American Wildlife Law - An Introduction

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Summary:
This article provides a short introduction to the matrix of government interests in controlling wildlife in the United States. The powers of state and federal government are considered along with limitations on the exercise of the authority.

Introduction

As you proceed through this material, please remember that the United States is somewhat unique in that, in theory, the state governments such as Michigan or New York are the sovereign governments while the United States is the limited, delegated government. This is important in the realm of wildlife law as it is the sovereign government has the claim to control wildlife. Thus , in China and India and most other countries, primary control over animal issues is at the national level of the government. Curiously, in this respect, Canada is like the U.S., as it is the Provinces that have the primary control over wildlife not the federal Canadian government.

The legal control of wildlife, as recognized under the state ownership doctrine, is based on the fundamental premise that state government has the power to control the taking (by capturing or killing) of all wild animals found within their jurisdiction. This power is exercised under the broad concepts of police power, but is mixed with public trust concepts. (*See* *Barrett v. State* , 220 N.Y. 423, 116 N.W. 99 (1917). Note that the doctrine is not based upon the claim that the government owns the wildlife as an individual might own a dog or goat (see *infra* for more discussion on the nature of the ownership asserted by states). The state ownership doctrine is still sufficiently viable today to give primary responsibility and control of wildlife to state governments. Substantial inroads upon this power have been made, however, and the states can no longer claim exclusive control of wildlife. (*See* George Coggins, *Wildlife and the Constitution: The Walls Come Tumbling Down* , 55 Wash. L. Rev. 295

(1980). Some of the inroads and limitations include private rights under the federal constitution, Indian rights under various treaties and the power of the federal government in associated areas.

While the state government is the sovereign, the powers and the responsibility of the federal government do come into play. While the U.S. Constitution does not mention animals or wildlife specifically, in the exercise of some of the federal powers, the federal government will trump the power of the states, circumscribing their authority. The first area of federal authority impacting wildlife is the power to negotiate and adopt treaties with other country. There is no constitutional limitation on the subject matter of a treaty. Migratory birds and endangered species clearly are acceptable treaty topics for federal action as they represent issues about which other counties have concerns. Another area is authority is that of federal land ownership. If the federal government owns land, then as a general rule, it is not bound by laws of the state as federal agencies make decisions about the use of federal land. Finally, there is the powerful commerce clause of the U.S. Constitution. While the primary use of this power is to justify new federal laws controlling some activity, it is also the basis for limiting state laws, like those that deal with capture and transportation of wildlife.

The first time that the U.S. Supreme Court had to deal with the issues of state ownership of wildlife was in *McCready v. Virginia*, 94 U.S. 391 (1876). In this case the Court acknowledged the ability of a state to limit access to oysters found within state waters. However, the full articulation of the doctrine, along with a detailed historical analysis of the concept had to wait until 1896 when the Court considered *Geer v. Connecticut*. (See discussion below.)

I. Scope of State Authority & General Limitations

In order to be understood, the issue of ownership or control of wild animals must be viewed within an historical context. During Roman times, wild animals were considered property of the community, belonging to no one until captured. It does not appear that the Roman state exercised any control over the taking or use of wildlife by private individuals. In the transfer of these legal concepts to the English common law system, however, a caveat was added. As noted by Blackstone, this right of access "still continues in every individual, unless where it is restrained by the civil laws of the country." In several areas, particularly with game animals, the English laws were numerous, complex and very restrictive. This highly structured and controlled approach to wildlife law, while clearly establishing the precedent for governmental control, did not transplant very well in American soil. The rich abundance of wildlife, the character of the people who immigrated, and the vast open spaces resulted in a severe pruning of the English ideas, almost back to the Roman roots. The frontier spirit supported the idea of free taking, and the states (colonies) could do very little about it.

After the American Revolution and during the 1800s, the increasing commercial value of wildlife and fisheries resulted in increased efforts by the states to control these natural resources. During the 1800's the Supreme Court, through a series of opinions, addressed the issue of ownership of wildlife. The first solid statement by the Court about state control or interest in wildlife was in *McCready v.*

Virginia (see above), but the full articulation of the concept of state ownership of wildlife was not presented until 1896 in the case of *Geer v. Connecticut*, 161 U.S. 519 (1896).

Since Geer is considered the landmark case of this area of law, it will be helpful to examine it in some detail. The Connecticut statute in question prohibited the possession of certain game birds with intent to transport the birds beyond the state boundaries. The defendant was charged with the possession of woodcock, ruffled grouse and quail killed during the proper hunting season but with intent to transport the birds out of state. The defendant claimed the statute was unconstitutional since it interfered with the federal powers under the Interstate Commerce Clause. Justice White began the opinion with a very scholarly discussion of the history of governmental control over wildlife, covering Roman, English and French civil law concepts. His ultimate conclusion was:

> **Undoubtedly this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. Its also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the Constitution.**

Thus, the Supreme Court strongly affirmed the right of the states to control the access to and the use of wild animals. In addressing the statute in question, the Court noted that its purpose is to confine the enjoyment of a state resource to the boundaries of the state.

Notwithstanding the narrow issue or the questionable logic, the advocates of state control have used the general language of the case to try and thwart all interference with state control. The caveat that the state ownership doctrine was subject to federal powers and rights seems to have been lost in the excitement.

Challenges to the broad ideas of Geer have been steadily accumulating since the turn of the century. In 1978, the Supreme Court in *Hughes v. Oklahoma* had a case with a similar fact pattern of that of Geer and overruled the old case. It did not really overrule the state ownership doctrine, but rather brought wildlife regulations within the normal test for burdening of interstate commerce, thereby removing the special exception status that might have been considered to exist previously. The Court, in fact, directly acknowledged "the legitimate state concern for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership." Thus, the state ownership doctrine, although turned back on several fronts, is still a legitimate basis for the exercise of state police power.

A. Indian Treaty Rights

One limitation on state action is Indian treaty rights. Many of the treaties signed over a century ago had a provision which assured Indians the sole right to hunt and fish on their reservation lands and a right to hunt and fish in other areas "in common" with non-Indians. When dealing with Indians under treaties, the states must respect them as another sovereign since the treaty is with the federal government and thus the law of the land. *See generally* *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741 (10th Cir. 1987). Recently, many problems have arisen when Indians refused to recognize the state regulations limiting access to certain fisheries. For example, in the State of Washington, the government sought to replenish the salmon fishery by severely limiting the quantity of migrating salmon that could be caught. At issue was how much of the quota, if any, was available to the Indians, and whether they would be bound by the state regulation. Ultimately, a sharing between Indians and non-Indians was ordered by the courts. *See* *Washington Game Dept. v. Puyallup Tribe*, 414 U.S. 44 (1973); *Washington, et al. v. Washington State Commercial Passenger Fishing Vessel Assoc., et al*., 443 U.S. 658 (1979).

An even more striking conflict in this legal area centers on the control of wildlife on Indian treaty lands. Such a conflict arose between the Mescalero Apache tribe and the New Mexico Department of Game, (630 F.2d 724 (1980)). The Indians claimed *sole* right to control access to wildlife on the reservation and intentionally disregarded state game and fishing regulations. The Tenth Circuit upheld the rights of Indians. Unless the Indians are improperly managing a species whose population is generally threatened, it does not appear the state will have any control over wildlife found on Indian lands. Some Indian treaty rights extend to land outside reservations, and this again may limit the ability of the state to control access to wildlife such as deer. In Wisconsin the courts have held that Indians have an equal right of hunting wildlife off reservation with the non-Indian. *See,* *Lake Superior Chippewa Indians v. Wisconsin*, 740 F. Supp. 1400 (Wis. D.C. 1990).

B. Private Citizens and Federal Constitutional Rights

The exercise of police power over wildlife may not, of course, be done in such a manner as to infringe upon the federal rights of U.S. citizens. When the state is inconsistent in its practice of denying or granting access to wildlife, then the individual may argue denial of equal protection or an interference with his or her "privileges and immunities" as recognized under the federal Constitution. As an example of the latter, in 1947 South Carolina passed a law requiring a $25 license fee for state shrimp boats to operate and a $2,500 license fee for out-of-state boats to operate in state waters. (Most shrimp boats operated out of Georgia at the time.) The U.S. Supreme Court found this law to be an improper interference with individual privileges and immunities. The fees significantly interfered, almost to the point of total exclusion, with the right of a non-resident to engage in a commercial activity in South Carolina. In a more recent case, the Court allowed to stand a fee differential of $9.00 as compared to $225 for instate versus out of state elk hunting fees in Montana. The Court did not feel that recreational hunting (versus shrimping which was a commercial activity) was protected by

the concepts of the privileges and immunities clause of the federal constitution. *See* , *Baldwin v. Montana Fish and Game Commission* , 436 U.S. 371 (1978); also *see* , *Conservation Force Inc. v. Manning* , 301 F.3d 985 (9th Cir. 2002) (Court says state must justify 10% limit on out-of-state hunting permits as least restrictive method even though state has interest in preserving species).

C. Federal Constitutional Authority

The final form of limitation upon the state power to control access to wild animals is the exercise of federal power. As previously noted, even the strongest state ownership doctrine case contained within it the caveat that the exercise of state power was subject to the "rights conveyed to the Federal government by the constitution." For a substantial period of time the federal government chose not to exercise its powers. At the same time the Supreme Court expanded greatly the scope of the powers available to the federal government generally. In the area of wildlife law, three bases of federal authority play a key role: the treaty power, the commerce clause and the government as a property owner.

Under the treaty power, the federal government by signing Migratory Bird treaties with Great Britain (Canada), Mexico and Russia, has obtained almost complete control over the hunting of migratory birds within the fifty states. It is under the treaty obligations which arise out of the treaties that the U.S. Fish and Wildlife Service obtains the authority to regulate the hunting of migratory birds over the objections of the states who might want to regulate their own hunters in their state. *See* , *Missouri v. Holland* , 252 U.S. 416 (1920).

The commerce clause has been perhaps the most important of the federal powers over the past half century in justifying federal laws impacting wildlife. The normal exercise of the power is to deal with issues that are multi-state or cross state boarders. Thus, the federal government power might stop a state from adopting laws that prohibit the sale of bait minnows that were raised out of state and then transported instate.

As an example of how federal power can interfere with state power and state decisions, the Palila case will be examined. The federal Endangered Species Act has been sustained as a constitutionally justified exercise of the commerce power.

The Palila is a small bird on the Endangered Species list found only in certain higher elevations of the Hawaiian Islands. In 1977, the U.S. Fish and Wildlife Service declared the native forest, *mamane-naio* , essential for the Palila's survival and designated it to be critical habitat. Since 1950 the state of Hawaii had allowed a population of feral goats and sheep to occupy the area for purposes of sport hunting. The feral goats and sheep were destroying the natural habitat by their eating habits and the state had not shown an inclination to eliminate them. The Sierra Club and others brought suit on behalf of the bird to force the state agency to adopt a program to eradicate the goats and sheep from the Palila's critical habitat. The court granted the relief requested by the plaintiffs, overcoming the state's arguments of sovereign immunity and unconstitutionality of the Endangered Species Act. The Act was

found to be a proper exercise of the federal treaty and commerce power. Thus, the court was willing to find federal authority to override a state program notwithstanding the following facts:

- that the species does not migrate across state lines;
- that the species does not now have any commercial value and apparently never did;
- that the critical habitat is state land;
- that state officials were pursuing an adopted policy.
  It is clear that when the federal government wishes to act, it will be allowed to do so, and in so doing, can abrogate the authority of the state.

  It is interesting to note that the federal government has never asserted any property interest, or any claim of title, in the wild animals. However, the federal government also rejects the idea that the states have any jurisdiction to control the actions of the federal government when operating on federal land. In the case *New Mexico State Game Commission v. Udall*, 410 F.2d 1197 (10th Cir. 1969), the court held that the federal government did not have to receive permission from the state of New Mexico to capture and kill deer needed for a land management study on federal lands within the state.

  While the federal power is not as all encompassing as the state governments it is still significant. The following laws as discussed in detail on the Animal Legal and Historical Center website:

  Marine Mammal Protection Act

  Bald and Golden Eagle Protection Act

  Lacey Act

Additionally, there is an article and a book chapter available on the site that provide significant details on the historical development of the wildlife laws at the federal level of the United States.

II. The Legal Structure within a State

A. State Constitutions and Wildlife

In addition to the common law concepts developed under the State Ownership Doctrine, the other major source of authority and policy for state government action is each state's constitution. Most state constitutions do not have a provision dealing directly with wildlife issues. At best wildlife are a subpart of the classification of natural resources.

Michigan - Const. 1963, Art. IV, § 52 (1998)

§ 52. Natural resources; conservation, pollution, impairment, destruction.

Sec. 52. The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

Note that the Constitution imposes a duty to protect wildlife from impairment and destruction. There is no case in Michigan that really explores what the scope of this responsibility might be. One phrase used is in the water law area is that the resource is held "in trust" by the state for the benefit of the citizens of the State.

The state constitution with the most detailed consideration of wildlife is Alaska. Not only is it a recent constitution, but the issues of access to wildlife are of importance to a greater cross section of the state's population and there are significant groups with divergent interests; commercial interests, sport interests and that of the Native Americans' interests.

Alaska - Alaska Const. art. VIII, § 3 (1997)

Section 1. Statement of Policy.

It is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.

Section 2. General Authority.

The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.

Section 3. Common Use

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

Section 4. Sustained Yield

Fish, forests, wildlife, grasslands, and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses.

Section 5. Facilities and Improvements

The legislature may provide for facilities, improvements, and services to assure greater utilization, development, reclamation, and settlement of lands, and to assure fuller utilization and development of the fisheries, wildlife, and waters.

Unstated in the Alaska Constitution is the tension that exists between the state government and the federal government over the status of Native Americans. Under the federal Endangered Species Act and Marine Mammal Protection Act, Native Americans receive a preferred status. In Alaska the attitude of many is that Native Americans are citizens of the state like anyone else and that they do not deserve any special status when it comes to wildlife issues.

B. State Management Agencies - Creation

State government clearly has significant control over the wildlife found within a state's boarder. Who actually exercises this power and what policy perspectives do they have? By long tradition, control of wildlife has gone to those directly involved with sport hunting, fishing and trapping. In most states, the authority for wildlife has been delegated by the state legislature to a "citizen commission," usually denominated as the "Fish and Game Commission" or some variation thereon. Such commissions are usually composed of private citizens appointed by the governor of the state. The commissions usually have broad discretionary powers. The following state laws are examples of the appointment limitations imposed on governors by legislatures in the creation of such commissions.

Arizona Revised Statutes

17-201 A Game and fish department and game and fish commission members; appointment; removal; meetings

The laws of the state relating to wildlife shall be administered by the game and fish department. Control of the department is vested in the game and fish commission. The commission shall consist of five members, appointed by the governor pursuant to ' 38-211. Not more than three members may be residents of the same county. Members shall be well informed on the subject of wildlife and requirements for its conservation. Appointments shall be for a term of five years and shall expire on the third Monday in January of the appropriate year.

Michigan Compiled Laws Annotated

324.501A Commission of natural resources; membership; appointment; terms; quorum

The commission of natural resources shall consist of 7 members, not more than 4 of whom shall be members of the same political party, appointed by the governor by and with the advise and consent of the senate. The term of office of each member shall be 4 years.

Massachusetts General Laws Annotated 21

7 A Fisheries and wildlife board

The division of fisheries and wildlife shall be within the department of fisheries, wildlife and recreational vehicles in the executive office of environmental affairs and shall be under the supervision and control of the fisheries and wildlife board, hereinafter called the board, which shall consist of seven members to be appointed by the governor for terms of five years. Five board members shall be appointed from one of each of the five fish and game districts, shall hold and have held for at least five consecutive years a sporting license in the commonwealth, four of whom shall represent the fishing, hunting and trapping interests and at least one of whom shall have been actively engaged in farming on land owned by him for a period of not less than five years. Two board members shall be appointed at large, one shall be particularly interested in the propagation, protection, research and management of wild birds and mammals and any, so-called, endangered species and one of whom shall be a wildlife biologist.

Kentucky Revised Statutes

150.022 A Department of fish and wildlife resources commission - Definition of "sportsman".

(1) The department of fish and wildlife resources commission shall consist of nine (9) members, one (1) from each wildlife district, as set out by the commissioner with the approval of the commission, and not more than five (5) of the same political party.

(2) The governor shall appoint the members of the commission. Each of such members shall be appointed for a term of four (4) years.

(3) Vacancies through the expiration of terms of the members of the commission shall be filled by appointment by the governor from a list of five (5) names from each wildlife district, recommended and submitted by the sportsmen of each respective district.

Fish and Game Commissions are a classic case of the capture and control of a state agency by the special interests they are supposed to regulate. While few states are as specific as Massachusetts in directing who may be appointed to the Commissions, in practice, appointees to Fish and Game Commissions are almost always sportsmen, usually individuals recommended and supported by private sportsmen organizations. Historically, this occurred because, in reality, it was only the

hunters, fishermen, and trappers who had an interest in wildlife and the decisions made by Fish and Game Commissions.

Previously, the hunters' conservation of wildlife model was nearly universally accepted as the proper context for agency decision-making. Today, the ecological and animal rights frames of reference provide alternative perspectives on wildlife. No longer can it be presumed that the view of the hunter reflects the general view of society-at-large.

When looking at the structure within a state it is important to distinguish between the power of the legislature to pass laws and the delegated power that the state agency has to pass administrative regulations. For example in Michigan only the legislature can establish which wildlife species are game animals. Once listed by the legislature, then the agency has the authority to set the exact limitations of the hunting of the species.

C. Scope of Authority Under the Police Power

The most common action by a state government under the state ownership doctrine is the passage of laws or regulations that forbid or control the time, place, and manner of the private taking of various mammals, fish and birds within a state. While commercial activities can be part of the agency responsibility, most energy is focused on sport hunting and fishing. The motivation for such control is conservation of the species, that is, protection of the species from over-utilization, thus assuring its continuing long-term availability as a renewable resource for the hunters and fishermen of the state. The exercise of this authority is within the police power of the state.

The state can control when and how humans attempt to capture wildlife. *State of Maine v. Cloutier*, 2003 ME 7 (Maine Sup. Ct. 2003) (prohibition against "driving deer" not unconstitutionally vague); *State v. Saurman*, 413 N.E.2d 1197 (1980); *Beard v. State*, 261 S.E.2d 404 (Ga. 1979); *People v. Zimberg*, 33 N.W.2d 104 (Mich. 1948). The method of capture is often critical, as some methods are more wasteful of the resource than others. For example, the use of seine or pound nets, nets with only small openings, captures many fish not targeted or desired. These non-target fish will die by suffocation and are thrown away. The case *Lawton v. Steele*, 152 U.S. 133 (1894), is one of the first opinions that examined the scope of power possessed by the state of New York to control this waste of resources.

"Police power" is a term of art within the legal world that refers to the power of the fifty states, historically derived from the sovereign power of the King of England, to pass legislation that is binding upon the members of that society. Any time a new law is passed by a legislature, or a regulation is promulgated by an agency under a law, it is an exercise of the police power. While at times this power may seem limitless, such is not the case. In our system it is the judiciary's role to

determine whether or not a particular law or regulation is a proper exercise of police power. If the exercise of police power is found to be improper, then, in effect, the courts have declared the law void and unenforceable. It is difficult to find recent examples in which a court has found an exercise of police power over animals improper. Nevertheless, there are real limitations that exist and restrict the scope of the legislature's powers. Generally, when testing the appropriateness of a law the court will first decide if the law is within the allowable concern of the public health, safety and welfare. Assuming that the law deals with an appropriate topic (protection of an endangered species), then the second question is the restrictions of the law rationally related to that lawful interest (a law which sought to control beaver problems by killing all the beaver in the state, would fail this rational relationship test). Third, assuming that the topic is appropriate and that the provisions are rationally related, then the court will set aside a law as inappropriate only if it violates some constitutional right of a citizen (this can be a state constitution, but is usually the federal constitution.)

Programs by state agencies.

The state Fish and Game commissions usually have considerate authority to deal with wildlife as a natural resource. Below is a list of topics that might be found within one state's law.

- Limitations on hunting trapping and fishing
- Endangered species programs
- Protection of habitat
- Building of dams on state waters

D. Funding of State Game Agencies

Funding for fish and game commissions falls into three basic categories: general funds of the state, specially dedicated funds (fees and taxes), and donations. The core of funding comes from specifically dedicated sources such as hunting permit fees and a special federal excise tax on products used by hunters and fishermen. Of more recent vintage are tax refund programs adopted by states to provide funding for many programs in support of non-game animals, such as habitat protection and recovery of endangered species.

Michael Bean, *The Federal Aid in Wildlife Restoration Act* , The Evolution of National Wildlife Law (1982), report published by the Council of Environmental Quality.

The Federal Aid in Wildlife Restoration Act , more commonly known as the Pittman-Robertson Act , serves as the principal mechanism for providing federal assistance to states for the acquisition, restoration, and maintenance of wildlife habitat; for the management of wildlife areas and resources; and for research into problems of wildlife management. Its enactment in 1937

culminated efforts to put the funding of state wildlife programs on a secure basis and provided a model for subsequent federal legislation pertaining to state fishery programs.

The principal feature of the original Pittman-Robertson Act was the creation of a special "federal aid to wildlife restoration fund" in the Treasury of the United States. The fund was comprised exclusively of revenues derived from the federal excise taxes on the sale of firearms, shells, and cartridges. From this fund, the Secretary of Agriculture could utilize up to 8 percent of the annual revenues for his administration of the Pittman-Robertson Act and of the Migratory Bird Conservation Act. The remainder, however, was to be apportioned among the states, one-half on the basis of geographic area and one-half on the basis of the number of paid hunting-license holders in each state. Upon submission of proposals for qualified wildlife restoration projects, eligible states would be entitled to receive from the sums apportioned to them up to 75 percent of project costs.

The original Pittman-Robertson Act was more than just a conduit for the funneling of federal tax revenues to the states; it also prescribed certain standards to be met before the states could receive funds. Most fundamentally, through a "carrot-and-stick" approach, it forced the states to put their wildlife conservation programs on a stable financial base by providing that:

> **no money apportioned under this chapter to any State shall be expended therein until its legislature, or other State agency authorized by the State constitution to make laws governing the conservation of wildlife, shall have ... passed laws for the conservation of wildlife which shall include a prohibition against the diversion of license fees paid by hunters for any other purpose that the administration of said State fish and game department.**

The "carrot" of 75 percent federal funding apparently outweighed any desire of the states to maintain complete flexibility in the use of their hunting license revenues, for all states adapted their laws so as to be eligible for Pittman-Robertson funds.

A second means of attaining a measure of federal control over the utilization of Pittman-Robertson monies was the requirement that only those wildlife restoration projects determined by the Secretary to be "substantial in character and design" would qualify for federal funding. This standard, undefined in the statute, was long interpreted in the implementing regulations to mean that a proposed project's "benefits to hunters and fisherman" must be commensurate with its cost. As indicated later in this chapter, the actual administrative implementation of the programs suggests that, in practice, a somewhat looser standard is utilized.

Finally, the original Pittman-Robertson Act limited the types of activities eligible for funds by adopting a somewhat restrictive definition of the term "wildlife-restoration project." That term was defined to include principally the acquisition and restoration of wildlife habitat, the construction of works thereon, and research into problems of wildlife management.

The opportunity for significant federal influence over state wildlife programs as a result of the above features of the Act has been steadily diminished and the corresponding flexibility of the states in their utilization of Pittman-Robertson funds increased, through a series of amendments broadening the scope of state activities eligible for federal aid. The first such broadening amendment, which came in 1946, included maintenance of completed projects within the definition of "wildlife restoration project." A further amendment in 1955 permitted the expenditure of funds for management of wildlife areas and resources, exclusive of law enforcement and public relations activities.

By far the most significant of these broadening amendments, however, was that of 1970, which made two important changes. First, it directed that the existing federal excise tax on pistols and revolvers be paid into the wildlife restoration fund and that half the annual revenues from this source be apportioned to the states for hunting safety programs, including the construction, operation and maintenance of outdoor target ranges. This special "fund within the fund," which, since fiscal year 1975, has also included half the federal tax imposed on bows and arrows, is apportioned among the states solely on the basis of their populations and may, at the discretion of the state, be used for traditional wildlife restoration projects rather than for hunter safety programs.

The second change introduced by the 1970 amendments was potentially of even greater significance. It gave the states the option of submitting a "comprehensive fish and wildlife resource management plan" in lieu of the traditional individual restoration projects. The elements of such a plan are described in very general terms in the statute. It must cover a period of at least five years, be "based on projections of desires and needs of the people" for a period of at least fifteen years, and include provisions for updating at least every three years. Beyond that, the only substantive standard imposed by the statute requires that comprehensive fish and wildlife management plans "insure the perpetuation of these resources for the economic, scientific, and recreation enrichment of the people." No procedural requirement that the public be permitted to participate in the development of the comprehensive plan is imposed.

F&W Press Release, October 6, 1997, Hugh Vickery : *State Fish and Wildlife Agencies to Share $301.8 Million in Excise Tax Receipts:*

Continuing a conservation tradition dating back more than six decades, state fish and wildlife agencies will share $301.8 million in excise taxes paid by America's hunters, target shooters, boaters, and anglers, U.S. Fish and Wildlife Service Director Jamie Rappaport Clark announced today. The states will use funds from the Federal Aid in Wildlife Restoration and Federal Aid in Sport Fish Restoration program for fish and wildlife conservation through land acquisition, habitat improvement, research, education, and other programs. The funds also will help pay for hunting education programs, boating access, and other fish- and wildlife-related recreation projects.

In the 1930s, hunters themselves took the rare step of lobbying Congress to use an excise tax on firearms and ammunition for wildlife conservation. Anglers followed suit in 1950. Boaters joined in 1985. During the past 60 years, the two programs have raised nearly $6 billion to support conservation, hunter education, boating access, and other efforts by states. The money is distributed to the states for projects proposed by the states and approved by the Service. Federal Aid funds pay up to 75 percent of the cost of each project while the states contribute at least 25 percent of the cost.

The preliminary apportionment for wildlife restoration and hunter education programs for fiscal year 1998 totals $104.7 million. The money is derived from an 11-percent excise tax on sporting arms and ammunition, a 10-percent tax on pistols and revolvers, and an 11-percent tax on certain archery equipment. One-half of the tax on handguns and archery equipment is made available for state hunter education and shooting range programs. The preliminary apportionment for sport fish restoration for FY 1998 totals $197.1 million. This funding results from a 10-percent excise tax on fishing equipment and a 3-percent tax on electric trolling motors and sonar fish finders. The Wallop-Breaux legislation of 1984 increased the tax base for sport fish restoration to include a portion of the Federal fuels tax and importation duties on fishing tackle and pleasure boats. Distribution of sport fish restoration funds to the states is based on the land and water area and the number of fishing license holders in each state. Wildlife restoration funds are made available based on land area and the number of hunting license holders in each state. Distribution of hunter education funds is based on the relative population of each state.

Note - Funding Habitat Preservation

All groups of individuals interested in wildlife recognize that habitat preservation is a critical necessity in any attempt to preserve or enhance the level and diversity of wildlife populations in the various states. As a result, there is often broad political support for the use of public money to purchase wildlife habitat. In most states, a process separate from the annual operating budget exists for the obtaining of funds with which habitat lands may be purchased. Usually a state will find some stream of money that is diverted into a Fund: Michigan uses royalty money from oil and gas leases, others may use lottery funds. A process is then created by which the money in funds can be used to purchase land. These funds are usually not in the direct control of the regulatory fish and game commission. As with the existence of any pot of money in state government, these funds will attract an assortment of projects looking for funding and it becomes a political arena of its own. To provide extra protection from raids on the funds as political forces change with time, these funds are often the creation of the funds are often placed within a state constitution.

Minn. Const., Art. XI, ' 14 (1997)

Sec. 14. Environment and natural resources fund

A permanent Minnesota environment and natural resources trust fund is established in the state treasury. The principal of the environment and natural resources trust fund must be perpetual and inviolate forever, except appropriations may be made from up to 25 percent of the annual revenues deposited in the fund until fiscal year 1997 and loans may be made of up to five percent of the principal of the fund for water system improvements as provided by law. This restriction does not prevent the sale of investments at less than the cost to the fund, however, all losses not offset by gains shall be repaid to the fund from the earnings of the fund. The net earnings from the fund shall be appropriated in a manner prescribed by law for the public purpose of protection, conservation, preservation, and enhancement of the state's air, water, land, fish, wildlife, and other natural resources. Not less than 40 percent of the net proceeds from any state-operated lottery must be credited to the fund until the year 2001.

HISTORY: Adopted, November 8, 1988; Amended November 6, 1990

Colo. Const. Art. XXVII, Section 1 (1997)

Section 1. Great Outdoors Colorado Program

(1) The people of the State of Colorado intend that the net proceeds of every state-supervised lottery game operated under the authority of Article XVIII, Section 2 shall be guaranteed and permanently dedicated to the preservation, protection, enhancement and management of the state's wildlife, park, river, trail and open space heritage, except as specifically provided in this article. Accordingly, there shall be established the Great Outdoors Colorado Program to preserve, protect, enhance and manage the state's wildlife, park, river, trail and open space heritage. The Great Outdoors Colorado Program shall include:

(a) Wildlife program grants which:

(I) Develop wildlife watching opportunities;

(II) Implement educational programs about wildlife and wildlife environment;

(III) Provide appropriate programs for maintaining Colorado's diverse wildlife heritage;

(IV) Protect crucial wildlife habitats through the acquisition of lands, leases or easements and restore critical areas;

(b) Outdoor recreation program grants which:

(I) Establish and improve state parks and recreation areas throughout the State of Colorado;

(II) Develop appropriate public information and environmental education resources on Colorado's natural resources at state parks, recreation areas, and other locations throughout the state;

(III) Acquire, construct and maintain trails and river greenways;

(IV) Provide water for recreational purposes through the acquisition of water rights or through agreements with holders of water rights, all in accord with applicable state water law;

(c) A program to identify, acquire and manage unique open space and natural areas of statewide significance through grants to the Colorado Divisions of Parks and Outdoor Recreation and Wildlife, or municipalities, counties, or other political subdivision of the State, or non-profit land conservation organizations, and which will encourage cooperative investments by other public or private entities for these purposes; and

(d) A program for grants to match local investments to acquire, develop and manage open space, parks, and environmental education facilities, and which will encourage cooperative investments by other public or private entities for these purposes.

Enacted by the People November 3, 1992 -- Effective upon proclamation of the Governor, January 14, 1993. (For the text of the initiated measure and the votes cast thereon, see L. 93, p. 2169.

E. Nature of State Ownership

Even though the state is capable of privately owning wild animals, the state ownership doctrine has a different connotation. As discussed previously, obtaining private ownership revolves around the concept of actual possession. I n dealing with wild animals, which by definition are not within the actual control of anyone, the state ownership doctrine is more closely related to concepts of trust and rights of access. For example, there may be only a dozen black bears within a state and no one in the state may know precisely where they are physically located, but the state still claims it has best title and right to control. If the state exercises its right of control, no one else will have the legal right to reduce the wild black bears to private possession except under the conditions set out by the state.

An additional aspect of the doctrine of state ownership is the concept of the state as a trustee for the wildlife within its boarders:

Supervision of wild life is exercised, moreover, as a trust for the people of the particular state, not as a "prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Whereas in England common law permitted the restricting of access to certain game animals, which could be reserved solely for the king or nobility, any action by a state government to give advantage of access or use to special groups will be found improper under the ideas of public trust. This characterization of sovereign power as related to wildlife has received support more recently through the discussions of the broader concept of the "public trust doctrine." This doctrine most often deals with title to submerged land (state owned), but may be useful when dealing with public resources such as wildlife.

As a general rule the state is not liable for damages caused by wildlife to private individuals and their property. Of course, the legislature can adopt specific legislation granting relief for losses. This rule is supportable under general concepts of sovereignty as well as by reference to the practical point that, since the state in fact exercises no actual control over wildlife, it cannot be held accountable for actions beyond its control. This rule is operative even when the state seeks to affirmatively protect a wild species under fish and game laws. In the case of Alex Leger v. Louisiana Department of Wildlife and Fisheries , 306 So. 2d 391 (1975), the court held that the state was not liable for the damages caused by deer in eating his commercial crop even thought the agency had told him he that under state law he could not kill the deer. It is ultimately a public policy question of who should bear the risk, individuals or the public at large.

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