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Getting Fins Out of the Soup and Back Into the Ocean:

How the United States Can Put an End to Shark Finning

By Kari Olson

The deadly combination of the high value of shark fins and the lack of compassion toward sharks creates an unlikely future for many of the world's shark species.

There are approximately 100 million sharks killed per year primarily due to shark "finning," the process of catching live sharks, cutting off all of the fins including the tail, and throwing the body of the still living shark back into the ocean either to bleed to death or slowly asphyxiate due to their inability to swim.[1] The decline of shark populations from finning is causing a serious ecological crisis.

Federal efforts to ban shark finning through fishing industry regulations are unsuccessful, demonstrated by the decrease in shark populations, some by 90 percent in the past 15 years; and, the increase in the shark fin market, growing by as much as 5 percent per year.[2]

New legislation enacted by several states to prohibit the sale and possession of fins also is unsuccessful because states are constrained by constitutional limitations on the power to regulate commerce. Additionally, a state-by-state approach creates problems with inconsistency and enforcement. To end overexploitation and prevent mass extinction, provisions of state "fin bans" must be incorporated into current federal regulations to eliminate the market for shark fins and, thus, stop shark finning.

Sharks have existed, relatively unchanged, for more than 400 million years, but the combination of human ignorance toward the ecological value of sharks, and the ever increasing demand for products derived from their fins has led to an unlikely future for many shark species. Large shark species have traits that naturally curb exponential population growth: late maturation, long life, long generation time, small litter size, and low reproductive capacity. These limitations on population growth prevent population recovery making sharks vulnerable to extinction.[3]

NOAA agent counting confiscated shark fins.

Without full international participation, including full compliance by fisherman, these regulations will continue to fall short of ending the slaughter of sharks and the rapid rate of extinction projected for many species.

The disparity in price between the fins and the meat of the shark drives the practice of finning because it is uneconomical for fisherman to fill their boat with the body of a shark when the fins are the only valuable part. The demand for shark fins makes sharks one of the most valuable and vulnerable fish in the sea. Shark fins are currently among the world's most expensive fisheries products, selling for upwards of $700 per kilo for dried fins, and as much as $15,000 for a pair of fresh fins.[4]

Federal legislation banning the actual practice of finning at sea has not ended finning because determined fishermen continue to expose loopholes in regulations, and the open ocean creates barriers to enforcement.[5]

The Shark Conservation Act tightened regulations on finning, but did not solve the enforcement problems.[6] Jurisdiction is limited to finning that occurs on American vessels in American waters. Finning is not illegal in all parts of the ocean and is not illegal for all species of shark. Therefore, countries that refuse to comply with U.S. regulations can continue to fin sharks. Once the fins are on land, there is no way to determine whether the fins were obtained legally or illegally. Without full international participation, including full compliance by fisherman, these regulations will continue to fall short of ending the slaughter of sharks and the rapid rate of extinction projected for many species. Endangered Species Act listing and other protective legislation are equally ineffective due to difficulties in collecting accurate population counts.[7]

Several states now have legislation prohibiting the trade, sale, and possession of shark fins, which prohibits the trade of shark fins in an effort to eliminate the market for fins and therefore eliminate the economic drive of shark finning, something federal legislation has failed to accomplish.[8] Although prohibiting the trade of fins on land is likely the solution to shark finning, state legislation is not an appropriate solution because of the inconsistencies and enforcement problems, and the constitutional issues with states regulating commerce. A pending case in the federal district court of California raises the constitutionality of state bans by calling into question their infringement upon the Commerce Clause.[9]

Continued on page 9

All the Pretty Horses, and Where They Go

By Julia Jarvis

The Wild and Free-Roaming Horses and Burros Act of 1971[1], was passed into law by Congress to preserve these animals literally as "living symbols of the historic and pioneer spirit of the West." But like other iconographic portrayals of the West, there exists a shadow side. The Bureau of Land Management manages wild horses and burros through controversial roundups, and this practice has resulted in more wild horses and burros living in captivity than in wild herds, with some potentially ending up on slaughterhouse kill floors.

By BLM estimates, there are approximately 49,000 captive wild horses and burros housed in short-term and long-term pastures, and 40,600 living in herds on their original range. A majority of the long-term pastures are located on privately owned rangelands in Kansas and Oklahoma, where the horses are separated into herds of mares and geldings. This system of housing captive wild populations now dominates the BLM's budget and accounted for 59.3 percent of its appropriations in 2012 for the management of wild horses and burros, with a taxpayer price tag of $43 million.

The BLM announced it wants to reduce wild equine numbers by about one-third, down to what it determines is an "appropriate management level" at around 26,700, so it is expected that the roundup program will continue in coming years with captive populations increasing.

Another way the BLM has managed the wild horse population is through adopting out healthy "excess" horses and burros to "qualified individuals." For years this system helped diffuse herd population pressure, but adoption numbers have dropped with a near-contemporaneous decline in the U.S. economy, increase in hay prices, and closure of the last domestic horse slaughterhouse in 2007. BLM adoptions were at about 8,000 in 2005, but dropped to just 3,000 in 2010.

However, this adoption process has led to morbid speculation as to the fate of adopted wild horses. Specifically, speculation has been ripe for years that many of the BLM's adopted horses are purchased by "kill buyers" who adopt wild horses to turn a profit by later selling these "living symbols" to slaughter houses.

Under the Act, one year after purchase, full title of the horse is transferred to the purchaser if "the Secretary has determined the individual has provided humane conditions, treatment and care," divesting formerly protected wild horses and burros from any protection pursuant to the Act. The BLM is aware of "kill buyers" but claims that the Act protects adopted horses by pre-purchase screening and limiting a single individual to four equines per year.[2]

The 9th Circuit has ruled that the BLM cannot adopt horses to purchasers whom the BLM has specific knowledge as "kill buyers," but it did not create a duty for the BLM to investigate a purchaser's intent, nor did it limit purchases by proxy or through a power of attorney.[3] Without specific limitation on the title to these horses, there is no way to administratively account for formerly wild horses and to determine if they have or have not been systematically subject to slaughter one-year post-purchase. Therefore, without regulatory change, it is possible that wild horses will end up in a slaughterhouse in New Mexico in the near future.

One possible solution to better manage herd populations is for the BLM to adopt a comprehensive fertility control program. Proposals for gelding wild stallions were staunchly opposed in the past by wild horse advocates who argued that it would disrupt the natural wild herd dynamic perpetuated by stallions.

Another alternative is to implement the use of long-term contraceptive vaccines. The BLM is currently in its second year of a five-year program studying two variations of such a vaccine for mares called SpayVac®, which is expected to reduce foaling rates. However, even if SpayVac® leads to a viable fertility control system, it will be years until it is fully implemented and wild horse populations are expected to continue expanding in the meantime.

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Wildlife Killing Contests *in New Mexico*

By Guy Dicharry

In late October, 2012, I was made aware that a gun shop in Los Lunas (where I live) was sponsoring a "coyote calling contest." After much negative publicity, an Albuquerque gun shop had recently decided not to sponsor one of these contests, but the Los Lunas gun shop's owners were determined to hold theirs. Knowing little or nothing about this type of "contest," I decided to investigate and here is what I found out.

These "calling" contests are indiscriminate, mass killing of wildlife for entertainment, prizes, and profit.

"Calling" is provided by an electronic device that is set hundreds of yards from a shooter and mimics the sound of an animal in distress. The shooter activates the "call" via remote control and then uses a rifle and scope to shoot at any coyotes attracted by the sound. The person who kills the most coyotes wins–so a more accurate description of this event would be a killing contest. There is also a "big dog/little dog" contest within the overall contest. That's right, there is a prize for the brave soul who kills the smallest coyote.

I also found that these contests and commercial events take place all over the country, with promoters and sponsors generating revenue from their sponsorship of these atrocities. In New Mexico, at least 16 coyote killing contests and commercial events took place between November 2012 and March 2013. The promoters were all commercial entities (either for-profit or tax-exempt) who profited from this mass exploitation of public resources.[1]

In addition to the contests' misleading name, another troubling aspect was that the promoters seemed to encourage their contestants to compete on state and federal public lands. For example, the term "statewide" was used to advertise the Los Lunas gun shop's contest. Other sponsors have advertised that potential contestants will have access to "millions of acres" of public lands.

The New Mexico State Land Office, the USDA Forest Service, and the Bureau of Land Management each have rules and regulations that define and set out a procedure for commercial and competitive events taking place on public lands.[2] However, my research indicated none of the agencies had any record of a permit or lease application by any contest or event promoter for the 16 contests mentioned above.

Ray Powell, New Mexico State Land Commissioner, has remained consistent in his approach to wildlife killing contests on state trust lands: The contests are not allowed. For instance, in his Nov. 15, 2012, letter to the Los Lunas gun shop owner, Commissioner Powell stated:

"The use of non-specific, indiscriminant killing methods, such as unrestricted coyote killing contests[,] are not about hunting or sound land management. These contests are about personal profit, animal cruelty, and the severe disruption of our healthy lands. These lands support our important agricultural industry, our unique wildlife populations, and the cherished natural world we call home – New Mexico. It is time to outlaw this highly destructive activity."[3]

The Forest Service's and BLM's respective approaches to killing contests have not been as consistent as Commissioner Powell's.

After Powell's letter was made public, the Forest Service applied its special uses permit rules to the gun shop's coyote killing contest. The time frame required for the contest sponsor to apply for a SUP effectively prohibited contestants from using federal lands. Specifically, the SUP application process requires an environmental assessment, public comment, and that the proposed activity be shown to be in the public interest.

However, after the gun shop's contest in November 2012, the Forest Service found ways to accommodate commercial wildlife killing contest promoters who wanted to promote federal public lands as being available for their participants' use. I learned from Mark Chavez of the Forest Service (no relation to Mark Chavez, owner of Gunhawk Firearms) that contest and commercial event promoters and contestants can use Forest Service lands without a SUP unless the contestants actually "gather" on Forest Service lands.

According to Gilbert Zepeda, then Acting Region 3 Regional Forester, in a letter he sent me dated Feb. 5, 2013, commercial contest and event promoters must require participants to use or must direct participants to Forest Service lands before SUP rules apply. Neither of these rationales for eliminating the need to apply for a SUP can be found in the plain language of the federal SUP regulations (36 C.F.R. § 251.50, *et seq.*, LAND USES, Subpart B, Special Uses).

As for the BLM, from November 2012 until late January 2013, officials consistently interpreted BLM rules as requiring any killing contest sponsor to apply for a Special Recreation Permit, as articulated in the following excerpt of an email I obtained under the Freedom of Information Act.[4]

> "…[T]hese kind of predatory shooting events and competitions have been outlawed by the NM Land Commissioner[.] I also have gotten a strong signal from management–to which I wholly agree–that [BLM] New Mexico would likely deny any application for competitive and/or commercial coyote hunts based primarily on the level of public controversy, public interest served, our inability to measurably manage and monitor such proposed use, and public safety[.]"
> *Roger Jaggers, BLM New Mexico, Outdoor Recreation Planner, 12/10/2012, to BLM New Mexico officials.*

BLM New Mexico officials were acutely aware that treating commercial killing contest promoters differently than outfitters, for example and as discussed in the email excerpt below, would be seen as unacceptable due to factors such as a requirement for liability insurance and indemnification of the United States.

> " . . . to let this activity [Gunhawk Firearms Contest] go without an SRP would be spitting in the eye of our permitted big game hunters—who have to have liability insurance and the whole ball of wax. ... [N]otwithstanding that if a coyote hunter happened to injure anyone on BLM, we could get sued back to the stoneage...although we can all agree the risk is not real high."
> *Roger Jaggers, BLM New Mexico, Outdoor Recreation Planner, 11/08/2012, to BLM officials*

Unfortunately, in late January 2013, the BLM Washington Office stepped in by identifying a process to waive the SRP requirement.

> "Hi All, Jesse and I were on the phone with the WO [BLM Washington Office] rec shop this morning and after discussion and going thru the CFR we may have found a process to waive requiring a permit. You can check the waivers out in 43 CFR chapter 11 section 2932.12**.** The WO office is preparing a letter in response to the person who keeps informing us of the hunts so when that it comes out we will use their verbage for our guys. In the meantime play it close and you may let any active applicants know that something will be coming along so don't spend any money on EA's [environmental assessments] or insurance or whatever."
> *William Merhege, BLM New Mexico, Deputy State Director, Resources, 01/22/2013, to BLM New Mexico officials*

BLM has applied the waiver provision to commercial killing contest promoters and commercial event sponsors. That action, however, is at odds with BLM's handbook for SRPs which requires an SRP if an event requires insurance.[5] *See also,* BLM Recreation Permit Administration Handbook, No. H-2930-1, pp. 13 – 14.

Soon a new wildlife killing contest season will start across the United States. I know of at least two contests sponsored by businesses in Valencia County. It seems clear that the Forest Service and BLM will continue to allow the promoters of these commercial wildlife killing competitions to circumvent special uses regulations. Those regulations were derived from procedures in the National Environmental Policy Act, signed into law in 1969.

This situation leaves wildlife legal advocates few, if any, means of persuading these federal agencies to enforce their rules equitably for *all* commercial users of federal public lands. Based on my conversations and communications with Forest Service and BLM officials over the past several months, I see no other option than litigation. ■

Endnotes

[1] Visit the Facebook page "Stop Coyote Killing Contests New Mexico" for specific information about contests going back to October 2012.

[2] *See*, New Mexico State Land Office - Commercial Leases, NMAC 19.2.9.6, et seq; BLM - Special Recreation Permits, 43 C.F.R. § 2930, et seq; USDA Forest Service - Special Uses Permits; 36 C.F.R. §251.50, et seq.

[3] Letter, Ray Powell, Jr. to Mark Chavez, owner of Gunhawk Firearms, November 15, 2012.

[4] The FOIA request yielded hundreds of pages of BLM internal emails regarding wildlife killing contests and commercial wildlife killing events. Contact the author for a CD-ROM containing the documents.

[5] For example, BLM requires hiking groups, school groups, jeep tour operators to apply for an SRP and provide proof of liability insurance.

Guy Dicharry, Esq., is a New Mexico attorney and former ER nurse. For 20 years he represented patients in medical malpractice cases. He now wishes he could fly-fish more, but he intends to keep working on wildlife legal issues.

All the Pretty Horses *Continued from page 4*

This article only touches on a few of the issues surrounding the maintenance of wild horses in the U.S. The reality is that current practices are unsustainable. The Act was well intended, but as it is currently implemented, it does not adequately protect wild horse herds or their captive members. ■

Endnotes

[1] 16 U.S.C § 1331 *et seq.* (2012).

[2] See *Animal Protection Institute v. Hodel*, 860 F.2d 920 (9th Cir. 1988).

[3] *Id.*

Julia Jarvis, a member of the State Bar of New Mexico since 2005, is a board member of the Animal Law Section. She is currently pursuing a masters of science degree in clinical/counseling psychology from New Mexico Highlands University, and is guardian to two horses, Riata and Mac.

Tort Liability of Persons Who Feed and Water Wildlife on Their Property

By Dave Reynolds

The ongoing drought in New Mexico, and the obvious stress it has placed on our wildlife, has caused many homeowners in our more rural residential communities to use their property to provide watering and feeding stations for wildlife and free-roaming horses. By attracting animals into the area, these property owners, well-meaning as they might be, often impact the property of others and affect the community in general, through such things as broken fences, creation of trails and erosion, damage to archaeological sites, animals on roadways, and encounters with humans. When confronting complaints about their activities, these individuals will often respond that they have no control over, and no responsibility for, what wild animals do, and that they can do what they want with their own property, without concern for how that might affect others.

New Mexico law is not fully developed on this matter. However, tort principles recognized by the state, when viewed in light of case law from other jurisdictions, suggest that New Mexico property owners are likely incurring potential tort liability under negligence and nuisance theories when they feed and water wildlife on their property.

The common-law doctrine of *ferae naturae* holds that there is no liability for the independent acts of indigenous wild animals naturally located on a defendant's property.[1] However, that safe harbor does not apply where the defendant contributes to the presence of the animals on the property, such as by feeding, watering, or sheltering them. Thus, the doctrine has not been historically applied so as to alter the traditional analysis of a negligence claim.[2] In short, the wild, indigenous nature of the animals involved does not absolve a defendant property owner from liability if the defendant has contributed to the animals' presence on the property.

Under common law, a property owner must use his or her property in such a way that others are not injured. *Andrews v. Andrews,*[3] illustrates this principle. The plaintiffs and defendant owned adjoining agricultural properties. The defendant had constructed an artificial pond on his property, a short distance from the plaintiffs' property, to attract wild geese. The defendant also maintained lame geese on the pond to act as live decoys for the wild geese. A vast number of geese were attracted to the pond, which they used as a base from which to raid the plaintiffs' crops. The plaintiffs brought an action in private nuisance. The Supreme Court of North Carolina reversed the trial court's dismissal of the case, and reinstated the plaintiffs' cause of action for nuisance, reasoning:

> While careful search fails to reveal a case based on similar facts, the application of well-established legal principles offers some help in pointing the way to a solution of the legal problem presented. The plaintiffs call to their aid an ancient maxim handed down to us from the time when Latin was the language of the court: *Sic utere tuo ut alienum non laedas*, (to use your own so that you do not injure another). The law makes it a private nuisance when one by an improper use of his property does injury to the land, property, or rights of another.[4]

The court went on to hold that while the same act may constitute both negligence and nuisance, a nuisance may be created or maintained without negligence. The court concluded that the plaintiffs' complaint, when liberally construed, stated a cause of action for nuisance, and concluded with the observation that whether the plaintiffs "can offer proof to support the allegations of the complaint will present a problem for another day and another tribunal."[5]

New Mexico case law is consistent with *Andrews*, to the extent that it holds that a property owner's liability may extend beyond the physical boundaries of the property. Thus, when the issue reaches New Mexico's appellate courts, the courts likely will hold that damages caused off a property owner's property by wildlife attracted to the area as a result of the property owner's conduct are recoverable under theories of negligence and public or private nuisance.

Bober v. NM State Fair,[6] supports that view. The plaintiff was driving past the fairgrounds in Albuquerque as traffic was exiting after a rock concert, and was struck by someone leaving the concert. Bringing a claim under the Tort Claim Act, she alleged that the fair's traffic control after the concert was inadequate and that this constituted negligent operation of a facility. The district court dismissed her claim, noting that the accident did not occur on the state fair's property, and that the state fair could not be held liable for an off-premises accident.

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A Walk on the Wild Side:
Civics Education and the Wild Friends Program

By Susan George

It's a chilly February pre-dawn morning, and several 7th grade students and their teacher stand huddled together, laughing as they watch their breath and wait for the train that will take them to Santa Fe. The students are part of a program called Wild Friends, a unique, award-winning program housed at the UNM School of Law for more than 20 years. The civics education program works with students across New Mexico in grades 4-12, using wildlife conservation as a tool to teach students about the New Mexico legislature in action.

On this February morning, the middle school students are scheduled to testify before the Senate Rules Committee, which will hear testimony on the memorial that the students have drafted, SM 11, to expand the use of wildlife safety zones across the state. The students will advocate for additional such safety zones,, which use flashing lights, traffic signs and trimmed vegetation to increase driver awareness and reduce wildlife-vehicle collisions.

The students, dressed in their turquoise Wild Friends T-shirts, have prepared written testimony that they will present to the committee as expert witnesses. On the train, the students practice their testimony, and attorneys from the UNM School of Law work with them to hone their presentations, ask questions that the students might be given, and go over the protocol for speaking in front of a committee ("Madame Chairperson and members of the committee;" good eye contact and posture; speak loudly and clearly). The students are nervous, but clearly ready for this adventure, which began months before the legislation was introduced at the beginning of the 2013 legislative session.

The students are nervous, but clearly ready for this adventure, which began months before the legislation was introduced at the beginning of the 2013 legislative session.

During the fall, 400 students across the state voted on a wildlife topic of concern, researched their topic, and helped draft legislation to address those concerns. Along with testifying, all the students in the program travel to the Roundhouse during the session, where they speak individually with their district and other key legislators. They also write letters, craft posters, and create fact sheets that they use to convince the legislators of the need for their bill or memorial.

All their preparation paid off. The Senate Rules Committee unanimously recommended a "do pass" for SM 11, which went on to pass its remaining committee assignment and then was adopted unanimously by the full Senate. Its companion memorial, HM 1, was similarly successful. The students beamed with pride at what they had accomplished. They were truly citizens in action, knowing they can make a difference in the world. ■

Susan George is a senior attorney at the Institute of Public Law, UNM School of Law, and the director of the Wild Friends program. She is a native of New Mexico, and loves the outdoors, democracy, and youth.

Wild Friends students from Mountain Mahogany in Albuquerque gather with memorial sponsor Sen. Howie Morales during the legislative session.

Wildlife Law Without Borders

By Leigh Anne Chavez

Are New Mexico lawyers affected by wildlife law? Only if lawyers' off-duty hours do not include fishing, hunting, birdwatching, or other glorious outdoor adventure. Or we lawyers are not concerned about wildlife trafficking, a clean environment or threatened species. What few lawyers may know is that federal, state, and international laws work together to control the relationship between citizens and wildlife.

Enforceable across 178 international borders, the 1973 Convention on International Trade in Endangered Species is a treaty that protects wildlife from threatened extinction and provides legal authority for member countries to counter global illegal trafficking. Countries signing on agree to vigorously enforce all applicable laws under the treaty's principles, including enforcement actions through Interpol, and regularly tackling illegal trafficking, whether by small-scale plunderers in developing countries or by organized crime.[1] At its 2013 global conference in Bangkok, Thailand, the convention addressed the plights of apes, elephants, big cats, antelope, and sharks in countries across the globe. Without CITES, depletion of species would accelerate worldwide.

Federal laws in the U.S. are enforced by the U.S. Fish & Wildlife Service. These laws include the Endangered Species Act of 1973, the Migratory Bird Treaty, the Marine Mammal Protection Act, and specialized acts such as the Bald and Golden Eagle Act.[2] Relying heavily on law enforcement approaches, FWS acts without fanfare to arrest violators, conduct forensics, and collect data.

States are responsible for the protection of wildlife within their borders, also regulating invasive species. New Mexico Game & Fish protects intrastate animals and habitat, and legitimate hunting and fishing opportunities for all New Mexicans.

Regardless of which agency protects your jurisdiction, put away those files and enjoy the outdoors! ■

Endnotes

[1]CITES, 1973-2013 (Sept. 13, 2013), http://www.cites.org

[2]U.S. Fish & Wildlife Service (Sept. 13, 2013), http://www.fws.gov/le/pdf/factswildlifelaws.pdf

Leigh Anne Chavez received her law degree from UCLA and taught paralegals at Central New Mexico Community College in Albuquerque for 24 years. Currently, she is a National Security Studies Scholar at UNM, and surrounds herself with foster animals.

Getting Fins Out of the Soup *Continued from page 3*

Instead of relying upon individual states to enact bans on finning, a new section should be added to the Shark Conservation Act, incorporating prohibition on fin possession found in state statutes. This new section would make it unlawful for any person to possess, sell, offer for sale, trade, or distribute shark fins. This proposed section applies to fins that have been removed from the body of the shark and would supplement the current federal legislation regulating the fishing industry and prohibiting the act of finning. This new prohibition would strengthen current legislation by stopping all trade and possession of fins that may or may not have been obtained legally as the states intended, and eliminate the possible constitutional problems, and the inconsistencies between each state. This update to current legislation is a necessary step to eliminate the harmful practice and enticement of shark finning and save vulnerable populations of sharks from extinction. ■

Endnotes

[1] *The End of the Line? Global threats to sharks,* WildAid 1 (2007), http://wildaid.org/sites/default/files/resources/EndOfTheLine2007US.pdf

[2] *Stop Shark Finning Campaign Factsheet* (2012), http://www.sharktrust.org/content.asp?did=34462.

[3] *See* J.G. Maisley, *What is an 'elasmobranch'? The impact of palaeontology in understanding elasmobranch phlogeny and evolution,* 80 J. Fish Biology 918, 919, 921-922 (April 2012).

[4] *Stop Shark Finning Campaign Factsheet* (2012).

[5] *See U.S. v. Approximately 64,695 Pounds of Shark Fins*, 520 F.3d 976, 978 (9th Cir. 2008).

[6] Shark Conservation Act of 2010, Pub. L. No. 111-348 §§101-104, 124 Stat.

[7] *See Petition to List the Northeastern Pacific Population of White Shark (Carcharadon Carcharias) as Threatened or Endangered*, Oceana Center for Biological Diversity (August 10, 2012), http://oceana.org/sites/default/files/press_release/Oceana_NEPwhitesharkESApetition_8_10_12_final.pdf.

[8] *See* Haw. Rev. Stat. §188-40.5.

[9] *See Complaint, Chinatown Neighborhood Association, et.al. v. Edmund Brown, et. al.,* No. 4:12-cv-03759 (N.D. Cal. Filed July 18, 2012).

Kari Olson is a third-year law student at the University of New Mexico School of Law. Before starting law school, Olson worked as a shark biologist at the Aquarium of the Pacific in Long Beach, Calif.

Tort Liability *Continued from page 7*

On appeal, the New Mexico Supreme Court disagreed, reversing the district court's dismissal of Bober's claim. The Court noted that it had previously held that a landowner's duty to avoid creating or permitting an unsafe condition or activity is *not* limited by the physical boundaries of the landowner's property, and that the owner, occupier or possessor of land may be held liable for injuries sustained by someone beyond the boundaries of the land if those injuries proximately result from the owner's breach of duty to exercise ordinary care to avoid creating an unreasonable risk of harm to that person.[7]

The Supreme Court held that the location of the accident was not relevant to the question of whether the landowner had a duty. The extent of an existing duty of care is to be determined not with reference to physical locations, but rather with reference to the foreseeability of harm from the hazardous condition. The duty remains constant, while the conduct necessary to fulfill it varies with the circumstances.

A private nuisance is an unreasonable interference with the private use and enjoyment of land.[8]

A public nuisance is an unreasonable interference with a right common to the general public, and which is either (a) injurious to public health, safety, morals, or welfare, or (b) interferes with the exercise and enjoyment of public rights, including the right to use public property (e.g., animals on roadways; animal attacks in public areas).[9] Nuisances can be mixed, or both public and private. *Supra City of Sunland Park*.

The same conduct may constitute both negligence and a nuisance, although a nuisance may be created and maintained without negligence. *Supra Andrews.* This demonstrates that perfectly lawful conduct on one's own property may trigger liability under a nuisance theory. As explained by the Ohio Supreme Court:

> When the owner of land rightfully and lawfully does an act entirely on his own land, and by means of such act puts in action or directs a force against or upon, or that affects, another's land, without such other's consent or permission, such owner and actor is liable to such other for the damages thereby so caused the latter, and at once a cause of action accrues for such damages; and such force, if so continued, may be regarded as a continuing trespass or nuisance.[10]

Given the New Mexico Supreme Court's holding in *Bober* that negligent conduct on one's property that results in damages off the property is actionable, it is likely that the Court would be similarly receptive to a claim of nuisance based upon feeding and watering of wildlife on the defendant's property. New Mexico has recognized causes of action for both private and public nuisance and both of these causes of action could be used under appropriate facts in wildlife feeding and watering cases.

Our domestic animals, and our wildlife, mean a great deal to most of us. While concerns about animal welfare can bring out the best in humanity, they also can cause some to elevate their concerns for animals over the welfare of others. Persons whose conduct and activities attract bears, free-roaming horses, or large mammals of any type into a residential area, or into any area where the animals are likely to come into contact with people or vehicles, may have punitive damage liability. See 13-1827 NMRA (outlining types of conduct upon which a punitive damage claim or tortious conduct may be based). A review of the definitions of "malicious," "willful," "reckless," and "wanton" conduct reveals how easily conduct driven by an "animals first, humans last" mentality, such as cutting fences, leaving gates open, and drawing large animals into an area by continually providing feed and water for them, could result in punitive damage exposure.

Additionally, punitive fees may be recovered by the government in connection with a public nuisance claim.[11]

In wildlife feeding and watering cases, a count for civil conspiracy can impose joint and several liabilities for all those involved in the conspiracy. A conspiracy court, therefore, can render liable those individuals and organizations involved in organizing, encouraging, supporting, or otherwise assisting property owners in the feeding or watering operations, even if they did not actually feed or water the wildlife themselves.[12] This cases holds that to establish a claim for civil conspiracy, the plaintiff must show (1) a conspiracy between two or more individuals existed; (2) specific wrongful acts were carried out pursuant to the conspiracy; and (3) the plaintiff was damaged as a result of such acts).

Property owners who provide feed and water to wildlife, and individuals and organizations assisting them in doing so, may very well have significant liability exposure for any damages proximately caused by those activities, under theories of negligence, nuisance, and civil conspiracy. ■

Endnotes

[1] *Belhumeur v. Zilm*, 949 A.2d 162 (N.H. 2008) (holding that property owner had no duty to remove wild bees from his property when he had done nothing to attract them there).

[2] *Booth v. State*, 83 P.3d 61 (Az. App. Div. 2004), *as amended on reconsideration in part* (3/31/2004).

[3] *Andrews v. Andrews,* 88 S.E.2d 88 (N.C. 1955).

[4] *Id.* at 92.

[5] *Id.* at 93.

[6] *Bober v. NM State Fair*, 111 N.M. 644, 808 P.2d 614 (1991).

[7] *Mitchell v. C&H Transportation Co.*, 1977-NMSC-045, 90 N.M. 471, 565 P.2d 342 (1977); *Calkins v. Cox Estates*, 1990-NMSC-044, 110 N.M. 59, 792 P.2d 36 (1990).

[8] *City of Sunland Park v. Harris News, Inc.*, 2005-NMCA-128, 138 N.M. 588, 124 P.3d 566.

[9] *Titus v. City of Albq*, 2011-NMCA-38, 149 N.M. 556, 252 P.3d 780.

[10] *State ex Rel. Doner v. Zody*, 958 N.E.2d 1235, 1244 (Ohio 2011).

[11] *Espinosa v. Roswell Tower, Inc.*, 1996-NMCA-006, 121 NM 306, 910 P.2d 940.

[12] See *Vigil v. Public Service Company of New Mexico*, 2004 NMCA-085, 136 N.M. 70.

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