

O. REV. STAT. §
43.190 (2017)“(The members of the patrol ..are hereby declared to be officers of the state of
Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the

This Article begins with a discussion of the history of wildlife regulation in the United States and Missouri.⁷ The historical perspective is necessary to identify the 'special needs' and 'primary purpose' behind a government action and ultimately to evaluate the reasonableness of a government action in the context of the Fourth Amendment.⁸ The Article then discusses current regulatory structure and procedures in Missouri related to the enforcement of fish and wildlife related laws.⁹ Finally, it discusses and analyzes the constitutionality of the enforcement procedures, specifically search and seizure procedures associated with the enforcement of Missouri fish and wildlife related laws.¹⁰

I. A HISTORY OF FISH AND WILDLIFE REGULATION IN THE UNITED STATES

In the same way that England is the source of our legal system, the origins of wildlife regulation in the United States has its origins in English¹ law. In medieval England, the king was the ultimate owner of all land and also the head of government.² The king was owner of all wild game in the realm and had the

Connecticut law that allowed game birds lawfully killed within the state to be sold within the state but prohibited the transport and sale of these birds outside the borders of the state.²¹ This discriminated overtly against interstate commerce, but the Court reasoned the state owned the game birds while they were in the wild and had “all power to decide who could take them and when,” including the precise property rights the hunter obtained upon capture.²² In 1979, the Supreme Court expressly overruled *Geer* in *Hughes v. Oklahoma*, when it struck down an Oklahoma law that prohibited the export of minnows taken from the wild.²³ The Court found the law was contrary to the Commerce Clause of the U.S. Constitution, and held the federal power to regulate interstate shipments of wildlife precluded states from banning interstate shipments of wildlife.²⁴

antelope had migrated west.³² At the same time, turkeys were so abundant to

Law.”⁴⁵ The law authorized the sale of hunting and fishing licenses and provided funding for a staff of wardens.⁴⁶ For the first time in Missouri, the law gave statutory recognition to the common law principle that wildlife belongs to the state.⁴⁷ It also established open and closed seasons for most game species, and it prohibited the sale and commercial transportation of game.⁴⁸ The law became the basis of Missouri’s fish and game laws until 1936.

Despite the Walmsley Law, wildlife populations continued to decline.⁴⁹ By 1934, market hunting had exploited wildlife populations to the degree it was estimated that less than 100 grouse, approximately 2,000 deer, 3,500 wild turkey, and 100 beaver remained in the state.⁵⁰ The citizens of Missouri sought change to restore fish and wildlife populations in Missouri.⁵¹ In 1935, a constitutional amendment aimed at wildlife conservation was drafted by sportsmen and placed on a ballot through the Missouri constitution’s referendum and petition process.⁵² The citizens of Missouri voted on the

the advice and consent of the senate, not more than two of whom shall be of the same political party.⁵⁶

Other provisions in article IV establish the Commission's rule making authority, repeal any laws which are inconsistent with regulations of the Commission, and grant the legislature the authority to enact laws in support of the regulations of the Commission.⁵⁷

In *Marsh v. Bartlett*,⁵⁸ the Missouri Supreme Court upheld the authority of the Commission to regulate fish and wildlife when an angler was convicted of violating a fishing statute which conflicted with the regulations of the Commission.⁵⁸ The court found the validity of the constitutional provisions granting authority to the Commission to be absolute in relation to the power to regulate and control game and fish within the state.⁵⁹ While the Commission has the exclu.3 (d816.h5 (0th)6. a.2 (u)td816.h.3 (h)o3 (h)r (53 (d816.ht(of)-6.1 0y)11.4 (t)4o (f)4-4.2

The statutes related to fish and wildlife, and the regulations enacted by the Conservation Commission pursuant to its constitutional authority, provide the framework for regulating hunting, fishing, and other uses of wildlife in Missouri.⁶⁷

B. Law Enforcement Procedures Used by Conservation Agents to Enforce Regulations

Conservation agents conduct routine stops and searches, without suspicion of any criminal wrongdoing, of persons engaged in fish and wildlife related activities: hunting, fishing, trapping, and the commercial uses of fish and wildlife. This has been the consistent method of enforcement throughout the history of Missouri.⁶⁸ During fiscal year 2015, conservation agents contacted 178,828 hunters and anglers to ensure compliance with the Wildlife Code. During these contacts, conservation agents uncovered 25,245 violations, which resulted in 7,066 arrests.⁶⁹

IV. CONSTITUTIONAL IMPLICATIONS OF INSPECTION PROCEDURES RELATED TO ENFORCING REGULATIONS GOVERNING HUNTING, FISHING, AND OTHER USES OF FISH AND WILDLIFE

There has been very little guidance from the state and federal judiciaries on the constitutional implications of the fish and wildlife related inspections conducted by conservation agents in Missouri. Aside from a brief mention in the concurring opinion in *Delaware v. Prouse*,⁷⁰ the Supreme Court has remained silent on the matter.⁷¹ The Eighth Circuit has not delivered an opinion, and other than the 1926 Missouri Supreme Court decision in *State v. Bennett*,⁷² Missouri courts have been silent. In *Bennett*, the court upheld the constitutionality of the statute requiring a hunter to permit the game commissioner or his deputies to inspect and count the fish, birds, animals, and game in his possession to determine their legality.⁷³ However, this decision was prior to the creation of the Missouri Conservation Commission and the current framework for regulating fish and wildlife resources in Missouri.⁷⁴ It was also prior to the Supreme

67. MO. CODE REGS. tit. 3, § 104.105 ("The rules of the Conservation Commission and statutory laws not inconsistent therewith shall constitute the Wildlife Code of Missouri. . .").

68. See generally Gene W. Arras, *The Theory and Enforcement of Wildlife Conservation*, 33 LOUIS. B. J., Summer 1967, at 37; George J. Pruneau, *Anatomy of a Missouri Conservation Agent* 23 J. MO. B., Jan. 1967, at 301.

69. Missouri Department of Conservation Annual Report ANN. REV., July 2014-June 2015 at 4.

70. *Id.*

71. 440 U.S. 648, 664 (1979) (Blackmun, J., concurring).

72. 288 S.W. 50, 51 (Mo. 1926).

73. *Id.* at 53.

74. See *supra* Parts II, III.

found an unlawful search occurred when a conservation officer entered an ice fishing house without a warrant, permission, probable cause, or other justification for the purpose of inspecting the number of fishing lines being used by the angler inside.¹⁰²

VI. THE CONSTITUTIONALITY OF FISH AND WILDLIFE RELATED INSPECTIONS IN MISSOURI

In *Delaware v. Prouse*,¹⁰³ the U.S. Supreme Court provides its only mention of the permissibility of inspections conducted by game wardens, wildlife officers, and conservation agents.¹⁰⁴ In *Prouse*, the officer stopped a motorist on a public roadway to check and see if he was properly licensed to operate a motor vehicle.¹⁰⁴ The Court concluded that motorists could not be randomly stopped for the officer to inspect a driver's license, and at a minimum, reasonable suspicion of criminal activity was required for the stop to be constitutional.¹⁰⁵ At first glance, this seems to cast doubt on the constitutionality of inspections conducted by conservation agents and other wildlife officers around the country.¹⁰⁶

laws.¹²⁶ In *State v. Keehn*, the Supreme Court of Iowa extended this analysis to the context of a vehicle stop conducted by an officer to conduct an inspection of an occupant who the officer reasonably believed was hunting.¹²⁷ *Id.* 5.3 a

limit the scope of the inspection to inquiries related to licenses, hunting or fishing equipment, and wildlife in the individual's possession.¹³⁹

As for the subjective component, conservation agents make contacts with citizens while wearing a distinctive uniform and patrol in vehicles marked with the insignia of the Missouri Department of Conservation. As the *Keebler* acknowledged, Iowa law requires those who engage in the act of hunting to display a license.

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exercising the privilege of using the public roads, the motorist has impliedly

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pervasive history of regulation.¹⁸² The Court recognized the need to conduct surprise inspections of these closely regulated industries to advance the regulatory scheme.¹⁸³ In *Donovan v. Dewey*,¹⁸⁴ the Court extended the warrantless administrative search exception to the coal mining industry, an industry which did not have a long history of pervasive regulation.¹⁸⁵ The Court reasoned that so long as the business was subject to comprehensive regulations, administrative agencies could perform warrantless inspections without any suspicion of a violation.¹⁸⁶ In *New York v. Burger*,¹⁸⁷ the Supreme Court established the current constitutional standards for

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Similar rationale is applicable to warrantless administrative inspections conducted by conservation agents. Missouri has enacted a comprehensive regulatory scheme aimed at preserving the fish and wildlife resources of the state.¹⁹⁰ Regulations are prescribed for a wide variety of activities related to the ta

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(authorized agents of the Conservation Commission, sheriffs, ~~marshals~~), gives notice of the specific places or items which may be inspected without a warrant, ~~and~~ the locations or items where a warrant is specifically required.¹⁹⁸ The regulation limits the inspections to times when a person is possessing, taking, transporting, or using wildlife; and the scope of the inspection is limited to permits, wildlife, and de

state.²⁰⁶ As wildlife populations declined, commercial harvest methods and sale of wildlife were abolished or strictly regulated.²⁰⁷ Today, wildlife regulations allow extremely limited commercialization by holders of sport permits, and business entities utilizing fish or wildlife as part of their enterprise are closely regulated.²⁰⁸ Based upon the historical uses and regulation of wildlife in Missouri, hunting, fishing, and other uses of wildlife are highly regulated activities which fall within the administrative inspection exception to the warrant requirement.

CONCLUSION

As Bryan Mull correctly notes: it appears fruitless to contend that the warden's suspicionless searches are unconstitutional.²⁰⁹ State and lower federal courts have upheld the majority of administrative game warden searches.²⁰⁹ Missouri has a rich history of protecting and conserving its fish and wildlife resources, and the citizens of the state have developed a regulatory framework that strongly favors protecting them.

Although history demonstrates a strong commitment to protecting Missouri's fish and wildlife resources by the citizens of the state, this must be done without infringing on the Fourth Amendment rights of those who hunt, fish, and utilize the wildlife resources of the state. While an argument to the contrary can be made that there is a lower standard for interactions between conservation agents and hunters and anglers,²¹⁰ the analysis indicates that the applicable laws and enforcement procedures exercised by conservation agents are within the traditional scope of police activities permitted by the Fourth Amendment.²¹³

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seizures conducted by conservation agents do not offend the Fourth Amendment.²¹⁵

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215. See *supra* Part VI.

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