

Who Owns Wildlife?

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## WHO OWNS WILDLIFE?

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Historically, in England only a few people were allowed to hunt. This early form of wildlife regulation allowed a sustained yield by limiting the number of hunters rather than the amount of game taken. People with large acreages were allowed to hunt, and only the wealthy could legitimately own hunting weapons (Lund 1975, 1980). Also, the type of weapon used was restricted by social class. One early shotgun was limited to those ranked as "Lords of Parliament" or above. Because a commoner could neither buy game nor hunt, mere possession of game was a violation of English law.

The English concepts were rejected in North America (Coggins and Smith 1975). Firearms were needed for survival, and game was needed for food and clothing. Hunting was not limited to an elite group. Everyone, except slaves, had a right to hunt. Giving landlords an exclusive right to hunt was out of place in a largely unsettled land. Specific laws were passed to open undeveloped and unenclosed areas to hunters. Only in the South were some of the English "qualification" laws retained (Lund 1976, 1980).

Before and after the American Revolution people recognized the need for maintaining a sustained yield of game animals. Seasons were

established, but compliance was largely voluntary. Intentional elimination of predators was encouraged by laws authorizing bounty payments. For example, the Massachusetts Bay Company authorized payment of 1¢/gray wolf (*Canis lupus*) in 1630 (Matthiessen 1964). Although an attempt was made to save the heath hen (*Tympanuchus cupido cupido*) from extinction, preservation was not generally a goal of early state government (Anon. 1971). Some early management examples do exist such as the closed season on white-tailed deer (*Odocoileus virginianus*) established by Portsmouth, Rhode Island, in 1646 (Field 1984) and the Massachusetts deer wardens authorized in 1739 (Palmer 1912). However, most enforcement of hunting regulations was lax, especially on the frontier. This situation began to change in the later part of the 1800s as conservation groups were established and game wardens became paid state employees (Palmer 1912, Trefethen 1961, Lund 1976).

Few federal wildlife laws existed in the 18th and 19th centuries except for control over hunting in federal territories or its elimination in Yellowstone National Park (28 Stat. 73, 1894). States stepped into this regulatory void, and during the 1800s state power over wildlife was upheld each time it was challenged. State

control was justified because the states inherited the powers possessed by the English Crown, including the right to regulate wildlife (*Martin v. Waddell*, 41 U.S. 234 [1842]). In *Smith v. Maryland* (59 U.S. 71 [1855]) a Maryland statute prohibited taking oysters (*Crasostrea virginica*) with a scoop or drag because it destroyed their beds. The statute was upheld because the oysters were on state land. Today, states have the power to regulate wildlife on private land as well, but may delegate this authority to private landowners.

In 1896 state control over wildlife was justified under the theory of state ownership (*Geer v. Connecticut*, 161 U.S. 519 [1896]). Connecticut had a law prohibiting nonresidents from exporting game birds. In upholding this anti-export law, the U.S. Supreme Court said the state owned wild animals and had a right to conserve them. This decision stood for 83 years and served as the principle justification for "exclusive" state wildlife management. However, a close reading of *Geer* (p. 528) shows that federal regulation was considered possible.

The idea of exclusive state jurisdiction was carried 1 step further in *The Abbey Dodge* (223 U.S. 166 [1912]). In this case, a federal statute controlling the harvest of sponges (species unspecified) conflicted with a state statute. Although the state statute was upheld, "exclusive" state jurisdiction had already begun to erode. *The Abbey Dodge* is considered by most legal scholars as an aberrant limitation on federal power and has been ignored (Coggins 1980).

Even though early wildlife management was the responsibility of the states, a federal role existed (Environ. Law Inst. 1977). In 1900 the first major federal law, the Lacey Act (16 U.S.C. § 667e & § 701), was passed. Among other things, the act placed limits on importing foreign animals and prohibited the interstate transport of wildlife that had been taken contrary to state law. Because market hunting was illegal in many states, the federal law had

an impact on it. In 1920 the Migratory Bird Treaty Act of 1918 (16 U.S.C. §§ 703–711) was upheld by the U.S. Supreme Court (*Missouri v. Holland*, 252 U.S. 416 [1920]). In another conflict the U.S. Forest Service authorized killing deer that were harming national forest lands. Killing the deer violated state law and was challenged (*Hunt v. United States*, 278 U.S. 96 [1928]). The federal action was upheld in order to "protect" federal property as authorized by the property clause of the Constitution (U.S. Const. Art. IV, sec. 3).

During the early part of this century, some state statutes were challenged as unconstitutional and were generally struck down (Coggins 1980). For example, in *Toomer v. Witsell* (334 U.S. 385 [1948]) the U.S. Supreme Court examined a South Carolina statute that required nonresidents to pay a shrimp (species unspecified) license fee 100 times more than residents. In declaring the statute unconstitutional the U.S. Supreme Court said the "whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource" (p. 402, emphasis added). Although many people continued to look on wildlife as state property subject to exclusive state control, the U.S. Supreme Court decided a series of court cases in the 1970s that clarified federal and state roles as well as changed the balance of power.

### THE BALANCE OF POWER

"Federalism" means there can be concurrent jurisdiction over resources. Because both federal and state regulations exist today, conflicts are inevitable. Federal power and state limitations are constitutional issues which have been interpreted by the courts.

#### *Federal Power*

Federal actions must be authorized by a constitutional clause (Maltz 1981, McGinley

1983). For wildlife legislation, the main clauses are the treaty clause (U.S. Const. Art. I, sec. 10), property clause (U.S. Const. Art. IV, sec. 3), and commerce clause (U.S. Const. Art. I, sec. 8). In addition Congress can direct federal agencies to modify agency actions to protect wildlife.

For Congress to pass legislation, a constitutional clause must exist justifying its action. For example, the Migratory Bird Treaty Act of 1918 (16 U.S.C. § 703) and the Endangered Species Act of 1973 (16 U.S.C. §§ 1531–1543) use the treaty clause as a partial justification. Statutes created under the treaty power can control any wildlife species as long as individual rights and liberties are not contravened (Coggins 1980).

The property clause is also important. Under it the federal government has the power to control its own land. Also, the federal government can control activities that take place elsewhere if they have an impact on federal land. For example, Devil's Hole National Monument was created to protect the Devil's Hole pupfish (*Cyprinodon diabolis*). A Nevada rancher drilled wells on private land nearby as authorized by a state water permit. When pumping began and the water in Devil's Hole began to drop, the rancher was required to reduce his pumping rate so that federal property was not harmed. This preserved the habitat and the pupfish (*United States v. Cappaert*, 426 U.S. 256 [1976]).

*Kleppe v. New Mexico* (426 U.S. 529 [1976]), which upheld the Wild Free Roaming Horses and Burros Act (16 U.S.C. §§ 1331–1340), was also a significant decision. New Mexico had a law (N.M. Stat. Ann. §§ 47-14-1 *et seq.*) that allowed feral horses and burros to be rounded up and sold at auction. In accordance with this state law, some wild burros were rounded up because a rancher claimed they were molesting his cows. The land involved was federal land with the rancher possessing a grazing permit. The U.S. Supreme Court held that the burros were federal property, just like the land.

Since activities off federal property can be controlled, animals that touch federal land at some time during their life may be federal property no matter where they go. A better argument limits this concept to animals that use federal land as an essential part of their habitat. In this view, land and animal are part of the same ecological system. Harm to one can cause harm to the other.

The commerce clause is perhaps the most far reaching of the 3 clauses. "The scope of the commerce power has become virtually unlimited" (Coggins 1980:327) with the U.S. Supreme Court decision in *Hughes v. Oklahoma* (441 U.S. 322 [1979]). The final extension of constitutional power was taken in this case, and wildlife species were declared articles of commerce. Species that are valuable for hide, hair, meat, or oil are obviously articles of commerce because these commodities can be sold. Species that cross state boundaries or are found in "navigable" waters are also articles of commerce under traditional constitutional interpretations. The same is true for species that might attract out-of-state visitors. "In short, while a few species may appear to be sedentary, lacking in economic value, and uninteresting, the overwhelming majority of American fauna clearly are (sic) in or affect interstate commerce and are thus subject to federal regulation" (Coggins 1980:328).

### **Limits on State Power**

States have the power to regulate wildlife under the police power. The police power is limited by the Constitution. Under the judicially developed doctrine called the negative or dormant commerce clause, a state law cannot burden commerce unnecessarily (Tushnet 1979, Varat 1981, Eule 1982). Also, citizens of 1 state may not be discriminated against under the privileges and immunities clause (U.S. Const. Art. IV, sec. 2, cl. 1). Federal legislation on wildlife will preempt conflicting state law

under the supremacy clause (U.S. Const. Art. VI, sec. 2).

The negative or dormant commerce clause is not explicit in the Constitution and is not unanimously accepted by legal scholars. The Constitution gives the federal government affirmative power over commerce, and by judicial interpretation state laws that interfere with commerce are unconstitutional.

In the past decade the U.S. Supreme Court has decided more than a dozen cases involving the negative commerce clause. The most recent major case on wildlife is *Hughes v. Oklahoma* (1979). Oklahoma had a statute preventing nonresidents from exporting minnows (species unspecified). The statute was justified to conserve wildlife. In evaluating statutes under the negative commerce clause there are 2 categories. If a statute expressly discriminates against interstate commerce or citizens of another state, it will be strictly scrutinized. Anti-export statutes and statutes treating nonresidents different from residents fit this category. Such discriminatory statutes will be upheld, if under the following conditions: (1) there is a local purpose related to health and safety, (2) the statute is narrowly tailored to that purpose, and (3) there are no nondiscriminatory alternatives. Some statutes have a discriminatory effect even if the statutory language is nondiscriminatory. For this category a less stringent balancing test is used which takes into account alternatives and local benefits (Tarlock 1983).

In the Oklahoma case the restriction on exporting minnows discriminated in the language of the statute. Nonresidents could not export minnows. The local purpose—conservation—was not connected very closely with health and safety. If conservation was the goal, nondiscriminatory ways to conserve were possible. The U.S. Supreme Court struck down the Oklahoma statute and in doing so reversed the *Geer* (1896) decision. The U.S. Supreme Court held wildlife was not state property but

an article of commerce. The decision means almost any wildlife can be subject to federal control. One exception might be sedentary wildlife on state land (*Palila v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985 [D. Ha.] [1979]).

Another constitutional clause provides that “[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States” (U.S. Const. Art. IV, sec. 2, cl. 1). The privileges and immunities clause has not been used as much as the commerce clause. In *Toomer v. Witsell* (1948) the U.S. Supreme Court invalidated a South Carolina statute charging nonresidents 100 times more than residents for a shrimping license. The statute was struck down under the privileges and immunities clause.

But, in some circumstances, it is acceptable for states to give residents preference over nonresidents under the privileges and immunities clause. In *Baldwin v. Fish and Game Commission of Montana* (436 U.S. 371 [1978]) the court was asked if a nonresident elk (*Cervus elaphus*) hunting fee 7.5 times greater than the Montana residents license was unconstitutional. The court held residents and nonresidents had to be treated “without unnecessary distinctions” only when the nonresident was engaged in an “essential” activity or was exercising a “basic” right. Unless the right or activity is a “fundamental” reason for the formation of the United States there is no discrimination. Although some individuals may disagree, the court did not feel elk hunting was a fundamental right or activity. Under the commerce clause Montana’s statute would probably have been struck down, but that issue was not raised.

If there is no federal action, states are free to regulate wildlife as long as one of the above constitutional prohibitions is not violated. However, the states no longer have exclusive jurisdiction over wildlife. What happens when federal and state legislation exist on the same

subject area? If constitutional federal legislation is passed, federal law will preempt conflicting state law under the supremacy clause. The problem is determining when there is conflict.

If the federal legislation specifically states it preempts state law, or allows state law to continue, the task is easier. Absent this, the courts must determine the intent of Congress when the legislation was passed. If there is both federal and state legislation on the same subject, the state law *may* be upheld under some circumstances. For example, a New York law that was more stringent than the Endangered Species Act was upheld because the purpose of the federal act was to preserve the species, and New York laws favored that purpose (*A. E. Nettleton Company v. Diamond*, 264 N.E. 2d 118 [N.Y.] [1970]). Also, state regulations may be upheld if they make a federally granted right more difficult but not impossible to perform. Preemption will occur if (1) the intent of Congress is clear in the statute and legislative history, (2) the federal regulation in this field is so pervasive there is not room for state control, (3) the nature of the subject area requires uniform regulation, or (4) the state law is an obstacle to accomplishing the full purposes and objectives of Congress (*Northern States Power Company v. Minnesota*, 447 F. 2d 1143 [8th Cir.] [1971]).

Congress has passed considerable legislation on wildlife, but it is not pervasive enough to preempt all state control. Most federal legislation protects or conserves specific species, or protects existing ecosystems as with the Lacey Act. State laws that further these purposes will be upheld even if they are more stringent than federal laws. On the other hand, if Congress allows seals (*Callorhinus ursinus*) to be harvested to meet a treaty obligation (*Fouke Company v. Mandel*, 386 F. Supp. 1341 [D. Md.] [1974]) or allows American alligators (*Alligator mississippiensis*) to be captured because they are no longer endangered (*Fouke*

*Company v. Brown*, 463 F. Supp. 1142 [E.D. Cal.] [1979]), state laws denying import of these animals will be struck down.

## THE COURT AND THE LEGISLATURE

The real question is not who owns wildlife but who has the power to manage it. According to the U.S. Supreme Court the state ownership doctrine has always been a myth (*Hughes v. Oklahoma* [1979]).

In the past few years the U.S. Supreme Court has been asked to determine which level of government has the power to manage wildlife. Because wildlife is not considered individual private property until reduced to possession, the status of wildlife changes when an individual captures or kills it. Until that point, wildlife is considered the common property of all the people. Originally, this meant the common property of the people of each state. But since wildlife may cross state boundaries, perhaps they are the common property of *all* the citizens of the United States. Justification exists for state control over wildlife. States are better able to respond to local management problems because they have better knowledge of the local environment than does a large centralized bureaucracy like the federal government. States, if left to solve their own problems, can experiment with unique solutions that might not be appropriate at a national level.

Even though state control can be justified in many instances, it cannot solve all problems. Congress has asserted federal power over some migratory species and other species in danger of extinction. In these circumstances the national interest is clear, and the states are unable to solve the problem alone. National interest is also clear on federal land which is the common property of all the people of the United States, not just people in the states where the land is found.

The earliest federal laws were enacted because individual states did not have power to properly manage wildlife in certain circumstances. This occurred when the management problem was not confined within 1 state's boundaries. The Lacey Act and the Migratory Bird Treaty Act are examples. If a state had no limits on hunting migratory birds, birds that nest elsewhere would be harvested within the state, thus impacting other states. Clearly coordinated management is needed for migratory birds. In another example, 1 section of the Lacey Act prevents the importation of certain foreign species. If all states and individuals were not limited, species without natural predators could be imported. The harm caused might not be limited to the importing state, but to all states.

The preservation of a national symbol like the bald eagle (*Haliaeetus leucocephalus*) is easy for most people to justify, but predators, like the wolf, or nuisance species, like rattlesnakes (*Crotalus* spp.), are not acceptable as candidates for preservation by all people. The same may be true when the species is "cold and slimy" rather than "warm and fuzzy" (Lundberg 1978). Even though all species might not be highly valued by everyone, an argument can be made that the loss of any species is a national concern. If the preservation of wildlife species is a national issue, federal laws should be justified.

When Congress passes wildlife legislation, courts are limited to determining if the legislation is constitutional. Also, the courts must determine the constitutionality of state laws. State laws are unacceptable if they unreasonably restrict the movement of resources or impair the fundamental rights of nonresidents. The idea of an unimpeded common market with equal opportunity for access by all is a fundamental constitutional concept. When citizens from another state are prohibited from freely participating in the economic system, a serious constitutional question arises.

In the past decade, the U.S. Supreme Court has interpreted the Constitution to justify existing federal legislation. In doing so, it has made federal power over wildlife unlimited. But, even though the power exists, Congress does not have to exercise it.

### CONCLUSIONS

The political process—not law—balances state and federal wildlife issues within Congress. If there is national interest in a wildlife issue, the issue should be debated at the national level and not relegated to state resolution. If a state issue exists, it should be resolved at the state level. The political process works, in most instances, to do this. Support for a national policy on jack rabbit (*Lepus* spp.) hunting is unlikely. An exception may occur in instances like the Idaho rabbit clubbing event that gained national notoriety. On the other hand the Utah prairie dog (*Cynomys parvidens*) is protected by national policy because it is an endangered species. In its natural habitat farmers and ranchers often consider it a pest which *should* be eliminated. Regulations have recently been changed to allow limited taking of this species (50 C.F.R. 1740 [g] 1985).

With wildlife management, it is politics and not "law" that controls which level of government is the manager. Although the federal government has power, the Constitution also allows state control if the federal government has not acted. Shared management seems to be what was intended in the Constitution—a kind of cooperative federalism. The states must accept federal power and develop management plans that consider the federal role. Failure to cooperate may allow political forces to increase the federal role through additional legislation. Although the current administration emphasizes a reduction in the federal role, the federal influence continues and will likely remain unless the federal environmental laws

of the 1970s are all repealed and all federal land is sold.

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## CONTENT ANALYSIS OF AGENCY ANNUAL REPORTS WITH RECOMMENDATIONS FOR IMPROVEMENT

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Public concern for fish and wildlife resources increasingly influences the way management agencies can operate. More and more people are involved in some form of wildlife-

oriented recreation (U.S. Dep. Inter. and U.S. Dep. Commer. 1982), and they are demanding greater accountability from managers supported by public revenues. Public involvement programs, therefore, are becoming integrated into agency operations and decision making. Hendee et al. (1974) noted the

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