ORIGINAL

In the

Supreme Court of the United States

LESTER BALDWIN, ET AL.,

APPELLANTS,

V.

FISH AND GAME COMMISSION OF MONTANA, ET AL.,

APPELLEES.

No. 76-1150

Washington, D. C.
October 5, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

LESTER BALDWIN, ET AL., Appellants,	:	
v.	:	No. 76-1150
FISH AND GAME COMMISSION OF MONTANA, ET AL., Appellees.	:	

Washington, D. C.,

Wednesday, October 5, 1977.

The above-entitled matter came on for argument at 10:01 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES H. GOETZ, Esq., Goetz and Madden, P. O. Box 1322, Bozeman, Montana 59715; on behalf of the Appellants.

PAUL A. LENZINI, Esq., Chapman, Duff and Paul, 1730 Pennsylvania Avenue, N.W., Washington, D. C. 20006; on behalf of the Appellees.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in 76-1150, Baldwin against the Fish and Game Commission of Montana.

Mr. Goetz, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES H. GOETZ, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GOETZ: Mr. Chief Justice, and may it please the Court:

My name is James H. Goetz. I am from Bozeman, Montana. I represent the appellant.

This case presents a challenge on constitutional grounds to the statutory system of the State of Montana by which big game licenses are made available to hunters who are not residents of Montana.

The Montana statutory scheme is challenged on the basis of two provisions of the United States Constitution, Article IV, Section 2, the interstate privileges and immunities clause, and Amendment 14, the equal protection clause of that Amendment.

The statutory system challenged is challenged in two parts: The first is, the challenge goes to the severe license fee differential implicit in the Montana statutory scheme, that is the differential between resident and non-resident big game hunters. The second challenge goes to the requirement

that the non-resident in order to hunt in Montana must buy what is called a combination license, and that combination license, I believe, is described adequately in the appellant's opening brief.

QUESTION: Well, is that latter really any different from the first? All that is required is to pay some money, is it not?

MR. GOETZ: All that is required is to pay some money to get the combination license. I think it presents -- excuse me.

QUESTION: But, it is just, you can get it if you just pay some money?

MR. GOETZ: Well, yes, that is true. In that sense it is the same, and in that sense our position, appellant's position is that it is a means of indirectly gouging, if you will, the non-resident hunter to increase the fees. However, in the constitutional sense it is different because the State chose to defend the combination license for reasons unrelated to the monetary or cost justification. So I think it presents a different issue in that regard.

QUESTION: Do you analogize this to an illegal tie-in sale?

MR. GOETZ: Yes, I think I would. I have not thought about it in that context, frankly, but I think it would be something like an illegal tie-in in the sense that it entails

an indirect imposition which must be undertaken by a person in order to avail themself of the right to hunt. I think in that sense it is much like an anti-trust tie-in, if I understand your question correctly.

QUESTION: Did the district court address the combination license issue?

MR. GOETZ: In my judgment, the district court did not. There is one footnote in the district court's opinion which suggests that the district court addressed that issue simply as another aspect of the increase in fees, somewhat along the lines of Justice White's question here today.

It is clear they did not address, the district court did not address it directly.

QUESTION: Do you think it is before us?

MR. GOETZ: Well, yes, I do, because it was presented in the district court and the district court rejected the plaintiff's and appellant's challenge to the combination license, and there is absolutely no doubt in the record that that issue was presented squarely and specifically, and as I say, it was referenced in the footnote. The district court did not address it, at least as I thought they should have, as a separate issue.

Now, the position of the appellants on the constitutional issue is that the combination license is simply unconstitutional under both provisions presented.

With respect to the fee differential, the severe fee differential, it is the position of appellants that that as applied in Montana is unconstitutional, but that the case Toomer against Witsell and the companion case from Alaska, Mullaney against Anderson, leave room on the fee differential for some additional assessment for non-residents if that assessment is reasonably related to one of two factors, or both.

Those factors are if the State residents contribute taxes which go to the resource or to conservation which the non-resident does not, then to that extent the non-resident can be assessed a higher fee.

The second aspect of the Toomer and Mullaney standard is that if the non-resident imposes some additional enforcement burden, then to that extent the non-resident can be assessed an additional fee by the State.

QUESTION: Do I understand you to agree with those propositions?

MR. GOETZ: Yes, I certainly do, Your Honor.

QUESTION: Both Toomer and Mullaney involved commercial enterprises, the kind of calling or making a living thing that I think Bushcd Washington first referred to in Coryell against Corfield. Do you think those automatically carry over to big game hunting, which certainly is not a way of making a living, at least for the people who come in and hunt.

MR. GOETZ: Your Honor, I do not think that they automatically carry over. That is, I do appreciate a difference between recreation and the pursuit of a common calling. However, it is appellants' position here that when logically analyzed and with due regard to the precedent in the area, that indeed Toomer and Mullaney do apply to the present situation.

If I may expand on that, I would say that there is some question about how far the privileged immunities clause goes or to what it applies, and I have looked at the two most recent -- or two of the most recent pronouncements by this Court, the most recent being Austin against New Hampshire, and there the case did not, in my judgment, address very specifically the question of what is the nature of the right; rather the opinion of the Court went to the purposes of the privilege, the interstate privilege and immunity clause, namely to promote comity among the States, and that issue is certainly and that purpose is certainly brought to bear in the present case.

QUESTION: Do you think that loomed large in the minds of the framers of the Constitution, the right of people in one State to hunt elk in another State?

MR. GOETZ: No, I do not. I think it was probably not significant question at that time, because --

QUESTION: There were no elk in the East, I think.

MR. GOETZ: I do not think there were any elk in the

East, but in any -- at any rate, the premium on recreation was not nearly so great at that time for obvious reasons, plus I suspect but I do not know, I suspect that hunting and fishing were not licensed at all.

QUESTION: Mr. Goetz, how many States have laws like this?

MR. GOETZ: Well, the appendix of the appellee sets forth a list of the States. In the first place, with respect to the combination license requirement, I think no State other than Montana has it.

QUESTION: Well, that is what I am talking about.

MR. GOETZ: Yes, the combination license, I do not, I am not aware of any State that has that.

QUESTION: So all we are dealing with is Montana?

MR. GOETZ: Insofar as the combination license is involved, that is right.

QUESTION: Well, how many licenses are applied for in Montana? I mean, how many people are involved in this?

MR. GOETZ: Well, in the last year for which figures are available, there were approximately 31,000 non-resident hunters. However --

QUESTION: In Montana?

MR. GOETZ: Yes.

QUESTION: 31,000?

MR. GOETZ: Yes.

QUESTION: Elk hunters?

MR. GOETZ: No, no. Elk hunters were substantially fewer, somewhere in the neighborhood of -- I would have to consult Defendant's Exhibit A, but somewhere in the neighborhood of 14,000.

And incidentally, there is a statutory limit for non-resident combination licenses now in the Montana statutes, to which I have reference in my brief.

That figure is 17,000. That figure has not been approached --

QUESTION: How many elk do you have in Montana?

MR. GOETZ: Well, I'm not sure --

QUESTION: If you've got 14,000 shooting at them, how many do you have left?

MR. GOETZ: Well, we have got substantial numbers of elk in Montana and the elk is quite wiley, and all elk are not shot. In other words, not all hunters get elk. Those are 14,000 non-residents. Of course, the number of residents is much greater than that, so we have substantial number of elk hunters.

QUESTION: Well then, I conclude there are a whole lot of bad shots out there.

(Laughter.)

MR. GOETZ: Well, they have to see them first to shoot them.

QUESTION: Mr. Goetz, how long have these disparities been in effect in your State?

MR. GOETZ: I am not sure. It has been quite a substantial period of time. The precise fee has changed, of course, with time, the most recent being in 1975.

QUESTION: But this is the first challenge you know of?

MR. GOETZ: To the fee structure it is. There was a requirement in Montana that non-residents be accompanied by residents and outfitters when hunting, and that was found unconstitutional by the Montana Supreme Court on equal protection grounds in 1975. But to the fee structure, to my knowledge this is the first Montana case.

Now, there is a New Mexico Federal case which I have referenced in my reply brief that was decided in August of this year.

QUESTION: Now, there are aspects of your statutory structure where no distinction is drawn between resident and non-resident, is that not so?

MR. GOETZ: Well --

QUESTION: Bow and arrow shooting?

MR. GOETZ: Yes, I believe that is true.

QUESTION: And wild turkeys?

MR. GOETZ: Yes.

QUESTION: Do you know why no different treatment

there?

MR. GOETZ: No, I do not, frankly.

QUESTION: Maybe the mortality rate of elk is not very high with bows and arrows, is that it?

MR. GOETZ: Well, it is rather rare that an elk would be taken by a bow and arrow, and I do know from my own experience, it is not in the record, but turkey is not a very prevalent game bird in Montana, and it may be that it is just not thought to be a very important issue.

If I may --

QUESTION: You say, before you proceed, that the total number of non-resident elk hunters is limited to a figure of 17,000?

MR. GOETZ: Yes.

QUESTION: And what, they are drawn by, or would be drawn by lot if there were more than that many applicants?

MR. GOETZ: I believe that is the, as I read the statute, it is not clear how they do that and it may be that the State Fish and Game Commission has to implement that by regulation. My understanding is that it is on a first-come, first-served basis. It would either be that or a deadline and then some lot. But they have not reached that figure, so that --

QUESTION: It has never been necessary to determine it?

MR. GOETZ: No, and that has not been challenged, of course, in this lawsuit. I might say, incidentally --

QUESTION: Do you think it would be challenged under your line of reasoning if anybody who resided in Montana was able to get an elk license but there was a flat ceiling on the number of out-of-staters who could get it, but no license fee differential?

MR. GOETZ: I believe that under my line of reasoning that would be equally -- that would probably be faulty. I must confess that, since that is not in the case, I may not have thought through it as carefully as I have the issues here, but it is my position that that probably would be constitutionally faulty also.

QUESTION: And a fortiori if Montana should say that there shall be no non-resident hunters, only hunters shall hunt elk?

MR. GOETZ: Absolutely. I believe that would be flatly unconstitutional.

QUESTION: Mr. Goetz, in my home state there is a provision that senior citizens, like most of us up here, over the ave of "X" years, can get a fishing license without charge at all, but they have to get a license. Under your line of reasoning, would that be unconstitutional?

QUESTION: De minimis significance, they never catch a fish.

QUESTION: Yes, but they are the ones who are always out fishing.

MR. GOETZ: I think that is an excellent answer, and I would like to expand on that.

QUESTION: If that is what your case amounts to, you had better get more than that, I think.

MR. GOETZ: No, I think the case presents a much more significant issue or I wouldn't be here. But in order to respond to your question, I believe that -- well, if we look at the senior citizen classification under the Equal Protection Clause, as this Court did in Murgia, Massachusetts Board of Retirement v. Murgia, it was decided to review that on a minimal scrutiny basis, and if the state has reasonable grounds for that approach, then that would pass constitutional muster.

The difference between that -- and I would be willing in the Minnesota case to -- that is where you are from, isn't it, that is the state you are talking about -- I would be willing to accept the constitutionality of that kind of discrimination.

If we carry that over to the present case, I think we have an explicit holding by the District Court that the discrimination is not justifiable on any cost basis, and I interpret that to be there are no rational grounds under the Equal Protection Clause unless you go to what the District Court went to, and that is the political justification, and therein

I think lies one of the differences between your situation and the Montana situation. And my feeling is that we have a unanimous finding by the District Court that, except for the political justification, this non-resident fee differential cannot be justified in Montana.

QUESTION: That is not the factual finding, that is a conclusion of law, is it not?

MR. GOETZ: No, I think that is a factual finding in this sense: Facts were taken by the District Court, testimony was taken, the District Court looked at that testimony, looked at the rationalization offered by the state and then said, in looking at the evidence, this can't be justified, even giving due regard to the presumption of constitutionality.

QUESTION: But the question of whether a statute may be justified under a particular set of facts or under a conceivable set of facts is itself a question of law, isn't it?

MR. GOETZ: Oh, I agree from that perspective, there has to be a legal rubric within which to fit the facts, and that legal rubric in the District Court was this: The appellants were arguing that the Toomer v. Witsell standard is applicable, that is to the extent that higher enforcement costs or conservation resident taxes were not paid or higher enforcement costs were imposed on non-residents, so conservation taxes were not paid, there could be a higher non-resident fee, and that is a legal rubric within which the court found,

in my judgment, that factually the state's cost justification didn't fit into that. I guess I would classify that as a mixed law-factual question.

QUESTION: Could you tell me or is it in the record what percentage of the elk that are taken are taken on federal land?

MR. GOETZ: Seventy-five percent of the elk taken in Montana are taken on federal land.

QUESTION: I take it, although the United States leaves that sort of thing to the states under our cases, if Congress were so inclined, I suppose it could limit or regulate the taking of elk on federal land?

MR. GOETZ: In my judgment, under the property clause, constitutionally Congress could on the federal lands have a federal license. And I might add to that, one of the worries posed on I think both sides implicitly in this case, from a state's rights standpoint, is a federal license. My feeling is that --

QUESTION: Maybe not a federal license but a limit on what the states could charge?

MR. GOETZ: Right, either one, what Montana might call federal intervention. My feeling is that if appellant's position were accepted here, that if reasonable constitutional limitations were placed on the states, it would pose less threat in terms of outside, what is perceived to be outside or

federal influence with the game in Montana.

QUESTION: Do you think Congress would preempt this area with exclusive license or would they have to do it concurrently with the states, as with the duck stamp on a state license?

MR. GOETZ: I'm not sure what they would have to do. In terms of hunting on the federal lands, I guess my feeling is that Congress could preempt the area if it wanted to. Insofar as gaming, of course, on non-federal lands, I'm not sure if Congress has any interest in doing that. So I think I would separate the two, in that sense.

QUESTION: Mr. Goetz, the cost problem, cost justification issue, is that relevant to both your equal protection claim and your privileges immunity claim, or does it have different constitutional significance?

MR. GOETZ: It's relevant and important under both. However, there may be different standards of judicial review under the Equal Protection Clause as opposed to privileges immunity.

QUESTION: Is there any difference in the standard of what the state according to your theory must prove in order to cost justify the licensing --

MR. GOETZ: No. According to our theory, that standard would be the same and we take that standard, of course, from Toomer v. Witsell, and there is no -- well, I was

going to say, to my knowledge, there is no equal protection case that imposes that same standard. However, it should be recognized that Takahashi v. Fish & Game Commission of California was decided at the same time as Toomer and is an equal protection clause, and I think juxtaposing those two cases, given their similarities and the time proximity, that really probably Toomer v. Witsell standard applies also under the equal protection standard.

I have reserved ten minutes for rebuttal, so I will conclude at this time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Goetz.

Mr. Lenzini.

ORAL ARGUMENT OF PAUL A. LENZINI, ESQ.,

ON BEHALF OF THE APPELLEES

MR. LENZINI: Mr. Chief Justice, and may it please the Court: Appellants challenge two separate features of Montana's statutory big game licensing scheme; first, the combination license, and, second, the higher fees imposed upon non-residents. Montana is, however, by no means unique among the states in charging higher fees for hunting by non-residents, indeed, virtually every state does charge higher fees.

The resolution of the constitutional issue here requires analysis of the asserted right as well as the regulatory interest of the State of Montana in regulating big game species.

Appellants claim that this case is covered by Toomer

v. Witsell and that the P&I clause of the Constitution requires that non-residents should be treated on terms of substantial equality with residents.

Neither the appelants nor the dissenting judge below, however, assert that recreational hunting is a fundamental privilege and immunity and, indeed, no case has ever held. Rather, appellants argue that extraneous features involved here call into play the protections of the Privileges and Immunities Clause, namely the fact that 75 percent of the elk are taken on federally owned land and the fact that the state receives financial assistance from the federal government for wildlife restoration programs.

The appellee submits that this analysis, without any support in the judicial history of the P&I clause, and indeed from the earliest interpretation in Corfield v. Coryell. The courts have consistently focused on the nature of the right itself.

The clause has never been considered to guarantee to non-residents equality in all rights and privileges and the fundamental right analysis has been consistently followed.

Neither may the appellants transform somehow this recreational activity into an activity covered by the Privileges Clause, simply because of federal land being involved. Congress has declared that, on the national forests and indeed much of the land in Western Montana, where the elk is taken, is national

forest, and has declared in 16 USC, section 4(e) that jurisdiction over the national forest resides in the state, both civil and criminal; and indeed in the Multiple-Use Sustained Yiel Act of 1960, affecting the national forests, 16 USC 528, Congress specifically declared that nothing therein shall be construed as affecting the jurisdiction or responsibility of the several states.

QUESTION: Would it be your position then that Montana could if it wanted to exclude non-residents entirely from recreational hunting --

MR. LENZINI: Mr. Justice White --

QUESTION: -- I mean insofar as the Privileges and Immunities Clause is concerned?

MR. LENZINI: Insofar as the Privileges and Immunities Clause is concerned, I believe it could. With respect to the Equal Protection Clause, we have a different situation completely.

QUESTION: I was thinking with the parks.

MR. LENZINI: With the national parks?

QUESTION: Yes.

MR. LENZINI: By law, there is no hunting permitted at all in the national parks.

QUESTION: How about state parks, reserving state parks for the use of citizens?

MR. LENZINI: I submit that under the Privileges Clause the court could, because the fundamental right is not

involved. I think we have a different question under the Equal Protection Clause. There I believe that, unlike this case, where we have a substantial number of non-residents coming into Montana, there I think the question would probably require a higher level of scrutiny by this Court.

QUESTION: Well, let's just say that -- why is that? Let's just say the state says that for political purposes, mainly to encourage our citizens to be willing to put up the money for state parks, we are just going to exclude non-residents. It says recreation, all they want to do is to camp and walk around --

MR. LENZINI: If the state scheme absolutely deters all in-coming non-residents, I think we have a different situation than this case.

QUESTION: Well, do you or don't you think that that would be reached by the Privileges and Immunities Clause?

MR. LENZINI: I do not think that it would be reached by the P&I clause --

QUESTION: And the Equal Protection --

MR. LENZINI: -- because I don't think that --

QUESTION: When you say equal protection, you would say you would need more than a rational basis for it?

MR. LENZINI: That is not this case, of course, but I think we would have to look at different reasons for the state, that is what is rational in that situation might be different

than simply --

QUESTION: But the interest remains the same, the interest of non-residents.

MR. LENZINI: The interest remains the same.

QUESTION: And do you say that under the Equal Protection Clause, you would say the interest is entitled to more weight?

MR. LENZINI: I think that under the Equal Protection Clause, where there is -- if federal lands are involved, for example, I think that there might well be a different measure of the state's conservation activity than in the situation here.

QUESTION: The point is that under the Privileges and Immunities Clause, that that clause is simply inapplicable because this right is the right --

MR. LENZINI: That's correct.

QUESTION: -- to hunt recreationally is not covered by that clause?

MR. LENZINI: That's correct.

QUESTION: But now in contrast, the Equal Protection Clause is applicable because it need not be any kind of a right for equal protection analysis, isn't that it?

MR. LENZINI: Well, under the Equal Protection Clause, implicit or explicit constitutional rights --

QUESTION: The Equal Protection Clause has to do with classification.

MR. LENZINI: That's correct. And where the classification is not invidious as here, but where the result is the total exclusion, I could see the Court applying a different level of reasoning perhaps, not necessarily strict scrutiny --

QUESTION: Because in your mind of the interests so-called involved?

MR. LENZINI: Because of the result, I think, Your Honor.

QUESTION: I must say, I just don't follow the reasoning, because the classification in either case -- we are talking about equal protection now, let's forget about privileges and immunity -- the classification between residents and non-residents, you say that is a legitimate classification. If it is a legitimate classification, why cannot they say no non-residents at all? Here you have said no non-resident who can't afford $240 or whatever it is. What is the difference in equal protection?

MR. LENZINI: I think conceivably a state could say no non-residents at all. It would depend upon the rational of the state, what it was trying to do. I think if we had, for example, a situation where we had a rare trophy species and only a limited number could be hunted, I believe that the state could readily say and demonstrate the need and the rationality.

QUESTION: Well, in all of these cases, as Justice White points out, we don't want too many people over-using our

park facilities and we would rather save them for the taxpayers who pay for them, and we will simply exclude everybody else. What is wrong with that?

MR. LENZINI: I simply believe that it is not a fundamental right, and I believe that the classification is not invidious.

QUESTION: Toomer v. Witsell is what is wrong with that, isn't that correct?

MR. LENZINI: Well, Toomer v. Witsell is a P&I Clause case. In Toomer v. Witsell --

QUESTION: I'm talking about equal protection. That was a racial classification, wasn't it?

MR. LENZINI: That's correct.

QUESTION: As I recall, in trying years, South Dakota has limited pheasant hunting to residents on occasion.

MR. LENZINI: That's correct. That case came to the Supreme Court and appeal was dismissed because of lack of a substantial federal question.

With respect to the question of federal aid, the Federal Aid and Wildlife Restoration Act provides an 11 percent excise tax on certain sporting arms and ammunition and apportions that money back to the states for wildlife restoration programs. Montana is a beneficiary of that. But there is nothing in the statute, the Pitman-Robinson Act, which in any way restricts the state in connection with non-resident/resident differentials.

And thus the appellee submits that the P&I Clause cannot be transformed to cover this activity simply because of the presence of federal land or because of the fact that Congress has provided for federal assistance. Congress knows how to establish limitations, and it has done so in connection with military personnel on military reservations. Those lands are generally lands over which the federal government has exclusive legislative jurisdiction. But even there, Congress has said state fishing licenses shall be required, but that if personnel who are on duty for more than thirty days, they need not have a state license if the state does not provide licenses on terms as favorable as those for residents. So Congress knows how to establish conditions. It simply hasn't done so.

The question here also involves the nature of the state right over wildlife. In Toomer v. Witsell, the Court stated that it was long ago decided that one of the privileges which the clause, the Privileges and Immunities Clause, guarantees is that of doing business in State B on terms of substantial equality with citizens of that state. But plainly, Toomer dealt with commercial shrimping, doing business, and does not govern the instant case. Both the majority below and the dissenting judge found that the case involved recreational hunting and the majority states that elk is not now and never will be hunted commercially.

Turning to the Equal Protection Clause, the court

below found that the Montana scheme bears a rational relationship to a legitimate state purpose. It held that it was a finite local resource, not everybody could hunt it, and therefore some restriction had to be made on hunter days. The District Court did not choose between the ownership doctrine and the police power doctrine.

The nature of the state's power to conserve wildlife has involved some semantic difficulties. We have had the ownership doctrine versus the police power doctrine. In a 1935 decision of this Court, Bayside Fish Flour Co. v. Gentry, 297 U.S., the Court, through Mr. Justice Sutherland, declared that over wild game generally the state has supreme control. But in Toomer v. Witsell, the Court said, well, the ownership was simply a legal fiction, but it was a legal fiction which was expressly legal shorthand of the importance to its people that a state has power to preserve and regulate the exploitation of an important resource.

QUESTION: How do you distinguish -- how would you distinguish between the state's interest in wild game as a resource, to use that term, and subsurface minerals and energy?

MR. LENZINI: Owned by the state as opposed to private ownership. In the mineral situation, the state has technical ownership, as it would over the state capital, the state capital building. But in connection with fish and wildlife, I think the state has a qualified ownership. It does not have technical

ownership. As Mr. Justice --

QUESTION: Is there a difference partly because the minerals can't migrate but the game can? Would that be a factor?

MR. LENZINI: I think it is simply a question of title, Your Honor. I think that where the state owns minerals, it has a patent, perhaps from the federal government, perhaps from someone else, it has all of the indicia of what we consider to be necessary to clear title.

QUESTION: You are proceeding on a premise that title must rest somewhere, are you?

MR. LENZINI: No, sir, I'm not. Title to things that are capable of ownership ordinarily rest somewhere, but title to wildlife is in no one, it was held in common law to be res nullius, it was owned by no one. But although it was owned by no one, there was a right, a beneficial right to utilize the wildlife, and it was held to be in the state for the benefit of its people. That is the holding of Geer v. Connecticut. But Mr. Justice Marshall stated earlier this year in Douglas v. Seacoast that it was fantasy to talk about the states owning wildlife, because wildlife cannot be owned in the sense that a private game preserve owner owns the animals he has stocked therein. And last year, in Kleppe v. New Mexico, talking again about the nature of the state's interest, there Justice Marshall stated that the state has broad trustee and police power

interest in wildlife.

So we have difficulty in semantics on what is the state's ownership. In Toomer, Chief Justice Vinson stated that there is considerable authority beginning with Geer to support the contention that the State may confine the consumption of fish and game wholly within its limits, and as the representative of its people, it can keep the fish and wildlife from moving in interstate commerce.

QUESTION: Are you suggesting that wildlife is not capable of ownership under any circumstances?

MR. LENZINI: If it is reduced to possession lawfully it is capable of ownership, and it is owned by the --

QUESTION: By that definition it is not wildlife any longer.

MR. LENZINI: It is no longer wildlife but personal property. But prior to its being lawfully reduced to possession it is considered not to be held in technical ownership.

So it is clear from the cases that the State does not have technical ownership in wildlife, but because of the fact that ownership is in no one, but it is clear that the State's authority over wildlife is that for the common good and conveys all the authority that technical ownership ordinarily confers, such as in Toomer where the court said it's important that the State have the power to preserve and exploit the exploitation of an important resource.

If the authority of the State must be expressed in terms of police power, however, appellees then submit that the exercises of police power in managing wildlife is not inconsistent with the recognition of beneficial use therein by the people, a user fructury right, perhaps.

We then turn to appellants' equal protection claim. It is alleged that residence is a suspect classification and thus requires the showing of a compelling State interest to sustain its use. Appellees submit that the classification of residence cannot be said to be suspect. It is not aimed at any discrete minority such as classifications by race, religion, sex or alienage and involved no fundamental right.

A non-resident's opportunity to hunt a prize trophy species simply does not rise to the dignity of a fundamental right and the record discloses that the non-resident hunter is not a group who is in need of special solicitude under the Constitution.

QUESTION: If someone had come to Montana and declared his residence there, would he then, say ten days later, have been able to get a resident license?

MR. LENZINI: Montana has a six-month residency requirement. If he had resided for six months prior to the application for the license, he would have gotten a resident's permit.

QUESTION: So it doesn't make any difference, once you

fulfill the six months requirement, it doesn't make any difference how much longer you've resided there, you can get a resident's license?

MR. LENZINI: That is correct.

A trial baloon the appellants attempted to show that the license fee differentials could not be cost justified by additional expenditures imposed on residents, and appellants' witness testified that at most under her calculations, the State could charge a non-resident fee of 2.5 to 1. This approach is comparable, however, to the approach taken in the commercial fishing cases, namely those fundamental rights cases where the requirement of substantial equality between residents and non-residents was involved, and it assumes that recreational hunting is a fundamental right.

The district court below determined that no records were kept which precisely disclose the direct and indirect cost which properly may be apportioned and thus the court found that the ratio of 7.5 to 1 could not be justified on any basis of cost allocation.

However, the court did not specifically address the arguments that lie behind -- pro and con, the arguments behind the combination license issue in its view of the case.

The appellant below demonstrated, attempted to demonstrate that the direct cost were those costs of the Fish and Game Department itself and that indirect costs were all of the

costs spent by the State in that year which amounted to about $211 million, and when the appellants' witness below calculated the number of person days that Montanans spent in Montana versus the number of person days spent by non-resident hunters, the witness determined that one-tenth of one percent of all these indirect costs could be utilized by the State as a cost of the hunting license.

And the witness testified that no other cost than these, no other forbearance, no other State interest could properly be considered in establishing the price of the hunting service as it was stated.

Another of appellants' witnesses testified that the license fee should be determined on the basis of generally accepted accounting principles and that no one should become bogged down in any measurement of value.

Appellees submit that the foregoing analysis is of course unrealistic, because it is many elements are involved in producing big game populations that may be harvested in a State. Private ranch lands are involved because during the critical winter months of the year, elk and deer move down from the higher elevations which tend to be Federally-owned land and move down into the lower private lands where they spend the winter months, which are the critical months in survival, and depend upon forage provided by those ranch lands.

QUESTION: Well, those ranchers can keep anybody off

of their land, can't they?

MR. LENZINI: That is correct.

QUESTION: Well, I do not understand what you are arguing.

MR. LENZINI: I am saying that because of the deer and the elk survive to a large extent because of the presence of those ranch lands, and the mere fact that they could keep hunters off the land does not mean that they keep the deer off the land or the elk off the land. And in fact, they have no recourse for the damage and depredations they may receive from the deer and elk.

QUESTION: Well, I do not understand why for that reason you have to charge somebody an extra amount of money?

MR. LENZINI: Well, the --

QUESTION: Because the elk comes in my land and eats my forage, therefore I keep the out-of-state man out.

MR. LENZINI: Yes, but the deer and elk are not taken on your land. They come on your land during the winter months, and during the summer months and the fall months they migrate off your land and they move onto adjoining Federal land, and that is where they are taken. So they are being taken on lands not your lands and they are being --

QUESTION: My real question is, isn't it true that Montana will survive if this law is knocked down?

MR. LENZINI: Are we talking about the combination

license or are we talking about the license fee differential?

QUESTION: If you take all the licenses away, Montana will still survive?

MR. LENZINI: I think Montana as a state will survive, but then the question is whether the wildlife management program will survive. That is the question.

QUESTION: This is the only State in the Union, you agree on that?

MR. LENZINI: This is the only state that I am aware has a combination license. It is one of --

QUESTION: Well, that is what is before us.

MR. LENZINI: Well, there are two questions, I think, Justice Marshall: There is the combination license and there is the question of the fee differentials, and the fee differentials is an extremely important management tool used by the State Wildlife Agency and if that were held unconstitutional, there would be a very significant impact on fish and wildlife management, particularly wildlife management.

QUESTION: Are you arguing that a rancher who is paying Montana State taxes on his land and whose land is then used for forage by elk and others is entitled to special protection which can't be measured mathematically?

MR. LENZINI: No, Your Honor, I am not. In some states, in fact, like Colorado, there are provisions under state statute for claims by ranchers for depredations. In the

State of Montana, the Legislature in its wisdom has decided not to provide a claims procedure for ranchers, and therefore they are required simply to undergo this depredation and loss of forage.

QUESTION: Well, then, they are contributing something to the well-being of the elk which non-residents do not contribute?

MR. LENZINI: I certainly submit that they are; yes, indeed. It is an opportunity cost, because if they chose to keep those elk and deer off of their ranch lands, they might do better in some other pursuit. They might be able to have more forage, more grazing, but the Montana Supreme Court has said that one who acquires property in Montana does so with notice and knowledge that we have some very substantial big game populations here, and he does so with knowledge that wild game cannot distinguish between fructus naturales and fructus industriales, and therefore cannot control animals, they cannot be controlled through the owner, and accordingly, a property owner in the State of Montana must recognize the fact that there may be some injury to property from wild game for which there is no recourse. And that is State versus Rathbone, 100 Pacific 2nd, page 86.

QUESTION: Your answer, Mr. Lenzini, to my brother Marshall's question indicated your belief that this relatively high license fee actually operated as a real disincentive to

non-resident hunting in Montana. Do you think that's correct?

MR. LENZINI: I believe it operates as a control. I believe the record indicates that in years when the Legislature has raised the fee, there has been a dropoff in the number of non-residents.

QUESTION: My observation, as well as I may say my personal experience has been, that this sort of recreation is quite an extravagant pursuit, monetarily, and --

MR. LENZINI: It is expensive.

QUESTION: -- and that the $200 fee is a rather small fraction of the overall cost and would probably not, in fact, operate as much of a disincentive to the kind of person who comes from outside Montana and comes in there and hires a guide and all the outfitting material necessary and indulges in big game hunting. Am I quite wrong about that?

MR. LENZINI: I think you are correct. I think that the fee here is $225, I think that the record indicates that over $1,000 is involved apart from that in spending 7 days in Montana.

QUESTION: At least, I would say.

MR. LENZINI: Yes. So it is a very expensive recreation, very expensive. And the $225 is not that much, but the plaintiffs --

QUESTION: Well then it is not a disincentive?

MR. LENZINI: Well, the plaintiffs --

QUESTION: And if it is not a disincentive, your case is weakened, is it not?

MR. LENZINI: No, I think not, because I think to some extent it is a disincentive. It is a control mechanism. That is why the plaintiffs are here. Their witnesses say that they cannot come back next year because of this license fee increase. So as far as they are concerned, it is a disincentive, and that is why they are here.

QUESTION: If it is not an injury, in fact, to them, I suppose they have no claim.

QUESTION: On the other hand, if it does not discourage any non-residents from coming in and hunting elk, then you have no case.

MR. LENZINI: Well, I think we can take notice of the fact that an increased license fee is going to have an effect on some people.

Now, it may not have an effect on the person who is outfitted by Abercrombie & Fitch and comes out, but it is going to have an effect on some people, maybe from South Dakota, maybe neighbors from Colorado, but it is going to have an effect on some people.

This case is not a Toomer v. Witsell situation where in the year prior to the $2,500 license fee there were 100 non-resident shrimp boats licensed and following enactment of that license fee there were no shrimp boats licensed by the State of

South Carolina. The effect of that case was to exclude non-residents.

We have here instead a situation where in the period 1960 to 1970 the number of Montana residents hunting in the state had increased by about 67 percent and the number of non-residents had increased over 530 percent. We have a situation here where Montana in 1974 was the state most frequently visited by out-of-state hunters. We have a situation here where during 1974 there were 32,000 non-resident big game hunters and there were 20,500 non-resident combination licenses issued, not 14,000 as stated by appellant.

QUESTION: When was there a limit of 17,000?

MR. LENZINI: The limit of 17,000 came into the law later, Your Honor.

QUESTION: I see.

MR. LENZINI: Faced with this increase in the number of non-residents, the Legislature simply increased the fee for the non-resident license. The state chose an economic means to limit the number of hunter days and the method plainly is not arbitrary.

With respect to the combination license, the record below indicates that non-residents hunt in larger groups than do residents, they usually come in groups of four or more, and that license swapping is a problem and is likely to recur more among nonresidents, whereas residents tend to hunt in smaller

groups, one or two. In attempting to enforce its conservation laws, the State of Montana has adopted the equal responsibility law. They have a state of about 145,000 square-miles, and they have 70 game wardens at this time, which means that each game warden is supposed to cover an area of about 2,000 square-miles. It is very difficult to do that. But the state does have over 400 licensed outfitters and guides, and so the legislature in its wisdom said that if a violation occurs in a hunting party, which is guided by a licensed outfitter and guide, then unless that guide or outfitter reports the violation, he himself is equally responsible with the person committing the violation. Because of the fact that there is license swapping, because of the practice of people going out and buying -- one buys a license for deer, one buys a license for elk, and then if they come upon the one and he is not licensed for it, they still may feel that they can take the deer or the elk; because of that problem, the legislature decided to establish the combination license, so that whatever you tended to come across insofar as bear, deer and elk were concerned, you would be licensed for that. And the record below indicates that non-residents utilize outfitters more than residents, perhaps as high as 50 percent in some areas of Western Montana.

The dissenting opinion below said that the use of a political justification, namely that without this discrimination the program would not receive political support, the dissent

said that that was inherently inappropriate. But appellee submits that such political considerations are part and parcel of numerous legislative choices and cannot be said to vitiate the choice unless fundamental rights are involved or unless invidious classifications are made.

We submit that in San Antonio School District v. Rodriguez, decided by this Court in 1973, such considerations were taken into account to determine whether there was a rational basis for the Texas system of financing public education. In that case, the financing method was the ad valorem tax on property within the state's school district, supplemented by funds from the state central system.

The attack on that, the equal protection attack was on the basis of wealth, because some districts had less valuable property than others, that school districts were being deprived of their equal protection rights. But the Court, referring to local control of school districts, which was fostered by the Texas plan, concluded that the plan was not irrational because the people of Texas may be justified in believing that other systems of financing would lessen desired local autonomy.

And in Salyer Land Co. v. Tulare Water District, which involved boating in water districts but was limited only to landowners, the Court said that there was no violation of the Equal Protection Clause because the State of California could conceivably take into account that landowners, as opposed

lessees or mere residents, would not be willing to join in formation of the water storage district, short-term lessees, for example, whose fortunes were not in the long run tied to the land, were to have a major vote in the affairs of the district.

In sum, where a state possesses a qualified ownership interest in a natural resource or at least a substantial regulatory interest which imports a right to the beneficial use thereof, and which may be exploited by citizens of other states, a state may prefer its own if the state regulatory program would be frustrated without such discrimination.

To sum up, there is room in the Fourteenth Amendment for practical considerations where no invidious classification is involved, where no fundamental right is involved, and whereas here the state, in regulating a finite resource in which its people have a beneficial interest, the appellee submits that the judgment below should be affirmed.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Goetz.

ORAL ARGUMENT OF JAMES H. GOETZ, ESQ.,

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. GOETZ: Thank you, Mr. Chief Justice.

QUESTION: Mr. Goetz, as I understand the record, none of your clients assert that they were actual residents of Montana, who were denied license simply because they hadn't

fulfilled the six-month requirement. Am I correct?

MR. GOETZ: That is correct. There is no issue as to durational residency requirement. I might say in that connection that one of the non-resident plaintiffs, however, is a propertyowner in Montana. And I think one of the problems with Mr. Lenzini's argument on depredation is that he is equating non-residency with property ownership. There may be non-residents who own property who contribute likewise to the elk resource. Obviously, the incidence of that is lower than resident propertyowners.

QUESTION: There may be a lot of residents who don't own property.

MR. GOETZ: That's correct also.

In response to the appellee's position, first I would like to say with regard to the ownership question that I think that this Court has settled that issue in the recent decision in Douglas v. Seacoast Products, where the opinion indicated that, rather than viewing wildlife in some kind of ownership context, the property way to look at the wildlife resource is through the traditional police powers concept, and that is the position that appellants have taken throughout this decision. I believe the language in Douglas v. Seacoast is very strong in that regard.

Now, with respect to the equal protection issue, Mr. Lenzini has argued that both the license fee differential and

I understand also the combination license requirement, both of those are very important management tools, and the thrust of the District Court decision is that this is a valid conservation measure. I think the record throws substantial doubt on that, for a number of reasons.

First of all, the State of Montana did not attempt to justify this in the District Court as a conservation measure. Secondly, Montana in 1975 charged residents only $4 to hunt an elk.

QUESTION: Must the legislature assert this conservation aspect in order to rely on it, in the passage of a statute of this kind?

MR. GOETZ: No, I don't think it has to assert that, and we have very little legislative history in Montana. However, what I am saying is that the state Fish and Game Department, in defending the case in the District Court, did not assert that. That doesn't necessarily bar them from arguing it now, but I think it does shed some doubt on whether they firmly believe that this can be justified as a reasonable management tool.

You see, there is no limit on the number of nonresident licenses that can be issued for elk, and they cost only $9 now and --

QUESTION: I thought you said there was a limit of 17,000.

MR. GOETZ: No, I mean on residents.

QUESTION: On residents. But there are not many residents in Montana?

MR. GOETZ: Pardon me?

QUESTION: There are not many adult male residents in Montana compared to the total of the other 49 states.

MR. GOETZ: Well, you don't have to be an adult male to hunt --

QUESTION: Well, generally that is what they are.

MR. GOETZ: In any event, the District Court seemed to find that there are large numbers of hunters and a finite number of elk, and I think there obviously is a finite dimension on that resource, but the legislature has not imposed any restrictions on residents as far as hunting them.

QUESTION: What is the population of Montana?

MR. GOETZ: 600,000, approximately.

QUESTION: The whole state, men, women, and children?

MR. GOETZ: Yes, and approximately 198,000 hunting licenses are issued in Montana. However, that relates to the whole spectrum of game, birds, et cetera.

QUESTION: Rabbits, squirrels, and so on.

QUESTION: There is a limitation on the number of elk that may be taken?

MR. GOETZ: Yes.

QUESTION: On per licensed hunter?

MR. GOETZ: Yes, one per license. What I am saying is that if this is viewed as a conservation device, this economic discrimination, designed to discourage non-resident hunters, we concede likewise that there is no equivalent in terms of the resident hunters. And Douglas v. Seacoast Products said that this cannot properly be viewed in the Virginia context as a legitimate conservation measure, if you have no limits or no policies discouraging the residents and simply discriminate against the non-residents.

QUESTION: But Seacoast was not only commercial, it was very high-powered commercial.

MR. GOETZ: Well, that is true, but I think the proposition for which I cite is, that is the difference between the resident and the non-resident, and the fact that Virginia did not take any measure to discourage residents, I think that is applicable to the present case.

Now, in any event, if we look at the combination license requirement, we have something that appears wholly arbitrary and capricious. Now, for instance, in 1975, Montana changed its combination license from one elk/two deer to one elk/one deer and one black bear. The record shows that with respect on the average year to the latter half of the hunting season, black bears are hibernating. Now, what kind of conservation device or management tool is that? They are not huntable --

QUESTION: They could as well have licensed you to hunt tigers, I suppose?

MR. GOETZ: Yes. They are just not going to be around to shoot. And in line with that, it is very difficult to mistake an elk for a black bear if the black bear are hibernating, obviously. And even if it is not hibernating, it is rather difficult to mistake those two.

QUESTION: Is there a bear season in Montana?

MR. GOETZ: There is. There are two bear seasons, one in the spring and then there is a bear season that is pretty much the equivalent of the elk season. And my understanding is that the spring bear season is different in the sense that the combination license doesn't impact that one way or the other.

QUESTION: Well, is there any reason why a possessor of a combination license couldn't come back in the spring and shoot a bear if he found they were all hibernating in the fall?

MR. GOETZ: I'm not sure whether he has to buy an additional license for that to start with. I just don't know that. But, secondly, there is an economic reason, of course, it costs money to come into the state a second time, and the record divulges that black bears are not in great demand in terms of hunting, that is, in 1975, the year before this went into effect, 730 non-resident black bear licenses were issued, as opposed to somewhere in the neighborhood -- Mr. Lenzini, correct me -- about 20,000 elk/deer combination licenses. So

obviously, most non-residents who hunt want to hunt either elk or deer, do not desire to hunt black bear.

So what it appear is as though the State of Montana is doing is gouging the non-resident with higher fees to subsidize artificially the operation of the Fish and Game Department in Montana, while charging probably the non-residents an unreasonably low figure, that is --

QUESTION: But that argument doesn't militate against the combination of elk and deer, does it? It is just that --

MR. GOETZ: No, that goes to the license fee differential. However, the problem with the economic problem, just as Justice White pointed out, is compounded by loading on other licenses and then saying, well, you have got to pay more because you have got to buy these other licenses.

QUESTION: Well, isn't, as Mr. Justice White suggested very early in your argument, isn't this really one problem? Let's say that Montana had said that in order for you to hunt elk you also have to be licensed to hunt tigers and elephants and zebras, in other words, wholly unrealistic, but that is what you have to do to get an elk license, and you pay $225 for it? Isn't that realistically the same as though they set a $225 fee on elk, period?

MR. GOETZ: Well, in one sense it is, in the sense that if you look at the combination license as simply a way to assess more fees to the non-resident. However, in a

constitutional sense, what that combination license is is excess baggage, that is conceivably, although I don't believe it should be the case, this Court could hold up a reasonable or an unreasonable differentiation and still find the combination license so arbitrary and capricious, which it seems to me it is, that it would strike that down, and that would be the argument I would be making here if I thought that the differential was reasonable under the Toomer standard, notwithstanding the combination license, that is we would just attack the combination license. However, we think that the differentiation cannot meet the Toomer Mullaney standards in any event, so to that extent I think they are two separate issues. And as Mr. Lenzini pointed out, he tried to justify the combination license on a separate basis.

Thank you.

QUESTION: Before you sit down, can you tell me if the record tells us how many elk are taken by residents as opposed to non-residents?

MR. GOETZ: Yes, the record does. I can't tell you offhand where it is.

QUESTION: I thought you said earlier that it was about a little less than half of the 31,000?

MR. GOETZ: That is the number of hunters who hunt elk. But the question is what percentage of residents take elk as opposed to non-residents, is that your question?

QUESTION: Yes.

MR. GOETZ: Yes. The answer to that, the short answer is found in the Footnote 17 on page 32 of Mr. Lenzini's brief. The success ratio in '74, non-residents succeeded on 15 percent of their elk licenses, compared with 11 percent success ratio for residents.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:02 o'clock a.m., the case in the above-entitled matter was submitted.]

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