CAPITOL CONSERVATION

Protecting Private Property Rights ... At What Cost?

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While most citizens, including hunters and other conservationists, firmly feel that government preemption of a landowner's rights to his or her land should receive compensation, legislation proposed by the Congress appears to have wide potential impact on programs of the federal land management agencies that provide habitat, big game, and recreational hunting in North America. Many states have either passed or are considering similar legislation. Their implications for wildlife deserve close examination.

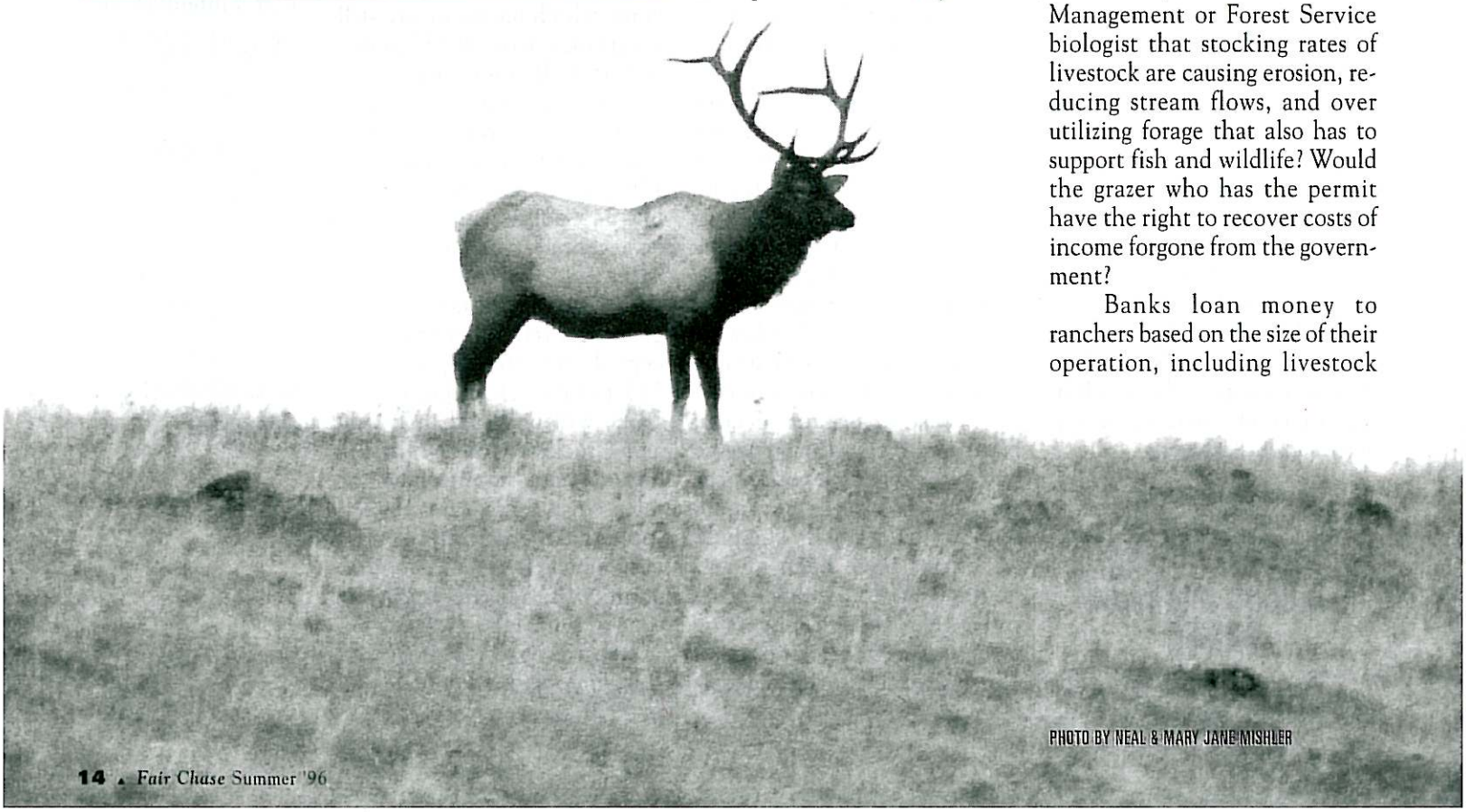
Renewed attention is being focused on legislative proposals ostensibly designed to protect private property rights, such as H.R. 925, which derived from the Contract With America and has passed the House of Representatives, and S. 605 not yet acted upon at the time of this writing. The House bill largely creates a statutory right to compensation when federal actions, particularly under the Endangered Species Act and Section 404 of the Clean Water Act, reduce the value of private property by more than a specified percentage. The Senate bill is far broader, covering virtually all federal (and some state) programs. It addresses state programs by extending liability back to the federal agency to pay for any claims against state enforcement of a federal law. Further, the Senate bill requires review of all existing regulations, and assessment of new agency proposals. It also provides for administrative appeals of agency actions and deals with court jurisdiction and avenues for compensation. The House action would clearly inhibit both endangered species and wetland programs. The scope of the Senate proposal appears so widespread that its impact on wildlife and wildlife habitat programs is of great concern.

"A major federal law such as S. 605 would undoubtedly encourage a virtual epidemic of...challenges to existing public programs for wildlife."

At the outset, one must acknowledge that many of the impacts are uncertain and cannot be quantified. After last year's fiasco with legislation to curtail federal regulations, which threatened the existence of migratory bird hunting as one small example, a bill this sweeping is reasonable cause for alarm It literally requires review, and provides for a "Taking Impact Assessment" on every action of the federal government that could be construed to take value away from a private landowner. It is widely perceived that this legislation could change the whole equation of dealing with responsible limitations placed on private landowners for achieving a public purpose.

If a government program condemns land to make it part of a refuge or forest, all would agree that the owner should receive compensation. But what about a decision by a Bureau of Land Management or Forest Service biologist that stocking rates of livestock are causing erosion, reducing stream flows, and over utilizing forage that also has to support fish and wildlife? Would the grazer who has the permit have the right to recover costs of income forgone from the government?

Banks loan money to ranchers based on the size of their operation, including livestock



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run on federal land under permit. Should a land manager's decision to recommend stocking rates to achieve conservation goals be judged by this reality?

What would the impacts be on habitat and wildlife in this situation? Such questions need answers.

Of great concern is that this legislation decrees that all fees, whether for court or any other judgments in such a case, come directly out of the program in the federal government that led to the action. This could cripple important programs carrying out responsible tasks on behalf of resources held by all of us, including forage management on public lands, wetland protection for waterfowl, or timber management for wildlife. Some suggest that this process would only provide greater accountability in the federal government, make agencies more cautious and frugal in doing their jobs, and produce fairness to the public. However, this process would put the agencies at a tremendous disadvantage in carrying out all laws mandated by the Congress, particularly at a time when budgets are deliberately being reduced, staffing is short, and public demand for their programs is greater than ever.

H.R. 925

This bill creates a statutory right to compensation when federal actions, particularly under the Endangered Species Act and Section 404 of the Clean Water Act, reduce the value of private property by more than a specified percentage.

Many unintended consequences are possible under this regulation because it is so sweeping. Why wouldn't an animal rights group challenge regulations allowing harvest of game animals on public lands as a "taking" that supposedly would reduce their opportunity to view wildlife? This could exacerbate the controversy over bear hunting, produce challenges to big game hunting on public lands, affect fishing and general public access, and most certainly be a new avenue for challenge of many routine agency actions in the public interest. The opportunity for mischief by unintended audiences is great, if not inevitable.

We have already seen litigation in Wyoming alleging that the Wyoming Game and Fish Department has inappropriately "taken" the rights of landowners by restricting their access to big game licenses, and that the landowner should have a "preferential right" to hunt the wildlife on his or her property without interference from the state. Thankfully, the court did not agree, but it took intervention by 10 wildlife groups to make it stick. In other cases, livestock operators have filed claim that their "property" (forage "entitled" to them from public lands) was taken by elk reintroduced by federal and state agencies. Several such cases are pending, and the outcome is quite important to the future of hunting. A major federal law such as S. 605 would undoubtedly encourage a virtual epidemic of such challenges to existing public programs for wildlife.

S. 605

This bill covers all federal and some state programs. It addresses state programs by extending liability back to the federal agency to pay for any claims against state enforcement of a federal law. Plus this bill requires review of all existing regulations, and assessment of new agency proposals.

This is all complicated, speculative business, but highly important to wildlife and the hunting community. There are so many unknowns, such as (1) which regulations and programs are affected; (2) the cost to agencies of completing takings assessments on even, existing law and even, implementation action; and (3) the actual impact on wildlife and the public itself. It is of interest that initial draft of S. 605 were opposed by, among many others, the National Governor's Association, the Western State Land Commissioners Association, the United States Conference of Mayors... even major church groups! Whether amended language or other clarification of this legislation will produce a supportable bill remains to be seen.

Of great concern is that such laws seem to lead us away from a fundamental American principle. The right to own and use private property is not limitless—with all rights come responsibilities to the rights of others. Should taxpayers pay property owners merely for living up to their responsibilities? Are we now to reappraise all of our wildlife and habitat protection laws and charge the taxpayer for the income forgone by a landowner for anything he or she may wish to do? This is a new turn in resource management in our country that bears close watching, and deserves careful thinking. So far, some legislators are proposing to make major change without any clear analysis of its effects.