ANIMAL LAW DOCKET

Practice Tips For Animal Law Cases

Animal Law is Wild

"He saw an animal that liked to growl, big furry paws and he liked to howl; Great big furry back and furry hair, think I'll call it a bear."[1]

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Introduction

Bears, lions, cougars, wolves (especially wolves), horses, whales, dolphins, sharks, the three-inch snail darter, the widespread sage-grouse, the elusive spotted owl, deer, nonhuman primates—all have been at the center of debate in our courts and legislatures. The list of wildlife species that have been at the center of important animal law cases—even impacting legal doctrines outside the specific cases involving them—is quite extensive. And while there are cases from the 1800s that influence modern day animal law, one way of looking at animal law's rise and growth begins with a focus on protecting wild species. As a formative collected area of concentration, wildlife law was the first animal law. The field has now expanded to address almost every kind of animal in every kind of setting, but protecting and interacting with our wild cohabitants on the planet has been a steady focus for over fifty years.

Before There Were Animal Lawyers, There Was Animal Law

The ranks of animal lawyers have been growing over the past three decades, with a sparse few in private practice, but increasing numbers within the legal departments of a number of animal welfare organizations. Animal lawyers are focused on litigation, drafting legislation, consulting with clients on various matters, and ensuring their human clients (often organizations) are complying with the laws governing the running of a business. Hundreds of lawyers in commercial firms are choosing animal law as the focus for their pro bono work; and a small group of independent practitioners are also representing people with animal-related legal issues.

But long before these legal frontier crusaders began their work in earnest, animal law was happening—sometimes intentionally, sometimes by accident. The most obvious example is that many of the anticruelty laws that still govern the treatment of

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some animals were enacted in the 1800s. And the original intent of those laws, in significant part, was the protection of the commercial interests that humans have in animals. That is, you could not be charged with animal cruelty if you were abusing or neglecting your own animals, only someone else's. The humanitarian—and humane—aspect of the anticruelty laws only came significantly into vogue in the late twentieth century.

We can also find the first kernels of thought about how humans interact with wild animals in judicial opinions going back to the nineteenth century. Many lawyers remember one of the cases from their property law class was *Pierson v. Post*,[2] in which an 1805 New York court discussed the issue of private ownership of wild animals. Still in that century, some 90 years later, a rather modern ruling came from the Supreme Court of Colorado, this time regarding captive wild animals about to be killed.[3] A "country club" made up of "gentlemen" (according to the court), admittedly for their "sport and amusement", were going to release some doves from small cages while standing by with their guns so they could shoot them.[4] The court ruled that this practice violated the Colorado anticruelty laws because there was "no adequate or reasonable excuse for the acts which, to be [legal], must be prompted by a worthy motive and a reasonable object."[5] This would be a progressive ruling in 2024—in 1896 it was truly a revolutionary view of the anticruelty laws, which exempt hunting practices indisputably done for "sport and amusement."[6]

Jumping forward roughly half a century, in *Baugh v. Beatty*, a child approached a chimpanzee in a circus cage and was bitten.[7] The plaintiffs attempted to invoke the "attractive nuisance" doctrine, which holds landowners liable for "artificial and dangerous contrivances" on their land.[8] The California appellate court effectively recognized the sentiency of animals, in comparison to a truly artificial contrivance: "An animal in a cage is not artificial and it does not fall within the definition of the word 'contrivance' which is defined … as 'a mechanical device; an appliance'."[9]

Finally, according to the attorney responsible for *La Porte v. Associated Indeps., Inc.*,[10] neither animal law nor any consideration of animal sentiency was in his mind when he filed and argued that case.[11] The court in *La Porte* upheld an award of emotional distress damages when a garbage collector threw a garbage can at plaintiff's miniature dachshund, ultimately killing the dog.[12] The garbage collector laughed when he saw the plaintiff and left.[13] The Florida Supreme Court, in upholding damages for emotional distress for the damages to the plaintiff, stated that "the affection of a master for his dog is a very real thing and … the malicious destruction of the pet provides an element of damage for which the owner should

recover, irrespective of the value of the animal."[14] Even today, that is not the rule of law in most states, but in the case of a lawyer in 1964 just trying to get some recovery for his client, the Florida court opened up the dialogue for recognition of the human-animal bond.

Wildlife Law

All of the cases and work discussed above have contributed to the body of animal law, though they came from a different viewpoint than that of the animal lawyers of the twenty-first century, whose primary motivation is usually animal protection and welfare. And the law around wildlife has always come from a different perspective as well, which is only partially animal centric. In large part, the laws protecting wild animals have been triggered by concerns that more rapid extinctions could occur without legal protection—and that *humans* would be harmed by their inability to see these species ever again. Their loss would eliminate our ability to appreciate them, so we write laws to protect them. Of course, many also seek to protect these wonderful beings because of their sentiency, their intrinsic value, and because their lives are important. Without these legal efforts, human overuse and destruction of habitat, hunting, and interruption of important migration and travel routes for wild animals could eliminate many species.

Wildlife protection statutes began long before modern-day animal lawyers were plying their trade. The Lacey Act, which is still viable, has been around since 1900.[15] It prohibits the taking, possession, import, sale and transport of certain species deemed to be in danger of diminution or extinction, and aims to prevent the introduction of opportunistic species that could jeopardize native species.[16] The Act has had several modifications and expansions, as recently as 2022, when the Big Cat Public Safety Act was added, which requires owners of tigers, lions, and other large cats to have a license, and prohibits public petting of these cats and their cubs.[17]

In 1918, Congress passed the Migratory Bird Treaty Act, which is based on a series of treaties that the U.S. entered into with other countries to protect avian populations that move across borders on a regular basis.[18] The law prohibits the killing, capturing, selling, trading, and transport of species identified in the law, without a permit granted by the Fish and Wildlife Service.[19] At this point, the hammer of wildlife protection was firmly cemented in the Congressional toolbox.

Beginning in the 1960s, and through the succeeding decades, this track of wildlife protection has increased in value and strength and has spread to laws governing the treatment of captive wildlife—normally wild species who are either captured and

contained (most commonly for exhibition, private ownership or biomedical research), and sometimes focusing on specific species.

In 1966, the first version of the Animal Welfare Act (AWA) was enacted, initially focusing on oversight and controls with respect to laboratory research; the AWA has now been expanded and modified many times to include some regulation of wild animals in captivity, with specific statutory and regulatory provisions addressing, e.g., the treatment of chimpanzees and avian species.[20]

A trio of laws in the early 1970s, all signed by President Richard Nixon, are responsible for much of the protection and destruction, dialogue and debate, controversy, and litigation that has been, and still is, seen regularly in the media and the courts. First, in 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act (WHA), which recognized America's wild horses as an iconic species, largely responsible for helping Americans develop the West, and one that should be protected at some level.[21] The WHA was/is a revolutionary step for federal legislation, because it singled out these two species (horses and burros) for special recognition at the Congressional level, and put that directly into federal law. Congress declared that wild horses are the "living symbols of the historic and pioneer spirit of the West," and that they should be "protected from capture, branding, harassment, or death … as an integral part of the natural system of the public lands."[22] Two federal agencies oversee the requirement that they "maintain a thriving natural ecological balance among wild horse populations, wildlife, livestock, and vegetation and to protect the range from the deterioration associated with overpopulation."[23]

A broader reach came in 1972, with the enactment of the Marine Mammal Protection Act (MMPA)[24], and 1973, with the Endangered Species Act (ESA).[25] As many readers know, and as indicated by their titles, these two laws set out means and methods of protection for marine and nonmarine species. While the MMPA provides coverage for all marine mammal species, it provides some exceptions for commercial activity.[26] The ESA, on the other hand, applies only to species that have been formally listed and generally categorized as being in danger of extinction.[27] It also provides protection for habitats needed for the survival of species in danger, and has been characterized by the U.S. Supreme Court as "the most comprehensive legislation for the preservation of endangered species enacted by any nation."[28] Its use in thousands of cases, hundreds of them officially reported by the courts, means that the ESA and its influence continues in force.