A Look at the Private Ownership of Whitetailed Deer by a Texas Property Attorney

By

Terry E. Hogwood
Attorney-At-Law

CONTACT INFORMATION:

Terry E. Hogwood
Attorney-At-Law
26519 Wedgewood Park
Cypress, Texas 77433
713.823.4949
terrye.hogwood@gmail.com

IMPORTANT DEFINITIONS

Chronic Wasting Disease: CWD

White-tailed Deer: deer

Texas Parks & Wildlife Department (in charge of white-tail deer breeding): The Department

Chronic Wasting Disease Definition

- CWD is a type of neurological disease that affects moose, elk, and deer. CWD was initially discovered in **1967** in Colorado and since that time has been spreading rapidly across the U.S. As of last year, twenty-four states have had confirmed cases of CWD. CWD is always fatal and the symptoms are well-known.
- There is now only one Department approved method of testing for CWD in Texas – post mortem brain stem testing.
- Thus, to test an entire herd for CWD, the entire herd must be destroyed.

Comment: CWD has been known and studied since 1967 when it first appeared in the US. (*What is Chronic Wasting Disease?*, U.S. GEOLOGICAL SURV. (Sept. 8, 2023, 3:35 PM) From that date forward, in Texas only one test for CWD has been approved by the Department – a *post mortem* brain stem test requiring that the animal be killed or have died before it can be tested. Why has there not been developed an acceptable (to The Department and the breeder deer owner) an *ante mortem* test for CWD for the last **57 years**?

FICTIONALIZED FACTUAL SCENARIO

➔A licensed Texas deer breeder is notified by The Department:

- One or more deer already tested has CWD
- Rest of herd must be tested
- Only post mortem testing will be used
- Breeder must provide land to inter dead deer
- Breeder will bear all costs of testing including housing costs, ammo and per diem rates of Department personnel
- Breeder will not be reimbursed market value of deer (if any cost at all)

Genesis of This Talk and Underlying Article

- **Discussions with deer breeders personally**

- ***Bailey v. Tex. Pk. & Wildlife Dept., 581 S.W.3d 374 (CCA – 2019)***

Legal Issue – Ownership of Breeder Deer

The main, driving legal issue raised by The Department in the *Bailey* case is who owns breeder deer in Texas:

- The deer breeder or
- The Department
- In the *Bailey* case, The Department asserted that it owned all wildlife in Texas, including deer bred behind high fences.

Article 16, Section 59(a) of the Texas Constitution:

"(a) The conservation and development of all of the natural resources of this State, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semiarid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto."

At no point in this Article is the ownership of breeder deer even remotely addressed as being in the State of Texas.

Section 1.011(a) of The Parks and Wildlife Code provides the following:

"All wild animals, fur bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state." (Parks and Wildlife Code, Title 1., Subchapter B. Section 1.011(a)) (emphasis added)

As can be seen from the above quote, NO statement of State of Texas OWNERSHIP is made.

Adoption of the Common Law of England

As of 1840, when Texas was a nation, the common law of England, as it existed in 1840 and as long as it was not inconsistent with the Texas Constitution or acts of its Congress, was adopted as the common law of the nation. (Act approved Jan. 20, 1840, 4th Cong., R.S., 1839 Repub. Tex. Laws)

U S Supreme Court

In any event, "[t]o put the claim of the State upon title is," in Mr. Justice Holmes' words, "to lean upon a slender reed." Missouri v. Holland, 252 U. S. 416, 252 U. S. 434 (1920). A State does not stand in the same position as the owner of a private game preserve, **and it is pure fantasy** to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures **until they are reduced to possession by skillful capture**. Ibid.; Geer v Connecticut, 161 U. S. 519, 161 U. S. 539-540 (1896) (Field, J., dissenting). The "ownership" language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Douglas v. Seacoast Products, Inc*., 431 U.S. 265, 284 (1977) (emphasis added)

Texas Common Law of Capture/Regulation of Wild Animals

- "It is well established that, by reason of the state's control over fish and game within its limits, it is within the police power of the state Legislature, subject to constitutional restrictions, to enact such general or special laws as may be reasonably necessary for the protection and regulation of the public's right in such fish and game, even to the extent of restricting the use of or right of property in the game after it is taken or killed;..." *Ex Parte Blardone*, 115 S.W. 838, 839 (Tex. Crim. App. 1909) (emphasis added)
- "Deer, though strictly speaking ferae naturae, if reclaimed and kept in inclosed ground, are the subject of property, pass to the executors, and are liable to be taken in distress." *Jones v. State, 45 S.W.2d 612, 614 (Tex. Crim. App. 1931)* (emphasis added)
- " Wild animals are not subject to theft until they become the property of an owner. This they do immediately upon being reduced to possession." *Runnels v. State*, 213 S.W. 2d 545, 547 (Tex. Crim. App. 1948)

- "The common law provides that animals ferae naturae belong to the state and no individual property rights exist as long as they remain wild, unconfined, and undomesticated. Jones v. State, 45 S.W.2d 612, 613-14 (Tex.Cr.App.1931). Unqualified property rights in wild animals can arise when removed from their natural liberty and made subjects of man's dominion. This qualified right is lost, however, if they regain their natural liberty." *Wiley v. Baker, 597 S.W.2d 3,5* (Ct. Civ. App. – 1980)

- "In Texas, it has been said that the common law provides that animals ferae naturae belong to the state and no individual property rights exist as long as the animal remains wild, unconfined, and undomesticated. Jones v. State, 119 Tex.Crim. 126, 45 S.W.2d 612, 613-14 (1931); Wiley v. Baker, 597 S.W.2d 3, 5 (Tex.Civ.App.--Tyler 1980, no writ). Unqualified property rights in wild animals can arise when they are legally removed from their natural liberty and made the subjects of man's dominion. Jones, 45 S.W.2d at 614. This qualified right is lost, however, if the animal regains its natural liberty. Wiley, 597 S.W.2d at 5." *The State of Texas v. Bartee*, 894 S.W.2d 34, 41 (Ct.Civ.App. 1994)

- "The State, through its agency, represents the common ownership of wild animals. The people have the right to change this arrangement if they so desire. The State, **as trustee**, has the power to regulate the taking and acquisition of property in wild animals by individuals by imposing such restrictions and conditions as the legislature may see fit. Wholly apart from its authority to protect the common ownership of wild animals, the right of the State to preserve wild animals cannot be disputed due to the undoubted existence of a **police power** to that end. *The State of Texas v. Bartee*, 894 S.W.2d 34, 42 (Ct.Civ.App. 1994)

- …"The implication is that the proceeds of any sale may be retained by the scientific breeder. Permits may also be granted to individuals by the department for the trapping, transportation and transplanting of "wild white-tailed deer" from areas overpopulated by such deer to other areas of the state, all without cost to the State government. TEX.PARKS & WILDLIFE CODE ANN. § 63.007 (Vernon 1991). There may be other examples, but clearly while acting under permits from the State, the scientific breeder and the transporter would legally have qualified rights of ownership or possession of the white-tailed deer." *The State of Texas v. Bartee*, 894 S.W.2d 34, 43 (Ct.Civ.App. 1994)

These are the simple rules of law known to property law practitioners since **1840**, the date the common law of England was adopted by the nation of Texas as its common law. The above reviewed cases have followed these principles ever since that date, **no exceptions**! A landowner erecting a high fence (usually 7' to 10' tall) will be deemed to own the deer within the high fence since the deer cannot escape. The landowner has reduced the deer within the high fence to its possession.

Enter the *Bailey* case

The *Bailey Case*

Rule No. 1 – "…private property rights in breeder deer is incompatible with the Legislature's direction that breeder deer are held under a permit….The statutory scheme simply leaves no room for common law property rights to arise in breeder deer." *Bailey* at pg. 393

Rule No. 2- "…we conclude breeder deer are public property held under a permit issued by the Department and, consequently, deer breeders do not acquire common law property rights in them." *Bailey* at pg. 393

High Fence Example 1 – Private citizen A buys 150 acres of land in East Texas and fences same with a high fence – no permit is ever required to construct a high fence. At the time of A's purchase, many wild deer were located on said land. With the construction of the high fence, no deer may escape A's land. They have been reduced to possession by A via the high fence. Per Texas common law set forth above, A owns those deer.

A is neither raising the deer under permit nor attempting to breed same. The deer are simply now restricted to A's land and A's land only thereby rendering them the private property of A. Although A owns all of the deer within its high fence, A cannot hunt same without a valid hunting license nor attempt to breed same without a State permit.

High Fence Example 2 – Private citizen B purchases 100 acres of land, high fences it and then applies for a breeder deer permit. Under *Bailey*, B does not own the deer within its fence.

What changed? THE PERMIT. B's breeder deer permit changed the court's decision in *Bailey*. The court's conclusions on breeder deer ownership are without precedential support. The court cannot point to any Texas case precedent allowing it to abrogate past common law rulings on wild deer ownership under high fence just because The Department was authorized to issue a breeder deer permit pursuant to the police power of the State of Texas.

Unconstitutional Taking of Property

If the breeder deer are the property of the permit holder, then The Department, if it decides to kill an entire herd of a breeder in order to test for CHD (The Department only recognizes *post mortem* brain stem testing), has a *takings* problem under both the Texas and US Constitutions (And a takings at market value, not some reduced per breeder deer cost). [See *Horne v. Dep't of Agriculture*, 576 U.S. 351 (2015), which once and for all holds that the taking of any property by the government, real or **personal**, may rise to the level of an unconstitutional taking under the fifth amendment (as applied to the states under the fourteenth amendment), thus requiring adequate compensation be furnished by the taking governmental entity.] And there can be no question that killing a deer breeder's entire herd just to test it for CWD is, as a matter of law, an unconstitutional taking under the federal and state constitutions.

The Court's Breeder Deer Ownership Ruling May be Dicta –

- The Department raised a plea to the jurisdiction asserting sovereign immunity. The court, in an effort to cover all possible outcomes, actually ruled on both the jurisdictional issue (which could cause the court to lose all authority to decide the case) as well as granted the Department's motion for summary judgment (that held The Department owned the deer).

- A petition for review was filed in this case with the Texas Supreme Court on 9/11/2019. However, it does not appear any further action was taken in the Texas Supreme Court with respect to this case other than a denial of the petition for review. It thus appears to the author that, since it is unknown if the court of appeals had jurisdiction to hear the case, all of the legal reasoning/conclusions related to the ownership of breeder deer in Texas could well be dicta, thus negating *Bailey's* holding relative to the ownership of breeder deer in Texas (Dicta – "An opinion expressed by a court, but which, not being necessarily involved in the case, lacks the force of an adjudication…" *Grisby v. Reid*, 153 S.W. 1124, 1126 (1913)