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Sandra Jo Craig

REGULATION OF WILDLIFE IN THE NATIONAL PARK SYSTEM: FEDERAL OR STATE?

Traditionally, ownership of wildlife located within its boundaries has been claimed by the state in its sovereign capacity, in trust for its citizens. Thus, the states have regulated wildlife on federal lands within their boundaries.[1] Erosion of the doctrine of state ownership of resident wildlife has resulted in the federal government attempting to regulate and license hunting and fishing on federally owned lands.[2] This comment will analyze state regulation of wildlife in the National Park System,[3] and explore the possible legal bases available to support federal regulation.

STATE REGULATION

Under Roman law wildlife, *ferae naturae,* was considered to be *res nullius; i.e.,* not subject to claims of ownership unless reduced to possession. The common law held ownership of such wildlife to be in the sovereign in trust for the people. This "sovereign ownership" doctrine passed from England to the colonies and was adopted by the states.[4] State ownership of resident wildlife, also known as the "proprietary interest" doctrine, was first recognized by the United States Supreme Court in *McCready v. Virginia.*[5] The case concerned a citizen of Maryland who planted oysters in the Ware River, in Virginia, in violation of a Virginia statute which allowed only citizens of Virginia to do so. The Court upheld the right of Virginia to pass such legislation, and said that the citizens of the state own collectively "the tide-waters . . . and the fish in them, so far as they are capable of

1. 4 Am. Jur. 2d, *Animals* §14 (1962); 35 Am. Jur. 2d, *Fish and Game* §§ 1, 29, 32 (1967).

2. East, *Wildlife Bombshell! Who Owns the Game?* Outdoor Life, Oct. 1968, at 50, 188. Brief for the State of Michigan as Amicus Curiae at 22, New Mexico State Game Commission v. Udall, 410 F.2d 1197 (10th Cir. 1969). Although state authorities receive the idea with fear, others react favorably:

> My proposal is what I've been calling a "Golden Trout" pass. I . . . do not always find it convenient to get a fish license on first entering a state. Often we might be tempted to stay longer if we'd gotten a license before making camp. We need a single license good in all states for one year.

Letter of Howard M. Bosch in Camping Journal, August 1972, at 8.

3. 16 U.S.C. § 1c(a) "The 'national park system' shall include any area of land and water nor or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational, or other purposes."

4. Geer v. Connecticut, 161 U.S. 519, 522-29 (1896) traces the development of this idea.

5. 94 U.S. 391 (1876).

ownership while running."[6] Since *McCready,* the Court has sustained the power of the state to regulate resident wildlife, unless such regulation is disruptive of a federal interest or is in violation of a constitutional provision.[7]

In *Missouri v. Holland,*[8] Missouri sought to prevent enforcement of a treaty with Great Britain concerning migratory birds alleging that this interfered with the right of the State to regulate wildlife as reserved to it by the Tenth Amendment to the Constitution.[9] Mr. Justice Holmes reflected the Court's eventual position on the state ownership doctrine when he said:

> No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.[10]

The "slender reed" of state ownership of resident wildlife was denounced as fiction by the Court in *Toomer v. Witsell.*[11]

> 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.[12]

Toomer involved regulation by South Carolina of boats fishing for shrimp in the tide-waters. The license fee for non-residents was one hundred times the fee for residents. In striking down this non-resident discrimination the Court stated that fishing falls within the scope of the Privileges and Immunities Clause[13] of the Constitution.

The holding in *Toomer* may be strictly interpreted to apply only to the three-mile area off the coast and would not be generally applicable to fish and game. *Toomer's* denunciation of state ownership might also be limited to migratory fish and game. Broadly construed, however, the holding in *Toomer* condemns the state ownership doctrine in its entirety as a fiction. This

6. *Id.* at 394.
7. Geer v. Connecticut, 161 U.S. 519 (1896); Corfield v. Coryell, 6 F. Cas. 546 (No. 3230) (C.C.E.D. Pa. 1823).
8. 252 U.S. 416 (1920).
9. U.S. Const. amend. X.
10. 252 U.S. at 434.
11. 334 U.S. 385 (1948).
12. *Id.* at 402.
13. U.S. Const. art. IV, § 2.

interpretation would require states to revise extensively their game and fish laws to remove discrimination between residents and non-residents. Since hunting and fishing licenses provide an important source of revenue to the states which would be affected by such a revision,[14] the consequences of a broad construction of *Toomer* are severe.

Without the doctrine of state ownership, the states may still attempt to regulate wildlife as an exercise of their police power—the general power to pass laws for the welfare of the people of the state. *Organized Village of Kake v. Egan*[15] noted that state control or ownership as a doctrine had been weakened:

> This theory has to some extent been repudiated and the modern concept contemplates that state control is founded upon the power to regulate in the state the protection of these resources for all the people.[16]

Federal regulation is preferable to state regulation when there is a need for uniformity. Such uniformity may be a reason for the federal government to intervene in an area otherwise controlled by the state. Since game and fish and their related problems are more likely to be a local matter, there is no real need for the federal government to become involved in this area.

FEDERAL REGULATION

Since all powers not specifically granted by the Constitution to the federal government are reserved to the states, the federal government must find authority to regulate wildlife in the enumerated powers of the Constitution.[17] There are two possibi-

14. Brief for the State of Michigan as Amicus Curiae at 15-18, New Mexico State Game Commission v. Udall, 410 F.2d 1197 (10th Cir. 1969). U.S. Bureau of the Census, *Statistical Abstract of the United States: 1971* (92d ed.) 199, gives the following information on hunting and fishing licenses sold by the states in 1969:

Hunting Licenses	
Total number of licenses sold	21,622,000
Resident	20,600,000
Non-resident	1,022,000
Cost to hunters	$95,709,000
Fishing Licenses	
Total number of licenses sold	29,855,000
Resident	25,706,000
Non-resident	4,150,000
Cost to anglers	$87,501,000

15. 174 F.Supp. 500 (D. Alas. 1959).
16. *Id.* at 504.
17. U.S. Const. amend. X.

lities for such authority: the Territorial Power and the Commerce Clause.

The Territorial Power offers a basis for federal control of wildlife on federally owned lands.

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . .[18]

The government may regulate and protect its own land[19] (the National Park System), and in so doing control animals which might damage the land.

Deer, harming a national park through overbrowsing, were regulated under the Territorial Power in *Hunt v. United States*.[20] Killing of the deer had been authorized by the Secretary of Agriculture. The Court recognized that title to the deer was in the State, but federal ownership of the land gave the federal government the right to kill the deer to protect the park.[21]

The Commerce Clause provides another possibility for federal regulation of wildlife in the National Parks.

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .[22]

The scope of the power thus granted has been enlarged through decisions of the Supreme Court. Regulation under the Commerce Clause may be directed at non-commercial goals,[23] such as wildlife.

The Court has never ruled whether wildlife movement across state borders constitutes interstate commerce. The Seventh and Ninth Circuits have classified the movement of migratory birds as such.[24] The Court allows regulation of intrastate activities, not in themselves interstate commerce, which have a rationally determinable impact on intercourse between the states.[25] The effect of wildlife on commerce is seen in hunting, fishing and other

18. U.S. Const. art. IV, § 3.
19. Utah Power & Light Co. v. United States, 243 U.S. 389 (1917).
20. 278 U.S. 96 (1928).
21. Such federal authority overrules state laws to the contrary by the Supremacy Clause, U.S. Const. art. VI.
22. U.S. Const. art. I, § 8.
23. United States v. South-Eastern Underwriters Assn., 322 U.S. 533 (1944).
24. Cerritos Gun Club v. Hall, 96 F.2d 620, 624 (9th Cir. 1938); Cochrane v. United States, 92 F.2d 623, 627 (7th Cir. 1937), *cert. denied*, 303 U.S. 636 (1938).
25. Wickard v. Filburn, 317 U.S. 111 (1942).

recreational activities. Americans purchase large quantities of cameras, hunting, fishing and other sporting equipment, and travel thousands of miles to visit national parks and forests.[26] This travel produces large profits and revenues for businesses across the country, especially hotels, motels, restaurants and recreation facilities.[27] The power of Congress to legislate under the Commerce Clause certainly seems applicable to wildlife as the catalyst of so much interstate movement of persons, *i.e.* "commerce."

Some statutory authority for federal regulation of wildlife already exists. The Endangered Species Conservation Act[28] does in fact control the movement in interstate commerce and importation of "endangered species." A species may be labelled "endangered" (threatened with worldwide extinction) by the Secretary of the Interior, taking into consideration the following factors:

> (1) the destruction, drastic modification, or severe curtailment, or the threatened destruction, drastic modification, or severe curtailment, of its habitat, or
>
> (2) its overutilization for commercial or sporting purposes, or
>
> (3) the effect on it of disease or predation, or
>
> (4) other natural or man-made factors affecting its continued existence.[29]

Implicit in the phrasing of the statute is a grant of broad

26. In 1970 the National Park System reported 172,005,000 visits with 16,160,000 overnight stays. Statistics on recreational use of the National Forests in 1970 showed an estimated 15,239,000 visitor-days (a visitor-day is 12 person-hours) spent fishing and 14,308,000 visitor days spent hunting. Statistics on Personal Consumption Expenditures for Recreation in 1969 showed the following figures:

	Amount Spent
nondurable toys and sport supplies	$5,213,000,000
wheel goods, durable toys, sports equipment, boats and pleasure aircraft	$4,219,000,000

U.S. Bureau of the Census, *Statistical Abstract of the United States: 1971* (92d ed.) 194, 195, 200.

27. Restaurants and motels were found to be subject to federal regulation under the Commerce Clause in two cases concerning the Civil Rights Act of 1964, 28 U.S.C. §1447 subsec. d, 42 U.S.C. §§ 1971, 1975a *et seq.* (1964). The Court held in Atlanta Motel v. United States 379 U.S. 241 (1964), that the interstate movement of persons is commerce. Katzenbach v. McClung 379 U.S. 294 (1964), held that a small, family-owned restaurant was subject to federal regulation since a substantial portion of the food served had moved in interstate commerce.

28. Pub. L. No. 91-135, 83 Stat. 275 (1969).

29. *Id.*

discretion to classify a species as "endangered," and thus subject to federal regulation.

In addition, U.S. Code Title 16, sections 1-4, which establishes the National Park Service,[30] gives the Park Service the authority to "promote and regulate the use of" the areas under its jurisdiction, and imposes the obligation to,

> . . . conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.[31]

This general wording leaves open the possibility of a liberal interpretation of the power. This is precisely how the power was interpreted in *New Mexico State Game Commission v. Udall.*[32] *Hunt* allowed the federal government to kill deer in a national park which were damaging the area through overbrowsing. *Udall* went far beyond *Hunt* by allowing the government to kill deer in a national park, in violation of state game laws, for a survey of feeding habits of the deer. The deer were causing no actual damage; the study was merely devoted to future regulation and management.

The Secretary of the Interior is authorized by Congress to,

> provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations.[33]

This statute would seem to require a finding of some detriment to the park, but the Tenth Circuit interpreted it to mean:

> In the management of the deer population within a national park the Secretary can make reasonable investigations and studies to ascertain the number which the area will support without detriment to the general use of the park. He may use reasonable methods to obtain the desired information to the end that damage to the park lands and the wildlife thereon may be averted.[34]

Udall could well pave the way for increased federal regulation of wildlife on federal lands. The Secretary has discretion to determine what constitutes a "detriment" to the national parks.

30. 16 U.S.C. §§ 1, 2-4.
31. Id. § 1.
32. 410 F.2d 1197 (10th Cir. 1969), *cert. denied* 396 U.S. 961 (1969).
33. 16 U.S.C. § 3.
34. New Mexico State Game Commission v. Udall, 410 F.2d 1197, 1201 (10th Cir. 1969).

"Detrimental" animals could conceivably be destroyed by federally authorized hunting on a limited basis.

The Commerce Clause, Territorial Power, and the precedent established in *Udall* offer sufficient legal ground for federal licensing of hunting and fishing on federal lands. This result is feared by state authorities:

> If the Federal Government succeeds in this case in achieving its ultimate aim, as indicated in its brief, of securing complete control over fish and wildlife located on its lands on the theory of its ownership of such lands, it is the fear of the states that the next logical step will be to use this new power for the purpose of regulating hunting and fishing on these lands and charging a license for such a privilege.[35]

Although the legal basis exists, perhaps the federal government should consider the expressed importance of control and management of resident wildlife to the state before taking over this field. Such a take-over would present vast new problems for both state and federal governments. Specifically, the federal government would be faced with the problem of establishing and administering new federal regulations. The states, as mentioned above, would face both the loss of a formidable sum in revenue and the task of finding alternative means of replacing it.

SANDRA JO CRAIG

35. *Id.*, brief for the State of Michigan as Amicus Curiae, at 22.