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Wildlife Ownership

How the state became responsible for management

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Introduction

Forensic techniques that identify wildlife, and assist in linking wildlife crimes to the responsible party are invaluable to the legal community. This book has been devoted to assisting law enforcement in the identification of individuals responsible for wildlife crimes. The identification techniques provided by forensic science are even more important in the courtroom. Oftentimes law enforcement has a good idea as to who committed a crime, and simple investigative techniques will reveal the most likely suspect. However, once that suspect is identified, focus turns to providing enough admissible proof in court so that a conviction can be obtained. DNA identification has permitted attorneys to quantify facts that in the past were left up to impressions. Proof that meat found in a suspect's freezer matches with 98% certainty a carcass found in the woods removes the factual issue from the table. The judge or jury only needs to consider whether the law, as applied to the fact that the freezer meat matched the carcass, requires that the suspect be found guilty or not. There may be due process problems inherent in jurors' willingness to accept DNA evidence as infallible without being able to properly weigh the effects of mishandled evidence or improper gathering techniques, however, that is beyond the scope this book (DeWitt, 1996).

The question of the law is separate from the factual question in the case. In criminal proceedings the prosecutor decides which law is to be applied, meaning which law has been violated. The prosecutor and, if there is a jury, the judge will

explain the law that the suspect is accused of breaking, and what facts the state will prove in order to find the suspect guilty.

The purpose of this section is to address the question of law. State authorities draft most laws regulating the taking of wildlife in the US. The federal government tends to regulate broader issues that concern the transportation of wildlife across state lines as well as internationally. State and federal governmental authority to regulate the taking of wildlife is derived from a legal history stretching nearly 2,700 years. The first half of this section follows the development of wildlife regulation from the property rights of ancient Rome through the royal prerogatives of King Charles' England to the unlimited resources of Colonial America. The second half focuses on present-day state, federal, and international regulations affecting the taking, transportation, and management of wildlife.

Ancient Rome and the Concept of *Res Nullius*

Ownership is a pivotal concept in understanding the Roman citizen's relationship with wildlife. Some of the earliest legal writings, dating back to the time of the Sumerians in ancient Mesopotamia, recognize the ability of humans to own or possess animals (Wise, 1996). The concept of wildlife as property allows separation between what is mine and what is yours. This is my dog, not your dog. In the legal realm, ownership is incredibly important when determining schemes of compensation. Laws based upon the economics of owning property allow compensation for damaged or stolen property (ibid.). You have killed my dog so you must give me your dog or financially compensate me. Ownership of the dog as if it were property allows the law to create a resolution to situations in which one suffers a loss. If I could not own the dog, then I would suffer a loss for which there is no compensation if the dog is killed or stolen by another.

The Romans divided property into three main categories: *res publicae*, *res communes*, and *res nullius* (Blumm and Lucas, 2005). *Res publicae* refers to things owned by the state such as roads, ports, rivers, and public buildings. *Res communes* includes things that belong to the community like air, running water, and the sea. *Res nullius* are things owned by no one such as unoccupied lands, property of the enemy captured in battle, and wildlife. Things labeled as *res nullius* only belonged to no one as long as no one had taken possession of the item through *Occupatio* (Wise, 1996). An individual could own wildlife only after physically capturing the animal (Blumm and Lucas, 2005). If the animal escaped the cage, then it became *res nullius* again, if the animal fell dead on neighboring property, the property owner maintained the right to prevent a hunter from trespassing to retrieve the game (Wise, 1996).

Roman law saw wildlife in the open as owned by no one until it was captured. English law took a different perspective. Wildlife was property under English common law, but instead of being owned by no one, it was owned by the king.

Common Law England: The King's Ownership

The English took the Roman understanding of ownership one step further, and eliminated the need for capture. In Rome, one was prevented from trespassing on someone else's property to hunt wildlife. English law concluded that if a restriction could be made on the land one owned, then it would make sense that the ability to restrict access to the wildlife on that land would imply a similar ownership in the wildlife (Blackstone, 1979).

During the time of the early Britons, England was replete with game, which they hunted for sustenance. The arrival of the Saxons brought domestication of wildlife, and the cultivation of lands. As the Saxons planted fields and staked off their own respective plots of land, they pushed wildlife off into the forested areas. The forests had never been distributed to private owners, and therefore they belonged to the Crown (*ibid.*). As wildlife now resided in these large forests, the king took ownership of them and reserved the right to hunt them. However, anyone owning their own land still had the right to pursue game within the confines of their privately owned property (*ibid.*).

With the Norman Conquest came a new view of the king and his powers. There is still debate over whether the Normans actually introduced feudalism to England. What is certain is that the Normans helped to establish a new system of property rights within England, but whether it could properly be called the traditional feudal pyramid power structure is a question best left to historians (Thomas, 2008). The right to pursue and take wildlife was vested with the king, and only those granted authority by the king. The king possessed a right known as the chase and he held the title of "lord paramount of the fee" (Blackstone, 1979). These two concepts combined to give the king the power to pursue game no matter where it might be, and these principles removed the right of anyone else, regardless of their status as landowners, to hunt wildlife. Once all the rights to pursue game and own them as property became vested in the king, the only way individuals could acquire a right to property in wildlife was through particular privileges granted directly by the king himself (*ibid.*).

There were four specific grants that permitted an individual to hunt game. These were: the chase, the park, the free warren, and the free fishery. The king reserved the forests for himself, and granted authority to others through chases and parks. A chase or park was a designation given to property that different individuals owned. If someone owned a chase or park, the king had granted that person the authority to hunt any game found on that land (*ibid.*). The park was more limited than the chase because the right to hunt extended only over one's own property, whereas the chase allowed a person to hunt on other people's property (Blumm and Lucus, 2005). Some of the more powerful lords turned their own property into parks, and hunted the grounds for leisure and sport. The lords maintained full authority to hunt their own parks as long as the land did not fall within forests that the king owned, in which case separate permission would have to be granted by the king (Green, 1997). The grant of

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warren was another type of property, the owner of which was allowed only to hunt “inferior species” including waterfowl and small upland game. The grant of free fishery permitted a person to take and kill fish from public streams and rivers (Blackstone, 1979). Individuals possessing a grant were the only people in England permitted to acquire a property right in wildlife.

Unlike in Rome, the right to capture wildlife was not affected by whether one owned the property upon which he or she was hunting, but rather by what type of grant the individual possessed. Determining who owned a particular animal after it was pursued and subsequently killed could result in very odd decisions, at least by today’s standards. If individual A has a chase, chase in the sense that he owns property on which he is permitted to hunt and may also hunt on property owned by others, and individual B owns an adjoining chase, the wildlife on each chase belong to the chase’s respective owner. If a deer walks from chase A to chase B and is killed by the owner of chase B, then owner B possesses a property right in that deer. Likewise, if A finds a deer on B’s chase and kills it, the deer belongs to B due to his ownership of the chase on which it was killed. If, however, owner A is hunting on his own property and his pursuit of a deer leads him to kill it in chase B, then A would possess a property right in that deer. The effort A places in pursuing the game vests a property right in A’s subsequent success even though he did not kill the game on his own property (*ibid.*).

If the hypothetical scenario is changed just slightly, a less familiar result can be obtained. Assume that instead of A, a property owner with the grant of chase from the king, we have C, a property owner with no particular grant. C is trespassing on A’s property and begins pursuit of a deer. The deer is subsequently killed on B’s chase. The result is A still possesses ownership in the deer. Since C had no right to begin pursuit of the deer, his efforts in the chase do not serve to divest A of his original right of ownership in the deer (*ibid.*).

The system of grants developed as a result of the natural evolution of property rights in England, and along with the grants came specific justifications for their existence and maintenance. Four reasons stood out more than most. The first reason was to encourage the improvement of land by ensuring that a landowner had exclusive ownership over everything in and on his land. The second helped to preserve certain species by preventing over-harvest. The third reason ensured that farmers and craftsmen would not take up hunting as a hobby, thus keeping them hard at work harvesting and building. The final and most important reason for grants was that they protected against insurrection from the peasant classes (Blackstone, 1979).

While hunting restrictions were in place to help preserve certain populations of wildlife, that goal was ultimately tangential to the main interest of maintaining class distinctions (Blumm and Lucas, 2005). It would be much more difficult for the peasants to revolt and overthrow the ruling class if it was illegal for them to own firearms. If peasants did not have the right to hunt, then there was no reason to legalize firearm ownership for their class. In addition, the lack of target practice ensured the ruling class that even if the revolting peasants did manage to get their hands on firearms, they would not possess the skills necessary to

utilize them effectively. William Blackstone in his commentaries discusses how the conquering feudal lords benefitted by arming their militaries while at the same time ensuring that the native conquered citizens did not have the arms necessary to fight back (Blackstone, 1979, p. 413).

As any elementary school class learns, the restrictions on English people, particularly those relating to religious freedom, led to the Pilgrims landing at Plymouth Rock (Ward, 2006). What lay before them was a vast untouched wilderness. The fact that the land was unclaimed, there were vast quantities of wildlife, and the societal class structure had no place in the New World, meant the new settlers had no need for restrictions on hunting or fishing.

The New World: Hunting for the Market

Settlers in America, instead of transferring the English notion of grants, adopted a more Roman approach, utilizing the rule of capture to determine ownership in wildlife. Three major influences brought about the abandonment of the English system. The first being the reasons for settlement in America. Citizens of England fled because of oppressive English policies, one of which was the restriction of hunting only to those with sufficient wealth or status. The second and more pressing reason was the need for food and clothing. Hunting was not just a sport to be pursued in one's leisure time, but rather a means of survival. The third influence on early settlers was the genuine expanse of America. There was so much unsettled wilderness that any regulation of those areas would hinder economic growth. This need to develop the New World, commonly referred to as Manifest Destiny, led to a further development in the rule of capture known as the "free take imperative" (Blumm and Lucas, 2005).

The concept of free take stems from a mindset that is very different than that of modern-day Americans. In most modern American cities the majority of people commute in to work from the suburbs. People actually seek out areas of the country where they can escape the city and find their own little piece of wilderness (Barta, 1999). The early settlers saw the wilderness as an unclean, dangerous area, and settlers implemented policies designed to tame the wilderness and expand civilization. A good example of this drive toward expansion can be seen from the top of the Governor's Mansion in Colonial Williamsburg. During the 1700s if one were to climb into the cupola that sat atop the mansion, one could look 6 miles to the south and see the James River and if one looked 7 miles to the north, one could see the York River. What one would not see is a single tree. Every tree between both riverbanks had been cut down because people did not want to live in or near the wilderness. How these policies were applied to hunting is best exemplified by the case of *Pierson v. Post*, this case is known by law school students as the first case they ever read in Property.

Pierson v. Post involved two hunters: one hunter, Post, pursued a fox with hounds along a piece of unowned wasteland. The other hunter, Pierson, knew of the pursuit by Post. Waiting until the opportunity presented itself, Pierson shot

the fox and carried it off, effectively preventing Post from capturing the animal (*Pierson v. Post* [1805] 3 Cai. R. 175, 180). The issue in the case was, who had the legal right of ownership in the fox? The Supreme Court of New York looked to ancient texts of medieval law as well as the writings of an old German jurist (*Pierson v. Post* [1805] 3 Cai. R. 175, 177). The justices could not turn to British case law to resolve the issue since most cases involving ownership in wildlife had been resolved either according to statute or according to the rights of the landowner. The court was addressing the question of pursuit without the usual guideposts provided by landownership. They had to determine whether pursuit alone was sufficient to create an ownership right in the animal being pursued (*Pierson v. Post* [1805] 3 Cai. R. 175, 178).

Regardless of the sympathy felt for Post, the individual who expended the effort in pursuing the fox, the court held that only through the killing or physical restraint of the animal could one take ownership. The animal must be deprived of its natural liberty through a mortal wounding, netting or ensnaring in order for an individual to rightly claim possession (*Pierson v. Post* [1805] 3 Cai. R. 175, 179). The dissenting justice on the Pierson Court was concerned with the chilling effect created by such a rule, and argued that the pursuer should take a right in the fox since the advancement of society would be fulfilled by the “destruction of a beast so pernicious and incorrigible” as the fox (*Pierson v. Post* [1805] 3 Cai. R. 175, 182). The viewpoint of all the justices was that the elimination of the fox was beneficial for economic expansion, they just disagreed as to which conclusion would result in the least amount of future ownership disputes in wildlife. *Pierson v. Post* set a precedent that the individuals killing the animal took possession, thus alleviating problems associated with wildlife pursued for short periods of time and then subsequently killed by another individual.

The development of a legal standard that recognized the individual mortally wounding, snaring, or netting an animal as the person with a right to possession helped to move hunting of wild animals into a marketplace pursuit. In the modern day, companies develop new innovative products because of the protection provided by patents. If a company develops a new invention and obtains a patent for it, they can enjoy exclusive distribution and use of that invention for a set period of time (Bravin, 2008). The right to possession in a mortally wounded animal or netted bird created a similar certainty to that of modern-day patent law. If a whale was killed by company X and later discovered by company Z, company X had a right of possession in that whale even though the mortal wound did not result in the whale being immediately landed (*Ghen v. Rich* [1881] 8 F. 159, 160). Unlike in *The Old Man and the Sea* (Hemingway, 1952), “I am a tired old man. But I have killed this fish,” or perhaps more like in *Moby Dick* (Melville, 1949), whales often ripped the harpoon lines free of the ship and custom dictated that the first harpoon to stick and hold created a right of ownership in that whale (*Ghen v. Rich* [1881] 8 F. 159, 161).

With the certainty created by the law of property combined with incredible technological developments in firearms, whaling vessels, and rail systems, America was able to expand at a blistering pace, and the market in wild game

expanded along with it. Unfortunately, wildlife were not able to keep pace with technology. The ability to kill wildlife faster than they could reproduce decimated populations. Passenger pigeons numbered in the tens of millions in the early 1800s, but due to over-harvest for market, the last passenger pigeon died in captivity on September 1, 1914 (Wilcove, 2008). By 1880, the population of buffalo in America had been reduced from tens of millions to less than a few herds (*ibid.*). The concept of hunting for market needed to give way to what we now call conservation.

Conservation of Wildlife Through Sport Hunting

While hunting regulations imposed by the aristocracy in England worked in an indirect way to maintain populations of wildlife, the US developed its own form of aristocracy in the captains of industry which eventually led to the conservation programs everyone knows today. Theodore Roosevelt was the biggest proponent of helping to preserve American wildlife for future generations. Much like the aristocracy of England, the wealthier individuals in America did not hunt for market or sustenance, but for sport. By the late 1880s, it had become clear that something needed to be done about the decimation of wildlife. One could not walk a few feet across the western plains without seeing buffalo bones, but could walk for hundreds of miles without seeing a single live buffalo (*ibid.*). Theodore Roosevelt helped to establish the first lobbying firm for conservation of big game species known as the Boone and Crockett Club (Brinkley, 2009). “If his father could found the American Museum of Natural History from a parlor in Manhattan, Theodore saw no reason why this group, meeting in the cramped uptown quarters . . . couldn’t save buffalo and elk in the American West” (*ibid.*). A new legal doctrine had to take the place of free take, it was and still is known as “fair chase.”

The notion of fair chase was not welcomed with open arms, after all there were huge industries devoted to hunting wildlife to sell at market, but one unfortunate event along with some favorable court rulings led to the ultimate success of sport hunting and sustainability-based conservation methods. The assassination of incumbent US President William McKinley thrust Theodore Roosevelt into the US presidency along with his policies and views about conservation. Theodore Roosevelt championed the idea of scientific management of resources; policies based on rational decisions made by trained experts could help to prevent scarcity of wildlife (Rothman, 2000). To implement these policies required a battle between what had been the traditional view of local control, and what was needed to help ensure conservation efforts were successful, which was centralized control. Not only would there be a question of the power of the federal government over the state, but also there would be disputes over the state’s power to regulate the individual (*ibid.*). Free take represented zero regulation and destroyed wildlife populations. In order to restore those populations, fair chase, by its design, required regulation.

The legal concept behind fair chase is known as the public trust doctrine. Long before Theodore Roosevelt came into the public eye, in 1821 a New Jersey Supreme Court case helped lay the foundation of the public trust doctrine (Blumm and Lucas, 2005). *Arnold v. Mundy* examined the English concept of land vesting in the sovereign and turned it on its head. In England, the sovereign was the king, but in the US, the sovereign is the people. The people through an elected democratic republic run the country. Therefore, the court held that the use of navigable waterways was common to all the people. The use could only be curtailed by the sovereign to ensure the “order and protection” of the resource (*Arnold v. Mundy* [1821] 6 NJL 1, 12). The court established a notion of public trust, which permitted the states to regulate waterways for the order and protection of those waterways. Wildlife would slowly change from being *res nullius*, owned by no one until capture, into something more like *res communes* or *res publicae*, owned by everyone and subject to regulation by the state for the benefit of everyone.

Management: The Property Right of States

Who creates and enforces the law is oftentimes just as important as the underlying legal theories. In the United States, the power of the government is divided between the federal government and the various state governments. The United States Constitution directs the balance of power between these two sovereign bodies. The Constitution limits the power of the federal government to only those functions that are enumerated in the Constitution. State governments, however, are not similarly limited. Each state government possesses what are called “police powers.” These powers are the general powers necessary to protect the safety and welfare of the citizens. Both state-level governments and the federal government participate in the creation and execution of wildlife law. But the balance of power has not always been clear.

The landmark Supreme Court case *Geer v. Connecticut* set the stage for the battle between state and federal governments over the regulation of wildlife, which lasted nearly one hundred years. The Court in *Geer* considered a Connecticut statute that prevented the transportation of game taken within Connecticut from being transported outside the state’s borders. The issue was whether the Connecticut statute violated the Commerce Clause of the US Constitution. In resolving this issue, the Court relied on the public trust doctrine in stating that several states hold wildlife in trust for their citizens. By doing so, the Court recognized that the state is the owner of natural resources, such as wildlife, and can create laws and regulations which protect and secure its benefits for the citizens and future citizens.

The *Geer* case is historically important for two reasons. First, the decision’s lasting impact on wildlife law was the recognition of the state ownership doctrine. But the decision is also important because the Court’s rationale in *Geer* was used to suggest that the state’s ownership of wildlife was to the exclusion of the federal

government (Blumm and Lucus, 2005). If true, the federal government would not be able to regulate wildlife because wildlife would be under the exclusive authority of the states (Wood, 2000).

State ownership of wildlife was successively questioned in the years that followed *Geer*. Before *Geer* was overruled in 1979, the Supreme Court slowly weakened the exclusive powers of the state over wildlife. For example, the Supreme Court held the Constitution's Equal Protection Clause prevented state ownership from being used in a discriminatory manner. In *Takahashi v. Fish and Game Commissioner*, the Supreme Court held that the state of California could not withhold a commercial fishing license from a resident alien, while at the same time granting it to individuals with US citizenship. Simultaneously, the Supreme Court slowly acknowledged the expanding powers of the federal government. In *Missouri v. Holland*, the Court held that the Migratory Bird Treaty Act of 1918, an international treaty, superseded conflicting state laws pursuant to the Supremacy Clause. Thus, the attack on *Geer* came from both directions: the exclusive power of the state was limited and the power of the federal government was expanded.

In 1979, the Supreme Court overruled *Geer* in *Hughes v. Oklahoma*. The *Hughes* court applied an expanded theory of the Commerce Clause to invalidate an Oklahoma law, which prohibited the exportation of minnows from the state. The Commerce Clause is a clause in the US Constitution that empowers the federal government to regulate interstate commerce. Originally, the Supreme Court narrowly interpreted the Commerce Clause. But over time, the Supreme Court expanded its view, especially in response to the New Deal legislation during the Great Depression. In 1977, the Supreme Court held that the Commerce Clause applies to the regulation of wildlife (Blumm and Lucus, 2005). Two years later, in *Hughes*, the Supreme Court held that that federal power to regulate wildlife allowed for the Supreme Court to overrule *Geer*. But more important than what the *Hughes* case did, is what it did not do.

Under *Hughes*, the Supreme Court undermined the notion that the state ownership of wildlife made the regulation of the wildlife the exclusive domain of the state. Instead, the states would be subject to the supreme powers of the federal government and federal wildlife law would be analyzed under the federal government's power to regulate interstate commerce. However, the *Hughes* court left intact the public trust doctrine. This allowed the states to remain stewards of the land, free to regulate wildlife, but subject to the oversight of the federal government (ibid.).

Although *Hughes* expressly overruled *Geer*, the limits of the *Hughes* decision are important in understanding the proper scope of state wildlife regulation. First, the *Hughes* case subjects state regulation to constitutional limitations, such as the limits of the Equal Protection Clause as seen in *Takahashi*. Similarly, state law must comply with federal law. For example, a state statute cannot undermine the intent of the federal statute, or prohibit what a federal statute expressly permits (ibid.). Nevertheless, the *Hughes* case did not completely remove state stewardship of wildlife. The majority of states in the United States have statutory

provisions that expressly endorse the state ownership doctrine and some have even included it in their state constitutions (*ibid.*). Further, each of the fifty separate legal regimes must work in conjunction with federal laws related to the regulation of the wildlife.

Federal Law and the Regulatory State

Even before the Supreme Court attempted to resolve the conflict between the federal government's constitutional powers and the state's ownership of wildlife, the federal government had undertaken efforts to regulate wildlife. The first federal statute that attempted to regulate wildlife was the Lacey Act of 1900. The Lacey Act made it illegal to transport game between two states taken in violation of state law. Although the statute benefited the nascent conservation movement, the Lacey Act was intended as a pest control measure (Kaile, 1993). By preventing interstate transportation of wildlife, the legislature sought to protect local crops and ecosystems from the potential dangers associated with the introduction of foreign species. Despite later amendments to the Lacey Act, the statute had limited impact on the actual regulation of wildlife. The importance of the Lacey Act is that it was the first step taken by the federal government to regulate the ownership rights of individuals in wildlife.

The next milestone in the expansion of federal regulation of wildlife was the passage of the Endangered Species Conservation Act in 1966. Unlike the Lacey Act, which focused on state law, the Endangered Species Act of 1966 involved the federal enforcement of exclusively federal law. As such, this act was the first comprehensive federal legislation specifically designed to protect wildlife (*ibid.*).

The 1966 Act was intended to reduce the risk of extinction by addressing some of the causes, specifically habitat destruction. The Act enabled the Secretary of the Interior to acquire lands as means to stop or prevent the extinction of a particular species. The Act, however, was quickly criticized as being largely ineffective. Critically, the Act's criteria were limited to the deleterious effect on habitation and did not address other reasons for extinction (*ibid.*).

As a result of these shortcomings, the Endangered Species Preservation Act of 1969 was passed. Importantly, the 1969 Act enhanced the provisions of both the 1966 Act and the Lacey Act. The 1969 Act required that the Secretary of the Interior develop a list of endangered species. Once on the list, the importation of the animal and its byproducts were prohibited. The 1969 Act also expanded conservation involvement, adding provisions that allow private individuals to petition for the protection of a certain species as well as calling for international participation by the United States in the protection of endangered species (*ibid.*).

Dissatisfaction with both the 1966 and 1969 Acts, and a growing conservation movement led to the passage of the Endangered Species Act of 1973. This Act served to replace the 1966 and 1969 Acts, and put into place the most expansive environmental protections of the time. The Act established the familiar structure of a two-part list. The Secretary of the Interior established an "Endangered"

and a “Threatened” list based on separate criteria. These two lists permitted the proactive protection of species before they were on the brink of the extinction. Further, the Act expanded its scope to include plants and invertebrates (*ibid.*).

Arguably, the Endangered Species Act’s most important provision was to require all federal agencies to use their authority to assist in the conservation of the threatened or endangered species. Moreover, the Act prevents federal agencies from acting if that action would threaten a listed species. These provisions of the Act represent the expansion of the regulatory state and its application to wildlife management. No longer is the management of wildlife left only to the states. Instead, it has become a combined effort of both the federal and state governments.

The basic structure of the Endangered Species Act has remained the same despite later amendments, including substantive amendments in 1978, 1982, 1988, and 2004. And since its passage, the federal government has continued to be an active participant in wildlife management through additional statutes and agency actions that are beyond the scope of this book. Once a theory developed about the state having some ownership interest in wildlife, the ability to protect and manage wildlife for the benefit of future generations became possible (Archer *et al.*, 1994).

Globalization: Working toward Worldwide Conservation Practices

As the human population expands and the exploitation of natural resources increases, the boundaries between nation-states become less important. This is especially true for wildlife because, by definition, wildlife does not abide by national boundaries. As a result, there has developed a growing body of international law relevant to wildlife.

While the expansion of international wildlife law in the past few decades dwarfs that of the previous two centuries, the first example of an international treaty intended to protect wildlife is the Treaty Concerning the Regulation of Salmon Fishing in the Rhine River Basin, signed in 1886 by Germany, Luxembourg, the Netherlands and Switzerland (Freyfogle and Goble, 2002). However, it has only been since the 1960s that there has been a concerted and sustained global effort to protect and manage wildlife.

International wildlife law is based largely on treaty law; the other source of public international law is what is known as “customary law.” Moreover, the treaty-making process oftentimes codifies then-existing customary law. For example, during the 1973 Conference of the Law of the Sea, the generally accepted norm that coastal countries have the jurisdiction and sovereign right to protect and manage their surrounding marine environment was incorporated into the United Nations Convention on the Law of the Sea. Customary law, however, is not directed by a supreme sovereign. Instead, it originates from universally recognized practice (Lyster, 1985).

Treaties, on the other hand, are similar to contracts between individuals but are between nation-states. They can be between two nations (bilateral) or between several (multilateral). There is no standard or formalized method for the formation of a treaty because the global community is not governed by a single government. Instead, various organizations serve as the fountainhead for treaties. Important to the development of wildlife treaties has been the Organization of American States (OAS), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Union for Conservation of Nature (ibid.). Once a treaty is drafted, it becomes open for signatures. But a treaty is not binding as soon as a country signs it. Instead, a treaty must be ratified. The signature merely represents that that nation will make a good faith effort to ratify the treaty with its domestic government or make it known that it no longer intends to be a party to the treaty. Ratification varies by country; the United States requires the President's approval, with the advice and consent of the Senate. Only after this process will a treaty be binding between the signatory countries.

Wildlife treaties fall into three main categories. First, some treaties are limited to a specific species or related species. Second, other treaties focus on wildlife of a limited geographical area. Finally, some treaties attempt to address the regulation wildlife on a much broader scope without limitation of species or location (ibid.).

Treaties of the first type usually involve an economically valuable species that populate areas outside of the single national jurisdiction. An example of such a treaty is the 1931 International Convention for the Regulation of Whaling. The intended subjects of the treaty were without a doubt economically valuable, but were particularly vulnerable because they primarily lived beyond the reach of any one national legal system. Likewise, treaties of this kind are also relevant to migratory animals, especially birds, because the protections afforded to the species may vary between each country the animal travels through.

The second category of treaties is likewise limited in scope. In this case, the treaties are limited to a specific geographic region. An example of this type of treaty is the Convention on the Conservation of Antarctic Marine Living Resources. This treaty is an outgrowth of the Antarctic Treaty, where the signing parties agreed to several limits to the use of Antarctica. But the Antarctic Treaty did not contain provision related to the exploration or management of the wildlife located there. Instead, the Convention on the Conservation of Antarctic Marine Living Resources was intended to augment the Antarctic Treaty and preserve the living marine resources.

Finally, and perhaps most importantly, the final type of treaty are the treaties that are not limited to a specific species or geographical region. These treaties, however, are not unlimited in their scope. For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is limited to international trade. But its scope is so broad that it warrants distinction from the two previous categories. Other examples include the Convention concerning the Protection of the World Cultural and Natural Heritage and the

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Convention on the Conservation of Migratory Species of Wild Animals. Each of these treaties is important in their own right, and collectively they represent an increasing global effort in wildlife management (Lyster, 1985). In effect, they represent the adoption of a global principle of conservation that parallels the public trust doctrine. Instead of a single state having a duty to protect wildlife for its own citizens, each nation has a similar duty for the benefit of every person.

Conclusion

We have tried to provide an understanding of the legal history supporting state and federal regulations. There are four important points in this chapter. First, animals are, and always have been, recognized as personal property capable of being owned by one or more people. Second, the free take doctrine led to the establishment of a market in wild game meat. Unfortunately, wildlife populations could not sustain the needs of a commercial market, and it became imperative to restrict the taking of wild game. Third, recognizing that the state owned the wildlife for the citizens created an obligation on the government to manage and conserve populations. And, fourth, as our scientific knowledge about wildlife populations has expanded and evolved, the need for international regulations, such as cohesive management plans for migratory birds, has arisen to ensure the continued success of wildlife conservation.

Cases Cited

Arnold v. Mundy [1821] 6 NJL 1.
Geer v. Connecticut [1896] 161 U.S. 519.
Ghen v. Rich [1881] 8 F. 159.
Hughes v. Oklahoma [1979] 441 U.S. 322.
Missouri v. Holland [1920] 252 U.S. 416.
Pierson v. Post [1805] 3 Cai. R. 175.
Takahashi v. Fish and Game Commissioner [1948] 334 U.S. 410.

References

Archer, J.H. *et al.* (1994) *The Public Trust Doctrine and the Management of America's Coasts*. Amherst, MA: University of Massachusetts Press.
Barta, P. (1999) Fear of sprawl prompts some cities to tighten up development rules. *The Wall Street Journal*, 3 February, T1.
Blackstone, W. (1979) *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1796*, Vol. 2. Chicago: University of Chicago Press.
Blumm, M.C. and Lucas, R. (2005) Symposium article: the pioneer spirit and the public trust: the American rule of capture and state ownership of wildlife. *Lewis & Clark Law School Environmental Law*, 35(Fall), 673–720.

- Bravin, J. (2008) High Court further limits scope of patents. *The Wall Street Journal*, 10 June, A4.
- Brinkley, D. (2009) *The Wilderness Warrior: Theodore Roosevelt and the Crusade for America*. New York: HarperCollins Publishers.
- DeWitt, S.L. (1996) Note: the indigent criminal defendant, DNA evidence and the right to an expert witness: a comparison of the requirements of due process in *State v. Dubose and Harris v. State*. *The Boston University Public Interest Law Journal*, 6(Fall), 267–291.
- Environmental Law Institute (1977) *The Evolution of the National Wildlife Law*. Washington DC: author.
- Freyfogle, E.T. and Goble, D.D. (2002) *Wildlife Law: Cases and Materials*. New York: Foundation Press.
- Green, J.A. (1997) *The Aristocracy of Norman England*. Cambridge: Cambridge University Press.
- Hemingway, E. (1952) *The Old Man and the Sea*. New York: Charles Scribner's Sons.
- Kaile, D.K. (1993) Evolution of wildlife legislation in the United States: an analysis of the legal efforts to protect endangered species and the prospects for the future. *Georgetown International Environmental Law Review*, 55, 441–478.
- Lyster, S. (1985) *International Wildlife Law*. Cambridge: Grotius Publications.
- Melville, H. (1949) *Moby Dick or the White Whale*, ed. by W. Maugham. Philadelphia, PA: The John C. Winston Company.
- Panjwani, R. (2008) *Wildlife Law: A Global Perspective*. Chicago: ABA Publishing.
- Rothman, H.K. (2000) *Saving the Planet: The American Response to the Environment in the Twentieth Century*. Chicago: Ivan R. Dee Publishers.
- Thomas, H.M. (2008) *The Norman Conquest: England after William the Conqueror*. New York: Rowman & Littlefield Publishers, Inc.
- Ward, K. (2006) *History in the Making: An Absorbing Look at How American History Has Changed in the Telling Over the Last 200 Years*. New York: The New Press.
- Wilcove, D.S. (2008) *No Way Home: The Decline of the World's Great Animal Migrations*. Washington, DC: Island Press.
- Wise, S.M. (1996) The legal thinghood of nonhuman animals. *Boston College Environmental Affairs Law Review*, 23(Spring), 471–546.
- Wood, M.C. (2000) The tribal property right to wildlife capital (Part I): applying principles of sovereignty to protect wildlife populations. *Idaho Law Review*, 37, 1–102.