

May 18, 2004

Mr. Jeffrey L. Gunderson
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RE: Minnow laws and the Commerce Clause

Dear Jeff:

It was great to meet you at the Sea Grant Marine Extension Program Leaders' Assembly Meeting in Jekyll Island this past April. It is a pleasure to get to know Sea Grant people from other parts of the country and to hear about the interesting issues they confront.

At the meeting, and later by email, you and I discussed some questions about Minnesota and Wisconsin laws regulating the sale and transportation of bait minnows. This letter contains the results of my research into your questions. Because the Sea Grant Law Center and the Minnesota Sea Grant College Program do not have an attorney-client relationship, this letter is for informational purposes only and should not be considered formal legal advice.

First, let me compliment you on the outstanding job you did of stating your four questions in your May 5 email. Your precision helps to ensure an accurate response, and also makes my job considerably easier than it might otherwise be.

As you suspected, your questions relate to the commerce clause of the U.S. Constitution. The commerce clause invests Congress with the power to regulate commerce "among the several States." The negative implication of the commerce clause is that states do *not* have the power to regulate interstate commerce because Congress' power in that arena is exclusive. States are generally barred from regulating even when Congress has not regulated. This negative aspect of the commerce clause is commonly referred to as the "dormant commerce clause," and it is the primary restriction on the power of states to enact laws and regulations that would normally be within their legislative powers but that impermissibly burden interstate commerce.

Question 1: Can Minnesota legally ban the importation of minnows?

Minnesota Statutes § 97C.515 makes it illegal to bring live minnows into the state, with four exceptions: (1) a person may transport minnows through the state with a permit, (2) a person may bring live minnows into the state for use in home aquariums, (3) a person with a private fish hatchery or aquatic farm license may transport minnows from contiguous states to the hatchery or aquatic farm, for the sole purposes of processing or feeding hatchery fish, and (4) a person with a private fish hatchery license may import minnows for export, with a special permit. There is no exception for importing live minnows to use as bait, so the general prohibition applies. There is

no prohibition on the sale or use for bait of live minnows from Minnesota. On its face, the Minnesota statute discriminates against commerce in out-of-state live minnows; this situation implicates the dormant commerce clause.

Under the U.S. Supreme Court's dormant commerce clause decisions, a state statute that facially discriminates against interstate commerce is unconstitutional unless the state is able to show that two conditions are met: (1) the statute serves a legitimate state purpose, and (2) the purpose is one that cannot be served as well by available nondiscriminatory means.

In *Maine v. Taylor* the Court applied this rule and upheld a Maine statute that completely banned the importation of live baitfish into the state. The legitimate purpose served by the ban was protection against two ecological threats: "First, Maine's population of wild fish... would be placed at risk by three types of parasites prevalent in out-of-state baitfish, but not common to wild fish in Maine. Second, nonnative species inadvertently included in shipments of live baitfish could disturb Maine's aquatic ecology to an unpredictable extent by competing with native fish for food or habitat, by preying on native species, or by disrupting the environment in more subtle ways." Maine was able to satisfy the second necessary condition by showing at trial that there was no scientifically accepted method of inspecting shipments of live baitfish for parasites or commingled species. An outright ban on imported baitfish was the only means available of serving the legitimate state purpose, so the Maine statute was constitutional.

The situation in Minnesota differs in some important respects. First, Maine's ban on imported baitfish was total, while Minnesota allows out-of-state minnows into the state under the four statutory exceptions. In your email you said that the rationale of Minnesota's ban is "to prevent the introduction of aquatic invasive species, parasites, and pathogens that might hitch a ride with baitfish." This is unquestionably a legitimate purpose for Minnesota, as it was for Maine, but in my opinion the statutory exceptions undermine this claimed rationale because they provide a legal conduit into the state for the noxious species, parasites, and pathogens. It is not difficult to imagine those species, parasites, and pathogens finding their way to state waters from home aquariums or private fish hatcheries once they have made it across the state line. An example will help illustrate my point. As you are probably aware, the lakes and streams of Maryland have been invaded by the highly destructive, nonnative northern snakehead. According to the state the invasion began when a man brought two fish from New York City to use in a soup for his sister; he never made the soup, and dumped the fish in a Maryland stream.

Of course, no law can completely prevent such occurrences (it was, in fact, illegal to introduce non-native fish into Maryland waters at the time). The exceptions to the Minnesota ban, though, make it appear less likely that the rationale for the ban is entirely ecological. Indeed, you noted that the original purpose of the ban may have been economic protectionism, which is unconstitutional. Although the law's original purpose may have been invalid, the law could nonetheless be permissible now if there is currently a valid purpose for it. Ecological protection is a valid purpose, but I believe the exceptions to the law make it vulnerable to attack on the grounds that the ecological rationale merely masks an economic motive. The ecological rationale would be much more plausible if the ban on out-of-state live minnows were total, like the Maine

ban.

A total ban would probably solve one dormant commerce clause problem by making it less likely that the valid ecological motive is a pretext for an invalid economic motive. The first constitutional condition - legitimate state purpose - would be met. A problem remains with the second condition: could the ecological purpose of the ban be served by nondiscriminatory means? In other words, could invasive species, parasites, and pathogens be kept out of Minnesota just as effectively while out-of-state baitfish are allowed in? I think the answer to this question depends largely on whether there is a scientifically accepted method of inspecting shipments of live baitfish for invasive species, parasites, and pathogens. The fact that there was no such method for baitfish in the 1980s is essential to the holding in *Maine v. Taylor*. If such a method is currently available to Minnesota then the ban may be unconstitutional.

Even if such a method is not currently available, the ban is not necessarily constitutional. State laws that burden interstate commerce rarely survive constitutional attack; *Maine v. Taylor* is unusual in that respect, and the result in that case depends on some unusual facts that may differ from the situation in Minnesota. First, as noted above, there was no acceptable inspection method available to Maine at the time. This may or may not be the case in Minnesota in 2004. Second, Maine was able to show that there were specific parasites of concern that were common to out-of-state baitfish but uncommon in native baitfish, and that its fisheries are “unique and unusually fragile.” This showing helped convince the Court that the discrimination was not arbitrary. Minnesota should be prepared to show that there are specific species, parasites, or pathogens that are common in baitfish shipments from, for example, Wisconsin, but uncommon in Minnesota waters. In addition, Minnesota should be able to show that these organisms are not likely to be transported into the state in other ways, such as in legal shipments of other types of fish. Singling out baitfish shipments for prohibition when the noxious organisms legally enter the state in other ways would strongly indicate unconstitutional protectionist intent behind the ban.

In summary, the answer to your first question depends on whether the ban has a legitimate state purpose that cannot be served by nondiscriminatory means. To answer that question, I think it would be helpful to answer the following (non-exclusive) list of questions:

1. Is there a scientifically accepted method of inspecting shipments of live baitfish for invasive species, parasites, and pathogens available to Minnesota? If there is, Minnesota may be obligated to use it so that it can stop discriminating against interstate commerce in baitfish.
2. Are the noxious organisms uncommon in Minnesota waters? If so, that fact would support Minnesota’s ecological rationale.
3. Are the noxious organisms more common in shipments of out-of-state baitfish than they are in Minnesota waters? Again, if so, that fact would support Minnesota’s ecological rationale.
4. Do the noxious organisms enter the state in other, legal ways, such as by swimming from neighboring states’ waters (perhaps via Lake Superior) or in shipments of other types of fish? If so, that fact would indicate that the baitfish regulations are arbitrary and possibly a mask for economic protectionism.
5. Is there reason for the state to believe that noxious organisms in baitfish shipments that legally

enter the state under the four statutory exceptions will not enter state waters? If not, that fact would indicate that it is arbitrary for the state to allow baitfish across state lines for some purposes but not others.

It may be beneficial for the state and/or Minnesota Sea Grant to answer these questions so that, if necessary, the out-of-state baitfish ban can be defended against a constitutional challenge. If the answers to these questions indicate that the statute's ecological rationale is only a pretext for economic protection, then the state legislature should perhaps consider changing the statute to cure the constitutional defect.

Question 2: Can Minnesota require persons transporting minnows through the state to obtain permits?

Minnesota Statutes § 97C.515, subd. 2 requires persons transporting minnows through the state to obtain a permit from the Commissioner of Natural Resources. The permit must include the person's name and address, the number and species of minnows, the point of entry into the state, the destination, and the route through the state, and is valid for no more than twelve hours after issuance. This statute concerns interstate commerce and therefore implicates the commerce clause.

In December 2003 the Minnesota Court of Appeals, in *State v. Kolla*, held that this statute does not violate the dormant commerce clause. In *Kolla* the defendant, an Ohio baitfish transporter, purchased minnows in South Dakota, took on more minnows in Minnesota, and transported all of the minnows out of state. He was charged with several statutory violations, including failure to obtain a twelve-hour permit under § 97C.515, subd. 2.

The court observed that the twelve-hour permit requirement, unlike the general prohibition on out-of-state baitfish discussed above, does not facially discriminate against interstate commerce; Minnesotans and non-Minnesotans alike must obtain twelve-hour permits to move baitfish through the state. Non-facially discriminatory statutes are subject to the more lenient standard of review announced by the U.S. Supreme Court in *Pike v. Bruce Church, Inc.*: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." The Minnesota court found the legitimate state interest to be essentially the same ecological protection to which you referred in your email. The court went on to conclude that the negligible burden of obtaining a free permit was outweighed by the "significant" benefit to the state of regulating minnow transport for ecological reasons. Under the *Pike* balancing test, then, the twelve-hour permit requirement was judged constitutional. Barring reversal by a higher court, this decision is controlling precedent in Minnesota.

Few judicial opinions are unassailable, however, and this one is no exception. The first weak point is the "legitimate interest" element of the *Pike* analysis. The court notes that "[t]here is

ample and undisputed evidence in the record of the state's strong interest in regulating the transport of minnows" for ecological reasons. Apparently the defendant in *Kolla* did not bother to dispute this point, but a future defendant might be more diligent. Considering that "[e]veryone agrees" that the law's original purpose was economic protection, it is not inconceivable that a defendant could show that the state's claimed ecological purpose is a pretext. In addition, the court declares that "the demonstrated benefit to the state [from the statute] is significant" but cites no evidence to support that conclusion. If the benefit is not really significant, then the *Pike* balancing test could come out differently even if the state were found to have a legitimate purpose for the statute. Practically speaking, these weaknesses are probably minor but I think they bear mentioning.

In summary, the answer to your second question is "yes" in Minnesota, unless *Kolla* is overruled. The answer is probably "yes" for other jurisdictions as long as the statute truly has a legitimate purpose and its benefits outweigh the burden of the permit requirement.

Question 3: Can Minnesota charge non-residents more than residents to transport baitfish through the state or to export baitfish?

The Minnesota Court of Appeals made clear in *Kolla* that the answer to this question is "no." Prior to that decision, non-residents had to pay higher fees than residents to export Minnesota minnows. That is no longer the case. The *Kolla* court held that the non-resident minnow hauler license requirement was unconstitutional and struck it altogether. On May 15, 2004 the Minnesota legislature passed a bill that changes the statute to conform to the court's decision. Residents and non-residents alike will now obtain the same minnow dealer license for the same fee. Residents and non-residents must obtain different vehicle licenses, but the fee is the same for both.

The twelve-hour permit to transport baitfish through the state remains free to any person.

Question 4: May Wisconsin legally impose a reciprocal importation ban on Minnesota baitfish, while continuing to allow baitfish importation from other states?

I suspect you are alluding to a recent bill in the Wisconsin legislature to add a section entitled "bait and fish reciprocity" to the Wisconsin statutes. The bill, S.B. 118, would prohibit commercial bait dealers from states that prohibit importation of Wisconsin bait (like Minnesota, but not limited to Minnesota) from bringing bait into Wisconsin for sale. It would also make it illegal for someone to bring bait purchased in such a state into Wisconsin for fishing purposes. Finally, the bill authorizes the Wisconsin Department of Natural Resources to impose conditions or requirements on the transport of bait through Wisconsin that are reciprocal to those imposed by the transporter's home state. The bill failed to pass in the 2003-2004 session, but could be revived in a future session.

This bill clearly discriminates on its face against interstate commerce, and thus is subject to the two conditions discussed above: (1) the statute must serve a legitimate state purpose, and (2) the purpose must be one that cannot be served as well by available nondiscriminatory means.

I doubt very seriously that S.B. 118, if enacted, could pass constitutional muster, because its purpose is obviously retaliatory. It is based not on ecology or biology but purely on the discriminatory practices, justified or not, of other states. This is exactly the type of legislation the framers of the Constitution sought to prevent, and which the dormant commerce clause accordingly prohibits. The Wisconsin bill is repugnant to the framers' vision of "a national market free from local legislation that discriminates in favor of local interests."

Of course, as Wisconsin would argue, the same might be said of Minnesota's baitfish import ban. That is why I think a positive course of action for Minnesota to take would be to consider whether the two conditions for constitutionality of facially discriminatory laws are met, as discussed in the response to Question 1 above.

I hope this letter is useful to you. If there are any additional issues on this topic that you would like the Sea Grant Law Center to research for you, or if there is any other topic you would like us to research, please feel free to ask. Thank you for bringing your question to the Sea Grant Law Center.

Sincerely,

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