

Public Ownership of Texas' White-Tailed Deer Re-Affirmed

Matt Wyatt – Texas Sports Nation



The Texas Supreme Court recently denied review of an appeal in the case of Bailey & Peterson v. Texas Parks and Wildlife Department, affirming that the state's white-tailed deer herd, including those held by breeders, are owned by the public.

“The Texas Supreme Court has ruled in favor of the Texas Parks and Wildlife Department in the litigation brought by two deer breeders against TPWD, Carter Smith, Clayton Wolf, and Mitch Lockwood challenging TPWD's chronic wasting disease rules for deer breeders and seeking a declaration that breeder deer are private property. The Texas Supreme Court summarily rejected without oral argument the deer breeder's request to appeal the opinion of the Third Court of Appeals that previously ruled in favor of TPWD,” TPWD said in a statement.

“This ruling effectively confirms the decision of the Third Court of Appeals that deer breeders have no private property rights in the breeder deer they are allowed to possess under a deer breeder's permit, that TPWD's CWD rules are valid, and upholds the award of more than \$426,000 in attorney's fees to TPWD.”

In 2017, the 98th District Court's summary judgement ruled in favor of TPWD in a lawsuit brought by two deer breeders, Ken Bailey and Bradley Peterson, who sought to declare a legal difference between “wild” and “breeder” deer and that the latter were private property. The deer breeders also claimed TPWD officials acted ultra vires by inhibiting their business with chronic wasting disease testing and regulations that restrict the transport of deer.

Peterson appealed the trial court's decision and the Third Court of Appeals affirmed. The Supreme Court effectively put an end to the years-long litigation battle this month.

“The Supreme Court, by denying review, has made it clear that the Third Court and trial court decision is the law,” said Joseph Fitzsimons, whose law firm filed an amicus curiae in support of TPWD on behalf of the Texas Wildlife Association and several other partners, including Boone and Crockett Club, National Wild Turkey Federation and Coastal Conservation Association Texas.

“The trial court and appellate court affirmed existing law, which is the North American Model and Public Trust Doctrine are law from really the time of the founding of the United States. We were not going to follow the rule of the English king, that wildlife was his property.

We made it clear that wildlife is public trust and this just reaffirms this simple concept of a public trust of wildlife.”

The North American Model of Conservation is the template for wildlife management in the U.S. Its seven principles have shaped regulatory framework for wildlife in this country for over a century.

The leading tenet is this: Wildlife resources are a public trust.

The Texas Constitution and the Texas Parks and Wildlife Code also hold that wildlife are owned by the state’s citizens.

Section 1.011 of the Texas Parks and Wildlife Code states “all wild animals, fur-bearing animals, wild birds, and wild fowl inside the borders of this state are the property of the people of this state.”

The trial court’s ruling and result of subsequent appeals ensure that white-tailed deer remain in public trust with the state and that TPWD has the power to protect the state’s white-tailed deer herd from its greatest threat, CWD.

CWD is a neurological disease that affects cervids like whitetails, mule deer, elk and red stag. It is always fatal and has no cure. Eradication is considered impossible once the disease becomes established. Symptoms include drooling, listlessness, weakness, lack of mobility, and excessive thirst and urination. The disease is caused by prions, or misfolded proteins, that inflict

brain damage. Those prions can be transmitted through blood, urine and saliva, nose-to-nose contact, or can be spread through environmental contamination in soil, food and water. CWD does not appear to affect domestic animals and there is currently “no strong evidence” that it can occur in humans, according to the Centers for Disease Control and Prevention. It is advised, however, to avoid consuming meat infected with CWD.

CWD was first detected in Texas whitetails at a breeding facility in Medina County in 2015, which prompted a CWD management plan from TPWD and subsequent tightening of restrictions on deer breeders, a growing multi-billion-dollar industry that has created thousands of jobs in the state.

Among other regulations, breeding facilities raising whitetails or mule deer are required to test 80 percent of adult mortalities in order to maintain compliant status, as well as requisite testing for live deer. Breeding facilities cannot move deer without meeting minimum requirements.

Most of the deer that have tested positive for the disease in the state are from breeder sites. A new CWD zone has been set up in Kimble County for this year’s deer season after a positive test at a breeding facility. It was the first instance of CWD in the county.

The result of *Bailey & Peterson v TPWD* allows the department to continue to protect the state’s white-tailed deer from this incurable disease and maintains the natural resource as property of the people.

“I think it was a great day for professional wildlife managers,” Fitzsimons said.

