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THE LEGAL ROLES AND RESPONSIBILITIES OF A COMMUNITY CONCERNING CROP DEPREDATION BY WHITE-TAILED DEER

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Abstract: The interwoven issues of the legal roles and responsibilities that landowners (i.e., farmers, foresters, and hunters) and a state agency have to control deer densities in rural areas that directly affect crop depredation and various stakeholders will be addressed in this paper. Because unmanaged deer populations severely can damage agricultural crops, the financial cost of this deer damage is borne entirely by individual private landowners. The South Carolina Department of Natural Resources (SCDNR) is the regulatory state agency in South Carolina responsible for annually promulgating rules and regulations pertaining to white-tailed deer harvest by hunters. Even though deer are property of the state and SCDNR is responsible for establishing legal harvest limits and open seasons, it alone cannot manage deer densities. Common crop depredation problems, responsibilities, and solutions regarding deer in South Carolina are presented, based on our investigation of legal sources such as the South Carolina Code of Laws, U.S. Constitution, State Constitution of South Carolina, and Common Law. Suggestions are presented for rural landowners who want to manage natural resources and agriculture on their property. Landowners who hunt and/or allow hunting on their property are the key to successful management of deer as a public resource. The ability to effectively manage deer is up to individual landowners. However, because private landowners have no legal responsibility to manage wild deer populations, minimizing crop depredation through legal harvest remains an ancillary benefit of rural landowners' sport hunting objectives.

Key Words: agriculture, community, crop, depredation, farmers, hunters, landowners, legal, *Odocoileus virginianus*, responsibilities, South Carolina, white-tailed deer

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White-tailed deer (*Odocoileus virginianus*) and their population densities are viewed by various user groups of land resources in different ways. In some areas of South Carolina, high deer densities have caused friction among these user groups. For example, in Hampton and Jasper Counties, SC, many farmers are being affected economically by crop damage caused by deer. Some farmers consider deer as a public nuisance and believe that someone should be held accountable for deer depredation to agricultural crops (Smathers et al. 1994). Yet, other citizens in the same community can benefit economically and recreationally from having white-tailed deer in the area.

This paper will address the interwoven issues of the legal roles and responsibilities that farmers, hunters, and foresters have to control deer

densities that directly affect crop depredation in rural areas. These 3 land resource user groups represent common resource users of rural areas across the southeastern United States. Forestry, in much of the Southeast, is a special type of agriculture where "crop" rotations of pine trees typically occur every 2 to 3 decades. In 1993, 12,645,557 acres were classified as forest lands in South Carolina (Conner 1993). That is an increase of 388,585 acres since 1986 (Conner 1993). Agricultural crops, such as soybeans, corn, and wheat, are grown by farmers throughout the Southeast and potentially can change the carrying capacity of an area for deer. In South Carolina in 1993, 6,579,403 acres of croplands and pasture existed (Conner 1993). Cropland alone decreased 521,862 acres since 1986 (Conner 1993). All agricultural and forestry practices are dynamic and affect food, water, and

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cover availability for white-tailed deer. These 3 factors are the habitat requirements deer depend upon to survive. Recreational deer hunting is the most efficient and effective means to control and determine annual deer densities in these areas.

White-tailed deer historically have been an important resource for hunters. Many people today benefit from deer hunting and often for slightly different reasons. Enjoying the outdoors and wildlife provides a means of relaxation and/or a break from the world of business and other social obligations. Hunting has been described as “the act of trying to find, seek, obtain, pursue, or diligently search for game” as defined by a court case ruling (*Prosser v. Parsons* 141S.E.2d 342 1965). This does not explain why people hunt, but rather, how hunting is performed. A successful hunt can bring fond memories, several dozen pounds of venison, and, in some cases, a deer that the hunter may wish to mount and keep as a constant reminder of a hunting experience. Each of these rewards has a different degree of importance to individual hunters. Yet, all of them are considered benefits by hunters.

Another reason why white-tailed deer are considered a resource is because they can bring a great economic benefit to a community. Private landowners and timber companies that allow hunting on their property through leases have depended on white-tailed deer as an important source of revenue. There also is a tremendous amount of economic benefit that other community members can gain by expenditures from both local and non-resident hunters. For example, the total annual return in-county private land hunter expenditures in 1992 was >\$6 million in Jasper County, SC (Richardson et al. 1992). Also, all South Carolina residents who plan to hunt deer must first purchase a big game permit in addition to a resident hunter's license (SC Code Ann. § 50-9-135 Supp. 1996).

Despite the numerous benefits deer can bring to a community, there are some negative impacts that uncontrolled and unmanaged deer populations also can bring to these same communities. If deer populations become too dense, deer-vehicle accidents can increase and cause physical harm and/or financial loss to individuals involved. For

example, in 1990, 49 deer-vehicle collisions occurred in Hampton County, SC, alone (Shipes and Williams 1990). People involved in these accidents often have a continuous fear of colliding with another deer, especially while driving at night. The environment also can be impacted negatively by high deer densities. “Browse lines” can occur where deer have eaten most of the vegetation within their vertical reach in a given area. This can cause an impact on the regeneration of forests and habitat for other species of wildlife. Pine and hardwood seedlings that foresters plant can be killed or stunted if deer eat the terminal buds. The depletion of all of these resources also can affect the health of deer.

Landowners who grow plants for personal consumption, aesthetics, and/or a livelihood often are affected to at least some degree in areas where deer densities are high. Thirty-six percent of South Carolina farmers surveyed reported that their crop damage was >5% of total crop production (Smathers et al 1994). Hampton and Jasper Counties are 2 of the 7 state counties where crop damage by deer has been classified as heavy (Smathers, Stratton, and Shiples 1994). Of all agricultural crops reported having been damaged by deer from the southeastern US, crops damaged most often have been soybeans in 11 states and corn in 9 states (Moore and Folk 1977).

WHO IS RESPONSIBLE FOR CROP DEPREDAATION BY WHITE-TAILED DEER IN SOUTH CAROLINA?

Landowners and SCDNR ultimately are the 2 groups who potentially affect crop depredation by deer in SC. SCDNR is the state agency that has legal responsibility for coordinating biological information, such as deer harvest data, to develop broad management guidelines, most of which are enforceable by law (SC Code Ann. § 50-3-90 Supp. 1996). The federal government recognizes the state's privilege to manage wildlife on federal land and its right to manage state lands. The US Constitution retains police power as a source of law for states, thereby authorizing statutory control of deer.

White-tailed deer in South Carolina are among several species of wild animals which “are property of <the> state” (SC Code Ann. § 50-1-10 Supp. 1996). SCDNR is a state agency that is responsible for establishing management guidelines for deer through rules and regulations which, if violated, are punishable under criminal law (SC Code Ann. §§ 50-1-120,-125,-130 Supp. 1996). SCDNR is bound by the South Carolina Code of Laws (SC Codes) to “continuously investigate the game and fish conditions of the state and the laws relating there to. It shall annually make report of its activities to the General Assembly and recommend legislation and other action by the General Assembly in its judgment conducive to the conservation of wildlife” (SC Code Ann. § 50-3-80 Supp. 1996). Because the state “owns” deer in South Carolina, it is responsible for establishing Rules and Regulations of game laws that can affect deer densities. The overall purpose of game laws is to avoid depletion of game to the point where harvest by hunters becomes too small or extinction occurs (74 A.L.R.2d 974).

Landowners constitute the other group that can affect deer densities. Unlike SCDNR, landowners have no legal obligation to manage for wild white-tailed deer on their property. Another difference between SCDNR and landowners is that landowners are the ones who decide whether deer hunting, which is the most practical and resourceful means for controlling deer in rural areas, will be allowed on their property. This is an important point because private landowners own the majority of land in South Carolina.

However, SCDNR is involved by restricting the means by which deer can be harvested and the quantity of deer that hunters can harvest. Landowners and hunters must follow these restrictions, which are printed in the annual Rules and Regulations as set forth by the SCDNR, if they choose to hunt deer on their property. This applies regardless of whether they are trying to manage the deer population on their lands. Virtually all land management actions taken by landowners in rural areas have the potential to affect deer densities on adjacent landowners’ properties. Even though some landowners

believe there is a moral obligation by all to “appropriately” manage deer densities, landowners have no legal responsibility to do so.

We believe that this is the root of the problem, as described at the outset of this paper. Hypothetically, deer populations could become entirely unmanaged if hunters did not hunt. This would be unfortunate and potentially problematic because deer densities could increase greatly. Landowners, who allow deer hunting and farming on their property, and SCDNR must continue to work together in a cooperative manner if problems like this are to be resolved.

In 1896, the US Supreme Court decided that wildlife is state (public) property and declared that states are to hold the property “in the public trust” (*Geer v. Conn* 161US 519 1896). In that case, the Court decided that a state could limit interstate shipment of legally taken wildlife. The application of the public trust doctrine, unfortunately, does little to resolve liability for damage caused by wildlife.

Given the recognition of state or public ownership of wildlife, only a small step is required to find constitutional authorization for state control of this resource. It is found in the police power retained by the states as a source of law. This authorizes state legislatures to enact a wide array of regulations, including statutory regulations on wildlife. The Legislature of South Carolina has set broad management guidelines through legislation and has empowered SCDNR to enact detailed regulations essential for wildlife and game management (SC Code Ann. § 50-1-10 Supp. 1996). This moves the actual regulation from the legislature to an agency (SCDNR) and the rules are promulgated following the State’s Administrative Procedure Act, with SCDNR acting in a quasi legislative function. The authority is the basis of the annual fish and game regulations that set seasons and bag limits.

Because one landowner’s land management actions indirectly can affect an adjacent landowner’s property (i.e., crop depredation) and because there are no specified legal obligations on either party, it should not be surprising that

several court cases regarding such issues have occurred across the nation (93 A.L.R.2d 1366, 74 A.L.R.2d 974). These cases have examined deer damage to plants (e.g., lawn, cultivated crops, apple orchard trees, standing grain), and even shucked corn that was piled in a barn (*Commonwealth v. Bloom* 21Pa.D.2d 139 1959, *Commonwealth v. Riggles* 39Pa.D. 188 1940, *Commonwealth v. Gilbert* 5Pa.D. 443 1924, *State v. Ward* 152N.W. 501 1915). In the SC Codes (Title 50, Chapter 11[Protection of Game], Article 6 [Special depredation permits, collection permits, closing seasons, special seasons], section 50-11-1050), property owners can obtain a permit through SCDNR to remove wildlife that is destroying their property. This section cites the *American Law Report* (2nd edition), a secondary authority source, as a source for case law on point because no Appellate Court cases regarding this matter have occurred in South Carolina. Both the Constitution (Article 1, §3) and the 5th Amendment to the United States Constitution state that no person "...shall be deprived of life, liberty, or property without due process of law." However, some cases reviewed by *American Law Report* ruled that "...before a plea of justification for killing a protected wild animal may be asserted and heard it must be shown that all other remedies provided by law were first exhausted by the person doing the killing" (93 A.L.R.2d 1366). So, intuitively, South Carolina landowners should consult SCDNR to obtain depredation permits if deer are damaging their property.

Clearly, game management is subject to the major sources of law: constitutional, statutes, and administrative. In addition, it has been affected by judicial elements in the form of court interpretations of statutes. In spite of the scope of this regulation, little firm law exists regarding state responsibility for deer damage, or game harm in general. Such law could come from common law claims of nuisance or trespass in which a private party would claim damage from the state caused by animals the state "owns." This has not been a markedly successful effort in most states, including South Carolina, because state law limits this type of lawsuit.

Although decisions from other states do not bind the actions of courts in South Carolina, at least they provide grounds for persuasive logical arguments. The pattern is not absolute, but cases from at least 12 states (AL, CT, GA, IA, KY, ME, MT, NH, NY, OH, PA, SD) suggest at least some right of landowners to kill deer to protect their property. Rather than pursuing legal action, the best solution seems to remain using existing laws that allow for permits to control deer and work with SCDNR to achieve reasonable interpretations of this law.

WHAT SCDNR DOES TO EASE THE PROBLEM

SCDNR publishes Rules and Regulations that are updated annually to reflect changes in law. South Carolina has one of the most liberal deer hunting seasons in the United States. In Hampton and Jasper Counties, the 1993-1994 rules/regulations and section 50-11-310 allowed hunting of deer by properly licensed hunters to begin on 14 August and end on 1 January. On private lands in these 2 counties, there are no limits on the number of bucks that can be harvested, as long as bucks have a 2-inch minimum antler height (SC Code Ann. § 50-11-335 Supp. 1996). There is a limit of 2 does/day on any of the 16 either-sex days, unless a hunt club chooses to use the antlerless deer quota program. Legal hunting hours on designated days begin ½-hour before sunrise until ½-hour after sunset.

Hunters in Game Zone 11 must choose between either-sex days or antlerless deer quotas. Antlerless deer quota tags are issued to landowners or lessees who submit a completed application with a \$50 fee prior to 1 September. Regional and local wildlife biologists will decide on the number of tags to issue each landowner each year. If landowners and biologists cooperate, the South Carolina antlerless deer quota program potentially can offer a means of managing deer densities. But, as mentioned earlier, landowners do not have a legal obligation to harvest a minimum number of deer each year.

Because SCDNR currently divides the state into 11 Game Zones, wildlife biologists potentially are better able to manage specific wildlife populations

of game to meet needs of local wildlife, wildlife habitat, and people. Each of these game zones have different rules and regulations, which are investigated annually by biologists (SC Code Ann. § 50-1-60 Supp. 1996). Biologists who deal with white-tailed deer in South Carolina help compile and examine harvest records from throughout the state. The annual South Carolina Deer Harvest Summary report includes statewide information concerning the deer harvest structure. Information that can indicate health trends of deer is taken from animals harvested. Deer weight, age, sex ratio, lactation dates of does, total hunter harvest, and harvest rates for a given area are examples of biological statistics that biologists, in each game zone, can use to alter rules and regulations yearly.

South Carolina statutory law establishes a means by which a landowner may use depredation permits to remove white-tailed deer that are destroying their property, "...the department has the authority during any season of the year to permit the taking of any game animal and prescribe the method by which they may be taken when they become so numerous that they cause excessive damage to crops and property. Any animal taken under these conditions is under the supervision of the department. Any deer killed under these conditions must be given to eleemosynary institutions" (50-11-1090 SC Code). Section 50-11-1050 states a similar law, "...where wildlife is destroying property, the department, upon the request of the property owner, may issue a permit authorizing the property owner, under the supervision of the department, to take action necessary to remove the destructive wildlife from his property." Even though these laws allow landowners to obtain depredation permits to remove destructive deer, problems with agricultural depredation by deer still persist in some areas of South Carolina. Survey results, discussion with respondents, researchers, and deer biologists agree that landowners do not have the time or skill to control deer damage to their crops using depredation permits (Smathers et al. 1994). To some farmers, especially those who cultivate large acreage, crop depredation permits are not an efficient means for controlling deer densities.

There are many factors that can influence the reformation of rules other than sound biological statistics. Any individual landowner in America is likely to have numerous interests in how and when they want to legally utilize their land. For example, imagine a hypothetical case where 2 adjacent landowners use their land in different, but legal, manners: one landowner may leave the entire property, which is forested with a mature hardwood stand, alone for as long as it is owned, whereas someone else, who has just purchased adjacent and similar property, may cut and sell all of the timber at once and begin farming immediately as an economic means for livelihood. Both of these private land management practices are legal. However they both affect deer populations and their movements throughout the year. Who should be responsible for crop depredation by deer that this farmer may experience? SCDNR may make decisions about rules and regulations that favor and oppose different people. The politics of aesthetic, economic, recreational, and resource conservation issues are of concern to many landowners and they should be of concern to SCDNR. Because these public concerns are ever changing, SCDNR has the potential to reform the Rules and Regulations which may address these issues annually.

WHAT CAN LANDOWNERS DO TO HELP EASE THE PROBLEM?

The first thing a landowner must do to solve crop depredation is to become knowledgeable of the problem. An understanding of basic ecology as it pertains to white-tailed deer management, agriculture, forestry, and hunting are some subjects that a rural land manager should be aware of to make sound decisions. Before a landowner makes any decisions, he/she should establish a prioritized list of objectives for his land. Factors to be considered might include economic income from agriculture, forestry, and hunting; personal and ethical obligations to adjacent landowners' property; management affects on white-tailed deer health; and personal use opportunities from hunting and gardening.

Once a prioritized list of objectives for land use has been developed by a landowner, leasing the

property to farmers and hunters may become a great benefit. If a landowner leases to conscientious people, he/she can benefit by financial profit and/or desired land management. By pre-writing a hunting lease that contains all of the expectations of a landowner, such as an annual quota of deer to be harvested, the owner can more effectively “shop” for a hunt club that will fulfill the stated objectives. The prospective hunting club should be respectful of the landowners expressed interests.

Similarly, when landowners lease to farmers, the same concept above could apply. Other means of crop depredation control, such as fencing, repellents, or scaring devices, could be incorporated into an agricultural lease if desired. If landowners who farm do not allow hunting on their property, then they should realize that they may 1) suffer the opportunity cost associated with leasing and 2) economically suffer from crop depredation by deer, especially where deer densities are unusually high.

SUMMARY

SCDNR is the regulatory state agency in South Carolina responsible for annually promulgating rules and regulations pertaining to white-tailed deer harvest by hunters. Hunting is the most efficient and effective legal means to control potentially damaging deer densities in rural areas.

Unchecked deer populations severely can damage agricultural crops on private property. The financial cost of deer damage is borne entirely by private landowners. Even though SCDNR “owns” deer and is responsible for establishing legal harvest limits and open seasons, it alone cannot manage deer densities.

Landowners who hunt and/or allow hunting on their property are the key to successful management of white-tailed deer. The ability to effectively manage deer is up to individual landowners. But, because private landowners have no legal responsibilities to manage wild deer populations, minimizing crop depredation through legal harvest remains an ancillary benefit of landowners' sport hunting objectives.

“There is much confusion between land and country. Land is the place where

corn, gullies, and mortgages grow. Country is the personality of the land, the collective harmony of its soil, life, and weather. Country knows no mortgages, no alphabetical agencies, no tobacco road; it is calmly aloof to these petty exigencies of its alleged owners.”

Aldo Leopold, “Country” in *A Sand County Almanac*

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