

Animal Law Committee

SWORD AND SHIELD: LAWSUITS AND CIVIC ACTION FURTHERING COEXISTENCE WITH WILDLIFE

By: Don Lipmanson

Introduction

As coyotes find habitable niches in Chicago and mountain lion sightings proliferate¹ in suburban Los Angeles, the public faces a stark choice: continuing centuries-old policies of exterminating “nuisance” animals or learning to co-exist with wildlife.

Historically, state and federal wildlife agencies have deployed hunters and trappers to solve wild animal “problems” by killing the purported offenders, individually or *en masse*. The U.S. Department of Agriculture’s Wildlife Services Division (WS) has spearheaded what wildlife advocates view as a century of brutal, unnecessary, and often counter-productive nationwide warfare on predators, primarily on behalf of the livestock industry.² The death penalty is being imposed on wildlife for sporadic predation upon domestic livestock or pets, or even for causing modest property damage such as a fence being pushed over or an irrigation hose punctured when megafauna seek food or water in times of scarcity.

However, as our nation has urbanized and suburbanized over the past century, both the physical landscape and societal attitudes toward wildlife have changed considerably. Development—in the form of

roads, shopping malls, houses and high fences—has greatly fragmented formerly huge, food-and-water rich expanses of wild land. Outside the largest national parks and designated wilderness areas, megafauna and

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LEGAL STATUS AND PROTECTIONS (OR, THE LACK THEREOF) FOR CANADA GEESE IN THE UNITED STATES

By: David Karopkin

Introduction

A Google search for news stories about Canada geese quickly reveals widely varied views and attitudes towards these well-known birds. Intrepid journalists frequently report on the state of Canada geese with subjects ranging from discussion of migration patterns, geese loafing at parks or on ball fields, peculiar nesting choices, the joy of spring goslings, the threat the large birds pose to aviation safety, and seasonal hunting outlooks. Some stories highlight connections made between kind families who share snacks with a hungry flock at a community lake or brave rescuers who save an imperiled or injured goose. Others account callous teenagers who torment or harm geese, arrogant and aggressive drivers who plow over a family trying to cross the road, or community members who complain of “nuisance” geese and call for their “removal.” The erratic tones of these articles reflect our confused relationship with Canada geese and raise questions and disputes regarding their standing—whether they are “good” or “bad,” whether there are “too many” and need to be dealt with in some respect or whether they should be left alone and protected. Today’s legal landscape is similarly inconsistent: while most people are prohibited from harming Canada geese, the law freely allows licensed hunters and wildlife exterminators to kill tens of thousands each year.



Conservation and the Rebound from the Brink of Extinction

Historically, the American conservation movement has been the dominant influence shaping U.S. wildlife law, establishing the legal status of wild animals, including Canada geese, as state-managed public resources. The Public Trust Doctrine is derived from the 1842 U.S. Supreme Court case *Martin v. Waddell* which established the legal tenet that “certain natural and cultural resources are preserved for public use,

and that the government owns and must protect and maintain these resources.”¹ Conservation principles developed during the nineteenth and twentieth centuries in response to over-hunting and other commercial exploitation that decimated wildlife populations and led to vast species extinction.² New ethics favored shared and robust opportunity to hunt (for sustenance or recreation) over private ownership and private access to wildlife for market use.³ Buttressed by the environmental movement of the 1960s and 1970s, today, a patchwork of powerful federal statutes seek to guide government administration of wildlife management by balancing consumption of wildlife with the health of species and their sustainability as resources.

Nearly hunted to extinction a century ago, Canada geese have experienced a resurgence across the United States, even internationally, and are now ubiquitous. When the widespread practice of using live captive flocks of Canada geese and other birds as hunting decoys was outlawed in 1935, the birds were released from captivity.⁴ However, because migration is a learned behavior, these birds and their descendants were unable to learn how to migrate and became year-round residents.⁵ *Migratory* geese are considered those that breed in northern North America and winter in central and southern North America, whereas **non-migratory or resident geese** live in and around the same area year-round.⁶ Therefore, while populations of migratory Canada geese surge and fall depending on the season, resident Canada geese are found in the same location year-round, and by definition, any Canada goose nesting in the mainland United States is considered a resident goose.⁷ According to United States Department of Agriculture (USDA) data, the once non-existent resident Canada goose population in the United States increased from about 0.5 million to 3.6 million between 1980 and 2014.⁸ This significant

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increase in population size has led to corresponding shifts in public perception about Canada geese as well as their legal standing.

Weakness of the Migratory Bird Treaty Act of 1918

State governments enjoy primary authority to establish management goals for Canada geese and other wildlife, including the discretion to execute wildlife control policies; however, the federal statutes discussed herein impose important constraining parameters. These laws are generally concerned with the health of wildlife species but provide limited protections for individual wild animals. Federal anti-cruelty statutes such as the Animal Welfare Act, as well as those of states, generally exempt or expressly do not apply to wildlife-killing practices, and require legislative updates.⁹ Because the law considers wildlife environmental resources, generally tort or property law cannot apply until the point of capture of a wild animal, after which point they are considered personal property. The animals themselves bear no legal rights or standing. Instead, the strongest legal protections from cruelty and harm for Canada geese come from international treaties, as well as environmental and administrative law.

The principal federal statute that protects Canada geese in the United States is the Migratory Bird Treaty Act of 1918 (MBTA), which ratified the need for international cooperation to protect bird species traversing domestic borders.¹⁰ The statute prohibits any unpermitted persons from killing, harming, possessing or otherwise interfering with migratory birds or their nests.¹¹ The MBTA originally protected all Canada geese, however, regulations issued by U.S. Fish & Wildlife Service have essentially allowed state game management agencies to freely issue depredation permits to control resident Canada geese.¹² Today, permits for resident Canada goose removal are generally made available to any party that claims that the birds are creating a nuisance, causing property damage, or pose a threat to human health or safety.¹³ Consequently, the MBTA no longer provides meaningful protections for Canada geese against management actions. However, the statute occasionally is used to pursue criminal charges against individuals for killing or harming Canada geese without a permit.¹⁴

The Conflict Associated with Funding of Wildlife Management Activities

Depredation permits issued for Canada geese under the MBTA work in conjunction with the Animal Damage Control Act, which granted authority to USDA Wildlife Services (WS) to assess the need for and conduct wildlife management activities.¹⁵ WS is routinely involved in assessments for Canada goose management as well as providing direct services for extermination, harassment, eggs treatment, and other control measures.¹⁶ Once state and federal permissions for lethal removal of wildlife has been secured by a complaining landowner (public or private), WS has discretion to conduct wildlife killing operations using a range of lethal management methods that are legal and condoned, including carbon dioxide asphyxiation and slaughter.¹⁷ WS has killed millions of wild animals across the United States in recent decades, including tens of thousands of Canada geese.¹⁸ The agency has become a focal point for criticism and investigation by conservation and animal protection groups arising from opposition to its routine engagement in excessive and even wanton animal cruelty.¹⁹ Proposed legislation has sought to restrain WS by requiring transparency and prioritization of non-lethal management efforts prior to allowing the issuance of depredation permits.²⁰

Canada geese also suffer tremendously as a result of hunting and pro-hunting law and policy. Though state Bureaus of Wildlife are relied upon to manage game populations, they are predominantly funded not from general state operation budgets but rather from allocations provided by the Federal Aid in Wildlife Restoration Act, also known as the Pittman-Robertson Act.²¹ Under this statute, the amounts collected by each state for gun permits and ammunition taxes each year are aggregated and then distributed back to the states in amounts proportional to their assessed wildlife management needs. This system incentivizes pro-hunting policies and other wildlife management actions.²² Ironically, in some instances, states have deliberately contributed to an increase in game populations, including Canada geese, to increase hunting, while simultaneously justifying the need to mitigate against overpopulation and nuisance concerns.²³

Advocacy is Necessary to Patch the Holes in Protections for “Abundant” Species


Ultimately, local governments and landowners retain control and discretion over wildlife management

decisions within their borders and are responsible for funding any management operations.²⁴ Any party, be they government entities or private property owners, must provide financial compensation for WS's activities and permission for access.²⁵ As such, local decision makers are often the focus of public engagement and in some cases can be swayed towards or away from policies destructive to Canada geese.

Consider for example, New York's 1999 Canada goose management plan, which called for a long-term goal of reducing the statewide population from approximately 220,000 to 77,000.²⁶ This plan has allowed the state's Department of Environmental Conservation (DEC) discretion to increase issuance of depredation permits for management actions and set longer hunting seasons and higher bag limits.²⁷ On January 15, 2009, an Airbus 320 collided with a flock of *migrating* Canada geese at 3,000 feet altitude over the Bronx, causing the plane to crash land in the Hudson River just west of Midtown Manhattan. Immediately after the incident, which became known as the 'Miracle on the Hudson,' the City of New York (the state's largest municipality) and the Port Authority of New York & New Jersey (the region's airport manager) moved forward with a drastic reduction of the population of *resident* Canada geese nesting in city parks.²⁸ The distinction between resident and migratory Canada geese is crucial here: eliminating every last resident Canada goose from New York City prior to the incident would not have prevented its occurrence. Nevertheless, the state's preexisting management goals allowed the City to quickly gain permission for an ambitious management initiative, with the DEC reasoning that the regional Canada goose population estimate was "five times greater than the number of geese that most people would find socially acceptable."²⁹ Between 2009 and 2016, WS was authorized to kill several thousand resident Canada geese on airport property and parks in New York City.³⁰ Advocates have questioned the efficacy of culls to reduce the threat of bird strikes and drawn officials' attention to the availability of non-lethal alternatives such as avian radar technology, but thus far, these efforts have failed to significantly impede WS's management actions. Though New York City's issues dealing with Canada geese is noteworthy, similar conflicts have become typical across the country.

Also worth mention are the Administrative Procedure Act, the Freedom of Information Act, and the National Environmental Policy Act (NEPA), as well as their state counterparts, as they may offer routes to protect Canada geese using procedural mechanisms. In theory, these statutes can be used to help ensure that at a minimum, agency wildlife management actions are conducted in the public interest, i.e., environmentally sound, open to public comment, and transparent. NEPA requires federal agencies to consider the environmental impacts of proposed actions into their decision-making process, as well as reasonable alternatives to those actions, through environmental impact assessments.³¹ USDA's findings of no significant impact for Canada goose management have not faced significant legal challenges, even though they have been based on statewide or large regional bases and may be outdated and otherwise inadequately comply with NEPA.³²

Finally, the Endangered Species Act (ESA) seeks to frustrate development on the basis of prevention against loss of endangered and threatened species.³³ Unfortunately, as an "abundant" species with little concern of extinction, Canada geese are not protected under the ESA. In any case, the continued existence of the ESA is now in serious doubt.³⁴ That said, if endangered species are denied protection, there may be little hope to protect less threatened species like Canada geese.

In conclusion, as a species frequently cited as a nuisance with little concern of extinction, the law offers extremely limited protections for Canada geese. Advocates must fight to prevent any weakening of existing defenses and may furthermore pursue advances expanding laws and policies that promote coexistence with wild neighbors, create and protect wildlife habitat, limit the environmental impact of human activities, increase public involvement in the decision-making process, and encourage agency transparency. 

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1 [Martin v. Lessee of Waddell, 41 U.S. 367 \(1842\)](#); see The Wildlife Society, *The Public Trust Doctrine, Implications for Wildlife Management and Conservation in the United States and Canada*, TECH. REV. 10-01 (Sept. 2010), http://wildlife.org/wp-content/uploads/2014/05/ptd_10-1.pdf; see also John Organ and Shane Mahoney, *The*

- Future of Public Trust, The legal status of the Public Trust Doctrine*, WILDLIFE PROFESSIONAL (Summer 2007), http://training.fws.gov/courses/csp/csp3112/resources/Related_References/Overview_of_Public_Trust_Doctrine.pdf.
- 2 See STEPHEN R. FOX, THE AMERICAN CONSERVATION MOVEMENT, JOHN MUIR AND HIS LEGACY (The University of Wisconsin Press, 1981).
 - 3 The Wildlife Society and The Boone and Crockett Club, *The North American Model of Wildlife Conservation*, TECH. REV. 12-04 (Dec. 2012), <http://wildlife.org/wp-content/uploads/2014/05/North-American-model-of-Wildlife-Conservation.pdf>.
 - 4 See US Department of Agriculture Office of Information Press Services, *Baiting, now banned, led to killing of more than 660,000 ducks in '34* (Aug. 9, 1935), <https://www.fws.gov/news/Historic/NewsReleases/1935/19350809.pdf>.
 - 5 See Jack Hope, *The Geese That Came in From the Wild*, 102 AUDUBON MAG., 122 (April 2000).
 - 6 Inter-governmental Agreement between City of New York and United States Department of Agriculture Animal and Plant Health Inspection Service Wildlife Services, Agreement No. 11-7236-4567-RA at 7-8 (2009) [hereinafter Inter-governmental Agreement], <https://www.scribd.com/doc/44497842/Geese-Removal-Documents-R-10-572-Reviewed>.
 - 7 According to the Coalition to Prevent the Destruction of Canada Geese, an advocacy group, "the concept of the 'resident goose' is the arbitrary creation of government wildlife managers.... By their terminology, a 'resident' goose is defined as any Canada goose not nesting north of Quebec, Canada. Thus, a goose spending the summer in Maine who winters in North Carolina, despite the impressive migration, is a 'resident' goose.... The term allows wildlife managers the flexibility of defining this imaginary goose in any way that suits their purpose." Canada Gees as a Suburban Wildlife Issue (1996), Archived website, <http://web.archive.org/web/20150724194142/http://www.canadageese.org/doc3a.html>.
 - 8 U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, AND U.S. DEPARTMENT OF AGRICULTURE, ANIMAL AND PLANT HEALTH INSPECTION SERVICE, WILDLIFE SERVICES, FEDERAL AVIATION ADMINISTRATION NATIONAL WILDLIFE STRIKE DATABASE SERIAL REPORT NUMBER 22, WILDLIFE STRIKES TO CIVIL AIRCRAFT IN THE UNITED STATES 1990-2015, REPORT OF THE ASSOCIATE ADMINISTRATOR OF AIRPORTS, OFFICE OF AIRPORT SAFETY AND STANDARDS, 2 (Nov. 2016), https://www.faa.gov/airports/airport_safety/wildlife/media/Wildlife-Strike-Report-1990-2015.pdf.
 - 9 See e.g., NYS AB.5050/[SB.620](#) (2017) (legislation introduced in New York State to include wildlife within the protections of the aggravated animal cruelty law covering companion animals).
 - 10 [16 U.S.C. §§ 703-712](#).
 - 11 Kristina Rozan, *Detailed Discussion on the Migratory Bird Treaty Act*, ANIMAL LEGAL AND HISTORICAL CENTER (2014), <https://www.animallaw.info/article/detailed-discussion-migratory-bird-treaty-act>.
 - 12 [50 C.F.R. §§ 21.49-52, 21.61](#).
 - 13 United States Fish & Wildlife Service, *Resident Canada Goose Nest & Egg Depredation Order* (Aug. 28, 2014), <https://epermits.fws.gov/ercgr/doc/ercgrfaq.pdf>.
 - 14 See e.g., John Hinton, *Three men cited with illegally killing geese at golf course*, WINSTON-SALEM J. (Jul 22, 2015) http://www.journalnow.com/news/crime/three-men-cited-with-illegally-killing-geese-at-golf-course/article_c6b7c3f4-30b1-11e5-8c03-93dde23cfe2.html.
 - 15 Inter-governmental Agreement, *supra* note 6, at 1 ("USDA, APHIS-WS has statutory authority under the Act of March 2, 1931 (46 Stat. 1468; [7 U.S.C. 426-426b](#)) as amended, and the Act of December 22, 1987 (101 Stat. 1329-331, [7 U.S.C. 426c](#)), to cooperate with States, local jurisdictions, individuals, public and private agencies, organizations, and institutions while conducting a program of wildlife services involving mammal and bird species that are ... injurious and/or a nuisance to, among other things, agriculture, horticulture, forestry, animal husbandry, wildlife, and health and human safety.").
 - 16 USDA Wildlife Services, *Management Of Canada Goose Nesting* (2009), https://www.aphis.usda.gov/wildlife_damage/downloads/canada_goose.pdf.
 - 17 See e.g., AMERICAN MEDICAL VETERINARY ASSOCIATION, GUIDELINES FOR THE EUTHANASIA OF ANIMALS: 2013 EDITION, 81-83, <https://www.avma.org/KB/Policies/Documents/euthanasia.pdf>. New guidelines for specific application towards "depopulation" efforts are currently in the drafting and approval process. See DRAFT AVMA Guidelines for the Depopulation of Animals, <https://www.avma.org/KB/Policies/Pages/DRAFT-AVMA-Guidelines-for-the-Depopulation-of-Animals.aspx> (last visited March 5, 2017).
 - 18 United States Department of Agriculture, Animal and Plant Health Inspection Service, *Program Data Reports*, https://www.aphis.usda.gov/aphis/ourfocus/wildlifedamage/sa_reports/sa_pdrs; see also, Darryl Fears, *USDA's Wildlife Services killed 4 million animals in 2013*, WASH. POST (June 7, 2014) http://www.washingtonpost.com/national/health-science/governments-kill-of-4-million-animals-seen-as-an-overstep/2014/06/06/1de0c550-ecc4-11e3-b98c-72cef4a00499_story.html.
 - 19 Tom Knudson, *The killing agency: Wildlife Services' brutal methods leave a trail of animal death*, SACRAMENTO BEE (April 28, 2012) <http://www.sacbee.com/news/investigations/wildlife-investigation/article2574599.html#storylink=cpy>.
 - 20 See e.g., H.R. 2236 (2016) (federal legislation to require USDA to publish information on an annual basis of the animals killed under the Wildlife Services program or by a state or local entity acting in cooperation with or on behalf of the program, including: the number of animals killed, species names, methods used to kill the animals, and reasons for killing the animals); See also NYS AB.7067/SB.2600 (2015) (legislation introduced in New York State which would "require the DEC to limit the number of permits authorizing the removal of turkeys and geese and requires the department to provide information related to humane alternatives to execution of such birds.").
 - 21 [16 U.S.C. §§ 669-669k, 50 Stat. 917](#); see also, Anne Muller, *Hunting Needs to be Part of the Gun Debate, Taking a Hard Look at the Pittman-Robertson Act*, C.A.S.H. COURIER (Winter 2013), <http://www.all-creatures.org/cash/cc2013-wi.pdf>.
 - 22 Jolene R. Marion, *Whose Wildlife Is It Anyway? How New York's Fish and Game Statutes, Regulations, and Policies Endanger the Environment and Have Disenfranchised the Majority of the Electorate*, 4 PACE ENVTL. L. REV. 401, 410 (1987), <http://digitalcommons.pace.edu/pelr/vol4/iss2/3/> ("State wildlife agencies are in competition with each other for federal funds, and the only way in which a state can raise the ceiling on its potential federal funding is to increase the number of people it licenses to hunt. The agencies have a dual financial incentive for increasing hunting: a chance for more Pittman-Robertson funds, and their statutory right to all state hunting license revenues as required by the Act. These incentives, in turn, provide further incentives to increase the number of animals available to hunt, and to increase their accessibility to hunters.").
 - 23 Loriann Vita, *Wildlife Management of Canada Geese in New York State: A Departure from the Express Policies of New York's Environmental Conservation Law*, 13 PACE ENVTL. L. REV. 399 (1995).
 - 24 See United States Department of Agriculture Animal and Plant Health Inspection Service, *Wildlife Services Directive 2.215, Financial Control And Risk Management*, (August 23, 2013), http://www.aphis.usda.gov/wildlife_damage/directives/2.215_Financial_Control_Risk%26Management.pdf; see also, C.B.S. News, *Geese Behind "Miracle on Hudson" Still Around*, (June 30, 2010) ("We can only go onto properties where we have permission," said Carol Bannerman, spokeswoman for USDA Wildlife Services.), <http://www.cbsnews.com/news/geese-behind-miracle-on-hudson-still-around>.
 - 25 See Tom Knudson, *Federal Wildlife Services makes a killing in animal-control business*, SACRAMENTO BEE (Nov. 18, 2012) ("Wildlife Services does business with more than 2,500 customers, from Fortune 500 companies to ranchers, prisons to zoos, country clubs to cemeteries, landfills to airports to other agencies."), <http://www.sacbee.com/news/investigations/wildlife-investigation/article2575975.html>.
 - 26 New York State Department of Environmental Conservation, *Long-term Population Goals for Resident Canada Geese*, <http://www.dec.ny.gov/animals/67311.html>; see also, Isolde Raftery, *Agencies Plan to Reduce Canada Geese Population in New York State by Two-Thirds*, N.Y. TIMES (July 23, 2010), <http://www.nytimes.com/2010/07/24/nyregion/24geese.html>.
 - 27 See e.g., New York State Department of Environmental Conservation, *DEC Announces Changes to September Canada Goose Hunting Seasons, Special Measures Adopted to Address Overabundant Goose Populations Statewide* (August 26, 2013), <http://www.dec.ny.gov/press/93076.html>.

28 New York City Wildlife Hazard Management Steering Committee, Minutes of Meeting (Mar. 5, 2009), <https://www.scribd.com/doc/44497842/Geese-Removal-Documents-R-10-572-Reviewed>.

29 Inter-governmental Agreement, *supra* note 6, at 7.

30 Jake Pearson, 'Miracle on the Hudson' legacy: 70,000 slain birds, ASSOCIATED PRESS (Jan. 14, 2017) <http://bigstory.ap.org/article/6d5b755eaba6465b9f6ffeeda2af29db/miracle-hudson-legacy-70000-slain-birds>.

31 42 U.S.C. § 4321.

32 See The Humane Society of the United States, *Wildlife Disservice: The USDA Wildlife Services' Inefficient and Inhumane Wildlife Damage Management Program* 17 (2015), <http://www.humanesociety.org/assets/pdfs/wildlife/wildlife-services-white-paper-2015.pdf>.

33 16 U.S.C. §§ 1531-1544.

34 See Associated Press, *GOP targets landmark Endangered Species Act for big changes* (Jan. 17, 2017) <http://bigstory.ap.org/article/c4809b5e9f4641ffa45e09b390030293>.

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