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Are Wild Deer Wild?: The Legal Status and Regulation of White-Tailed Deer

Miles Figg

ARE WILD DEER WILD?: THE LEGAL STATUS AND REGULATION OF WHITE-TAILED DEER

I. INTRODUCTION

From the earliest days of modern settlement in North America, hunting practices and game regulation present in the American colonies diverged greatly from the policies and history of feudal ownership that existed in the Old World. Soon after settlement in the New World began, westward expansion made vastly abundant resources available for those settlers that ventured to the lands out west.¹

English land-use laws and the corresponding regulations pertaining to game and sport hunting were ineffective at encouraging the development necessary in the Americas, which boasted a notably dissimilar geographic and environmental landscape.² In turn, English laws and regulations were swiftly overtaken and interpreted in such a way that

¹ See ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* (Mariner Books) 131-132 (1986).

² Michael E. Field, *The Evolution of the Wildlife Taking Concept from Its Beginning to Its Culmination in the Endangered Species Act*, 21 HOUS. L. REV. 457, 464-65 ("Because of its immense size, its seemingly endless supply of wildlife, and the frontier spirit of its early settlers, the American continent did not lend itself to the English class system of controlling wildlife.").

embraced the law of capture, particularly in the context of unenclosed lands.³

Any policy that restricted hunting to a specified group or for a limited term would have impeded the harvest of wildlife, thereby allowing substantial natural resources to go unused.⁴ Early settlers relied heavily upon the abundant native wildlife for survival and success, and the native wildlife species served as vital resources to the human population. In response, American courts transformed English concepts of wildlife ownership and established the state ownership doctrine, also known as the wildlife trust.⁵ Moving forward to today, the world and environmental landscape is vastly different from what was present at the time of the initial settlement of the New World. Now, in this changed landscape, there is ongoing litigation with the potential to strip the Missouri Department of Conservation of its constitutional authority to regulate wildlife.⁶

Among other issues, *Donald Hill v. Missouri Conservation Commission* addresses the question of whether captive white-tailed deer

³ Thomas A. Lund, *Early American Wildlife Law*, 51 N.Y.U. L. REV. 703, 712 (1976).

⁴ *Id.* at 705 (recognizing "free taking" as the "logical policy" for America).

⁵ *Cawsey v. Brickey*, 144 P. 938, 939 (Wash. 1914).

⁶ *Hill v. Mo. Conservation Comm'n*, No. 150S-CC00005-01 (filed Sept. 15, 2016).

are wildlife or livestock. The legal designation of whether white-tailed deer are wildlife or livestock is controversial in many states across the country. Some states have addressed these questions by enacting legislation⁷ and some by passing constitutional amendments.⁸

In addition to the ongoing litigation in Missouri courts, the captive cervid industry in Missouri has been actively working to get legislation passed in the Missouri General Assembly. The captive cervid industry refers to the privatization and farming of deer and closely related species such as elk.⁹ One bill in the Missouri House of Representatives, House Bill 1412, specifies that the Department of Agriculture has the authority to regulate agricultural deer by creating a designation between wild and domesticated, or semi-domesticated, white-tailed deer.¹⁰

⁷ Niki Kelly, *High-fenced hunting gets OK'd: Pence's decision ends 10-year legal battle over issue*, THE JOURNAL GAZETTE (Mar. 23, 2016, 1:03 AM), <http://www.journalgazette.net/news/local/indiana/High-fenced-hunting-gets-OK-d-12178547>.

⁸ Wyoming Amendment B of 2012 (codified as amended at WYO. CONST. art. I, § 39).

⁹ Michigan Department of Natural Resources, *A Risk-based Audit of the Captive/Private-owned Cervid Industry in Michigan*, MICHIGAN DEPARTMENT OF NATURAL RESOURCES REPORT SERIES ISSUE REPORT NO. 1, ii (Mar. 10, 2005) http://www.michigandnr.com/publications/pdfs/HuntingWildlifeHabitat/Reports/CPOCAuditReport_Final.pdf.

¹⁰ H.B. 1412, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

This article analyzes the legal status of cervids—in particular the context of captive white-tailed deer—the impact of respective legal statuses of cervids, how the particular legal status of cervids impacts their regulation, the regulations imposed by the Missouri Department of Conservation versus that of the Missouri Department of Agriculture, and the potential outcomes of such factors.

II. *DONALD HILL V. MISSOURI CONSERVATION COMMISSION*

Plaintiffs, who are individuals and businesses actively involved with the breeding and hunting of white-tailed deer and are jointly represented by Donald Hill, brought an action seeking to enjoin Defendants, the Missouri Conservation Commission, its individual members, and the Missouri Department of Conservation, from enforcing their newly enacted regulations on the captive cervid industry.¹¹ Plaintiffs asserted that their white-tailed deer, the “animals at issue[,] are not ‘game . . . [or] wildlife resources of the state’ (Count I); that the regulations interfere with Plaintiffs’ fundamental right to engage in farming and

¹¹ Hill v. Mo. Conservation Comm’n., No. 150S-CC00005-01 at *1, (filed Sept. 15 2016) (Regulations at issue are the Department of Conservation’s “Wildlife Code,” Title 3, Division, 10, Chapter 9).

ranching practices (Count II); and that the regulations discriminate against interstate commerce (Count III).”¹²

The trial court enjoined the Missouri Department of Conservation from enforcing its enacted regulations,¹³ stating:

Now, therefore, the court hereby orders and adjudges as follows:

1. Defendants are prohibited from directly or indirectly relying on or enforcing the regulations challenged in this matter: 3 CSR § 10-4.110(1), 3 CSR § 10-9-220(2), 3 CSR § 10-9.220(3), 3 CSR § 10-9.353, 3 CSR § 10-9.359, and 3 CSR § 10-9-565(1)(B);

2. Plaintiffs and others affected by the regulations are allowed to import white-tailed deer, white-tailed deer-hybrids, mule deer and mule-deer hybrids into the State of Missouri, subject to the existing regulations issued by the Missouri Department of Agriculture or any other relevant federal or state regulations not challenged herein; and

3. Plaintiffs and others affected by the regulations can hold live cervids imported into the State of Missouri on a licensed big game hunting preserve, subject to the existing regulations issued by the Missouri Department of Agriculture or any other relevant federal or state regulations not challenged herein; and

4. Defendants may enforce all other regulations issued by the Conservation Commission as they existed prior to the January 30, 2015 amendments challenged herein.¹⁴

¹² *Id.* at *3.

¹³ MO. CODE REGS. tit. 3, §§ 10-9.000 (2016).

If the preliminary injunction is upheld, this action sets the stage for an appeal on numerous bases including a constitutional challenge to the definition and classification of livestock, wildlife, and white-tailed deer.

III. PROPOSED MISSOURI LEGISLATION

Significant efforts have been undertaken by members of the captive cervid industry to pass legislation that would transfer the management and regulation authority of white-tailed deer from the Missouri Department of Conservation to the Missouri Department of Agriculture.

At the time of the writing of this article, and during the current session of the Missouri General Assembly, House Bill 1412, if passed, would specify that the Missouri Department of Agriculture has the authority to regulate agricultural deer.¹⁵ During the 2015 session of the Missouri General Assembly, two bills, Senate Bill 178¹⁶ and House Bill 1094,¹⁷ were introduced to add captive cervids to the definition of

¹⁴ *Hill*, No. 150S-CC00005-01, at *32. Department of Conservation’s ‘Wildlife Code,’ Title 3, Division 10, Chapter 9.

¹⁵ H.B. 1412, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

¹⁶ S.B. 178, 97th Gen. Assemb., Reg. Sess. (Mo. 2015).

¹⁷ H.B. 1094, 97th Gen. Assemb., Reg. Sess. (Mo. 2015).

“livestock,” and thus, transfer regulatory authority from the Missouri Department of Conservation to the Missouri Department of Agriculture.

Additionally, during the 2014 session of the General Assembly, four bills were introduced and two passed: Senate Bill 506¹⁸ and House Bill 1326.¹⁹ The governor subsequently vetoed both of those bills. Senate Bill 506 was later voted on during the fall veto session, but the Missouri House of Representatives failed to override the governor’s veto by only one vote.²⁰

IV. THE CAPTIVE CERVID INDUSTRY

The practice of cervid farming has existed in the United States since the late 1800s and has existed elsewhere in the world for millennia; however, commercial cervid farms are a more recent phenomenon and have taken on a contentious rancor in recent debates.²¹ Debates around the

¹⁸ S. 506, 96th Gen. Assemb., Reg. Sess. (Mo. 2014),

¹⁹ H.R. 1326, 96th Gen. Assemb., Reg. Sess. (Mo. 2014),

²⁰ Mike Lear, *Agriculture and Captive Deer Bill Narrowly Fails in Missouri Veto Session*, MISSOURINET (Sept. 11, 2014), <http://www.missourinet.com/2014/09/11/agriculture-and-captive-deer-bill-narrowly-fails-in-missouri-veto-session/>.

²¹ D.E. Lantz, *Deer Farming in The United States*, U.S. DEPARTMENT OF AGRICULTURE – FARMERS’ BULLETIN 330, 4 (July 29, 1908), <http://www.ncdeerandlk.com/pdf/Deer-Farming-report-from-1908.pdf>; see also Ryan Sabalow, *Study: Some deer farmers put ethics on line for profit*, USA Today (March 31, 2014), <http://www.usatoday.com/story/news/nation/2014/03/30/study-deer-farmers-sacrifice-ethics-for-profit/6938465/>.

country today primarily center on whether the management authority of captive cervid operations should be held by a states' fish and wildlife agencies or by a states' agricultural agencies.

The U.S. Department of Agriculture first began supporting the captive cervid industry “[a]s a result of the growing scarcity of game animals in this country the supply of venison is wholly inadequate to the demand, and the time seems opportune for developing the industry of deer farming, which may be made profitable to the State and the individuals alike engaged therein.”²² The U.S. Department of Agriculture reasoned that “[t]he growing scarcity of game mammals and birds in the United States and the threatened extinction of some of them over large parts of their present ranges make the preservation of the remnant highly important.”²³ Therefore, the U.S. Department of Agriculture determined the captive cervid industry was needed “to make game once more abundant. It is believed that by means of intelligent game propagation,

²² *Id.*

²³ *Id.*

both by the States and by private enterprise, many of our depleted ranges can be restocked with big game.”²⁴

White-tailed deer have been a part of Missouri’s great hunting heritage and tradition, much like the rest of the nation, since the beginning of settlements within the state. Historically, white-tailed deer were found in abundance throughout the state.²⁵ However, byproducts of the settlers’ colonization, including human-induced environmental changes and the overexploitation of local consumption and market hunting has, led to a significant reduction of the white-tailed deer population.²⁶

The Missouri Department of Conservation successfully initiated, oversaw, and facilitated numerous conservation and restoration efforts, and the white-tailed deer population has effectively been restored.²⁷ Indeed, the population actually began to grow in the late 1980s.²⁸ Over half a million individuals hunt for white-tailed deer in Missouri each

²⁴ *Id.*

²⁵ Jason Sumners, *Missouri White-Tailed Deer Management Review*, MO. DEPT. OF CONSERVATION, 3 (Jan. 2014), https://mdc.mo.gov/sites/default/files/resources/2014/05/deer_management_program_review_online_document.pdf.

²⁶ *Id.*

²⁷ *Id.* at 3-4.

²⁸ *Id.*

year.²⁹ Deer hunting supports more than 12,000 jobs and generates over \$1 billion in economic activity for the state annually.³⁰

Beginning in the early 2000s, states began introducing legislation regarding the captive cervid industry around the country. While initial legislative efforts were marked by varying degrees of relative unsuccessfulness,³¹ by 2012 ten states had proposed or introduced such legislation.³²

Proposed legislation in the state of Mississippi is representative of what the proponents of the captive cervid industry have been pursuing across the nation.³³ Mississippi's proposed Senate Bills 2554 and 2555 sought to "allow the importation of farm-raised white-tailed deer, semen, ova, and embryos ... to allow the establishment of deer-breeding farms."³⁴

²⁹ Mike Hubbard, *Meeting The Changing Needs of Wildlife*, MO. DEPT. OF CONSERVATION, 1 (Aug. 2013), <https://mdc.mo.gov/conmag/2013/09/meeting-changing-needs-wildlife>.

³⁰ *Id.*

³¹ James E. Miller, *A Growing Threat: How Deer Breeding Could Put Public Trust Wildlife at Risk*. CHRONIC WASTING DISEASE (Dec. 24, 2012), <http://chronic-wasting-disease.blogspot.com/2012/12/a-growing-threat-how-deer-breeding.html> (Miller is Professor Emeritus in the Department of Wildlife, Fisheries, and Aquaculture at Mississippi State University and is a Past President of the Wildlife Society).

³² *Id.* States where legislation was proposed or introduced in 2012 include: Georgia, Indiana, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Tennessee, and West Virginia. *Id.*

³³ *Id.*

³⁴ *Id.*; see also S. 2554, Gen. Assemb., Reg. Sess. (Miss. 2012); and S. 2555, Gen.

The proposed legislation would have extended as far as to make Chapter 7 of Title 49 of the Mississippi Code of 1972 “not apply to farm-raised white-tailed deer contained in breeding facilities or to deer-breeding farms.”³⁵ The amendment to Title 49 of the Mississippi Code of 1972 would have exempted captive cervid operations from regulation by the Mississippi Department of Wildlife, Fisheries and Parks.³⁶ Both of the Mississippi bills were defeated, as has similarly been the case with the majority of legislation on this topic nationally.³⁷

Legislation of this sort would transfer the authority to regulate and manage cervids away from state wildlife and natural-resource agencies to other entities with dissimilar interests and motives, such as state departments of agriculture or state veterinarians.³⁸ Some question whether state veterinarian agencies have the requisite scientific capabilities, focus, and mission to oversee wild cervid populations.³⁹

Assemb., Reg. Sess. (Miss. 2012).

³⁵ *Id.*

³⁶ Miller, *supra* note 31, at 2.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 2-3.

V. CHRONIC WASTING DISEASE AND THE CAPTIVE CERVID INDUSTRY

Chronic Wasting Disease (“CWD”) is a transmissible spongiform encephalopathy, also known as a prion disease, which affects the brain and nervous systems of infected animals.⁴⁰ CWD is known to affect the *cervidae* species, which includes Rocky Mountain Elk, Red Deer, Mule Deer, Black-Tailed Deer, Sika Deer, Moose, and White-Tailed Deer.⁴¹ To date, no CWD vaccination exists.⁴² Further, no identified way to neutralize environments that have become infected with CWD has been found.⁴³ The mortality rate is 100% for infected animals.⁴⁴

There are substantial ecological and economic effects once an environment becomes infected with CWD. First, high CWD prevalence is

⁴⁰ E.S. WILLIAMS, J.K. KIRKWOOD, & M.W. MILLER, INFECTIOUS DISEASES OF WILD MAMMALS 292-301. (E.S. Williams & I.K. Barker eds., 3rd ed. Iowa State Univ. Press 2001).

⁴¹ *Animal Health: Chronic Wasting Disease*, U.S. DEP’T OF AGRIC. (July 29, 2015), https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/animal-disease-information/sa_alternate_livestock/sa_cervid_health/sa_cwd/ct_cwd_index (hereinafter *Chronic Wasting Disease*, APHIS).

⁴² *Chronic Wasting Disease: Implications and Challenges for Wildlife Managers*, CHRONIC WASTING DISEASE ALLIANCE (2012), <http://cwd-info.org/cwd-overview/>.

⁴³ E.S. Williams. *Chronic Wasting Disease*, VETERINARY PATHOLOGY 530, 541 (2005).

⁴⁴ Letter from Susan Cameron, Executive Board – North Carolina Chapter Wildlife Society to Chairman of the House Agriculture Committee (June 5, 2015) (on file with author).

correlated with large decreases in mule deer populations,⁴⁵ and there is evidence, which suggests that infected animals may be more likely to contribute to vehicular collisions.⁴⁶ Additionally, infected and diminished cervid populations will detrimentally effect hunting seasons and will have severe consequences on economies that have previously benefitted by dense cervid populations.

The challenge of effectively addressing CWD-infection is evidenced by the fact that CWD has never been fully eradicated from a wild cervid herd.⁴⁷ At present, the only way to determine if a cervid is infected with CWD is through a biopsy of tonsil or lymphoid tissues and all live-testing of animals requires anesthesia.⁴⁸ These live-testing methods are expensive and are not well suited for testing large numbers of animals, such as the captive herds that exist in deer breeding and hunting operations.⁴⁹

⁴⁵ M.W. Miller, et al. *Lions & Prions & Deer Demise*, PLOS ONE (Dec. 24, 2008), <http://journals.plos.org/plosone/article?id=10.1371%2Fjournal.pone.0004019>.

⁴⁶ Cameron, *supra* note 44.

⁴⁷ See Williams, *supra* note 43.; see also L.L. Wolfe, et. al, *Evaluation of Antemortem Sampling to Estimate Chronic Wasting Disease Prevalence in Free-Ranging Mule Deer*, 66 J. OF WILDLIFE MGMT. 564, 564-73 (2002).

⁴⁸ Wolfe, *supra* note 47, at 564.

⁴⁹ Cameron, *supra* note 44, at 2.

Numerous organizations support “a moratorium on the construction of high-fenced facilities and shipment of live cervids until live-animal diagnostic tests are available for detecting and monitoring important infectious diseases, including CWD.”⁵⁰ The transmission of CWD between captive and wild populations has been a growing concern and poses substantial consequences.⁵¹

The deer farming industry has been expanding since its inception. The number of cervid farms increased nationally by 15 percent from 2002 to 2007, bringing the total number of cervid farms to 7,282.⁵² It is estimated that the cervid farming industry generates approximately “\$652 million in economic activity and 7,335 jobs.”⁵³

In general, it is relatively easy to enter and participate in the commercialization of wildlife, as there are often only minimal regulations and requirements to start such an operation. For example, Texas merely

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Kirby L. Crow, *Oh Deer: The Public Trust Doctrine and Issues Regarding Estate Planning for the Cervid Breeding Industry*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 375, 378 (2014); see also Brian J. Frosch et al., *Economic Impact of Deer Breeding Operations in Texas*, TEX. A&M UNIV. (2008), <http://ageconsearch.umn.edu/bitstream/6830/2/sp08fr01.pdf>.

⁵³ Frosch, *supra* note 52.

requires that one possess a permit and be capable of providing records of transactions upon inspection.⁵⁴

CWD was first identified in a captive mule deer population in the 1960s.⁵⁵ Since then, CWD has spread to both other captive herds and to free-ranging cervid populations in 23 states and two Canadian provinces.⁵⁶ The human movement of cervids has likely contributed to the spread of CWD in captive facilities and the establishment of the disease in previously uninfected free-ranging populations.⁵⁷ Captive cervid operations routinely involve and require the intra- and inter-state transportation of cervids.⁵⁸ Furthermore, the escape of captive animals and the entry of wild animals into captive enclosures are routine experiences, both of which exacerbate the transmission of CWD and other diseases.⁵⁹

⁵⁴ 31 TEX. ADMIN. CODE § 65.330 (2014).

⁵⁵ Frosch, *supra* note 51.

⁵⁶ See Williams, *supra* note 43; see also S.E. Saunders, et. al., *Occurrence, Transmission, and Zoonotic Potential of Chronic Wasting Disease*. 18 EMERGING INFECTIOUS DISEASES, 369, 370 (2012), <http://dx.doi.org/10.3201/eid1803.110685>.

⁵⁷ Saunders, *supra* note 56.

⁵⁸ Laura Bies, *Captive Cervid Breeding: Fact Sheet*. *The Wildlife Society NC Chapter Comments on Captive Cervid Management* (2015) (citing J. Fisher and W. Davidson, *Reducing Risk Factors for Disease Problems Involving Wildlife*, 70 TRANSACTIONS OF N. AM. WILDLIFE AND NAT. RESOURCES CONFERENCE 289, 289-309 (2005)).

⁵⁹ Cameron, *supra* note 44.

Once it was discovered that white-tailed deer in Missouri had become infected with CWD, it became apparent that areas within the state's Wildlife Code needed to be reexamined.⁶⁰ A group of state agencies and other stakeholders, which included the Missouri Department of Conservation, developed a CWD contingency plan in 2003 in order to adequately protect and ensure the future health of Missouri's free-ranging and captive herds.⁶¹

However, the plan was not implemented until 2010, seven years after its initial development.⁶² Modifications were also made to the Wildlife Code by the Missouri Conservation Commission in order to reduce the number of deer in the CWD zone. Changes included the removal of antler point restrictions and the elimination of certain practices, such as wildlife feeding, which tend to concentrate animals. All of these changes were undertaken in order to minimize the spread of CWD within the deer population.⁶³

⁶⁰ See Hubbard, *supra* note 29.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

More than 38,000 deer have been tested by the Missouri Department of Conservation, which revealed 21 confirmed cases of CWD in north-central Missouri between 2010 and 2013.⁶⁴ Of the 21 confirmed cases of CWD at that time, 11 occurred in two captive facilities, and the remaining 10 occurred in the wild deer population.⁶⁵ All wild deer that had been infected with CWD were located within two miles of one of the captive hunting facilities.⁶⁶

Since 2011, CWD management zones have been established to isolate and slow the spread of CWD.⁶⁷ Regulations and recommended guidelines apply in CWD management zones and compel individuals to (1) avoid deer attractants, (2) leave deer carcasses undisturbed, (3) refrain from transporting unprocessed meat out of the zones, (4) report any sick deer, and (5) donate a tissue sample from harvested deer.⁶⁸

CWD has now been confirmed in 26 free-ranging deer in Missouri with six in Adair County, 19 in Macon County, and one in Cole County.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Missouri Department of Conservation, *CHRONIC WASTING DISEASE MANAGEMENT ZONES*, <http://huntfish.mdc.mo.gov/hunting-trapping/regulations/chronic-wasting-disease-management-zones>; *see also* Hubbard, *supra* note 29.

⁶⁸ Missouri Department of Conservation, *supra* note 67.

CWD has also been confirmed in 11 captive deer in Macon and Linn counties.⁶⁹ Correspondingly, CWD Zones have subsequently been expanded due to additional occurrence and additional confirmed cases of CWD in Missouri deer.⁷⁰

Since its inception, the Missouri Wildlife Code has been subject to various changes - CWD merely serves as the present-day example of the catalyst that has prompted reevaluation and further changes to the code.⁷¹ Undoubtedly, future regulation changes will need to be considered and subsequently adopted to address the risks of diseases and their potential impacts on both wild and captive populations.⁷² Other diseases, including bovine tuberculosis, have recently been widespread among captive cervid facilities and in wild populations.⁷³ CWD merely represents a particular cervid strain disease that is the most recent, and currently the greatest interest, of state wildlife and veterinary agencies.

⁶⁹ Missouri Department of Conservation, *CWD SURVEILLANCE AND MONITORING IN MISSOURI*, <https://huntfish.mdc.mo.gov/hunting-trapping/wildlife-diseases/chronic-wasting-disease-cwd/cwd-surveillance-and-monitoring>.

⁷⁰ Missouri Department of Conservation, *Chronic Wasting Disease Setting the Record Straight* https://mdc.mo.gov/sites/default/files/resources/2013/08/cwdsetrecstrt_8-23-13.pdf.

⁷¹ *Id.* See also Missouri Secretary of State, *Title 3 - Department of Conservation, CODE OF STATE REGULATIONS*, <http://www.sos.mo.gov/adrules/csr/current/3csr/3csr.asp>.

⁷² Missouri Department of Conservation, *supra* note 70.

⁷³ Miller, *supra* note 31, at 4.

States have attempted to limit the threat of CWD by introducing efforts and restrictions that include bans on the importation of any live member of the cervid family and increased disease monitoring and surveillance.⁷⁴ These types of restrictions have been commonly challenged as being examples of overregulation and attacks on small business and commerce.⁷⁵

Privatization of these wildlife resources, through the legalization process of designating wildlife as livestock, has the potential to greatly impact a traditional hunting industry “that in 2011 involved 13.7 million people who expended \$34 billion on recreational hunting.”⁷⁶

VI. CAPTIVE CERVIDS: WILDLIFE OR LIVESTOCK

A. *The North American Model of Wildlife Conservation*

The North American Model of Wildlife Conservation has served as a set of principles guiding wildlife management and conservation.⁷⁷ Since its inception, the origins of the model have been rooted in the 19th century conservation movements, the near extinction of several wildlife species,

⁷⁴ *Id.*

⁷⁵ *Id.* at 5.

⁷⁶ *Id.*

⁷⁷ J.F. Organ, et. al., *The North American Model of Wildlife Conservation*, THE WILDLIFE SOCIETY TECHNICAL REVIEW 12-04, <http://wildlife.org/wp-content/uploads/2014/05/North-American-model-of-Wildlife-Conservation.pdf>.

and the rise of sportsmen within the middle class.⁷⁸ Because the North American Model of Wildlife Conservation lacks mandatory legal authority,⁷⁹ it serves as the framework for policy development for entities, such as non-profit organizations, wildlife agencies, professional organizations, and teaching institutions.⁸⁰

Under the North American Model of Wildlife Conservation, wildlife is held in public trust.⁸¹ This means the sovereign holds certain resources in trust for public use, such as fish and other wildlife. In other words, though an individual may own the land upon which wildlife resides, that individual does not hold a property interest in the wildlife that may be located on his or her land; conversely, all citizens own such wildlife.

⁷⁸ *The North American Wildlife Conservation Model*, ROCKY MTN. ELK FOUND., <http://www.rmef.org/Conservation/HuntingIsConservation/NorthAmericanWildlifeConservationModel.aspx> (last visited Oct. 21, 2016).

⁷⁹ David Petersen, *The North American Model for Wildlife Conservation Is an Endangered Species in Colorado*, HUFF-POST DENVER (Mar. 22, 2013), http://www.huffingtonpost.com/david-petersen/the-north-american-model-1_b_2868149.html.

⁸⁰ Michael P. Nelson, et. al. *An Inadequate Construct? North American Model: What's Flawed, What's Missing, What's Needed*, THE WILDLIFE PROFESSIONAL 58–60 (2011) <http://www.isleroyalewolf.org/sites/default/files/Nelson%20et%20al%202011-An%20Inadequate%20Construct.pdf>.

⁸¹ Petersen, *supra* note 79.

Brian Murphy, the Chief Executive Officer of the Quality Deer Management Association stated, “Not only does [the captive cervid] industry undermine the North American Model of Wildlife Conservation . . . it also threatens the health of wild deer and the public’s perception of hunting.”⁸² The North American Model of Wildlife Conservation specifically calls for the science-based management of wildlife held in trust by the government for the benefit of the public.⁸³

B. *The Public Trust Doctrine*

With origins based in Roman and English Common law, the Supreme Court has handed down multiple decisions memorializing the common ownership of public resources to be managed and regulated by the state.⁸⁴ The American form of the Public Trust Doctrine began in 1821 with the New Jersey Supreme Court’s decision in *Arnold v. Mundy*.⁸⁵ Then in 1842, the United States Supreme Court fully adopted the Public

⁸² Miller, *supra* note 31, at 2.

⁸³ *Id.*; Petersen, *supra* note 80.

⁸⁴ See *Arnold v. Mundy*, 6 N.J.L. 1, 3 (1821); see also *Martin v. Waddell's Lessee*, 41 U.S. 416 (1842).

⁸⁵ *Arnold*, 6 N.J.L. at 3; see Dale D. Gobble, *Three Cases / Four Tales: Common, Capture, the Public Trust, and Property in Land*, 35 ENTVL. L. 807, 831-33 (2005) (providing analysis on the *Arnold v. Mundy* decision).

Trust Doctrine in *Martin v. Waddell*, in alignment with the *Arnold* decision.⁸⁶

While Missouri implements unique methods for managing and regulating the state's forest, fish, and wildlife resources, the Public Trust Doctrine is the guiding principle behind those methods.⁸⁷ The reliance upon the Public Trust Doctrine extends across all 50 states and Canada.⁸⁸ This doctrine relies upon the premise that certain natural resources are so valuable to the public that they must not be owned or controlled by any individual person and should be held in trust by the government for the benefit of the larger society as a whole, for present and future generations.⁸⁹

i. History of The Public Trust Doctrine

Wild animals have been a vital part of North American society for as long as the continent has been inhabited. This significance has been highlighted through laws recognizing that wildlife cannot be owned by

⁸⁶ *Martin*, 41 U.S. at 411.

⁸⁷ See Hubbard, *supra* note 29.

⁸⁸ *Id.*

⁸⁹ *Id.*

individual people and must be managed for the benefit of all citizens.⁹⁰ In part, the reason the North American Model of Wildlife Conservation is so well regarded is because of its core tenant that wildlife be held in trust as a public resource.⁹¹

In 1842, the United States Supreme Court established the Public Trust Doctrine, in *Martin v. Waddell*.⁹² The Supreme Court's decision was based in large part on the interpretation of the Magna Carta (A.D. 1215). The Court determined that the lands under navigable waters were to be held as a public trust, which states, “[b]y the law of nature these things are common to all mankind. . . . [n]o one, therefore is forbidden to approach the seashore.”⁹³

Martin v. Waddell deviated from the English law inasmuch as under the English legal code the king legally owned wildlife and nature and was the trustee of natural resources.⁹⁴ Following *Martin v. Waddell*, individual states assumed public trustee status and have since overseen the

⁹⁰ John Organ & Shane Mahoney, *The Future of Public Trust: The Legal Status of the Public Trust Doctrine*, THE WILDLIFE PROF. 19 (Summer 2007).

⁹¹ *Id.*

⁹² *Martin v. Waddell's Lessee*, 41 U.S. 367, 406 (1842).

⁹³ Organ, *supra* note 90, at 19.

⁹⁴ *Id.*

governing of natural resources.⁹⁵ Courts have continued to mold and shape the Public Trust Doctrine. In 1896, the United States Supreme Court clearly articulated the state ownership of wildlife in *Greer v. Connecticut*, which explicitly denoted wildlife as a public trust resource.⁹⁶ Since *Greer*, the extent of the doctrine's applicability has been more thoroughly defined and state constitutions and statutes have further codified the public ownership of wildlife.⁹⁷ The Public Trust Doctrine has since been a guiding force in the management and regulation of wildlife resources of the United States.⁹⁸

There have been recent pushes for the privatization and commercialization of wildlife resources.⁹⁹ These efforts create complex legal and philosophical problems, to which there are no simple answers.¹⁰⁰ For instance, every member of the public has the right to access and use wildlife, because wildlife belongs to the public as property held in trust. Alternatively, landowners expect and have some level of rights to control

⁹⁵ *Id.*

⁹⁶ *Id.* See also *Geer v. Connecticut*, 161 U.S. 519 (1896).

⁹⁷ Organ, *supra* note 90, at 20.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 20-21.

access to the land that they privately own, pay taxes for, and manage.¹⁰¹ The Public Trust Doctrine balances the conflicting nature of public rights, property law, and the idea of “the commons,” with private rights and the desire to profit from wildlife.¹⁰²

ii. Policy of The Public Trust Doctrine

States vary the scope to which they interpret the Public Trust Doctrine.¹⁰³ For example, “public trust purposes” are limited statutorily in Arizona to only three narrow purposes: commerce, navigation, and fishing.¹⁰⁴ The privatization and commercialization of wildlife essentially changes and nullifies the Public Trust Doctrine.¹⁰⁵ Additionally, the legal devices granting the ability for the government to oversee and regulate wildlife as a public resource held in trust are undermined through privatization efforts.¹⁰⁶

¹⁰¹ *Id.* at 21.

¹⁰² *Id.*

¹⁰³ *See, e.g.*, IDAHO CODE ANN. § 58-1203 (West 1997) (restricting the doctrine’s applicability); *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984) (interpreting the doctrine expansively).

¹⁰⁴ ARIZ. REV. STAT. § 37-1101(9) (LexisNexis 2011) (“‘Public trust purposes’ or ‘public trust values’ mean commerce, navigation and fishing”).

¹⁰⁵ *Organ, supra* note 90, at 21.

¹⁰⁶ *Id.*

From a practical perspective, those currently managing wildlife as a public trust could have diminished power and authority if the stewardship of wildlife is taken out of the public domain and handed to private interests.¹⁰⁷ This could lead to the inability to “accurately monitor wildlife populations or track the spread of disease,” which would greatly limit any protection efforts.¹⁰⁸ Further, the privatization of wildlife may have societal impacts such as a “change in perception [that] could impact the very core of how experiences in nature, such as fishing, hunting, hiking, birding, and more, are valued by the public at large.”¹⁰⁹

Finally, movement away from government regulation of wildlife in public trust means that individuals will lose their ability to pursue the government for enforcement of their legal rights. Instead, people will be forced to pursue actions against individual-privatized entities, which will likely not have the same means and ability to respond to legal actions.¹¹⁰

The Public Trust Doctrine must play into the rationale for review of any legal actions or proposed legislation when considering resource

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 22.

uses and the implications for management and regulation of these resources, such as white-tailed deer.¹¹¹“The question remains, 165 years after *Martin v. Waddell*: Does the Public Trust Doctrine have any judicially enforceable right beyond the laws that it has already inspired? And a further question must be asked: What needs to be done to ensure the Public Trust Doctrine survives the next 165 years and beyond?”¹¹²

“In future decades, will citizens continue to have free access to enjoy wildlife in traditional as well as emerging pursuits? Will governments preserve biodiversity for future generations? Will wildlife remain wild? The answers to these questions will depend significantly upon people’s awareness of their innate share in the ownership of wildlife, and in their shared responsibility for it.”¹¹³

“Government trustees can help secure the Public Trust Doctrine by increasing public awareness and by increasing government responsiveness to the needs and desires of all citizens, democratically enshrined and democratically discharged.”¹¹⁴

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

iii. Captive Cervid Impact on The Public Trust Doctrine

Captive deer breeding operations and confined shooting facilities have the effect of creating a monetary value for wildlife. In turn, this may threaten the Public Trust Doctrine by creating an incentive for privatization, illegal taking of wildlife, wildlife trafficking, and the exploitation of a publicly owned resource.¹¹⁵ There are numerous, undesirable outcomes possible because of privatization, including the tendency and incentives to promote unethical practices to supply markets.¹¹⁶

For example, when public trust resources become privatized, the practices of commercialization encourage, and for some purposes require, that animal wildlife resources be categorized as livestock or alternative livestock.¹¹⁷ At that point, management authority transitions from wildlife agencies to departments of agriculture.¹¹⁸ Due to the limitation of wildlife agency authority to regulate wildlife populations, this transfer of management can effectively blur the lines between wild and captive

¹¹⁵ Bies, *supra* note 58, at 3.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

animals, challenging the North American Model of Wildlife Conservation.¹¹⁹

The Boone and Crockett Club defines “fair chase” as the “ethical, sportsmanlike, and lawful pursuit and taking of free-ranging wild, native North American big game animals in a manner that does not give the hunter an improper advantage over such animals.”¹²⁰ The concept of fair chase, in accordance with the Public Trust Doctrine, is fundamental to ethical hunting.¹²¹ The outcome of confined shooting operations provide the hunter with unfair advantages, threaten the heritage of ethical hunting practices, and could erode public support and acceptance of hunting.¹²²

VI. REGULATION AND MANAGEMENT OF THE CAPTIVE CERVID INDUSTRY

Breeding farmed cervids for various uses has created philosophical divisions within the hunting community. In particular, breeding cervids has raised concerns over the spread of wildlife diseases. Epidemiological considerations primarily center on the transmission of CWD, which has

¹¹⁹ *Id.*

¹²⁰ *Fair Chase Statement*, BOONE AND CROCKETT CLUB, http://www.boone-crockett.org/huntingEthics/ethics_fairchase.asp (last visited Nov. 28, 2016).

¹²¹ Bies, *supra* note 58, at 3.

¹²² *Id.*

potentially far-reaching implications not only for the farmed cervid industry, but for free-ranging cervid populations as well.

Concern over CWD is at the center of the current debate over whether farm raised deer should be classified as livestock or as wildlife and, which state agency should have regulatory authority over the industry - the state fish and wildlife agency or the state agricultural agency.

A. *Missouri Department Of Conservation*

By passing a constitutional amendment in 1936, the citizens of Missouri established a unique method of managing the forest, fish, and wildlife resources of the state.¹²³ The 1936 constitutional amendment granted the Department of Conservation a constitutional mandate by establishing and providing authority to the Conservation Commission.¹²⁴

This authority included:

The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wildlife resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto. . . .¹²⁵

¹²³ See Hubbard, *supra* note 29.

¹²⁴ *Id.*

¹²⁵ MO. CONST. art. IV, § 40(a).

All the powers, duties, and functions of the constitutionally authorized Conservation Commission have been transferred to the statutorily created Missouri Department of Conservation.¹²⁶ Since its inception, the Missouri Department of Conservation has been responsible for managing the wildlife resources of the state in a way that supports and encourages functional public use.

Under Chapter 252, Department of Conservation—Fish and Game, regarding the wildlife of the state of Missouri:

The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri. Any person who fails to comply with or who violates this law or any such rules and regulations shall not acquire or enforce any title, ownership or possessory right in any such wildlife; and any person who pursues, takes, kills, possesses or disposes of any such wildlife or attempts to do so, shall be deemed to consent that the title of said wildlife shall be and remain in the state of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof.¹²⁷

¹²⁶ MO. REV. STAT. § 252.002 (2000).

¹²⁷ § 252.030.

The plain language of the law¹²⁸ indicates that, as has been the historical practice, white-tail deer are subject to the regulation of the state as promulgated by the Conservation Commission.¹²⁹

“In 2011-12, more than 2.2 million Missourians identified themselves as ‘wildlife watchers’ and nine out of 10 Missouri citizens said they had an interest in fish, forest, and wildlife resources. In fact, one out of every four Missouri citizens between the ages of 16 and 65 had a permit that allowed them to hunt or fish in our state. There were 1.1 million Missouri anglers and more than 608,000 resident hunters.”¹³⁰

The management of wildlife in Missouri is conducted in alignment with the state’s Wildlife Code, which is the collective body of regulations that have been approved by the Conservation Commission.¹³¹ The Wildlife Code “reduces the risk of exotic and invasive species, as well as diseases, by reducing their probability of establishment or slowing down their rate of expansion.”¹³²

¹²⁸ *Id.* See also § 252.040.

¹²⁹ Hubbard, *supra* note 29.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

Changes to the Wildlife Code have been necessary in the past and will continue to be in the future. Wildlife population changes and other impacts to wildlife species and habitats, such as new diseases, can often require constituent involvement, stakeholder support, and Wildlife Code modification.¹³³

The Missouri Department of Conservation manages and protects the state’s public trust resources, per its constitutional authorization.¹³⁴ The Department of Conservation utilizes the best science available with the goal of overseeing these resources “to facilitate and provide opportunity for all citizens to use, enjoy, and learn about these resources.”¹³⁵

B. *Missouri Department of Agriculture*

The Missouri Department of Agriculture “is dedicated to the promotion and protection of the state’s agriculture industry.”¹³⁶ The mission of the Department of Agriculture is “[t]o serve, promote, and

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* See also Missouri Department of Conservation, *Mission, Vision, Strategic Plan*, MO. DEP’T OF CONSERVATION, <https://mdc.mo.gov/about-us/mission-vision-strategic-plan>.

¹³⁶ Missouri Department of Conservation, *About the Missouri Department of Agriculture*, MO. DEPT. OF AGRIC., <http://agriculture.mo.gov/aboutMDA.php>.

protect the agriculture producers, processors, and consumers of Missouri’s food, fuel, and fiber products.”¹³⁷

The Department of Agriculture exists to monitor, regulate, and protect the farming industry within the state of Missouri.

1. The department of agriculture is authorized and directed to cooperate with the United States Department of Agriculture in performing the duties and exercising the powers vested in it under sections 267.560 to 267.660 and is empowered to enter at any time any premises, barns, stables, sheds, vehicles or other places where livestock or birds are kept for the purpose of administering and enforcing the provisions of sections 267.560 to 267.660.

2. The department may make such rules and regulations pursuant to the provisions of section 267.122 and chapter 536 as may be deemed necessary for the enforcement of sections 267.560 to 267.660 including all necessary rules and regulations for the entry and movement of livestock, animals or birds into, within and through the state.¹³⁸

The Missouri Department of Agriculture is led by “a director of the department of agriculture who shall be a practical farmer, well versed in agricultural science . . .”¹³⁹ The Department of Agriculture holds the authority to enact rules and regulations necessary for the enforcement of

¹³⁷ *Id.*

¹³⁸ MO. REV. STAT. § 267.645 (2000).

¹³⁹ § 261.010.

the “Missouri Livestock Disease Control and Eradication Law,” which includes regulation of animals.¹⁴⁰

By statute, the Missouri Department of Agriculture has the authority to make rules and regulations as deemed necessary for the “entry and movement of livestock, animals or birds, into, within and through the state.”¹⁴¹ Animal is defined as “an animal of the equine, bovine, porcine, ovine, caprine, or species domesticated or semidomesticated.”¹⁴² As “captive white-tailed deer would be a ‘domesticated or semidomesticated species;’ [and] therefore, the movement of the white-tailed deer would be under the authority of the Missouri Department of Agriculture.”¹⁴³

Additionally, the Missouri Department of Agriculture has various regulations regarding “captive cervids,” including regulations about interstate and intrastate movement and disease testing requirements.¹⁴⁴ Alternatively, the Missouri Department of Agriculture has very few regulations on how to confine or manage captive cervids; furthermore, the

¹⁴⁰ Letter from Michael Warrick, Gen. Counsel of Mo. Dep’t of Agric., to Robert J. Brundage 1 (Received July 28, 2012) (on file with author). *See generally* MO. REV. STAT. § 267.645 (2000); *see also* MO. REV. STAT. §§ 267.560-267.660 (1959).

¹⁴¹MO. REV. STAT. § 267.645 (2000).

¹⁴²§ 267.565.

¹⁴³ Warrick, *supra* note 140.

¹⁴⁴ MO. CODE REGS. tit. 2, § 30-2.010(10)(A) (2016).

Missouri Department of Agriculture has no enforcement authority if any established standards are violated. Ultimately, the expertise of the Missouri Department of Agriculture includes livestock management and adhering to FDA Guidelines and Regulations.

C. *Single Or Joint Approach To Cervid Management*

The transfer of regulatory authority away from state wildlife agencies to state departments of agriculture runs precisely against the North American Model of Wildlife Conservation. In particular, it shocks the Public Trust Doctrine and entirely contradicts any notion of the concept of fair chase.

The North American Model of Wildlife Conservation has proven successful since its inception. There is no apparent, nor has there been any proposed, alternative to the North American Model of Wildlife Conservation. A primary feature of the North American Model of Wildlife Conservation is that wildlife is a public trust resource, managed and maintained by government agencies for the benefit and use of the people. Private ownership of native wildlife in North America held in captive facilities both fails to conform to the principle of managing wildlife as a

public trust resource and further threatens the ecological stability of cervid populations belonging to and used by the public.

Missouri should continue to be a leader in the national conservation and wildlife community and should respond to the changing landscape of cervid management with creative and innovative solutions. First, the Missouri Department of Conservation, and similarly situated state agencies across the country, should lay challenge to the captive cervid industry as a whole, both challenging the constitutionality and the common law. The ethical and moral dilemmas that derive from for-profit breeding and hunting deer farms are noteworthy and should be fully considered. The determination could be made, for any number of reasons, that native cervids are a public resource and that their private use and ownership is impermissible.

Policy decisions impacting wildlife populations should be based on established and well founded scientific evidence. State wildlife agencies are in a superior position to understand and respond to the scientific information associated with the management and regulation of deer herds, both captive and wild. Wildlife agencies, not departments of agriculture, are in the best position to provide the greatest likelihood of successful

management of regulation of deer populations. This regulation will ensure the long-term healthy maintenance of this and other species, and it will reduce potential issues such as disease transmission and genetic exchange among native wildlife and captive or exotic species.

The spread of wildlife diseases, especially CWD, is inadequately regulated in many states and is directly linked with the transportation of animals within the captive cervid industry. State wildlife agencies must retain their authority to manage and regulate all wildlife, thus serving to protect the wildlife resources of the state.

Removing the authority of state fish and wildlife agencies to regulate and manage captive cervids will likely decrease the ability to manage and contain wildlife disease outbreaks, including CWD. Additionally, categorizing captive cervids as livestock will have the effect of immediately terminating the authority of state fish and wildlife agencies to manage captive cervids. Further, it has the potential to extend to the ultimate erosion of the agency's authority to manage wild cervid populations by blurring the lines between captive and wild animals.

The captive cervid industry will likely continue to exist into the foreseeable future. The Missouri Department of Conservation should

welcome the opportunity to work with veterinarians, other associated organizations, and the ability to regulate and manage both the wild and domesticated cervid herds. There are numerous examples of the co-ventures relating to cervid management, in particular in regard to CWD, which indicate that the Missouri Department of Conservation and the Missouri Department of Agriculture can effectively work together.¹⁴⁵ As it exists presently, it is possible for the Missouri Department of Agriculture to be responsible for captive cervid populations while the Missouri Department of Conservation is responsible for the wild cervid populations. However, this leads to numerous problems, including dissimilar interests and power imbalances, which have yet to be adequately addressed.

Alternatively, it would be possible for a singular entity to be responsible for both farmed and wild cervid populations, which may further enhance the ability to manage and contain wildlife disease

¹⁴⁵ Hubbard, *supra* note 29. (“The Department (of Conservation) has a long history of engaging citizens on natural-resource issues and has worked with cervid owners since the 1940s. When CWD was discovered in our state, a Captive Cervid Working Group was formed to review disease issues in our wildlife populations. The group is composed of representatives from the Missouri Department of Conservation, the Missouri Department of Agriculture, sporting organizations, the Missouri Whitetail Breeders and Hunting Ranch Association, and the Missouri Elk Farmers Association.”).

outbreaks, including CWD.¹⁴⁶ Due to this notion, state wildlife agencies, including the Missouri Department of Conservation, tend to be in the best position to manage and provide oversight for wild animal populations.

VII. Conclusion

A joint approach to cervid management involving stakeholders from both the Missouri Department of Conservation and the Missouri Department of Agriculture could be effectively implemented and provide a positive outcome for the management of all cervids within Missouri. Any outcome of ongoing litigation,¹⁴⁷ or the promulgation of legislation,¹⁴⁸ will be timely appealed or challenged in a court of law with the probable eventual outcome being resolved by the Missouri Supreme Court. Until then, one is left asking the overly complex question – are wild deer, in fact, wild?

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¹⁴⁶ *Management Authority Over Farmed Cervids*, CONGRESSIONAL SPORTSMEN’S FOUNDATION (2016), <http://sportsmenslink.org/policies/state/management-authority-over-captive-cervids#sthash.BSnqGOul.dpuf>.

¹⁴⁷ Findings of Fact, Conclusions of Law, and Judgement at 1, Donald Hill, et. al. v. Missouri Conservation Commission, et. al., (2016) (No. 150S-CC00005-01).

¹⁴⁸ H.B. 1412, 98th Gen. Assemb., Reg. Sess. (Mo. 2016).

