp. 2d 103 (D.D.C. 2007).

¹⁷³ WFSB-TV-DT Channel 3, *Bill Would Ban Certain Animal Tools: Animal Rights Activists Claim Abuse at Circus* [¶ 6], <http://www.wfsb.com/politics/11076370/detail.html> (Feb. 21, 2007).

¹⁷⁴ *Id.* at [¶¶ 10, 13].

¹⁷⁵ Bruce Read, *Ringling Bros. and Barnum & Bailey Frequently Asked Questions* 3, <http://www.feldentertainment.com/pr/aca/Animal%20Care%20FAQ.pdf> (Jan. 2008).

¹⁷⁶ Nicole J. Hanson, *Assembly Comm. on Pub. Safety Bill Analysis*, "Background" 4, http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_0751-0800/ab_777_cfa_20070423_101221_asm_comm.html (Apr. 24, 2007).

¹⁷⁷ Captive Wild Animal Protection Coalition, *Legislation, One State at a Time*, <http://www.cwopc.org/legislation/state.html> (accessed Apr. 13, 2008) (California, Connecticut, Massachusetts, and New York proposed legislation banning bullhooks); Jeff Holtz, *The Week in Connecticut: No Elephant Hook, No Performance, Circus Says* [¶ 1], <http://www.nytimes.com/2007/05/13/nyregion/nyregionspecial2/13weekct.html?scp=6&sq=elephant+connecticut&st=nyt> (May 13, 2007); Conn. H. 6599, Jan. Sess. 2007 (Jan. 22, 2007).

1. California

In February 2007, Assemblyman Lloyd Levine (D) introduced A.B. 777 into the Assembly.¹⁷⁸ The bill would have amended current law regarding elephant abuse to include a ban on the use and possession of a bullhook or similar device.¹⁷⁹ The bill also would have banned the use of chains or similar restraining devices on elephants unless they were being used for “the shortest amount of time necessary to provide actual medical treatment.”¹⁸⁰ Furthermore, the bill’s goal was to broaden the current law, which only applies to owners and managers of elephants, by including any person or entity housing, possessing, in contact with, or traveling with an elephant.¹⁸¹

Additionally, the bill would have provided new requirements for stationary facilities that possess, keep, or maintain elephants.¹⁸² Such facilities would be required to “[allow] elephants . . . to walk an average of at least five miles per day”; to provide a variety of enrichment activities for exercise and mental stimulation; to provide a bath, pool, or lake; and to construct the majority of the facility’s walkable surfaces with a soft, natural substrate.¹⁸³ The stationary facility requirements represented a change from a similar bill that Levine proposed in 2006, which would have mandated minimum outdoor space requirements, as well as substrate requirements similar to those in the current bill.¹⁸⁴ A violation of the newest proposed bill would have constituted a misdemeanor.¹⁸⁵

Opponents of the bill argued that its requirements were arbitrary, shortsighted, and incomplete and that the bill unwisely removed animal care decisions from professionals with expertise and unique understanding of the animals’ needs.¹⁸⁶ Levine and others argued that it is a privilege to be able to see an elephant in a zoo or circus and along with that privilege there is a responsibility of ensuring that elephant handlers are providing proper care for elephants.¹⁸⁷ Pursuant to

¹⁷⁸ The Assembly is “[t]he house of the California Legislature consisting of [eighty] members, elected from districts determined on the basis of population.” Cal. St. Legis., *Glossary of Legislative Terms*, <http://www.legislature.ca.gov/quicklinks/glossary.html> (accessed Apr. 13, 2008); Cal. Assembly 777, 2007–2008 Reg. Sess. (Feb. 22, 2007).

¹⁷⁹ Cal. Assembly 777, 2007–2008 Reg. Sess. at § 1(a)(7)–(8).

¹⁸⁰ *Id.* at § 1(a)(9).

¹⁸¹ *Id.* at § 1(a).

¹⁸² *Id.* at § 1(b).

¹⁸³ *Id.* at §§ 1(b)(1)–(4).

¹⁸⁴ Cal. Assembly 3027, 2005–2006 Reg. Sess. §§ 1(d)(1)–(3) (Feb. 24, 2006).

¹⁸⁵ Cal. Assembly 777, 2007–2008 Reg. Sess. at § 1(d)(1).

¹⁸⁶ Ltr. from Marie Belew Wheatley, Pres., Am. Humane Assn., to Jose Solorio, Hon., *AB 777 Letter Elephants*, http://www.americanhumane.org/site/DocServer/AB777Letter_Elephants.pdf?docID=5521 (Apr. 12, 2007).

¹⁸⁷ Carla Hall, *L.A.-Area Legislator Never Forgets the Elephants*, L.A. Times (Mar. 8, 2007) (available at <http://democrats.assembly.ca.gov/members/a40/articles/20070308AD40AR01.htm>); see The Detroit Zoo, *Questions and Answers About Not Having Elephants at the Detroit Zoo*, http://www.detroitzoo.org/News%10Events/In_the_News/Elephants_-_Questions_and_Answers/ (last updated Aug. 2005) (explaining that

the state constitution, the bill died on January 31, 2007 because the Assembly had not yet passed it.¹⁸⁸

2. *Massachusetts*

On January 10, 2007, Senator Robert Hedlund (R) introduced a bill to ban the use and possession of a bullhook or similar device, as well as prohibit the use of chains or similar devices, except if being used “for the shortest amount of time necessary to provide actual medical treatment.”¹⁸⁹ The bill would apply to “any person who houses, possesses, is in contact with, or travels with [an] elephant kept at a stationary facility or . . . a circus or traveling show.”¹⁹⁰ However, the bill would specifically exempt all institutions accredited by the American Zoo and Aquarium Association, as well as an annual fair in Massachusetts known as the Big E.¹⁹¹ Despite being exempt from the bill, zoo officials at Southwick’s Zoo are unhappy about the proposition and say it will not accomplish anything.¹⁹² If signed into law, violators would face a fine of not more than five thousand dollars per offense, imprisonment for not more than one year, or both.¹⁹³ As of this writing, the bill is currently being reviewed in committee.¹⁹⁴

3. *New York*

The New York legislature also considered a bill regarding the treatment of elephants at circuses and zoos in 2007.¹⁹⁵ Like the California and Massachusetts bills, the New York bill addressed the use of bullhooks and chains in the training and housing of elephants.¹⁹⁶ The bill would also have prohibited the use of any hooked instruments, as well as any device that emits an electric shock.¹⁹⁷ In addition, ele-

the Detroit Zoo decided to no longer keep elephants when they determined the zoo could not adequately provide for the elephants).

¹⁸⁸ Cal. St. Assembly, *Complete Bill History*, <http://www.assembly.ca.gov/acs/acsframeset2text.htm>; *select* (2007–2008) CURRENT, *select* ASSEMBLY, *search* “777,” *select* History (accessed Apr. 13, 2008); Cal. St. Capitol Museum, *Lifecycle of a Bill*, <http://www.capitolmuseum.ca.gov/Citizens.aspx?Content2=1090> (accessed Apr. 13, 2008); Cal. Const. art IV, § 10(c).

¹⁸⁹ 185th Gen. Ct. Cmmw. Mass., *Senate, No. 2002*, <http://www.mass.gov/legis/185history/s02002.htm> (accessed Apr. 13, 2008); Mass. Sen. 2002, 185th Gen. Ct. § 1(b)(1)–(3) (Jan. 10, 2007).

¹⁹⁰ Mass. Sen. 2002, 185th Gen. Ct. § 1(b).

¹⁹¹ *Id.* at § 1(c); The Big E, *2008 Big E Dates: September 12–28*, <http://www.thebig.com/fair/index.html> (accessed Mar. 30, 2008) (describing The Big E as “the largest fair in the northeast,” featuring “free top name entertainment” including The Big E Super Circus).

¹⁹² Ira Kantor, *Bill Would Outlaw Hooks Used on Elephants*, Metro W. Daily News (Oct. 18, 2007) (available at <http://www.metrowestdailynews.com/homepage/x2130787008>).

¹⁹³ Mass. Sen. 2002, 185th Gen. Ct. § 1(c).

¹⁹⁴ 185th Gen. Ct. Cmmw. Mass., *supra* n. 189.

¹⁹⁵ N.Y. Assembly 7255, 2007–2008 Reg. Sess. (Apr. 4, 2007).

¹⁹⁶ *Id.* at § 1(B)(5)–(6).

¹⁹⁷ *Id.* at § 1(B)(6).

phant keepers would have been required to allow every elephant to have its legs untethered for at least one hour per day, not including time when the animal is on display.¹⁹⁸

The New York bill would have required any person bringing an elephant into the state as part of a traveling exhibition to file an itinerary of the elephant's entry into the state; the length of stay, including dates and locations of each display; and departure from the state with the Department of Agriculture and Markets (Department) not less than thirty days before entering the state.¹⁹⁹ Violations of the itinerary requirement would have resulted in a civil penalty of not more than one thousand dollars.²⁰⁰ Traveling exhibitions would have also been subject to ventilation and ambient temperature requirements in any compartments used to transport elephants within the state.²⁰¹ The bill attempted to give the Department the authority to inspect all areas or compartments where elephants are kept in order to ensure compliance with the bill.²⁰² The bill would have also prohibited elephant riding, unless the person riding the elephant "[was] engaged in training, exhibiting[,] or providing care to the elephant."²⁰³

A violation of the provisions of the bill prohibiting bullhook use and possession, elephant riding, or the ventilation and untethering requirements would have constituted a class E felony.²⁰⁴ The bill remained in committee as the 2007 legislative session adjourned.²⁰⁵ The bill was introduced and referred to committee again at the beginning of the 2008 legislative session.²⁰⁶

¹⁹⁸ *Id.* at § 1(B)(5).

¹⁹⁹ *Id.* at § 1(B)(2).

²⁰⁰ *Id.*

²⁰¹ N.Y. Assembly 7255, 2007–2008 Reg. Sess. at § 1(B)(3).

²⁰² *Id.* at § 1(B)(4).

²⁰³ *Id.* at § 1(B)(7).

²⁰⁴ *Id.* at § 1(B)(3)–(4), (6)–(7). For a first time felony offender, a class E felony is punishable by either an indeterminate sentence of between one to four years imprisonment or one of the following alternate sentences: five years probation, three years conditional discharge, a definite sentence of imprisonment for one year or less, a "split sentence" of a definite sentence for six months or less along with probation or conditional discharge, an intermittent sentence of imprisonment for one year or less, a "split sentence" of an intermittent sentence of imprisonment for four months or less along with probation or conditional discharge, a fine in lieu or in addition to the foregoing, or an unconditional discharge. N.Y. Penal Law § 70.00 (McKinney 2007); N.Y. Sentence Charts, Chart V, Non-Drug, Non-Felony Sex Offense, and Non-Violent Class B to E Felony (2008 Pamphlet) (updated by Donnino). If an alternate sentence is used, a definite, intermittent, or split jail or state prison sentence of any length, including one day, is also required. N.Y. Penal Law § 70.00; N.Y. Sentence Charts, Chart V, Non-Drug, Non-Felony Sex Offense, and Non-Violent Class B to E Felony.

²⁰⁵ N.Y. St. Assembly, *Bill Summary–A07255*, <http://assembly.state.ny.us/leg/?bn=A07255> (accessed Apr. 13, 2008) [hereinafter *7255 Bill Summary*]; N.Y. St. Assembly, *New York State Legislative Session Calendar: January–June 2007*, <http://assembly.state.ny.us/leg/2007sessioncalendar.pdf> (accessed Apr. 13, 2008).

²⁰⁶ *7255 Bill Summary*, *supra* n. 201.

B. Civil Penalties for Harm to Animals

Legally, animals are property.²⁰⁷ Practically, society treats animals differently than all other forms of property.²⁰⁸ It is estimated that \$41.2 billion was spent on companion animals in the United States during 2007.²⁰⁹ The legislatures of each state also treat animals differently than other forms of property by making it a violation of state law to abuse or neglect animals.²¹⁰ At the same time, in most states, pet owners are not permitted to collect non-economic damages²¹¹ resulting from harm to a companion animal because the animal is still classified as property.²¹² Courts are generally unwilling to categorize animals as anything more than property when awarding damages because doing so would require courts to deviate from precedent and statutory law.²¹³ However, two state courts have provided an exception to this general rule.²¹⁴ In 1964, the Florida Supreme Court held that the owner of a dog that was maliciously killed was entitled to recover damages for mental distress, as well as punitive damages.²¹⁵ Similarly, in 1981, the Hawaii Supreme Court upheld an award of damages for emotional distress to a family whose dog was killed while in state custody, despite the fact the family did not witness the wrongful conduct or death of the dog.²¹⁶ During the 2007 legislative session, Hawaii and Massachusetts considered bills that would allow for non-economic damages in cases involving harm to companion animals.

Civil damages are not just for compensating individuals who have been harmed—they can also serve as an alternative to criminal prosecution. In 2007, Vermont passed a law specifically allowing the state's attorney to charge certain first offenses of the state's animal cruelty laws as civil, rather than criminal, violations.

1. Non-Economic Damages for Injury to Companion Animals

a. Hawaii

Acknowledging the emotional bond people have with their pets, the Hawaii Senate considered creating an exception to the prohibition

²⁰⁷ Kathy Hessler, *Mediating Animal Law Matters*, 2 J. Animal L. & Ethics 21, 23 (May 2007).

²⁰⁸ *Id.*

²⁰⁹ Am. Pet Prods. Mfrs. Assn., Inc., *Industry Statistics & Trends*, http://www.appma.org/press_industrytrends.asp (accessed Apr. 13, 2008).

²¹⁰ Hessler, *supra* n. 207, at 29.

²¹¹ "Non-economic damages compensate plaintiffs for intangible injuries such as pain and suffering, loss of companionship, and emotional distress." Victor E. Schwartz & Emily J. Laird, *Non-economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227, 230 (2006).

²¹² Hessler, *supra* n. 207, at 39.

²¹³ *Id.* at 47.

²¹⁴ *LaPorte v. Associated Indeps., Inc.*, 163 So. 2d 267, 269 (Fla. 1964); *Campbell v. Animal Quarantine Station*, 632 P.2d 1066, 1071 (Haw. 1981).

²¹⁵ *LaPorte*, 163 So. 2d 267.

²¹⁶ *Campbell*, 632 P.2d at 1071.

against emotional distress damages in cases based solely on property damage when the property damage at issue is harm to a companion animal.²¹⁷ The bill defines a companion animal as “a domesticated animal kept in or near a household for the primary purpose of companionship for a member of the household, or a service animal.”²¹⁸ The exception caps the amount of emotional distress damages that a plaintiff can recover,²¹⁹ and excludes licensed veterinarians from the exception unless the damage resulted from the veterinarian’s gross negligence or wanton acts or omissions.²²⁰ The Hawaii Senate carried this bill over to the 2008 Regular Session.²²¹

b. Massachusetts

Like Hawaii, Massachusetts is also considering allowing non-economic damages in cases involving harm to companion animals.²²² The pending bill defines the term animal companion as a “dog, cat or any warm-blooded domesticated non-human animal dependent on one or more human persons for food, shelter, veterinary care, or companionship.”²²³ The definition specifically excludes animals that are the subjects of legal, humane farming and biomedical research practices, as well as all activities regulated by the federal Animal Welfare Act.²²⁴

If the bill passes, an owner who proves that his companion animal was injured or killed by the willful, wanton, reckless, or negligent acts or omissions of another person will be entitled to recover non-economic damages on behalf of himself as well as on behalf of his companion animal.²²⁵ For his own injuries, the owner will be entitled to recover damages for the fair monetary value of the animal, including damages for loss of consortium; veterinary expenses or reasonable burial expenses; pain, suffering, and consequential damages; court costs and attorney’s fees; and other reasonable damages.²²⁶ The owner will also be entitled to recover damages for his companion animal’s pain, suffering, and loss of faculties.²²⁷ In addition, the owner will be entitled to collect at least \$2,500 in punitive damages.²²⁸ The court may also impose a

²¹⁷ Haw. Sen. 1301, 24th Legis., 2007 Reg. Sess. §§ 1–2 (Jan. 22, 2007).

²¹⁸ *Id.* at § 2(b)(2).

²¹⁹ *Id.* (the amount of the cap has not yet been determined).

²²⁰ *Id.* at § 2(c).

²²¹ Haw. St. Legis., *Bill Status: SB 1301*, <http://www.capitol.hawaii.gov/site1/docs/getstatus2.asp?billno=SB1301> (accessed Apr. 13, 2008).

²²² Mass. Sen. 789, 185th Gen. Ct. § 2(b) (Jan. 10, 2007).

²²³ *Id.* at § 2(a).

²²⁴ *Id.*; 7 U.S.C. § 2131 (Supp. 2002) (The Animal Welfare Act regulates “the transportation, purchase, sale housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes of holding them for sale as pets or for any such purpose or use”).

²²⁵ Mass. Sen. 789, 185th Gen. Ct. at § 2(b)–(c).

²²⁶ *Id.* at § 2(b)–(c).

²²⁷ *Id.* at § 2(b).

²²⁸ *Id.* at § 2(d).

restraining order or other form of injunctive relief if such relief is deemed appropriate.²²⁹ The statute of limitations for damages to both the companion animal and owner is set at three years.²³⁰

Damages awarded on behalf of the companion animal must be paid into a trust for the care of the animal.²³¹ The trust is enforceable until the animal dies, at which time any remaining funds must “be distributed to a non-profit organization dedicated to the protection of animals.”²³²

2. *Civil Penalties in Lieu of Criminal Charges*

a. *Vermont*

On May 26, 2007, Governor Jim Douglas signed into law H.B. 0313, which allows the state’s attorney to punish certain first-time offenders of the state’s animal cruelty laws with civil penalties instead of pursuing criminal charges.²³³

For most offenses of the animal cruelty law, a first-time offender is punished by imprisonment for not more than one year, a fine of not more than two thousand dollars, or both.²³⁴ The new law distinguishes a first offense of the animal cruelty law for the following offenses: tying, tethering, or restraining an animal in an inhumane manner;²³⁵ depriving an animal of food, water, shelter, rest, sanitation, or necessary medical attention;²³⁶ transporting animals in overcrowded vehicles;²³⁷ knowingly selling or displaying artificially colored baby fowl;²³⁸ or failing to provide proper brooder facilities to poultry.²³⁹ For first time offenders of these sections, punishment is now a civil penalty of not more than five hundred dollars.²⁴⁰ Subsequent offenses of the aforementioned sections, as well as first and subsequent offenses of all other provisions of the animal cruelty law, will continue to be criminally charged.²⁴¹ Although the law enforcement officer must issue a civil citation for first offenses of the above referenced crimes, the state’s attorney retains the power to withdraw the civil complaint and

²²⁹ *Id.* at § 2(g).

²³⁰ *Id.* at § 2(e)–(f).

²³¹ Mass. Sen. 798, 185th Gen. Ct. at § 2(f).

²³² *Id.*

²³³ Vt. H. 0313, 2007–2008 Legis. Sess. (Feb. 2007); Vt. Legis., *Display Current Status of a Specific Bill or Resolution: 2007–2008 Legislative Session*, [http://www.leg.state.vt.us/database/status/status.cfm?Session=2008; search “H.0313”](http://www.leg.state.vt.us/database/status/status.cfm?Session=2008; search \) (accessed Apr. 13, 2008).

²³⁴ Vt. Stat. Ann. tit. 13, § 353(a)(1) (2007).

²³⁵ *Id.* at § 352(3).

²³⁶ *Id.* at § 352(4).

²³⁷ *Id.*

²³⁸ *Id.* at § 352(9).

²³⁹ *Id.*

²⁴⁰ Vt. Stat. Ann. tit. 13, § 353(a)(4)(B).

²⁴¹ *Id.* at § 353(a)(1).

file a criminal charge up until the time the accused admits to violating the animal cruelty law.²⁴²

C. Sexual Abuse of Animals

At the beginning of the nineteenth century, nearly every state had a law criminalizing sodomy.²⁴³ Most sodomy laws were modeled after the original English sodomy statute of 1533, which did not describe the prohibited acts in great detail.²⁴⁴ Despite their vagueness, most states' sodomy statutes were interpreted to cover all "un-natural" sexual relations, whether homosexual, heterosexual, or between man and animal.²⁴⁵ In 1955, the American Law Institute followed the trend among the states of repeal and non-enforcement of sodomy laws when it did not include any sodomy law in its Model Penal Code.²⁴⁶ In 2003, the United States Supreme Court issued its opinion in *Lawrence v. Texas*, which held that sodomy laws are an unconstitutional violation of liberty rights under the Due Process Clause of the United States Constitution.²⁴⁷ At the time *Lawrence* was decided, thirteen states still had sodomy laws on the books.²⁴⁸

The *Lawrence* ruling had an indirect and unanticipated impact on animals because many states still had catchall, "crimes against nature" laws in effect that outlawed sodomy as well as bestiality.²⁴⁹ Although state legislatures created new laws against sexual assault, they did not always create new laws prohibiting bestiality.²⁵⁰ State animal cruelty laws may provide some protection for animals if the

²⁴² *Id.* at § 353(a)(4)(B).

²⁴³ Jennifer Naeger, Student Author, *And Then There Were None: The Repeal of Sodomy Laws After Lawrence v. Texas and Its Effect on the Custody and Visitation Rights of Gay and Lesbian Parents*, 78 St. John's L. Rev. 397, 400–01 (2004).

²⁴⁴ John F. Simmons, Student Author, *Constitutional Law—Sodomy Statutes: The Question of Constitutionality*, 50 Neb. L. Rev. 567, 568 (1971); 25 Hen. 8, c. 6 (1533).

²⁴⁵ Simmons, *supra* n. 244, at 567.

²⁴⁶ Naeger, *supra* n. 243, at 401. The American Law Institute created the Model Penal Code "to stimulate and assist legislatures in making a major effort to appraise the content of the penal law by a contemporary reasoned judgment." The Model Penal Code was successful in bringing about "widespread revision and codification of the substantive criminal law of the United States." American Law Institute, *Model Penal Code*, http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=92 (accessed Apr. 13, 2008).

²⁴⁷ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

²⁴⁸ Linda Greenhouse, *Justices, 6–3, Legalize Gay Sexual Conduct in Sweeping Reversal of Court's '86 Ruling*, 152 N.Y. Times A19 (June 27, 2003) (noting that Alabama, Florida, Idaho, Kansas, Louisiana, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Texas, Utah, and Virginia all had criminal sodomy laws on the books at the time of the *Lawrence* decision).

²⁴⁹ Richard Roesler, *Senate Bill Would Ban Bestiality*, *Spokesman Rev.* (Jan. 13, 2006) (available at <http://www.spokesmanreview.com>; search "Senate Bill Would Ban Bestiality").

²⁵⁰ *Id.*

sexual abuse falls within the statutory definition of cruelty, but not all sexual abuse results in physical injury to the animal.²⁵¹

1. *New Jersey*

New Jersey repealed its sodomy law in 1979,²⁵² twenty-four years prior to the *Lawrence* decision. The sodomy law prohibited “[sodomy], or the infamous crime against nature, committed with man or beast.”²⁵³ During the 212th Legislature, Assemblyman²⁵⁴ Guy Gregg (R) introduced a bill that would have made it a crime and a civil offense under the state’s animal cruelty laws to sexually penetrate or contact any living or dead animal.²⁵⁵ The bill is nearly identical to one previously introduced by Gregg during the 211th Legislature.²⁵⁶ The bill from the 211th Legislature would have prohibited only sexual penetration or contact with living animals and would have made all commissions of the prohibited act a crime in the third degree.²⁵⁷ On the other hand, this year’s bill would make recklessly committing the prohibited act a crime in the fourth degree²⁵⁸ and knowingly committing the prohibited act a crime in the third degree.²⁵⁹ New Jersey’s General Assembly unanimously passed the bill during the 212th Legislature, but it remained in committee in the Senate as the session adjourned.²⁶⁰

²⁵¹ NM Animal Control, *The First Strike Campaign: Animal Sexual Abuse Fact Sheet*, http://www.nmanimalcontrol.com/aco_fo/sex_abuse/index.html (Feb. 1999).

²⁵² N.J. Stat. Ann. § 2A:143-1 (repealed 1979).

²⁵³ *Id.*

²⁵⁴ The General Assembly is one of two houses that make up the New Jersey Legislature. It consists of eighty members who are elected from legislative districts that have approximately equal populations. Each district elects two Assemblymen and one Senator. N.J. Legis., *Our Legislature*, <http://www.njleg.state.nj.us/legislativepub/our.asp> (accessed Apr. 13, 2008).

²⁵⁵ N.J. Assembly 219, 212th Legis., 2006–2007 Sess. §§ 1(e), 2(dd) (Jan. 10, 2006).

²⁵⁶ N.J. Assembly 3972, 211th Legis., 2004–2005 Sess. (May 2, 2005).

²⁵⁷ *Id.* at § 1(b)(2). For a first time offender, a crime in the third degree is punishable by either a fine of not more than fifteen thousand dollars, restitution, or both; probation with a term of imprisonment not to exceed 364 days; a specific fixed term of imprisonment between three and five years; payment of a fine, making restitution, and being placed on probation or payment of a fine, making restitution, and imprisonment; community supervision or community service; placement in a halfway house; or imprisonment at night or on weekends with opportunities to work or engage in educational programs. N.J. Stat. Ann. § 2C:43-2 (West 2004).

²⁵⁸ For a first time offender, a crime in the fourth degree is punishable by either a fine of not more than ten thousand dollars, restitution, or both; probation with a term of imprisonment not to exceed 364 days; a specific fixed term of imprisonment not more than eighteen months; payment of a fine, making restitution, and being placed on probation or payment of a fine, making restitution, and imprisonment; community supervision or community service; placement in a halfway house; or imprisonment at night or on weekends with opportunities to work or engage in educational programs. N.J. Stat. Ann. § 2C:43-2.

²⁵⁹ N.J. Assembly 219, 212th Legis., 2006–2007 Sess. at § 1(e).

²⁶⁰ N.J. Legis., A219: *Establishes Sexual Penetration or Sexual Contact with an Animal as a Crime and a Civil Offense under the State Animal Cruelty Laws*, <http://>

2. Florida

Florida was one of the thirteen states that still had sodomy laws on the books when the Supreme Court declared the criminalization of homosexual contact between consenting adults unconstitutional in *Lawrence*.²⁶¹ Florida's "sodomy law" is still in effect, but it does not mention sodomy specifically and is not enforced against homosexual conduct.²⁶² The law does little to protect animals because it only prohibits "unnatural and lascivious" acts between persons.²⁶³ In 2007, a highly publicized rape and killing of a pregnant goat brought Florida's lack of a bestiality law to the forefront.²⁶⁴ The man who raped and killed the goat only committed a crime because he killed the goat; if the goat had lived, he would not have committed a crime.²⁶⁵

In September 2007, Representative Frank Peterman (D) introduced H.B. 119 which would have made it a first degree felony to engage in or to aid another in engaging in sexual conduct or contact with an animal; to organize or promote, for commercial or recreational purposes, an act involving sexual conduct or contact with an animal; to photograph or film, for the purposes of sexual gratification, a person engaged in sexual conduct or contact with an animal or to sell or transmit such photographs.²⁶⁶ An identical bill was introduced in the Senate by Senator Nan Rich (D) in December 2007.²⁶⁷ Offenses under the newly proposed law are punishable by a term of imprisonment not exceeding thirty years, a fine of not more than ten thousand dollars, or both.²⁶⁸ The proposed bills present a stark contrast to Florida's current animal cruelty law, which contains the same fine provision, but only provides for a maximum of five years imprisonment.²⁶⁹ Florida Governor Charlie Crist said that if the Legislature passes the bill, he will sign it into law.²⁷⁰

www.njleg.state.nj.us/; select 2006–2007, search "A219," select A219 (accessed Apr. 13, 2008).

²⁶¹ Greenhouse, *supra* n. 248.

²⁶² Sodomy Laws, *Florida*, <http://www.sodomylaws.org/usa/florida/florida.htm> (site no longer available) (on file with *Animal L.*); Fla. Stat. Ann. § 800.02 (West 2007).

²⁶³ Fla. Stat. Ann. § 800.02.

²⁶⁴ See Marc Caputo, *Goat Abuse Sparks Outcry*, Miami Herald (Jan. 4, 2008) (available at <http://www.miamiherald.com/458/story/366527.html>) (covering outfall of goat scandal).

²⁶⁵ Josh Poltilove, *Bill Would Make Bestiality a Felony in Florida*, <http://www.msnbc.msn.com/id/22476168/> (site no longer available) (on file with *Animal L.*).

²⁶⁶ Fla. H. 119, 2008 Reg. Sess. § 1(2)(a)–(e) (Sept. 14, 2007) (withdrawn from further consideration on Mar. 12, 2008).

²⁶⁷ Fla. Sen. 744, 2008 Reg. Sess. (Dec. 11, 2007).

²⁶⁸ Fla. H. 119, 2008 Reg. Sess. § 1(2); Fla. Stat. § 775.082(3)(b) (2007); Fla. Stat. § 775.083(1)(b).

²⁶⁹ Fla. Stat. § 828.12(2); Fla. Stat. § 775.082(3)(d).

²⁷⁰ Caputo, *supra* n. 264.

D. Restrictions on Ballot Initiatives

Ballot initiatives are often successful when state legislatures are unresponsive to citizens' concerns²⁷¹ and have become increasingly popular as a means to advance animal issues in the law.²⁷² Among other successes, initiatives have successfully banned cockfighting in Arizona, Missouri, and Oklahoma as well as gestation crates for pregnant sows in Florida and Arizona.²⁷³ In the past, a number of states have attempted to restrict the ballot initiative process by requiring a two-thirds majority of legal voters to pass wildlife initiatives, increasing the number of signatures required for animal issues to be placed on the ballot and banning ballot initiatives for wildlife issues.²⁷⁴ Animal rights groups criticize these types of restrictions because they hold wildlife issues to a different, more stringent standard than all other types of issues.²⁷⁵ During the 2007 legislative session, three states, which have previously had animal rights laws successfully passed as ballot initiatives, attempted to restrict their citizens' ability to put all types of initiatives on the ballot.

1. Arizona

The citizens of Arizona rejected an initiative to require a two-thirds majority of voters on wildlife ballot initiatives in 2000 and passed a ban on gestation crates²⁷⁶ and veal crates²⁷⁷ in 2006.²⁷⁸ This year, the Arizona House of Representatives considered three resolu-

²⁷¹ Humane Socy. U.S., *Missouri Bill Would Make It Next to Impossible for Citizens to Protect the State's Wildlife* [¶ 8], http://www.hsus.org/legislation_laws/ballot_initiatives/past_ballot_initiatives/2006/missouri_bill_citizen_protect_wildlife.html (Mar. 27, 2006).

²⁷² Joseph Lubinski, Student Author, *The Cow Says Moo, the Duck Says Quack, and the Dog Says Vote! The Use of the Initiative to Promote Animal Protection*, 74 U. Colo. L. Rev. 1109, 1128 (2003); Humane Socy. U.S., *Post-1990 Initiative and Referendum Summary-Animal Issues*, <http://files.hsus.org/web-files/PDF/Initiativechart.pdf> (accessed Apr. 13, 2008) (comparing the number of animal issues on ballot initiatives from 1990 to 2006 (38) and 1940 to 1990 (about 6)).

²⁷³ Humane Socy. U.S., *supra* n. 272.

²⁷⁴ In 1998, Utah voters approved a ballot initiative that requires a two-thirds majority of voter approval to pass wildlife issues. Arizona voters rejected a similar proposal in 2000. That same year, Alaska voters rejected an outright ban on all animal related ballot initiatives. In 2002, Oklahoma citizens voted against a ballot initiative that would have required more signatures to get animal issues on the ballot than are required for other types of issues. *Id.*

²⁷⁵ Humane Socy. U.S., *supra* n. 271.

²⁷⁶ A gestation crate is a metal stall where a pregnant sow is confined for the duration of her four-month pregnancy. The stalls are approximately two feet wide by seven feet long and are too small for the pig to turn around or take a step forward or backward. Susan Adams, *Legal Rights of Farm Animals*, 40-Oct. Md. B.J. 19, 20 (Sept./Oct. 2007).

²⁷⁷ A veal crate is similar to a gestation crate except that it confines a calf for its entire sixteen week life before the animal is slaughtered. *Id.* Like the gestation crate, the veal crate is too small to allow the animal to turn around or walk. *Id.*

²⁷⁸ Humane Socy. U.S., *supra* n. 272.

tions and one bill that would have restricted the ballot initiative process.²⁷⁹

One of the proposed resolutions, H.C.R. 2014, would have required that a minimum number of the signatures needed to place an initiative on the ballot be collected from at least three different counties to put an initiative on the ballot.²⁸⁰ The number of signatures required represented a percentage of the total number of votes cast in the county for all candidates in the last gubernatorial election.²⁸¹ For an initiative that would not amend the state constitution, the minimum number of signatures required would have been ten percent.²⁸² For an initiative that would amend the state constitution, the minimum number of signatures required would have been fifteen percent.²⁸³ Finally, for a referendum, the minimum number of signatures required would have been five percent.²⁸⁴ Any petition that did not satisfy the required distribution of signatures would have been invalid.²⁸⁵

Proposed H.B. 2338 would have required the parties filing an application for an initiative to include certain disclosures on the petition form, including the name and a description of their major funding source.²⁸⁶ H.B. 2338 would have further required that each petition sheet include a statement noting the single county in which all signers on the page are registered to vote.²⁸⁷ Petitions lacking the required disclosures or containing signatures from voters registered in a county other than that printed on the petition would have been invalid.²⁸⁸

The bill also would have amended current law to make signature collection more difficult. Current law allows the petition circulator to assist an elector in filling in the petition.²⁸⁹ The proposed bill would have obligated a third person to assist any elector requiring assistance.²⁹⁰ Furthermore, it would have required paid circulators to be paid in a manner that qualifies the circulator as an employee under the Federal Unemployment Tax Act.²⁹¹ Signatures collected by a paid

²⁷⁹ Ariz. H. Con. Res. 2012, 48th Legis., 1st Reg. Sess. (Jan. 2007); Ariz. H. Con. Res. 2014, 48th Legis., 1st Reg. Sess. (Jan. 2007); Ariz. H. Con. Res. 2026, 48th Legis., 1st Reg. Sess. (Jan. 2007); Ariz. H. 2338, 48th Legis., 1st Reg. Sess. (Jan. 2007).

²⁸⁰ Ariz. H. Con. Res. 2014, 48th Leg., 1st Reg. Sess. at § 1(7)(a)–(c).

²⁸¹ *Id.*

²⁸² *Id.* at § 1(7)(a).

²⁸³ *Id.* at § 1(7)(b).

²⁸⁴ *Id.* at § 1(7)(c).

²⁸⁵ *Id.*

²⁸⁶ Ariz. H. 2338, 48th Legis., 1st Reg. Sess. at §§ 1(B), 2(D), 3(D).

²⁸⁷ *Id.* at §§ 2(B)–(C), 3(B)–(C).

²⁸⁸ *Id.* at §§ 2(E), 3(E).

²⁸⁹ Ariz. Rev. Stat. Ann. § 19-112(A) (West 2007).

²⁹⁰ Ariz. H. 2338, 48th Legis., 1st Reg. Sess. at § 4(A).

²⁹¹ *Id.* at § 5(A); The Federal Unemployment Tax Act defines an employee as an officer of a corporation, a person who is considered an employee under common law rules regarding establishing an employee-employer relationship, someone who works as a driver for pay for certain types of food products and laundry services, or a full-time salesman engaged in "solicitation on behalf of and the transmission to, his principal . . . of orders from" certain types of business customers. 26 U.S.C. § 3306(i) (2000).

circulator who was not paid in conformance with the Unemployment Tax Act would have been invalid.²⁹²

Another proposed resolution would have amended the Arizona Constitution to require a person filing an initiative application to submit the text of the proposed initiative to the Arizona Legislative Council (the Council) before circulating the petition.²⁹³ The Council would then establish an official title for the initiative; make recommendations regarding possible errors, inconsistencies, or other issues; and hold a public hearing to gather information.²⁹⁴ Only the official title would be binding on the applicant.²⁹⁵ The resolution also would have required the completed petition to be submitted to the Secretary of State not less than seven months before the election.²⁹⁶ Current Arizona law only requires that the completed petition be submitted not less than four months before the election.²⁹⁷

Finally, a proposed amendment to the Arizona Constitution would have given the legislature the power to repeal, amend, or supersede any initiative passed by the citizens of the state four years after the initiative is passed.²⁹⁸ This power would not have applied retroactively.²⁹⁹

All four items remained in committee as the First Regular Session adjourned.³⁰⁰

2. *Missouri*

Missouri similarly considered multiple resolutions that would have restricted citizens' access to the ballot initiative process.³⁰¹ Like the Arizona legislature, Missouri officials considered amending the state constitution regarding the number of signatures required to put an initiative on the ballot.³⁰² Currently, for initiatives amending the constitution or proposing new laws, the law requires that at least eight percent and five percent, respectively, of the legal voters in at least

²⁹² Ariz. H. 2338, 48th Legis., 1st Reg. Sess. at § 5(A).

²⁹³ Ariz. H. Con. Res. 2026, 48th Legis., 1st Reg. Sess. § 1(4).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ Ariz. Const. art. IV, pt. 1, § 1(4).

²⁹⁸ Ariz. H. Con. Res. 2012, 48th Legis., 1st Reg. Sess. § 6(E).

²⁹⁹ *Id.*

³⁰⁰ Ariz. St. Legis., *Bill Status Overview*, <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/bills/hcr2012o.asp> (accessed Apr. 13, 2008); Ariz. St. Legis., *Bill Status Overview*, <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/bills/hcr2014o.asp> (accessed Apr. 13, 2008); Ariz. St. Legis., *Bill Status Overview*, <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/bills/hcr2026o.asp> (accessed Apr. 13, 2008); Ariz. St. Legis., *Bill Status Overview*, <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/1r/bills/hb2338o.asp> (accessed Apr. 13, 2008).

³⁰¹ Mo. H. Jt. Res. 4, 94th Gen. Assembly, 1st Reg. Sess. (Dec. 28, 2006); Mo. H. Jt. Res. 5, 94th Gen. Assembly, 1st Reg. Sess. (Dec. 28, 2006); Mo. Sen. Jt. Res. 11, 94th Gen. Assembly, 1st Reg. Sess. (Jan. 11, 2007).

³⁰² Mo. H. Jt. Res. 5, 94th Gen. Assembly, 1st Reg. Sess. at § A.

two-thirds of the congressional districts sign an initiative petition.³⁰³ The proposed amendment would have changed the percentage of legal voters' signatures required for both amending the constitution and proposing new laws to fifteen percent.³⁰⁴ The resolution remained in committee as the regular session adjourned.³⁰⁵

The Missouri House of Representatives and Senate both also considered resolutions to amend the state constitution regarding the constitutional amendment process.³⁰⁶ The Missouri Constitution currently requires all amendments, whether proposed by the general assembly or by initiative, to be placed on the ballot for voter approval.³⁰⁷ Proposed amendments take effect if a majority of the votes cast are in favor of the amendment.³⁰⁸ The House resolution would have raised the favorable vote requirement to sixty percent for amendments to take effect.³⁰⁹ The Senate resolution would have required a favorable vote of at least a two-thirds majority of the votes cast for the amendment to be enacted.³¹⁰ Both resolutions were in committee as the regular session adjourned.³¹¹

3. Florida

In 2002, Florida voters passed a ballot initiative banning the use of gestation crates for pregnant sows.³¹² However, in 2006, the citizens of Florida passed Amendment 3, a constitutional amendment requiring a sixty percent vote to pass ballot initiatives rather than a simple majority.³¹³ Proponents of Amendment 3 cited the passage of the 2002 "pregnant pig" law as an example of the need to restrict the citizens'

³⁰³ Mo. Const. art. III, § 50.

³⁰⁴ Mo. H. Jt. Res. 5, 94th Gen. Assembly, 1st Reg. Sess. at § A.

³⁰⁵ Mo. H. Reps., *HJR 5: Proposes a Constitutional Amendment Increasing the Percentage of Voters Required for Initiative Petitions*, <http://www.house.mo.gov/content.aspx?info=bills071/bills/HJR5.HTM> (last updated Oct. 23, 2007).

³⁰⁶ Mo. H. Jt. Res. 4, 94th Gen. Assembly, 1st Reg. Sess. at § A; Mo. Sen. Jt. Res. 11, 94th Gen. Assembly, 1st Reg. Sess. at § A.

³⁰⁷ Mo. Const. art. XII, § 2(b).

³⁰⁸ *Id.*

³⁰⁹ Mo. H. Jt. Res. 4, 94th Gen. Assembly, 1st Reg. Sess. at § A.

³¹⁰ Mo. Sen. Jt. Res. 11, 94th Gen. Assembly, 1st Reg. Sess. at § A.

³¹¹ Mo. H. Reps., *HJR 4: Proposes a Constitutional Amendment Requiring at Least 60% of Voters to Approve Amendments to the Missouri Constitution*, <http://www.house.mo.gov/content.aspx?info=bills071/bills/HJR4.HTM> (last updated Oct. 23, 2007); Mo. Sen., *SJR 11: Requires a Two-Thirds Majority Vote of the People in Order to Amend the Constitution*, http://www.senate.mo.gov/07info/BTS_Web/Bill.aspx?SessionType=R&BillID=4040 (accessed Apr. 13, 2008).

³¹² Humane Socy. U.S., *supra* n. 272.

³¹³ Humane Socy. U.S., *Election '06: Animals Win in Arizona and Michigan*, http://www.hsus.org/legislation_laws/ballot_initiatives/election_06_animals_win_html (Nov. 7, 2006).

initiative process.³¹⁴ If Amendment 3 had been in force during the 2002 election, the gestation crate ban would have failed.³¹⁵

During the 2007 legislative session, the Florida House of Representatives and Senate considered identical bills that would have further restricted the state's initiative process.³¹⁶ Both bills died in committee.³¹⁷ The proposed laws would have required a person to leave property held open to the public for commercial purposes after the owner asked them to leave.³¹⁸ The owner would have been allowed to request persons to leave the property on the grounds that those persons' actions are detrimental to the business.³¹⁹ That would mean that commercial property owners could ask people collecting signatures for ballot initiatives, or other causes, to leave areas such as shopping malls or grocery stores, thus making signature collection more difficult.

This type of law raises complex issues surrounding the interplay between private property rights and free speech rights.³²⁰ Although the Florida Supreme Court held that the Florida Constitution gives freedom of speech the same protection as required under the United States Constitution,³²¹ lower state courts have made conflicting decisions regarding a commercial business owner's right to exclude persons soliciting signatures on his or her property.³²² Given the split in the state courts, if passed the proposed law would have raised big questions about its constitutionality.³²³

³¹⁴ *Id.*

³¹⁵ Humane Socy. U.S., *Floridians Can Preserve Voting Rights*, http://www.hsus.org/legislation_laws/ballot_initiatives/past_ballot_initiatives/2006/florida_amendment3.html (Sept. 18, 2006).

³¹⁶ Fla. H. 233, Reg. Sess. 2007 (Jan. 11, 2007); Fla. Sen. 736, Reg. Sess. 2007 (Jan. 23, 2007).

³¹⁷ Fla. H. Reps., *House 0233: Relating to Trespass on Commercial Premises*, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=34541&SessionId=54> (accessed Apr. 13, 2008); Fla. H. Reps., *Senate 0736: Trespass on Commercial Premises*, <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=35076&SessionId=54> (accessed Apr. 13, 2008).

³¹⁸ Fla. H. 233, Reg. Sess. 2007 at § 1; Fla. Sen. 736, Reg. Sess. 2007 at § 1.

³¹⁹ *Id.*

³²⁰ Fla. H. Reps., *House of Representatives Staff Analysis: Trespass on Commercial Property*, <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0233.CTS.doc&DocumentType=Analysis&BillNumber=0233&Session=2007> (Mar. 12, 2007).

³²¹ *Dept. of Educ. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982).

³²² Fla. H. Reps., *supra* n. 320, at "Federal Court Decisions" (citing *Publix Super Mkts. v. Tallahasseeans for Prac. L. Enforcement*, 2005 WL 3673662 (Fla. 2d Cir., Dec. 13, 2005) (holding owner of commercial property held open to the public has the right to exclude persons soliciting signatures on political initiatives); *Wood v. State*, 2003 WL 1955433 (Fla. 14th Cir., Feb. 26, 2003) (holding the Florida Constitution is more expansive than the U.S. Constitution and owners of shopping centers and other "quasi-public" private property cannot exclude peaceful political activity)).

³²³ *Id.*

