

Pace Environmental Law Review

Volume 15
Issue 2 *Summer 1998*

Article 2

June 1998

Third Annual Conference on Animals and the Law

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Recommended Citation

Kevin Cleary, *Third Annual Conference on Animals and the Law*, 15 Pace Envtl. L. Rev. 457 (1998)

Available at: <https://digitalcommons.pace.edu/pelr/vol15/iss2/2>

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KEVIN CLEARY

The bird is an anomalous creature. Many birds are very much at home on the water and spend a lot of their time on the water. They are also at home on land and, of course, in the air. The foreshore is their prime feeding ground. That is where they eat lunch. As most of you know, most birds migrate. They go to the north in the spring and south in the winter. These birds need stopovers in order to cover these great distances which are often many thousands of miles from up deep into Canada near the Arctic circle all the way into Tierra del Fuego in South America. Just like anyone who has taken a long trip with kids knows a motel is needed after a while in order to have a break, these birds also need to stop. A problem for the birds is that over the eons the places where their ancestors have made their migrations, their stop-over points, have been closing along the migration route. Man has constructed cities, developed malls, roads, drained wetlands and generally made it easier for man to get around but more difficult for birds to get around. Therefore, these remnant habitats are essential stopovers for these migratory birds. One of the things this country has done as a strategy was to set up national parks like Jamaica Bay or Oyster Bay, a national wildlife refuge, which is run by Fish and Wildlife Service and has maintained the natural habitats in as pristine a form as possible. Amazingly, Oyster Bay is the only place you can actually eat the oysters that are harvested from the water. So, there has been some success at maintaining Oyster Bay at a reasonable level despite the fact that a lot of the Long Island Shore is polluted.

What I want to do today is to go into the legal aspect of all of this, since many of us are lawyers and there are also those that may be interested in learning a little about the law, too. Learning about the underpinnings of the rights is important. I have always believed that a court will have a better understanding of a case argued before it if the case's

history is developed and explained. I was a history major in college so this is just a bias of mine but maybe you can indulge me today. First of all, prior to the American Revolution we were colonies of England. Therefore, the common law ruled this country. In England, the situation that prevailed was that the King, or Crown as they called it, controlled the waterways. In particular, the Crown did not own it the way the Queen owned Westminster Palace or Windsor Palace. Rather, that was a private ownership of the King. The King also had the public ownership, which was really the King standing as the representative of the state. In other words, it was a primitive way of saying the people of England controlled the waterways. In England, a landowner could not dock into the King's waterways without committing a trespass. They had no right to do it. They had to petition the King and the King may or may not have granted permission. If someone built a dock without the King's permission, which, by the way, was rarely given because the rivers in England are relatively narrow, the king could either destroy the dock, remove the dock or rent it out for his own uses.

After the Declaration of Independence, the United States began to develop its own common law. If you look at the English common law like a tree, there is a point in 1776 where there is a graft on the tree, a limb, and that is American common law but it still has its roots in English common law. The original thirteen colonies became the states and each of them, in their own territories, took over the power of the King. They began to represent the people through a democracy, of course. As the successors to the King, the states of the United States controlled the waterways. When they adopted the constitution they collectively gave certain powers over to this newly formed federal government. What they gave to the federal government was the power, among other things, over commerce. This is the United States, as successor to the King of England, controlling the waterways and that means today if you want to build onto a navigable waterway, then you have to seek permission from the federal government. These lands are sometimes called submerged lands or bottom lands. This refers to the land below the mean high water. If

someone in New York has a grant which states that they were given the land all the way to the sea, what does that mean? That means, under New York law, if you put a stick in the ground, watch it for thirty years and track where the tide goes or where the marks go then that is basically what mean high water is. It is not the highest or lowest tide, it is a mean. The land below the mean high water mark still belongs to the states and is called a navigational servitude which basically means that the land under the water has a public easement over that land. The boats can pass over it. It is analogous to when your neighbor builds a home on a common piece of land and puts a driveway through their own portion of the land that they have divided up. This is described as an easement over the land even though the person who uses that common driveway may not own it. The person that has the interior house has a right to go over it. The navigational servitude is similar to that because irrespective of who owns the bay bottom, the federal sovereign has a navigational servitude over that land and, as anyone who buys waterfront land should know, they are subject to that servitude. That is why there have been many takings cases in which the plaintiffs claim that an upland property owner cut off their rights by not letting the plaintiff do a certain thing with the foreshore that abuts their property. The United States defends these claims on the grounds that the plaintiffs took that land subject to a navigational servitude. They will also throw in the argument that the state has a general power to police the waterways in order to keep them open for navigation.

There is a particular twist in New York that does not exist out west or in the newer states. Since New York was one of the original colonies, the King appointed various governors. As an example, in the mid-1600s he appointed Governor Andros. Governor Andros gave a patent for what is now Nassau. It was called the Andros patent. The same is true in Suffolk with the Dongan patent. Under the New York State Constitution, these patents were given to towns, such as the town of Hempstead, Oyster Bay or Huntington. These towns had claims to the bay bottoms. They claimed, for example, Oyster Bay. The New York Board of Appeals has upheld

those claims on the theory that the New York Constitution did not intend to deprive these towns of their claims. If, at the time of the Revolution, New York State took from the King and if the King had already given to Hempstead or Oyster Bay Township the bay bottom then under the New York Constitution it cannot be taken away. If you have a bunch of marbles and you gave them away, they are not yours to give away twice. This creates a definite twist when you are trying to figure out rights, especially in Oyster Bay or in Jamaica Bay, which has its own complications.

An upland owner has, under New York common law as interpreted by the New York courts, a common law right to dock to navigable water. They have a right of access to the water. No one can come and build a wall between them and the water. That is a taking and that is unconstitutional. What does that dock mean? Does that mean if you have a house on the water, you have the right to build the Canarsie pier. If you have ever driven out along the Belt Parkway, there is a huge pier called the Canarsie pier. It is a very heavy ocean going pier. It is probably the biggest pier in all New York. I always wondered why it was there and eventually I found it when I started doing these cases. It was built in the twenties as part of a project to turn Oyster Bay into a super port. The plan was that the Oceanic, Lucitania and the other great ships of that era would come into Jamaica Bay and give the ship's passengers access to the planned high speed rail lines which were to go into Manhattan. This way, people arriving from Europe would get off these ocean liners and then take a high speed train into Manhattan and would save them almost six hours. Where a boat, without the dock and train, would otherwise have to go around Brooklyn and through the narrows to get into New York City. However, this plan never happened. The closest thing that did happen was the construction of another port, Kennedy Airport. Kennedy Airport was built on part of the area that would have been the super port. Instead, it was filled in.

Ironically, the other part of Jamaica Bay is also a port and it is a port to creatures that are a lot smaller than the great ships. They travel equal or greater distances to use the

port as a bird sanctuary. Birds stop in Jamaica Bay in droves. Four hundred species have been counted there including all kinds of ducks, egrets and even arctic owls. There have been some eagles out there and the City of New York has built, with Robert Moses' idea, some fresh water ponds in the center of Oyster Bay to attract these birds. The birds got used to it and the birds liked it. What is now the Jamaica Bay wildlife refuge is the site of, what would have been under the Jamaica Bay Improvement commission plan of 1916, this super port. In fact, there is a theory that the only reason Jamaica Bay remained natural was because it was so polluted that humans could not swim in it. Otherwise, it would have been developed. Rockaway was dumping its sewage into it because it did not want to foul the beaches. So, when Rockaway developed in the 1880-1890s, the Jamaica Bay became so polluted that the only things that could live in it were the birds and they stayed. So, it is actually ironic that the pollution actually helped protect the birds in a strange way.

Littoral and riparian mean the same thing. Littoral means the shoreline. Riparian means a river. So, technically, a person who has riparian land has land on a river while a person who is a littoral owner has a littoral right but no one uses that term. So, riparian has been the generic term and that is what I will use. Understand that it includes not just rivers but also the seas and salt water bays.

Throughout most of the nineteenth century, the towns and cities that wanted to fill into navigable water below mean high water, if they wanted to build docks or bridges, would have to go to the United States and get permission. Congress has always handled this on a case by case method. Congress referred it to a subcommittee that would handle it. The town would ask for a permit and Congress would either give it out or not. It became unwieldy and Congressman, not like most people, did not want to do extra work. Little by little, as the country began to grow, Congress became overburdened by this. They began to be advised informally by the Army because the Army had engineers who dealt with these issues and the government was small in those days. Therefore, they seemed to be a likely choice. If you look at something like the

original plans for the Brooklyn Bridge, in order to maintain the line of the bridge, there were girders running under the bridge. So, if you look at the line it actually is a perfect ellipse. What happened was in order to build the bridge the city of Brooklyn and New York, who were building it at the time, said to the Congress we want permission to build this great suspension bridge. Congress did not know what to do, so they went to the Army and asked how high this bridge should be because the Brooklyn Navy Yard is right up river from that bridge and it is very important to the Army and Navy. What the Army did was to write to England to the English Navy and asked how tall their tallest ship was. This is because at that time the British had the biggest ships and based upon the English ship sizes, the Army could determine how tall the Brooklyn Bridge should be. Unfortunately, it was short by a few feet so they had to move the girders up. If you look at the Brooklyn Bridge, you will see that the lines are very different and they actually had to raise these girders. So, if you are driving across the Brooklyn Bridge today, you will see the girders all next to you instead of being unsightly and underneath you.

One of the great events in American history, besides the American Revolution, was the Civil War. It changed everything and it even created baseball, as we know from the Ken Burns series. I was looking through a book of Civil War pictures, called great photographs of the Civil War, and there is a picture of a union soldier who is sitting in a puzzled way on this makeshift boat that looks like it was put together with pontoons and wood which was tied together with rope. He is trying to cross a river. If there is ever a picture that told a thousand words it was the picture of this union soldier. The caption reads "Union General Herman Haut on a makeshift pontoon in March, 1963". This is not a heroic picture of a general. This is not a painting of Washington crossing the Delaware. This is not a general on a horse. This is a ridiculous picture and the idea that a general in the union army would be trying to get over the water in this contraption makes me understand exactly why it is that the Army, to this day, controls the waterways of the United States. Because,

during the Civil War if you actually look at battle maps and atlases there is a lot of water in them. The military has been forever moving gunboats up and down the waterways and shelling their adversaries. Fort Sumpter was shelled from the water. They are either trying to get over a bridge or trying to trap an Army on the water, so movement by boat was essential to both sides during the Civil War. Since the union won, the union makes the rules. The Army kept control of the waterway because in order to control the waterway you have to know the waterway. You have to map the waterway. You cannot have some town, city or local property owners deciding to build unfettered on the waterways to accommodate their own needs because if the Army has to move fast, a bridge or dock in the wrong place could trap the Army. So, in order to prevent this the Congress enacted the Rivers and Harbors Appropriation Act of 1889.¹ This law remains today virtually unammended. There have been some predecessors to the law that were able to be traced back about ten years with the help of another one of my students from NYU. Basically, there is no legislative history because it was so obvious that the Army Corps of Engineers should be controlling this. Today, if you want to build, you must seek a permit from the Army Corps of Engineers. Little by little, over the century, since this law was enacted, the navigational servitude has been expanded into almost an environmental servitude. In order to get a permit today, you have to show that it is not a scenic river that you are about to destroy, there are no endangered species and the Army has to consult with the Fish and Wildlife Service, along with the various environmental agencies, in order to find out if there is any reason why this town, city or person should not be able to build this structure on the water. For example, whether the wetlands that are going to be destroyed are an important habitat for migratory birds. These are issues so they become battlegrounds. Little by little, a statute that was enacted purely to keep the army in the driver's seat on the United States' waterways and in effect to

1. Rivers and Harbors Appropriation Act, ch. 425, 30 Stat. 1121 (1889)(codified as amended at 33 U.S.C. §§ 401-430 (1994)).

maintain marshal law on the waterways in the United States has evolved through interpretation by the courts into this very powerful environmental statute.

Ironically, a law was enacted to enforce the Migratory Bird Treaty Act of 1916.² That treaty is intended to protect birds migrating between Canada and the United States. I had a quote from the Supreme Court from 1920 and it is amazing how things change.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitory within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of the opinion that the treaty and statute must be upheld.³

Those are strong words. What has, in effect, happened through statutory construction or destruction, as the case may be, by the courts is that the Migratory Bird Treaty Act has become an anti-hunting statute. In the Eastern district of New York, this is a real problem because since 1920 there has been a great deal of change on Long Island and the hunters, who may have been the greatest threat to the migratory birds seventy years ago, have given way to malls, suburban sprawl, and office buildings. This has caused the bird's habitat to disappear. The interpretation that the courts have been taking is that if you shoot a bird it is clear because you are killing it and that is a hunting statute. But, if you chop down a tree where there is clearly a bird nesting in the tree in

2. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755. 755 (1918)(codifies as amended at 16 U.S.C. §§ 703-712 (1994)).

3. *State of Missouri v. Holland*, 252 U.S. 416, 435, 40 S.Ct. 382, 384 (1920).

the middle of nesting season, or in one case I dealt with recently, where sixty acres of trees were chopped down in the middle of nesting season and where a number of people from environmental groups have spotted birds nesting, and the trees are cleared, the birds' habitat will be destroyed but that it is not really what the Migratory Bird Treaty Act intended to protect because it is a hunting statute. It is ironic that a statute that was intended to keep the Army in the driver's seat on the waterways and to facilitate commerce should become an environmental statute while the environmental statute should become almost a nullity in the eastern district in New York. There were very few hunting cases brought because anybody who is running around with a gun in Hempstead is going to get arrested real fast. It is not a problem. What has happened now is that the Fish and Wildlife Service which has to respond to these cases is reluctant to take on anything other than a clear shooting case. There are a couple of cases that give some support to the idea that knocking down a tree and killing the birds directly is enough to trigger this act but one is unreported. It is a circuit court case and the court refused to report it so I guess they are sending a message to the world that they do not want anybody to know they wrote this. Basically, the frustrating situation that we have in the eastern district of New York is that we have a statute that was intended to protect migratory birds and it has been narrowed and narrowed and narrowed to something that really has little effect on protecting migratory birds that land in Long Island in the waters and in the remaining natural spaces on Long Island.

Thank you very much.