Supplement to The Hunting Report Newsletter

Published Monthly

June 2005

"SERVING THE HUNTER WHO TRAVELS"

"Hunting provides the principal incentive and revenue for conservation. Hence it is a force for conservation."

Special To The Hunting Report

World Conservation Force Bulletin

by John J. Jackson, III

Nonresidents Stripped of Constitutional Rights in Congress

The Reid Amendment that authorizes unlimited discrimination against nonresident hunters and anglers by states passed Congress on May 11, 2005. It passed as a rider, or amendment, to an emergency military appropriations bill that was on the "fast track." The new law transfers Congress' Commerce Clause powers reserved to it under the US Constitution to the states for the express and limited purpose of authorizing states to differentiate between residents in pricing and allocation of hunting and fishing licenses. In short, it legalizes discrimination by relegating all oversight authority over licensing to states. The wholly one-sided legislation has no hint of balance or consideration of nonresident hunters' and anglers' interests.

The entirety of the rider language reads as follows:

"Amendment No. 389

(Purpose: To reaffirm the authority of states to regulate certain hunting and fishing activities.)

On page 231, after line 6, add the following:

SEC. 6047. STATE REGULATION OF RESIDENT AND NONRESIDENT HUNTING AND FISHING.

(a) *Short Title* - This section may be cited as the "Reaffirmation of State Regulation of Resident and Nonresident Hunting and Fishing Act of 2005."

(b) *Declaration of Policy and Construction of Congressional Silence.*

(1) **IN GENERAL** - It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for any purpose of fish and wildlife within its boundaries, including by means of laws or regulations that differentiate between residents and nonresidents of such State with respect to the availability of licenses or permits for taking of particular species of fish or wildlife, the kind and numbers of fish and wildlife that may be taken, or the fees charged in connection with issuance of licenses or permits for hunting or fishing.

(2) **CONSTRUCTION OF CONGRESSIONAL SILENCE**.—Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of Section 8 of Article I of the Constitution (commonly referred to as the "commerce clause'') to the regulation of hunting or fishing by a State or Indian tribe.

(c) *Limitations* - Nothing in this section shall be construed—

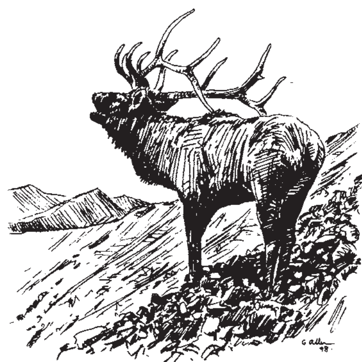
(1) To limit the applicability or effect of any Federal law related to the protection or management of fish or wildlife or to the regulation of commerce;

(2) To limit the authority of the United States to prohibit hunting or fishing on any portion of the lands owned by the United States; or

(3) To abrogate, abridge, affect, modify, supersede or alter any treaty-

reserved right or other right of any Indian tribe as recognized by any other means, including, but not limited to, agreements with the United States, Executive Orders, statutes, and judicial decrees, and by Federal law.
(d) *State Defined* - For purposes of this section, the term "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands."
Congressional Record S 4086, April 21, 2005

The above rider was added to a House emergency military appropriations bill, H.R. 1268, when that appropriations matter was being approved by the Senate on April 21. The whole matter went to conference because of multiple amendments. The Conference



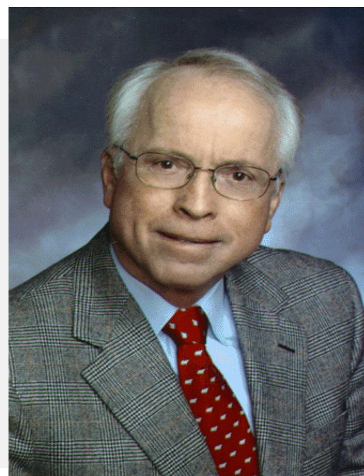
Committee approved the Senate version, including the Reid rider, on May 3. The Conference Report was then accepted in the House of Representatives on May 5 and in the Senate on May 10.

The merits of the Reid bill, originally SB 339, and the companion Udall bill, H.R. 731, were never really debated in the Senate Judiciary and House Resources Committees where they had been assigned since introduced. Instead of a hearing, the Reid bill was attached as S.389 (the number changed in the process from SB 339 to S 389) to the emergency military appropriations measure, H.R. 1268, which passed at the speed of light. The Reid rider was actually added to the appropriations measure by Senator Stevens from Alaska, acting for Senator Reid. There were no hearings or testimony, no weighing of interests or weighing of feigned versus real interests. Because of the manner it was passed, nothing can be gleaned or assumed about Congressional interest or feeling about the real underlying issues. Though you can't conclude much from its passage because of the way it was passed, it is the law.

Congressman Collin Peterson of Minnesota, past-Chairman of the Congressional Sportsmen's Caucus, made an attempt to delete the attachment to the emergency appropriations measure. He challenged the Reid rider before the Rules Committee because it was not germane to the emergency appropriation. He argued that the rider was a substantive matter unrelated to the military or appropriations for the military. His was a heroic, long shot effort that was doomed to failure because of the forces behind the Reid rider and the urgency of the military appropriations. All nonresident hunters and anglers owe him a debt of gratitude. He is a dedicated sportsman with an uncommon history of leadership. Importantly, he has legislation coming down the pipe that will have more balance to solve the underlying problems instead of forcing one side's views on the other. He is the Ranking Minority Member of the House Agriculture Committee.

The best hope of having the Reid rider removed from the appropriations measure was in Conference and we were actually led to believe that it would be deleted there. Apparently, Senators Reid and Stevens, who both served on the Conference Committee, had the last word. It was considered a bipartisan amendment and Senator Reid is the ranking Democrat in the Senate and Senate Minority Leader. He was not to be stopped.

The purpose behind the Reid rider and probable effect is the overturning of the 9th Circuit Court of Appeals decision, *Conservation Force, Inc. v. Manning,* 301 F.3d 985 and resulting Arizona Federal District Court decision, *Montoya v. Manning* that followed. Its likely effect is the nullification of those decisions and the dismissal of the similar cases pending in Nevada, Wyoming, North Dakota, Ten-



JOHN J. JACKSON, III
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World Conservation Force Bulletin

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ISSN 1052-4746. This bulletin on hunting-related conservation matters is published periodically free of charge for subscribers to *The Hunting Report*, 9300 S. Dadeland Blvd., Suite 605, Miami, FL 33156-2721. All material contained herein is provided by famed wildlife and hunting attorney John J. Jackson, III with whom *The Hunting Report* has formed a strategic alliance. The purpose of the alliance is to educate the hunting community as well as proadvocacy of hunting rights opportunities. More broadly, the alliance will also seek to open up new hunting opportunities worldwide and ward off attacks on currently available opportunities. For more information on Conservation Force and/or the services available through Jackson's alliance with *The Hunting Report*, write:

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nessee and Illinois. The court in Arizona's *Montoya* case had basically held that the states could not discriminate against nonresidents because that authority was reserved to Congress by the US Constitution since it was interstate commerce.

In such instances, the burden is on the state to show legitimate, independent justification for the discrimination. "Independent" means more than the purpose of favoring those being favored because they want to be favored. That is not independent justification at all. According to the US Supreme Court, the primary purpose of the Constitutional Convention that adopted the US Constitution was to stop the feuding between the states over the allocation of natural resources, i.e., to reserve to Congress the regulation of commerce to prevent states hoarding and favoritism. The Reid rider targets that very point by Congress stating it is now to be a national policy that the states can discriminate in the narrow case of licensing of hunting and fishing. That is not true of any other natural resource or of any other interstate commerce activity other than hunting and fishing. It is unprecedented and was wholly unforeseen by those of us who have attempted to reduce the interstate feuding over allocation of game and fish for the past decade. Our colonial forefathers reserved authority over commerce between the states to Congress to eliminate the "warring between the states." We are supposed to be one indivisible nation, not 50 competing interests.

Within two days of the passage of the Reid rider, the state of North Dakota had already filed a motion to dismiss Minnesota's case contesting North Dakota's discrimination against nonresident Minnesota migratory waterfowl hunters. We expect dismissal of all the cases.

Many questions remain. What is its effect in commercial activities? Will the Reid rider permit states to discriminate against guides and outfitters who commercially ply their trade as a business from state to state? That is a right protected by the separate *Privileges and Immunities* clause of the US Constitution that Congress can't transfer. Nevertheless, states may no doubt try to raise permit fees or place limitations on operators from out-of-state. Before this legislation, states have attempted discrimination against out-of-state outfitters and commercial interests many times, so they will no doubt attempt it again.

Does the Reid rider overturn the nonresident rights *Terk* case in New Mexico for sheep and gemsbok hunting? No, it does not. The *Terk* decision was based upon the *Equal Protection* clause of the US Constitution, not the commerce power that Congress is granting states through the Reid rider. That is a wholly independent protection under the US Constitution. In fact, the Reid rider itself may be an unconstitutional act by Congress that is not above the highest law of the land, but

under that clause of the Constitution the challenger has the burden of proof and the slightest possible justification is adequate.

Will the new law worsen the discrimination in practice, will the abuses remain the same, or will nonresidents be treated more fairly? We think it will no doubt worsen with the passage of time.

License price disparity was worsening before the litigation began. Also, discrimination in the method of selection and ratio of license allocations to nonresidents was worsening. In some instances, resident groups would rather game populations that are greater than management objectives be slaughtered in depredation kills after the season that allocated to nonresidents, even though every resident is licensed. The fact is that there have been too many hunters in most Western states since the 1960s. Yet there is a perception that more are needed! Conversion and development of more habitats in combination with a growing human population will make license allocations progressively more difficult. Underrepresented and unprotected nonresidents will fare more poorly in the allocation process with the passage of time. If unbridled, the resident tendency is to limit nonresidents to leftovers and less desirable surpluses and to make nonresidents "foot the bill" for it all.

The price and allocation decisions are generally made by commissions and legislatures that are political bodies that are duty bound to answer to resident constituents. Nonresidents have little or no representation or notice and input. Outfitters and guides are ridiculed and threatened for speaking up for their out-of-state hunters. Even nationwide hunting and angling organizations with large nonresident memberships that are financially dependent upon outfitter donations at their conventions and fundraisers have no record of speaking up.

On the other hand, there were enough nonresident licenses issued for the creation of a substantial interstate hunting industry before the litigation began. The states need the revenue. Private landholders need and want the revenue. Most sportsmen and women are fair and proud of the resources within their states. Many want to share the game with out-of-state friends and strangers alike. Now that the discrimination has been under the microscope there is a new awareness that it has been unfair. The discriminatory abuses may have been raised to the level of Congressional scrutiny. Those fiercely lobbying for the Reid rider have suggested and some even promised ("Trust me.") that they will work to be fairer in the future. That may lead to improvements in the short term, but will do little to protect nonresident opportunities over the long term.

There is no hard evidence that nonresidents will be treated more fairly at all, much less on federal lands. We have no such expectations. Residents falsely

believe that they own the game in their states, though the courts long ago ruled that was a discarded “fiction.” That would make us 50 separate feuding nations. Moreover, there is a sense among those in the West that all those federal lands were taken away from them in the first place and should rightfully be theirs. Of course, Teddy Roosevelt would no doubt be shocked not to be able to get a license in a Western state because he was from New York or Washington, D.C., our nation’s capitol. It remains to be seen if nationwide hunting organizations will finally participate in the process through their local chapters and contacts, particularly since they never have and so many tacitly or directly supported the Reid rider through their inaction. Taking a stand makes them unpopular as much at a local commission meeting as it does long distant in Congress.

Regardless, some think that it is good that the divisive issue has so quickly been brought to closure. We ourselves have done a lot of soul searching over that, since we already serve the hunting community in so many important ways. The problem I have with that resolution is, it is wholly one-sided. No one wants to see hunters against hunters. It is not right that nonresident hunters and anglers are expected not to advocate their own interests and are demons if they do. Residents are most certainly representing themselves and are well represented within the system. Why are only nonresidents expected to back down? Nonresidents contribute more per capita for wildlife conservation than any other group in society, and would be more of a growth component of our conservation system but for the trade barriers initiated against them. It is not the nonresident hunters and anglers that have been discriminating and hoarding. Nonresidents don’t dislike residents because of their wealth and landholding. That is not true of resident interests. Some residents hate wealthy nonresidents and their outfitters and say so at commission meetings. The Reid rider favors residents over nonresidents despite the long history of abusive practices that should call for remedial action.

The number of nonresident hunters outnumbers the number or resident hunters in any two states. Nonresidents number two million per year, which is one out of every seven licensed hunters per annum, yet Reid rode right over them all.

The Reid rider is represented to be a reaffirmation of “states rights,” but an examination of that right is revealing. The *Reid* right is the “right” to discriminate against fellow US citizens because of where they hang their hats, granted despite a history of abuses. When states don’t act right, then their rights come into question by their own acts. Despite their practices, states had no right to discriminate until the Reid rider created it. It was illegal, as it has long been for all natural resources. The

Reid “*Right*” should not have been created without debate.

Action Plan

What is next? For the time being, the discrimination has been made a Congressional issue, even if not yet fairly debated or resolved with any balance. The courts have been eliminated, but Congress can revisit it. We shall see that it does as necessary. We shall see that the states are closely monitored for excessive discrimination. Let us know of any increase in discrimination in your state, or if you need our help. Nonresidents can’t continue to be completely at the mercy of self-interested residents. Many resident hunters in Western states have supported our efforts because they too must hunt out-of-state. There is a need for positive legislation that rewards states for being fair. Only a small minority of the states are the worst offenders. In fact, a relatively small number rammed the Reid rider through Congress. Too small a number to be legislating national policy. Nonresidents can’t be left at the mercy of those states. A more balanced resolution is necessary. The Reid rider does not prevent a bill of substance from being enacted – one that would provide a less one-sided solution. Even the Reid rider, (c)(1), states that it does not limit other federal laws from being enacted and enforced. We are working on such a law and need your full support. The Non-Resident Rights Defense Fund (NRRDF) was not sufficient to do even one mailing to the list of nonresident applicants in the Western states, but we hope to build it until there is at least enough for two such mailings. Please help us get the word out. As well as contributing to Conservation Force’s NRRDF, send a letter of thanks and contribution to Don McMillan of CONPAC, 898 Mendakota Court, Mendota Heights, MN 55120 (www.conpac.org); and Congressman Collin Peterson, 2159 Rayburn HOB, Washington, DC 20515. They stood up for your rights during these critical days, as did too few. Many others have helped, but are not being named here to prevent retribution against them. Please remember that Conservation Force administers the Non-Resident Rights Defense Fund (NRRDF) separately, so earmark those contributions.

The Reid rider has eliminated nonresident hunting and fishing as a right protected by Congress under the Constitution and further reduced nonresident representation by eliminating Congress’ inherent oversight and control of interstate commerce. Nevertheless, we will continue to carry the term “rights” in the name for historical perspective. Let’s all hope that the residents that once again hold all the cards will be fairer. Nearly all hunters and anglers hunt and fish out of state over the course of their lives. We received a surprising number of strong letters of support from resident hunters in the Western states because they themselves know they need help if they are to continue to be able to hunt out of state. - *John J. Jackson, III.*