American Wildlife Law by Thomas A. Lund

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BOOK REVIEW

WILDLIFE LAW


Reviewed by Nancy Lee Jones*

The area of wildlife law has long been one of the more esoteric and neglected subjects of environmental law;¹ however, the past decade has seen an emergence of interest in this ancient field. One commentator has described federal wildlife law as having been "catapulted into prominence."² Numerous reasons can be advanced for this surge of interest which has led to increasing numbers of federal statutes³ as well as significant judicial decisions.⁴ These reasons can

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¹. The reasons for this neglect are, as one commentator has stated "not obvious," but may lie in part due to the difficulties of defining the area. The very term wildlife is difficult to define and even if the term is limited to mammals, fish, or birds, the numerous statutes which would or could impact on these groups are voluminous.


⁴. See e.g., Kleppe v. New Mexico, 426 U.S. 529 (1976). It is interesting to note that people have arrived at a respect for and interest in the preservation of wildlife in various ways. Russell E. Train, the former Administrator of the Environmental Protection Agency, claims
be divided into four main groups: ecological, scientific, aesthetic, and ethical.\textsuperscript{5}

The ecological considerations which have given rise to increased interest in wildlife law can be described as concern for the protection of the environment as a whole. The existence and well-being of wildlife serves as a general indicator for many people of how well our environment is being protected.\textsuperscript{6} As the sciences of biology and botany have advanced it has become more and more apparent that the lives of animals and man are interconnected. Man exists as a part of the earth's biosphere which is composed of ecosystems,\textsuperscript{7} and it has been observed that without a healthy, functioning biosphere, man's survival is in question.\textsuperscript{8}

Wildlife is important to man in more scientific and practical senses as well; wildlife has proved to be a valuable tool for medical science\textsuperscript{9} in addition to advancing more general scientific knowledge. For example, studying natural ecosystems can provide information which will improve our knowledge of the workings of man-made or influenced environments.\textsuperscript{10}

The aesthetic importance of wildlife has also become increasingly significant. More people are finding that the mere observation of wildlife can bring enjoyment\textsuperscript{11} and in addition the traditional enjoyment of hunting and fishing has continued to be popular.\textsuperscript{12} Wildlife has also been seen as intrinsically important because it is life, and philosophical issues have been increasingly raised concerning to have been converted to the cause of wildlife "while treed by a rhino in Africa. It gave him time to think." \textit{Wildlife and America} 273 (H. Brokaw ed. 1978).

5. It should be noted that other general reasons such as the receptiveness of the courts to suits concerning public resources may also be significant. See Bean, \textit{The Developing Law of Wildlife Conservation on the National Forest and National Resource Lands}, 4 \textit{J. of Contemp. L.} 58, 59 (1977).


7. \textit{Ecosystems have been defined as "communities of living organisms and the physical environment with which they interact." R. Dassmann, Wildlife and Ecosystems} in \textit{Wildlife in America} 18 (H. Brokaw, ed. 1978).


9. \textit{Id.} Dassmann notes several species of wildlife whose current medical importance could not have been predicted. For examples, Rhesus monkeys have proved valuable for blood groupings, sea urchins in embryology, and foxgloves for digitalis.

10. \textit{Id.}


whether man has the right to kill animals, especially when such killing exterminates an entire species.\textsuperscript{13}

The recent interest in wildlife law, as evidenced by the reasons discussed above, has given rise not only to statutes and case law but also to legal commentary. One of the most recent additions to the scholarly writing on wildlife law is Thomas A. Lund's book, \textit{American Wildlife Law}. This well-written and thoughtful book traces the history of wildlife law, describing "the development of American governmental policy regarding free wildlife presently valued either for sport, or for aesthetic, ethical, and ecological reasons."\textsuperscript{14}

Although other articles and books have been published recently,\textsuperscript{15} the field is still an uncrowded one and as recently as 1974 the lack of material led one commentator to call for "a much needed definitive study of wildlife law."\textsuperscript{16} This need was answered in large part by the definitive work, \textit{The Evolution of National Wildlife Law}.\textsuperscript{17} This book contains a brief discussion of the historical background of wildlife law but focuses most of its attention on an examination of the present federal statutes and regulations. \textit{American Wildlife Law}, on the other hand, focuses on the historical development of wildlife law, and seeks to discern trends and place present law in its proper context. As such it is a unique and welcome addition to the legal commentary and is a particularly important work for readers in policy-making positions. \textit{American Wildlife Law} is written in a lucid style, despite the difficulty of describing early English law in that manner.\textsuperscript{18} It is logically organized into five major categories, exclusive of the introduction and conclusion: English wildlife law before the American Revolution, early American wildlife law, the constitutional limits of wildlife law, state wildlife law, and federal wildlife law.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{13} FAVRE, \textit{Wildlife Rights: The Ever-Widening Circle}, 9 ENVT'L L. 241 (1979).
\item \textsuperscript{14} T. LUND, \textit{AMERICAN WILDLIFE LAW} 1 (1980). (Hereafter referred to as LUND).
\item \textsuperscript{17} M. BEAN, \textit{THE EVOLUTION OF NATIONAL WILDLIFE LAW} (1977).
\item \textsuperscript{18} At times the words seem to sing. For example, the opening sentence of Professor Lund's conclusion reads: "Tempo affects writing no less than music, and a quick summary of the evolution of American wildlife law may therefore play a novel variation on earlier themes, prior to several muted notes of conclusion." LUND at 101.
\end{enumerate}
\end{footnotesize}
Thomas A. Lund, a professor of law at the University of Utah College of Law, is probably the leading authority on the history of wildlife law. Chapters Two and Three, which deal with English and early American wildlife law, have appeared previously as articles in law reviews. These articles have been described as "informative and analytical" and as containing "painstaking research and quality writing." They have also been widely cited; one of the articles was cited in a Supreme Court dissenting opinion, and Professor Lund's work has been noted in almost every subsequent discussion of the history of wildlife law.

The reason for such widespread approval is obvious when these chapters are read. Chapter Two carefully outlines the themes of early English wildlife law, especially the amazingly sophisticated techniques that were used to preserve wildlife. Although these techniques may have been successful, they were so in part using what Professor Lund refers to as "unforgivable vices, that is discrimination by class and wealth in the right to utilize wildlife." Some of the themes of early English law were echoed in subsequent early American law; however, the English tradition of hunting as an amusement only fit for gentlemen was rejected in America. The economy of the new world required the use of game as a source of food and clothing. This rejection of the English tradition is described by Professor Lund in the following manner:

As a reflection of the threats the colonists confronted regarding survival, the alterations were expedient; as an expression of their democratic sentiments, the alterations were admirable; but as a means of preserving the remarkable wildlife bounty of the

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23. Lund at 17.
24. Id. For example, the concept of closed seasons was derived from English law.
25. Id. at 19.
American continent, the alterations were a failure, followed by a hecatomb of wildlife which mocked the restrictive laws upon taking.\(^{26}\)

The failure of the American approach to preserve wildlife led inexorably to preservation attempts by the states and then by the federal government. Professor Lund provides an analysis of these solutions in Chapters Five and Six but first discusses the constitutional law which circumscribes to some degree legislative ability to implement wildlife policy.

Chapter Three, the constitutional limits of wildlife law, is divided into two parts: the constitutional doctrines applicable to state law and the constitutional doctrines applicable to federal law. This overview is useful and concise, although perhaps too concise: the complex federal power to regulate commerce is dealt with in slightly over one page.\(^{27}\) However, it is difficult to be too critical of brevity in legal publications; if it is a vice, it is a vice which ought to have more adherents. The danger of brevity, though, is the sin of omission. Professor Lund generally avoids this pitfall when discussing constitutional law with one exception: he does not consider the issues raised by federal preemption of state wildlife law. It is arguable that such a discussion would be of little help in a historical work; however, the interplay between state and federal laws has assumed increasing importance and a discussion of it would have been a valuable addition to the work.\(^{28}\)

Chapters Five and Six trace the development of certain themes in state and federal laws. As the economic approach of early American wildlife law was seen as failing to meet preservation goals, states changed their emphasis from the economic interests of exploitation to the support of sport. This change in emphasis is seen by Professor Lund as making valuable contributions to preservation; however, as other interests in wildlife—esthetic, ethical, and ecological—have increased, this emphasis on sport has appeared flawed.\(^{29}\) The major theme running through federal wildlife law is described by Professor Lund as “cooperation with the states to facilitate their sport goals.”\(^{30}\) However, he also sees an “undercurrent” running counter

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26. Id. at 34.
27. Id. at 49.
29. LUND at 78.
30. Id. at 81.
to this theme: a divergence in state and federal interest due to increasing federal sensitivity to aesthetic, ethical, and ecological considerations regarding wildlife.\textsuperscript{31} In examining this undercurrent, various federal laws such as the Endangered Species Act of 1973 and the Marine Mammals Protection Act of 1972 are discussed,\textsuperscript{32} again briefly. And again, although the depth of statutory analysis present in \textit{The Evolution of National Wildlife Law} would not be appropriate to the purposes of Professor Lund's book, slightly more detail on these important federal statutes would have been helpful.

\textit{American Wildlife Law} in general makes a valuable and interesting addition to the field. It is not a practical work and would be of little use to the attorney preparing litigation; however, it is an excellent summary of the historical themes of wildlife law and would be an invaluable source for a policy maker seeking to understand the framework of the issues. Only two minor criticisms can be offered. First, since the book is basically an overview of historical trends, a title which indicates its thrust would have been more appropriate. The present title might lead some would-be readers to expect a detailed analysis of state and federal statutes. Second, one of the strong points of \textit{American Wildlife Law}, its brevity, also gives rise to difficulties. The work is not and should not be encumbered with long and tedious passages on specific statutes; however, more detail in certain places would have been welcome. For example, as was noted above, a discussion of federal preemption of state statutes and a slightly expanded coverage of the major federal wildlife statutes would have been helpful.

The greatest strength of the work is its emphasis on trends as a starting point for future decisions. Wildlife law has evolved and grown from its early aristocratic English roots to the protection of sports interests and finally to a realization of the aesthetic and ecological importance of wildlife. The question becomes where this evolution will turn next. Professor Lund sees a common interest shared in large part by sportsmen and persons interested solely in the protection of wildlife\textsuperscript{33} and advocates that these two groups unite

\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id. at 96.}
\textsuperscript{33} He does note that some of the differences between these two groups, such as moral objections to hunting, may be difficult to resolve. \textit{LUND at 108.}
to protect their common interests in the future.\textsuperscript{34} He notes that:

Together, protector influence in achieving diversity and sport influence in achieving abundance present a mounting force in favor of wildlife preservation. At issue is whether that force will increase as rapidly as does the value of wildlife habitat for economic development. This is the basic question that will determine the future of American wildlife.\textsuperscript{36}

This issue for the future of wildlife law—that of the tension between economic and energy needs, and the needs of wildlife—is indeed a crucial one. A decreasing sensitivity to environmental issues as expressed in recent political trends and the many ways in which wildlife preservation affects such economic interests as mining,\textsuperscript{36} bodes ill for wildlife, especially on the public lands.\textsuperscript{37} Perhaps, though, the present statutes and case law, along with valuable summaries of the law such as that contained in \textit{American Wildlife Law}, will mitigate this danger.

\textsuperscript{34} Both groups are seen as having certain strengths. Sports interests exert continuing pressure to increase certain animal populations since they consume wildlife and also provide a convenient method to allocate the costs of game programs. Protectors are seen as having as their greatest strength broad political support. \textsc{Lund} at 109-10.

\textsuperscript{35} \textit{Id.} at 110.

\textsuperscript{36} \textit{See} \textsc{Lundberg, Birds, Bunnies and the Furbish Lousewort—Wildlife and Mining on the Public Lands, 24 Rocky Mt. M.L. Inst. 93 (1978).}

\textsuperscript{37} \textsc{Bean, The Developing Law of Wildlife Conservation on the National Forest and National Resource Lands, 4 J. Contemp. L. 58, 77 (1977).}