

History and Development of Wildlife Law

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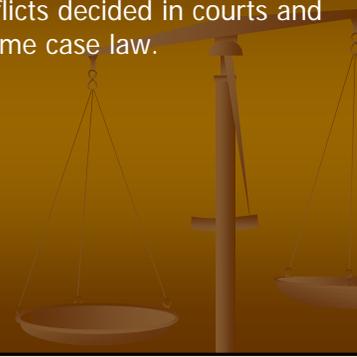
Aspects of Regulation in US

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Constitution is ultimate source of authority for governmental actions in US

Authority for conservation and protection rests in 3 legal sources

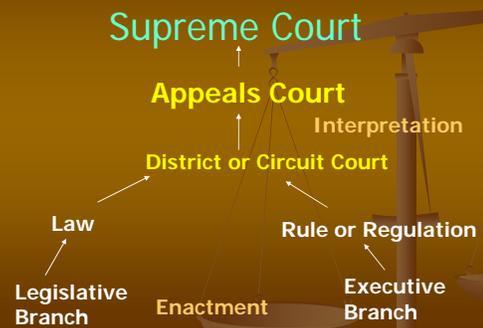
- **Statutory Laws** – laws enacted by Congress either for protection of specific wildlife or for protection of resources (Clean Air Act, Water Pollution Control Act)
 - **Common Law** – body of court decisions deriving from custom and traditional practice (negligence, nuisance, trespass)
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- **Case Law** – Legislation written in general language thus many interpretations possible. Conflicts decided in courts and decisions become case law.
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American Law is Based on Two Foundations

- English Common Law
 - Precedents with U.S. Constitution as framework
- European Common Law
 - Detailed Civil Codes
 - Executive Orders
 - Statutes
 - Ordinances
 - Rules
 - Regulations

Brief Overview of Legal Process



Earliest Laws

- Tribal Taboos – hunter/gatherer societies – restrictions on taking certain animals (e.g. apes), restrictions on taking game during reproductive season.
- Mosaic Law – Torah

“If you come upon any bird’s nest... with the mother sitting on the fledglings or the eggs, you shall not take the mother with the young. Let the mother go. Take only the young for yourself” (Deut. 22:6-7)

- Greeks and Romans – Preparations for battle

- Mongol Empire – Great Khan initiated 4 management activities
 - harvest restrictions – allow species to increase
 - food plots
 - winter feeding
 - cover conservation

English History

- To 1215 (Magna Carta)
 - **Feudal System** – all lands and all wildlife belonged to the nobility, serfs could not carry weapons
 - Increased power of king led to **greater consolidation of land and hunting rights** – king delegated the right to hunt and fish to his nobles
 - **Legal system developed** to deal with infractions of hunting and fishing restrictions – first game wardens appeared at this time

Punishments were excessive –

William of Hessa – all commoners caught in act of poaching deer were to be hanged on the spot and their children and wife would be treated as slaves

Baron Sforza – caught poacher who killed a hare and made him devour it on the spot (intestines, fur and all).

British government instituted full range of laws used by modern managers

1. Take of wildlife
2. Protection of habitat – laws preventing burning of heath and fern from Feb. – June to enhance productivity of grouse

But 2 classes of laws with no modern analogues -

1. statutes restricting the right to hunt to upper class

2. statutes imposing penalties on those who stole game from upper class

Restrictions enforced with severe penalties

“involuntary transportation to America and death without benefit of clergy”

England after 1215

- Power transferred from king to Parliament
- However, class distinctions remained –
Laws passed to keep wildlife in hands of wealthy

United States

- Early history much different than in England –
colonists in land of plenty
- Taking restrictions unnecessary (at first)
- Policy of free access was assumed

United States

- By Revolution – every colony (except Georgia) had established limits on killing deer
- Legislatures began restricting land uses to conserve wildlife

Essex Company incorporated by
Massachusetts legislature 1845

United States

- Laws in statute books often differed dramatically from the law in the field

Essex Co. dam was a technological marvel –
“Yankee ingenuity”

No comparable ingenuity invested in the fishway.
“there is not the slightest evidence that a single
fish had passed from the waters below to the
waters above”

•Land and hunting/fishing rights were still delegated to companies (e.g. Hudson Bay Company) or nobility (e.g. Lord Baltimore) when America was being settled and later

E.g. Martin v. Waddell 1842 - Justice Taney ruled that delegated powers to civil authority were transferred to the states



Chief Justice Taney's court consistently supported states rights

Who "Owns" Wildlife?

States v. Federal Government



Who "Owns" Wildlife?

- **10th Amendment to Constitution** - all powers not delegated to the federal government nor prohibited to the states are 'reserved to the states respectively' or to the people.

- **Martin v. Waddell 1842**
 - First case before U.S. SC
 - States were successors to Parliament
 - Exclusive rights to collect oysters in Raritan River, NJ – land title went back to 1664
 - First SC ruling that states do have the right to regulate wildlife (and fish) harvest
but these rights did not supersede those given to the federal govt. by the Constitution



The Development of the Concept of State Ownership

- **Smith v. Maryland 1855**
 - Oyster harvesting in tidal waters
 - Did state law interfere with commerce?
 - Maryland law upheld – but limited decision
- **McCready v. Virginia 1876**
 - McCready wanted to plant oysters in VA but wasn't a resident.
 - SC upheld VA and gave stronger interpretation in favor of state ownership of wildlife resources

State Ownership, cont.

- **Manchester v Mass. 1891.**
 - Represents a 'chink' in the state armor.
 - SC ruled that MA could prevent netting of menhaden because of territorial rights, not ownership of wildlife; also protection of food
 - Suggested that SC might be becoming concerned over too much state power

A Strong Decision

- **Geer V. Connecticut 1896**
 - Geer legally harvested game birds w/in CT but was prevented from taking them out of the state for market
 - Did this illegally interfere with interstate commerce?
 - SC decided "NO", states had right to control and regulate the common property of game within their borders
 - Killing was not commerce
 - If commerce not interstate
 - If interstate, state still had the right to protect food source

Geer v. CT 1895

– important case for state ownership of wildlife

Hughes v. OK 1979

- overturned Geer ruling

Increased Power to the Federal Government

■ Lacey Act 1900

- First clear assertion of federal authority over wildlife
- Prohibited interstate transport of game taken illegally within a state
- Also prohibited importation of noxious species into the country
- Ordered the U.S. Secy. Ag. To take all necessary measures for the preservation of gamebirds and other wild birds

The Last Hurrah for States

■ Abbey Dodge 1912

- The *Abbey Dodge* was a sponge fishing boat operating off the coast of Florida
- U.S. had law against using diving gear but Florida said it was ok
- SC (same justice as in Geer) decided in favor of *Abbey Dodge* and against the U.S. saying that Florida had jurisdiction

Increased Federal Importance

■ Constitution Guarantees Federal Supremacy in three areas:

- Ability to create treaties with other nations
- Ability to protect resources on federally owned lands
- Ability to regulate interstate commerce

Bases of Federal Power

- Property Clause
- Commerce Clause
- Treaty Clause

Federal Ability to Form Treaties

- Migratory Bird Act 1913 – response to “grim competition”
 - Totally within US
 - Federal protection of all insectivorous and migratory birds
 - Ruled down by federal district court

- Convention for the Protection of Migratory Birds 1916 (US, Canada) and Migratory Bird Treaty Act 1918 (US, Canada, Mexico)

- Upheld by *Missouri v Holland* 1920 – resounding defeat for concept of state ownership of wildlife

Federal Ability to Protect its Own Resources

- *Hunt v. United States* 1928
 - Sec. Agriculture directed removal of excess deer, state of AZ arrested people carrying out order (Kaibab Natl. Forest, AZ), contrary to AZ state game laws
 - SC ruled in favor of Secy. Of Agriculture federal govt. has right to protect its land, federal govt has right to carry out management policy on its land

New Mexico State Game Commission v Udall 1969

- Concerned right of federal govt. to harvest deer for research w/o any evidence of damage
- SC supported federal govt saying that Secy. Udall had the power to determine ‘which animals may be detrimental’

Protection of Federal Resources, cont.

- **Kleppe v. New Mexico 1976**
 - 1971 – Wild Free-roaming and burros Act

Instituted to protect horses and burros – treated as integral parts of natural systems of public lands

- 1975 – Struck down by federal court
- New Mexico tried to remove wild horses from federal lands, BLM officials sued
- SC ruled in favor of Dept. of Interior saying that **protection** was only a **sufficient** but not **necessary** cause for federal mgmt. of wildlife on its lands

Federal Ability to Control Interstate Commerce

- **Manchester v. Mass. 1881**
- **Douglas v. Seacoast Products Inc. 1977**
 - Va allowed menhaden fishing only by residents
 - Fishing boats licensed by feds
 - Fishing boats won (compare to Manchester)

Decision of Douglas v. Seacoast Products, Inc.

“A State does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of ‘owning’ wild fish, birds, or animals. Neither the State nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture.”

■ **Hughes v. Oklahoma 1979**

- Nearly identical to Geer but opposite decision
- OK prohibited interstate trade of minnows but SC ruled against their law

What's the Bottom Line?

- Early law defended states' rights
- More recently, federal jurisdiction has been supported
 - Clear support regards treaty, protection and commerce
 - Definition of 'protection' is being expanded
- "There seems to be little legal basis or support for the assertion that state ownership doctrine can bar federal wildlife regulation. There has been no authoritative judicial support for the state ownership doctrine since *Abbey Dodge*."