Morgan's Law: A Legal Prophylactic to Compassionately Protect Rescued Cetaceans

Matthew V. Spiegl [1], Ingrid N. Visser [2,3]

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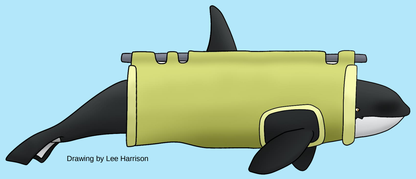
[1] Legal Counsel, Free Morgan Foundation, Bosweg 14, 6523 NM Nijmegen, The Netherlands, spiegl@freemorgan.org
[2] Chair & Scientific Advisor, Free Morgan Foundation, [3] Founder & Principle Scientist, Orca Research Trust, P.O. Box 42043, Tutukaka, New Zealand, ingrid@orca.org.nz

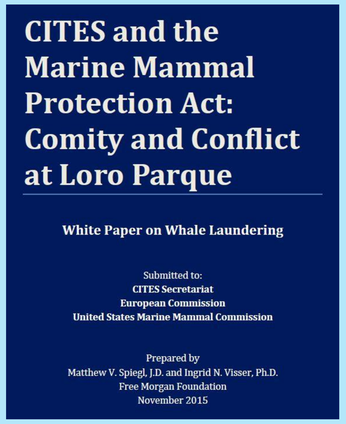
The Problem

Legislation and regulations are sometimes named after an individual because they fell victim to tragic circumstances. This is also the growing case for animals, with ethical legislation implemented in the hope that others can avoid the same fate. There are 20+ examples of legislation named after animals, in the USA alone.

Despite the current trend recognizing issues surrounding the keeping of whales, dolphins & porpoises (cetaceans) in captivity, rescued individuals rarely are viewed in terms of compassionate conservation, but rather exploited for commercial use, including circus-like shows, trading and breeding.


Drawing by Lee Harrison

In November 2015, the Free Morgan Foundation (FMF) released its white paper on whale laundering. Using orca Morgan as a case study, the authors identified four key areas (see 'The Process'), related to the trade permits issued pursuant to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). This became the springboard for the proposal referred to as 'Morgan's Law'.


CITES and the Marine Mammal Protection Act: Comity and Conflict at Loro Parque

White Paper on Whale Laundering

Submitted to:
CITES Secretariat
European Commission
United States Marine Mammal Commission

Prepared by
Matthew V. Spiegl, J.D. and Ingrid N. Visser, Ph.D.
Free Morgan Foundation
November 2015


MORGAN'S LAW
Learn more at www.freemorgan.org/morgans-law

We refer to the following four points as the cornerstones of "Morgan's Law" and believe they should be brought forth for discussion at CITES CoP17, not only because they apply directly to Morgan the wild-born orca's case, but because they concern long overdue reform necessary to highlight the predominantly commercial nature of transactions involving rescued cetaceans. These points will facilitate closing the loopholes exploited by the industry to the detriment of rescued wild cetaceans.

[1] Require consistent and conforming purpose-of-transaction codes on all CITES and international wildlife trade permits and certificates for both import and export of a single transaction. This thereby ensures that the authorized purpose – as presented to the exporting authority for approval and consistent with the standards of that particular use in the exporting country – is not arbitrarily changed by the importing authority to a different purpose which was neither considered nor authorized by the exporting authority. This will also prevent arbitrary changes to suit the importing countries legislation and ensure transparency and necessary oversight.

[2] Provide full disclosure of the legal "owner" in addition to identifying the name of the "holder" and "facility" on all CITES permits in order to facilitate transparency and accountability and eliminate deniability of legal consequences for actions taken by the holder and/or facility and/or owner, any of which may have a direct financial stake in the specimen.

[3] Establish a clear and enforceable CITES policy regarding the non-breeding of rescued, wild cetaceans (whales, dolphins, and porpoises) with their captive-born counterparts in order to ensure that the rescued cetaceans will not become breeding stock for commercial purposes or used to propagate hybrid (wild/captive) specimens with no conservation benefit to wild populations.

[4] Revise purpose-of-transaction codes to simplify, clarify and define the codes with unambiguous criteria; in particular provide concrete guidelines under CITES as to what constitutes (bona fide) scientific research to allow Parties to differentiate consistently and genuinely between commercial and non-commercial transactions, including transactions which may include elements of both. This will help recognize that just collecting data, not primarily motivated by scientific concern and/or with no particular peer reviewed scientific study or defined research project in place, is not a legitimate scientific purpose to justify permanent captivity of wild cetaceans.

The four actions of Morgan's Law were formally submitted to the United States CITES Management Authority (US Fish and Wildlife). This was prompted when that agency called for proposals for agenda items for the CITES Conference of Parties (CoP17) in Johannesburg, South Africa from 24 September to 5 October 2016.

The Process

A case study of trying to implement Morgan's Law
US CITES Management Authority Response to the Four Proposed Actions

1. Purpose of Transaction Codes on CITES Permits:
***FMF proposed*:** The USA call for the consistent use of CITES Codes in 'Purpose of Transaction' documents.
***FMF reasoning*:** The impact of import and export documents not identifying the same Purpose of Transaction Code, is that it allows for the circumvention of national laws. Specifically, FMF was concerned that inconsistent use of the Codes could lead to Appendix-I specimens being traded in contravention to the Treaty.
***USA response*:** The USA strongly supports this aspect, as well as the development of definitions for the Codes and guidance on their use. However, working groups have been discussing this issue since the USA proposed a similar resolution at CoP14 (in 2007) and no resolution has been reached.

2. Legal Owner Information on CITES Permits:
***FMF proposed*:** The USA raise the question of legal ownership of a CITES specimen being traded.
***FMF reasoning*:** Without a means to identify the owner on the face of a CITES document there is no way to measure the commercial interests involved, as is the case with orca Morgan. Additionally, Parties are apparently confused over who is responsible for the welfare of an animal if the legal ownership is not documented on the face of a CITES document.
USA response: The USA does not believe that having this information identified would provide Parties with any greater recourse regarding legal actions for mistreatment of an animal. Parties are responsible for determining if a specimen was legally acquired before issuing a CITES document and they surmise that legal ownership of a specimen should already be known by the exporting Parties.

3. Breeding Rescued Cetaceans:
***FMF proposed*:** Ban the breeding of rescued cetaceans.
***FMF reasoning*:** Wild-captured cetaceans, including orcas, are being bred in captivity and subsequently used commercially *e.g.,* to perform. Although cetaceans are protected under CITES, to date FMF has identified 13 cetacean species who have been impacted in this way, highlighting this growing trend. Compassionate conservation must not fall victim to regulatory decisions based on economies of scale. The 'frequency' of exploitation for a particular species should not determine 'worthiness' for protection (*e.g.,* worldwide there are only 60 orca currently in captivity).
***USA response*:** The USA does not believe that this situation is occurring frequently enough to be a priority for CITES to address.

4. 'Primarily Commercial Purpose' *verses* 'Bona Fide Scientific Research' for CITES Listed Species:
***FMF proposed*:** The USA present criteria and clear guidance to Parties on distinguishing between transactions that are 'primarily commercial' and those that are for 'bona fide scientific research'.
FMF reasoning: CITES Resolution Conf. 5.10 provides only guidance for "*not for primarily commercial purposes*", not strict criteria. Stronger rules would protect individuals and species better, as reflected in a recent ruling by the International Court of Justice regarding a Japanese whaling program, which determined the program was "*not primarily motivated by scientific concerns*."
***USA response*:** The USA believes that the current resolution is adequate to provide Parties with a consistent understanding of the required finding for Appendix-I species.

The Challenges Ahead

As of 2017, there are 183 Parties in CITES. Convincing even one, let alone a majority, of a need for change is a daunting task. Yet there is hope. In response to the US CITES Management Authority's comment concerning the breeding of rescued wild cetaceans, the US Marine Mammal Commission took a position that validates the FMF's call for a bright line rule, at least in the USA:

"The Commission notes the potential difficulties that can arise if cetaceans from different species or stocks are allowed to interbreed. Among other things, it may make it unwise to release the captive-bred offspring into the wild, should that ever be deemed desirable. The Commission therefore supports the adoption of clear policies regarding the breeding of rescued, wild cetaceans with captive-bred counterparts."

(Dr. Rebecca J. Lent, Executive Director, USA MMC, 29 Jan 2016.)

Conversely, CITES Purpose of Transaction Codes continue to be a major topic of debate. Despite support from Parties such as the USA, efforts to address this issue (which date back to CITES CoP14 in 2007), the Parties at CoP17 appeared no closer to resolving this issue. They have now deferred meaningful action to no earlier than CoP18 in 2019.

Conclusions

- As conflicts between people and nature increase in frequency, Morgan's Law, will help clarify existing regulations whilst strongly promoting ethically robust and transparent legislation by closing inequitable loopholes.
- The changes proposed would in effect future-proof cetacean rescues and facilitate compassionate measures, including appropriate housing in approved seaside sanctuaries.
- The ultimate goal of rescues should be repatriation back into the wild to support compassionate conservation at both the individual and species levels.

Reference Material

- Free Morgan Foundation's full response to the US CITES Management Authority comments regarding the four actions of Morgan's Law is available at this link: http://tinyurl.com/y9l4souj
- Free Morgan Foundation white paper on whale laundering: http://tinyurl.com/o4b7pzx