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Red in Tooth & Claw: Issues in Animal Law

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An Introduction to This Issue

By Ellen Kelly

This is the third issue of the *New Mexico Lawyer* produced by the Animal Law Section. As was true for past issues, some of the authors have very definite views on the subjects of the articles, but every piece is well-documented and all of them continue to demonstrate how law, even animal law, is the servant of human economic, environmental and social interests.

To encourage interest in animal law issues, the Section is experimenting with a new format for the articles in this issue of the *New Mexico Lawyer*. Four of the articles appear printed in whole in this issue. The remaining articles are printed in full on the Animal Law Section's website. A summary of those articles are included in this issue. The Section is grateful to all the authors for their articles, all of which deserve to be read in their entirety because

they demonstrate the range of animal law issues lawyers encounter, from evidence and standing to international treaties and historical shifts in land use policies.

The Animal Law Section holds regular brown-bag events and sponsors continuing legal education programs that address the human interests that are at the heart of the legal issues involving animals. Those interests are commercial, environmental, philosophical or linked to concerns about human physical and psychological health. The brown-bag events, or "Animal Talks," are open to the public and draw attention to the connection between animal law and other legal topics. This year, the Section's main CLE program will be held in September and will focus on land use issues as they affect endangered species. Check out the Section's web page (www.nmbar.org/AnimalLawSection) or Facebook page (www.facebook.com/

animallawnewmexico/?fref=nf) for updates on Animal Talks and CLE programs.

The Animal Law Section welcomes comments on the articles in this issue of the *New Mexico Lawyer* as well as suggestions for speakers or topics for Animal Talks. We also invite all members of the legal community, not just Section members, to submit article on legal issues involving animals for publication on our State Bar website and attend the Animal Talks. Membership in the Section is encouraged and is quite affordable. For additional information about the Section's activities, contact the current Section Chair Guy Dicharry at gdicharry@gmail.com.

Ellen Kelly is an attorney with Robert Curtis Law Firm, PA, and a member of the Animal Law Section board.

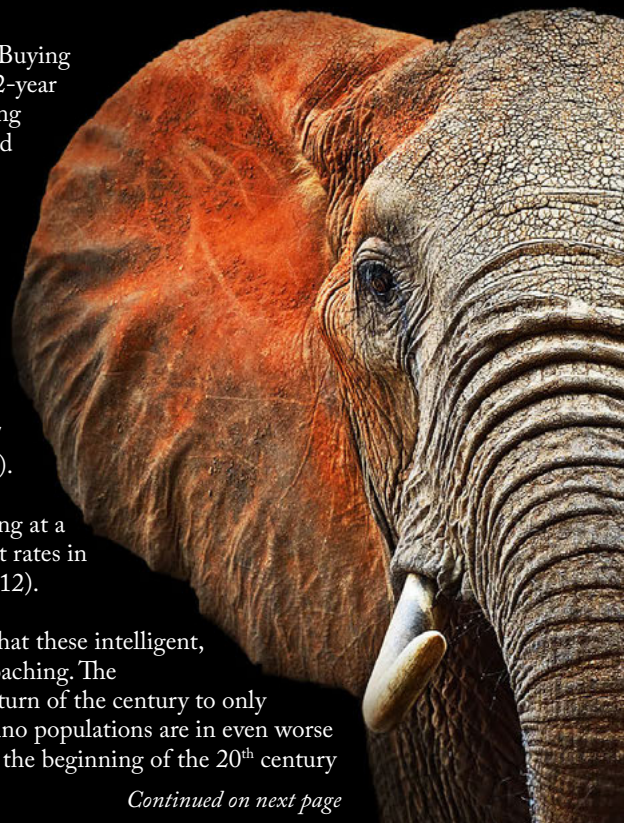
Blood Ivory: How States are Stepping in to Stop Elephant and Rhinoceros Poaching

By Susan George and Ruth Musgrave

"We can't let 96 elephants be killed every day just for their ivory. Buying and selling ivory should not happen!" These words are from 12-year old Taegen Yardley, a sixth grader in Shelburne, Vt. Yardley was testifying in April 2015 before the state's House Committee on Fish, Wildlife and Water Resources in support of a bill to ban ivory and rhino horn sales (H.297). But isn't there already a ban on such sales, you ask?

Federal law does indeed prohibit the import, export and interstate sale of most ivory (African Elephant Conservation Act of 1989, 16 U.S.C. § 4201 *et seq.*; Rhinoceros and Tiger Conservation Act of 1994, 16 U.S.C. § 5301 *et seq.*; Endangered Species Act, 16 U.S.C. § 1538), but it does not regulate intrastate sales. This means that a market for ivory still exists in the United States, and in fact, the U.S. is still the second-largest market in the world after China (*Ivory and Insecurity: The Global Implications of Poaching in Africa*, 112th Cong., 2nd sess., May 24, 2012). This loophole in federal law, and relaxed international restrictions, have given new life to the ivory trade, which means that poaching is increasing at a mind-numbing rate, with elephants being killed in Africa at the highest rates in a decade (Bryan Christy, *Blood Ivory*, National Geographic, October 2012).

It's hard to imagine a world without elephants, but scientists estimate that these intelligent, massive creatures will be gone from the wild in 10 years due to ivory poaching. The population of African elephants has dwindled from the millions at the turn of the century to only 500,000 today, and an estimated 30,000 are poached each year (*Id.*). Rhino populations are in even worse shape, with only 29,000 living in the wild today, down from 500,000 at the beginning of the 20th century



Continued on next page

(South African Department of Environmental Affairs, 2015). Ninety percent of all black rhinos were killed in the 1970s, and there are only four northern white rhinos left on earth; the one male is too old to breed. The loss of these species will have dire consequences for both the ecosystems in which they live and the ecotourism trade which supports millions of people. For ecotourism alone, it is estimated that, over its lifetime, a live elephant is worth 76 times its value in ivory (John Platt, *Slaughtered for Ivory*, Scientific American, Feb. 12, 2014).



“...a market for ivory still exists in the United States...”

In response to this looming extinction, states around the country are acting to close the loophole in federal law by passing their own bans on intrastate sales. To date, at least 21 states have introduced legislation to this end. New York and New Jersey now have laws in place, both of which passed with bipartisan support; California had a prohibition already, and in the fall of 2015 passed an even stronger law with tighter exemptions (AB 96, numbered for the 96 elephants that are slaughtered every day). Citizens in Washington state passed I-1401 in November of 2015, an initiative that prohibits the sale or trade of many animal parts, including elephant and rhinoceros ivory. Yet many of these bills and initiatives have faced opposition from groups ranging from antique dealers to the National Rifle Association, and bills in 13 states have been defeated. Bill proponents often respond to opposition by providing exemptions in the bills to meet some of these concerns, such as exempting ivory that is more than 100 years old. But it is difficult, if not impossible, to distinguish antique ivory from recently poached ivory, or for that matter, legal from illegal ivory. In fact, more than half of the “antique” market in the U.S. is actually from recently killed animals (*Antiques Roadshow to Stop Featuring Ivory Tusks*, Wildlife Conservation Society, June 4, 2014).

To counter the outcry from the NRA about attempts to restrict commercial sales of animal parts and ivory-handled guns, bill proponents point to recent case law upholding similar restrictions. In *Asian American Rights Committee v. Brown*, 2012 WL 11891478 (Cal. Sup. Ct., July 23, 2012), a state prohibition on

the sale of shark fins in California was challenged as a “taking” in violation of the U.S. Constitution. The court found that no taking occurs if the product can still be possessed or non-commercially transferred, so that eliminating commercial trade alone does not constitute a taking, as it is still legal to possess, use, display, inherit and donate ivory. Additionally, in *Chinatown Neighborhood Assn. v. Harris*, 794 F. 3d 1136 (9th Cir. 2015), the court upheld a district court decision ruling that the shark fin ban did not discriminate, interfere with commerce or preempt federal laws governing fisheries.

States are also ramping up their involvement because of the impact of poaching on organized crime and national security. Wildlife poaching is a major criminal activity, worth \$19 billion per year and ranking only behind narcotics, counterfeiting and human trafficking in international crimes. Terrorist organizations around the world are using sales from ivory trafficking to finance their attacks on Americans and others (*Larger than Elephants: Inputs for an EU Strategic Approach to Wildlife Conservation in Africa*, European Commission, European Union, 2015). Rhino horn, for example, sells for up to \$30,000 per pound, which is higher than gold and platinum; elephant ivory can sell for \$1,000 per pound (*Id.*). New Jersey’s Sen. Bateman, a Republican co-sponsor of that state’s bill, stated that “ivory trafficking is at the highest rate ever recorded, and we must work with other states to crack down on organized crime connected with ivory sales” (Press Release, *Gov. Christie Signs Bipartisan Legislation to Crack Down on Black Market Ivory*

Trafficking, Aug. 5, 2014). New Mexico has not yet joined the throng of states with legislation either introduced or passed to limit ivory sales intrastate.

The federal government is also stepping up its efforts to combat wildlife trafficking. President Obama issued Executive Order 13648 on July 1, 2013, committing the U.S. to increased efforts to stop the trade in “blood ivory.” Since then, the U.S. Fish and Wildlife Service created new rules for trade in elephant ivory in 2014 and 2015 (Director’s Order 210, effective July 31, 2015; 50 C.F.R. Part 23, effective June 26, 2014). A proposed final rule under Section 4 (d) of the Endangered Species Act

will further restrict interstate commerce in ivory and sport hunting trophies, but does not limit intrastate sales (50 C.F.R. Part 17.40(e)). Additionally, Senators Feinstein and Graham introduced the Wildlife Trafficking Enforcement Act (S. 27) in January of 2015 to stiffen penalties for wildlife trafficking violations. The bipartisan Global Anti-Poaching Act (HR 2494), with more than 90 sponsors, passed the House in November of 2015 and would enhance international anti-poaching efforts.

Despite these positive efforts, it will take a shift in consumer demand and a concomitant restriction on intrastate sales of ivory to have an impact on this illegal practice. Proponents stress that we are faced with a choice of whether being able to sell ivory-handled guns or trinkets is more important than the survival of arguably the most iconic animal on Earth. Urging state legislatures around the country to step up and close the federal loophole is vital, as the role that states can play to protect these beautiful, majestic animals is a critical component in the fight against ivory poaching and extinction.

Susan George is the director of the Wild Friends program at the UNM School of Law, a hands-on civics education program for youth focusing on wildlife conservation issues.

Ruth Musgrave is the Conservation and Climate Adaptation Coordinator for the National Caucus of Environmental Legislators and is a founder of the Wild Friends program.

Hidden Justice Department Policy Prevents Prosecution of Endangered Species Killers

By Judy Calman

In 1995, a man named Chad McKittrick shot and killed a gray wolf in Montana. Once a U.S. Fish and Wildlife Service Law Enforcement investigation had been done, McKittrick was charged in federal district court with committing an illegal take under the Endangered Species Act. His case would set the stage for a dramatic, unexplained, and unpublicized shift in federal policy that has severely undermined the ESA's criminal prohibition of killing endangered species.

Under the ESA, "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19) (1973). A conviction for illegally taking an endangered species can result in a sentence of up to a year in jail and a fine of up to \$50,000 for each take that is committed. (16 U.S.C. § 1540(b)(1) (1973))¹.

McKittrick testified at trial that he thought he was shooting a dog; in other words, he argued that he should be acquitted because he thought he was killing a non-endangered species. Defendants in previous ESA cases had attempted to use the same argument as a defense, but it had never been recognized as a valid defense. Like the other defendants who had raised that defense, it did not help his case, and McKittrick was convicted. *U.S. v. McKittrick*, 142 F.3d 1170, 1172, 1176-77 (9th Cir. 1998).

The only defense provided by the statute itself to a charge of taking an endangered species is the protection of one's life or the life of another person. 16 U.S.C. § 1540(b)(3) (1973). Between 1973, when the ESA was passed, and 1998, courts accordingly upheld take convictions regardless of any defenses offered by the defendant as to mistaken identity of the species, noting that Congress intended to make taking an endangered species a general intent crime and that to hold otherwise would make the statute ineffective.

For example, in *U.S. v. Billie*, the defendant was charged with taking an endangered Florida panther and raised mistaken identity of the species as a defense. In determining that taking is a



“ People have consistently avoided prosecution for takes of various endangered species...

general intent crime, the court wrote that "the construction advanced by defendant would eviscerate the Act's purpose because it would be nearly impossible to prove that the average hunter recognized the particular subspecies protected under the Act." 667 F.Supp. 1485, 1493 (S.D. Fla. 1987).

In *U.S. v. Nguyen*, the defendant was charged with taking an endangered sea turtle. The court cited the ample legislative history showing that Congress intended to make takes under the ESA general intent crimes. The court explained that "[t]he plain intent of Congress in enacting [the Endangered Species Act] was to halt and reverse the trend toward species extinction, whatever the cost.... The legislative history of [Section 11] shows that Congress intended to make violations of its provisions a general intent crime. Thus, it is sufficient that Nguyen knew that he was in possession of a turtle. The government was not required to prove that Nguyen knew that this turtle is a threatened species." *U.S. v. Nguyen*, 916 F.2d 1016, 1018 (5th Cir. 1990).

Despite the precedent holding that mistaken identity of the species is not a defense, McKittrick appealed his conviction to the Ninth Circuit Court of Appeals, which affirmed the conviction based on *Nguyen*, *Billie*, and other cases. *U.S. v. McKittrick*, 142 F.3d 1170, 1176-77 (9th Cir. 1998). McKittrick submitted a petition for a writ of certiorari to the U.S. Supreme Court, but in a sudden and unexplained shift in policy, the U.S. Solicitor's response brief in opposition to certiorari stated that prosecutors would no longer ask for a jury instruction stating it was not a defense to claim mistaken identity of an endangered species; the Solicitor's office would recognize mistaken identity as a defense to prosecution. Brief for U.S. in Opposition, *McKittrick v. U.S.*, No. 98-5406, 525 U.S. 1072 (1999). This internal shift in policy was a surprise, especially since case law on the subject had firmly established that mistaken identity of the species was not a valid defense.

In the years since the *McKittrick* case, memos have been issued and articles have appeared in the *U.S. Attorney's Bulletin* regarding the change in jury instruction

and cautioning prosecutors that the new policy is not supported by case law.² Notice of the change was only issued to federal prosecutors, however, and no notification ever appeared in the Federal Register or in any other public record. The U.S. Supreme Court denied certiorari, and McKittrick's conviction stood, but his case had an enormous impact on endangered species law. As a result of the incredible shift in policy, the government is now applying an entirely different standard than that which was outlined by Congress and 20 years of ESA case law.

The Mexican gray wolf (*Canis lupus baileyi*), native to Mexico and the American Southwest, is the smallest and most endangered subspecies of wolf. It was essentially exterminated by the first half of the 20th century as part of a program to remove predators from the West to expand settlements, agriculture, and cattle grazing. More recent biological research has shown that predators are the most important aspect of a functioning ecosystem. In 1970, the last seven wild Mexican gray wolves were captured and brought into captivity, and shortly after the ESA was passed in 1973, the Mexican gray wolf was listed as endangered.

Mexican gray wolves were first reintroduced into the wild areas of the Gila Wilderness in New Mexico and the Apache-Sitgreaves National Forest in Arizona in 1998. The program was always controversial. Half of the wolves that were initially released were shot within months, and the rest were brought back into captivity for their own protection.

Today, after a long struggle, there are approximately 110 Mexican gray wolves in the wild. This is still far short of the 750 wolves biologists say are needed for a sustainable population, but it is much better than previous years.

Wolves remain vilified in many communities. While wolf recovery is a federal program on federal land and paid for by federal tax dollars, people are



permitted under the 1934 Taylor Grazing Act (43 U.S.C. § 315 (1934)) to lease parcels of the same National Forest land for grazing cattle. This becomes a conflict when wolves scavenge on cows that have died in the forest, and when they occasionally take calves, which are easy prey. The vast majority of the wolves' diet consists of elk, deer, and small animals, but their occasional³ predation of cattle creates tension between ranchers, conservationists, biologists, and the federal government.

An unfortunate side effect of this tension is the deliberate illegal killing of wolves. A staggering number of wolves have been shot; there have been more than 60 documented illegal killings of Mexican wolves in New Mexico and Arizona since 1998, a shocking number considering the small number of these wolves that exist. Illegal killing is by far their most common cause of death.

New Mexico Wilderness Alliance began considering legal action after noticing that while wolf killings were often reported in the media, charges for ESA violations were not. After several Freedom of Information Act requests and many months of research, we discovered that almost every defendant claimed during the investigation to have thought he was shooting at a coyote or a dog. Despite many of these cases being turned over by U.S. Fish and Wildlife Service Law Enforcement to the U.S. Department of Justice for prosecution, only one person has actually been charged with a take, and that case resulted in a plea deal, leaving the issue of the change in jury instruction unreached. Another person was charged with the lesser charge of illegal possession of an endangered species under 16 U.S.C. § 1538(a)(1)(D). A little more

digging led us to the little-known "McKittrick Policy," which has become shorthand for the Justice Department's shift in jury instruction use for take cases.

Amazingly, the McKittrick Policy is applied nationwide, to all endangered species, and while conservation organizations have remained relatively uninformed about it, other groups and websites have discovered it and used it to circumvent the ESA's take provisions.

People have consistently avoided prosecution for takes of various endangered species, including for killing grizzly bears by claiming a belief they were black bears, killing condors by claiming a belief they were turkey vultures, and killing whooping cranes by claiming a belief they were Sandhill cranes. We obtained an internal Fish and Wildlife Service memo in which a law enforcement officer sarcastically criticized the McKittrick Policy, stating, "[a]s soon as word about this policy gets around the west, the ability for the average person to distinguish a grizzly bear from a black bear or a wolf from a coyote will decline sharply. Under this policy a hen mallard is afforded more protection than any of the animals listed as endangered." In an interesting instance of executive agencies disagreeing with each other, the Fish and Wildlife Service itself requested that the Justice Department rescind the policy, stating that it has prevented the prosecution of many take cases and has made ESA enforcement much more difficult.

New Mexico Wilderness Alliance, partnering with WildEarth Guardians, sued the Department of Justice in 2013 arguing, among other things, that the Justice Department violated the Administrative Procedures Act by administering a policy that is so extreme that it abdicated the agency's statutory responsibilities and violated the Freedom of Information Act by not notifying the public of the rule change. The Justice Department filed a motion to dismiss later that year, and this July, U.S. District Court Judge Richard Bury denied that motion, concluding in his Order that

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Evidentiary Issues in Animal Abuse Cases

By Leigh Anne Chavez

Disturbing images of dead, beaten, emaciated, injured and neglected cats, dogs, horses and chickens peppered a highly informative conference on animal abuse held last fall in Albuquerque on “The Link Between Animal Abuse and Human Violence.” The link between cruelty to animals and violence towards humans is a matter of public safety and protecting the community’s animals from abuse goes hand-in-hand with protecting the community from violence overall, especially domestic violence. Not surprisingly, serial killers have been linked to animal cruelty¹. One way to address public safety is to address the treatment of animals.

The path from powerless pets to widespread prosecution for their abuse is a new one. Why should the law throw limited resources at animal protection? Dogs, cats and domestic birds are considered personal property in New Mexico (and most other jurisdictions). Throughout the ages, animals have provided rough sport for human entertainment—from Egyptians who harpooned hippos from boats, to Romans who watched as hapless criminals fought wild animals to the death. Fox hunts, horse racing, cockfighting and countless other human scheme has exploited animals and made them historically unworthy of legal protection.

That is changing. While the idea of animal abuse as a societal problem is not new, the modern focus began with the 1975 publication of ethicist Peter Singer’s “Animal Liberation,” in which he argued that animals’ ability to feel pain mandated their protection just like humans, although the legal interests between animals and humans were not necessarily identical. Shortly thereafter, the Animal Legal Defense Fund was established and it has taken a leading role in promoting prosecutions for animal abuse.

Lora Dunn, a staff attorney for ALDF’s Criminal Justice Program, identifies three ways in which prosecution of animal abuse cases is significant for public safety: 1) crime prevention, 2) breaking the



“The animal in an animal abuse case is both evidence and someone’s legal property.”

cycle of family violence, and 3) danger assessment². Dunn states that animal abuse “should be handled just like any other crime, but there are unique hurdles to animal cruelty cases: animals are voiceless victims and can’t recount what happened and they are also live evidence that need immediate, consistent and costly care while the case is pending. What’s more, law enforcement and prosecutors’ offices, already facing budget constraints, sometimes don’t have the resources to investigate and prosecute a case to its fullest extent.”³

Nevertheless, ALDF and other animal protection organizations such as the American Society for the Prevention of Cruelty to Animals have identified and shared key issues in evidence that must be addressed in the fight to properly hold abusers accountable.

No vet—no case

Dr. Patricia Norris, a veterinarian and director of animal welfare for the North Carolina Department of Agriculture and a specialist in the emerging field of veterinary forensics, is often asked to assist law enforcement agencies throughout Mexico. According to the International

Veterinary Forensic Sciences Association, forensic veterinary is a relatively new discipline which applies forensic science techniques to legal investigations in criminal offenses against animals, helping crime scene analysts to process, assess and treat injuries and to determine causes of death. The focus is on preserving evidence, and availability to testify as expert witnesses.

Dr. Norris emphasizes the importance of the veterinarian in evidentiary issues that arise in animal abuse prosecutions and in making sure that veterinarian will be able to testify. “No vet—no case,” she holds. Evidentiary problems can be minimized by tapping into the forensic skills of a trained veterinarian from the very beginning, and developing strong relationships with crime scene investigators. The forensic veterinarian is able to recognize signs of injury resulting from intentional acts against the animal and to assess the animal’s level of distress, which may become significant issues at trial where the crime charge is a felony requiring intent. There the knowledge, skill and treating notes of the forensic veterinarian, who is presented as the principal expert witness at trial, is indispensable.

Crime scene management

While the veterinarian may be indispensable, the investigator is still in charge of the scene. New Mexico prosecutors generally agree that animal welfare investigators and law enforcement officers do a good job assisting in animal abuse prosecutions by preserving evidence and handling the scene, calling in the forensic veterinarian, and being available to testify. However, a 2010 ASPCA survey of law enforcement nationwide showed that less than 19 percent of officers had received formal training in animal cruelty laws in their jurisdictions.⁴ For example, an otherwise qualified crime scene investigator who can easily identify dogfight paraphernalia may not be aware of the developing legal rule that exigent circumstances not requiring a warrant to search extends to freezing dogs and animals in hot cars.⁵ It is the forensic veterinarian who can best testify as to whether the crime scene evidence showed whether starving, freezing, confining, or striking was tantamount to torture and thus supports a felony charge. She can also assist the lead investigator in assessing whether such evidence as visible sores on the animal signifies felonious intent.

Seizure and the “luxury” of long-term impoundment

The animal in an animal abuse case is both evidence and someone’s legal property. Evidence in all cases must be preserved, but an injured animal seized as evidence must be housed, fed and provided veterinary care pending trial, rather than simply being stored in an evidence locker like a stolen television. Although animal welfare authorities may be able to arrange a foster home placement, the chain of custody must be maintained. All of this requires scarce resources that governments and animal welfare organization already strain to allocate.

Pre-trial motions

Is the defendant a repeat abuser? Are those graphic images inflammatory? It may be necessary to file a Rule 404(b) motion to bring in evidence of the defendant’s prior abuse history in order



to counter a claim of absence of criminal intent. Photos and videos from the crime scene are, unfortunately, probably fairly explicit, but nonetheless essential to a possible conviction. However, this same vivid imagery will likely cause even a novice defense attorney to file a motion to exclude the evidence because it may prejudice the jury in its ability to traumatize more sensitive jurors. If such a defense motion is even partially successful, thought must be given to mitigation the disturbing aspect of such visual evidence by taping over faces for example.

An article on the ALDF website entitled “Why Prosecutors Don’t Prosecute,” the ALDF asserts that in addition to resource issues, a prosecutor may simply lack the necessary evidence to prove beyond a reasonable doubt that the perpetrator is guilty. For jurisdictions that cannot afford scrupulous investigations, a forensic veterinarian, or to house animals while the investigation is pending, the ALDF provides grant money for necropsies (animal autopsies), forensic testing, expert witness fees and costs of care as well as other legal research assistance on legal motions and brief writing.

New Mexico statutes divide animal abuse into two categories, cruelty and extreme cruelty, but do not protect insects, reptiles, most livestock animals or rodeo practices. Extreme cruelty requires intentional malicious killing, torturing, mutilating, injuring or poisoning an animal.⁶

Assistant district attorneys around New Mexico have different experiences prosecuting animal cruelty cases and find themselves concentrating on the

extreme cruelty felony cases. Spirit Gaines, assistant district attorney for the Second Judicial District, who prosecutes felony animal abuse cases in Bernalillo County, has had less than ten cases in two years. In New Mexico, there is no division of labor in the veterinary tasks needed to be completed in preparing for an animal abuse trial: animal welfare investigators serve both as evidence

preservers and expert witnesses. Among cases Gaines has prosecuted included one involving a puppy whose nose was broken while being disciplined, and a domestic violence case in which an animal was stabbed with scissors.

Prosecutions in rural areas of New Mexico are even fewer. Joseph Martinez, assistant district attorney for the 13th Judicial District, had a felony case—one of only three he has prosecuted—in which a mother dog who had given birth, died and was being eaten by her puppies for sustenance. District Attorney Andrea Reeb of the Ninth Judicial District thinks that the most difficult part of handling animal abuse cases is the general sense that animals and their protection are not important.

On the other hand, Don Gallegos, the Eighth Judicial District’s head prosecutor, sees a conviction rate of around 90 percent for animal abuse cases, but struggles with resource issues. Gallegos believes that investing in training for investigators, veterinarians and their assistants who treat injured animals following discovered or reported abuse, those who board live animals pending trial, and law enforcement personnel involved in the evidentiary chain that leads to animal abuse convictions bring long-term benefits to the community.

The relative infrequency of animal abuse prosecutions is thus to a large extent a function of resources available to provide tools for success bringing cases. Gaines is confident there are many more cases

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Read the full versions of these articles at

www.nmbar.org/AnimalLawSection.

Lobos and Litigation: Mexican Gray Wolf Reintroduction¹

By Peter M. Ossorio, retired federal prosecutor



The Mexican gray wolf (*Canis lupus baileyi*) or lobo, is not the gray wolf (*Canis lupus*) reintroduced into the Northern Rockies. It is a genetically distinct, smaller (50-90 pounds) and much rarer subspecies. Unlike its northern cousins, the lobo has no genetically diverse “source” population of thousands of wolves in Canada. Reduced by government killing to only seven “founders,” the lobo’s reprieve from extinction came with a genetic bottleneck and a time bomb of inbreeding depression. This urgency permeates every aspect of

the politics and policies affecting them.

During the 20th century, the U.S. Fish and Wildlife Service (and its predecessor, the Bureau of Biological Survey) extirpated the lobo from the United States by about 1970 – and also “assisted” Mexico in trying to wipe out wolves there. After the 1973 passage of the Endangered Species Act, the Service was charged with reversing course and saving, rather than exterminating, species.

In 1976, the Service listed the lobo as an endangered species. Between 1978 and 1980 a few were found in Mexico. By 1982 private conservation organizations succeeded in breeding them in captivity. However the reintroduction of lobos into the wild (1998) came in direct response to a 1990 lawsuit. As documented in the on-line article, at every subsequent major step the Service appeared to court lawsuits from conservationists to provide political “cover” and counter political pressure from lobo opponents.

Endnotes

¹ In addition to the USFWS <http://www.fws.gov/southwest/es/mexicanwolf/> and Arizona websites, <https://azgfdportal.az.gov/Wildlife/SpeciesOfGreatestConservNeed/MexicanWolves/> additional information about lobos from conservation groups is at www.mexicanwolf.org.

This article is dedicated to men and women of the Interagency Field Team (IFT) – federal, state, and volunteers – who do not quit on the week-ends as they strive to recover the lobo. Comments are welcome: peterossorio@centurylink.net.

Protecting Wildlife from Government Agencies

Samantha Ruscavage-Barz, staff attorney, WildEarth Guardians; and Ashley Wilmes, former staff attorney, WildEarth Guardians



Between 2004 and 2010, Wildlife Services, a federal agency within the U.S. Department of Agriculture, spent nearly \$1 billion to kill nearly 23 million animals using aerial gunning, poisons, traps, snares, and hounds, purportedly to protect agriculture and other private interests from wildlife interference. As part of its program on federal lands, Wildlife Services distributes sodium cyanide booby traps and shoots

tens of thousands of native carnivores such as coyotes and wolves from helicopters and airplanes on public lands, including in wilderness areas. The agency also kills many “non-target” species such as domestic dogs and cats. Because it is a federal program, Wildlife Services’ actions must comply with the National Environmental Policy Act, a statute requiring federal agencies to analyze the environmental impacts of their actions before proceeding with the action. 42 U.S.C. § 4332(2)(C).

In 2012, WildEarth Guardians (“Guardians”) sued the U. S. Department of Agriculture and Wildlife Services to enjoin the federal agency’s management program because of its two-decade refusal to analyze the environmental consequences of its actions pursuant to NEPA and other statutes. *WildEarth Guardians v. USDA et al.*, Case No. 2:12-cv-716 (D.Nev. April 30, 2012). Guardians alleged Wildlife Services relied on an outdated environmental analysis for its wildlife-killing activities that failed to take into account new reports evaluating the efficacy of the program, current public concern with wildlife, and new scientific and economic information concerning wildlife management. Guardians presented significant new information to the agency on the costs, ineffectiveness, and environmental harms of wildlife-killing programs, but the agency did not consider the new data in its ongoing program implementation.

This article traces the historical development of Wildlife Services, discusses the program’s killing methods and budget, and describes the *WildEarth Guardians v. USDA* case.



Wacky Wildlife Laws

By Kelsey Rader, third year law student, UMM School of Law

Strange, outdated laws are often found on websites and in urban legends. Some of these laws have an actual basis in fact and tell an interesting story about the time period and events that led to their creation. This article focuses on the seemingly wacky wildlife laws still on the books in many states. Boxing bears, escaped camels and ill-fated Easter pets are investigated for their journeys into legislation and what they have to say about serious problems affecting animal welfare.

Hidden Justice Department Policy

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“the Plaintiffs allege a cause of action causally linked and fairly traceable to the McKittrick policy because it negates the coercive and deterrent effect of the general intent crime formulated by Congress and the vigorous enforcement plan designed by FWS in the Final Rule to prevent illegal shootings of Mexican gray wolves.” *WildEarth Guardians and New Mexico Wilderness Alliance v. U.S. Department of Justice*, Case 4:13-cv-00392-DCB, Doc. 30, p. 9 (July 27, 2015).

We continue to work for the reversal of the McKittrick Policy through this lawsuit, and we hope that regardless of the case’s outcome, the administration chooses

to rescind the policy in deference to the Fish and Wildlife Service and Congress’s intent when it passed the ESA.

Judy Calman is the staff attorney for New Mexico Wilderness Alliance

Endnotes

¹ See also 16 U.S.C. § 1538 (prohibiting the taking of endangered species, subject to several exceptions, such as taking with a permit).

² See Marshall Silverberg and Ethan Carson Eddy, *Prosecuting Criminal Violations of the Endangered Species Act*, 59 U.S. Attorney’s Bulletin No. 4, at 49 (July 2011).

³ For example, in 2010 in New Mexico, 22,000 head of cattle died. Of these, 3,300 were killed by predators. Of those 3,300 killed by predators, 2.4 percent (79 cows) were killed by wolves, totaling .3 percent of total cattle losses for that year. In contrast, 38 percent of total losses (8,360 cows) were due to digestive and respiratory problems. Other medical problems led to the vast majority of the rest of the losses. These numbers are statistically consistent over many years. See USDA, *Cattle Death Loss* (May 12, 2011), available at <http://usda.mannlib.cornell.edu/usda/current/CattDeath/CattDeath-05-12-2011.pdf> (last accessed 3/30/16).

Evidentiary Issues in Animal Abuse Cases

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than what is reported, and that New Mexico’s Legislature must look at our legal structure to address such issues as the lack of a statutory veterinarian duty to report abuse. Prosecutors Gaines, Gallegos, Martinez and Reeb all agree that, while the number of case handled per year or in total for each of the districts hovers at around a dozen, the problem is much more widespread than the number of prosecutions indicate based on their involvement in domestic violence cases and contact with animal welfare personnel.

District attorneys nationwide recently organized an effort to promote collegial support for animal abuse prosecutors. In 2011, the National District Attorneys Association founded its National Center for the Prosecution of Animal Abuse. The mission of NCPAA is in part to provide the resources, tools and support to prosecutors and allied professionals in order to prosecute those who harm animals.

Based on years of solid work by the ASPCA and ALDF in educating law enforcement, building coalitions, and holding outstanding conferences that

both educate and bring those who support humane animal approaches together, the NCPAA strongly promotes the ideas that voiceless victims deserve knowledgeable prosecutors to pursue justice in their name. Perhaps the strongest tools in the kit for such prosecutors is both the appreciation for the role of the expert veterinarian in prosecuting cases, as well as a strong assembly of resources from legislative funding. Thus, for the quality of life for all New Mexicans and their families, evidentiary issues in animal abuse lie at the heart of how we line up resources for future protection of all of those interests.

Leigh Anne Chavez works with the New Mexico Regulation and Licensing Department and is a member of the Animal Law Section.

Endnotes

¹ See, e.g., “Serial Killers & Animal Abuse”, noting that the FBI has recognized the connection since the 1970s, when its analysis of the lives of serial killers suggested that most had killed or tortured animals as children. Infamous connections in more recent times include Columbine High School students Eric

Harris and Dylan Klebold, who shot and killed 12 classmates before turning their guns on themselves, having bragged about mutilating animals to their friends. <https://spcala.com/programs-services/humane-education/serial-killers-animal-abuse/>

² Danger assessment is a tool, often in the form of a questionnaire, used by domestic violence professionals to determine the level of risk of death or serious harm posed to a domestic violence victim based on certain behaviors of the abuser. Violence towards pets is a risk factor. See, e.g., <http://learn.nursing.jhu.edu/instruments-interventions/Danger%20Assessment/index.html>.

³ Email interview between author and Lora Dunn, 11/5/2015.

⁴ Allie Phillips, J.D., and Randall Lockwood, Ph.D., *A Guidebook on Safer Communities, Safer Families & Being an Effective Voice for Animal Victims*, National District Attorneys Association, 2013.

⁵ See *Commonwealth v. Duncan*, 467 Mass. 746, 7 N.E.3d 469 (2014)

⁶ NMSA 1978, § 30-18-1 through 30-18-15

Editor’s note: The following update came after the New Mexico Lawyer was printed.

Metro Court to Launch ‘Animal Court’ Pilot

Albuquerque Metro Court recently formed a new specialty court to handle animal abuse cases and their offenders. One goal is to “intervene in that cycle of violence”, according to attorney Laura Castille, who worked for two years to establish the animal court.

Alleged offenders would then be encouraged to give up their pet and sign up for counseling. Read more at <http://krqe.com/2015/12/17/metro-court-to-launch-animal-court-pilot/>.

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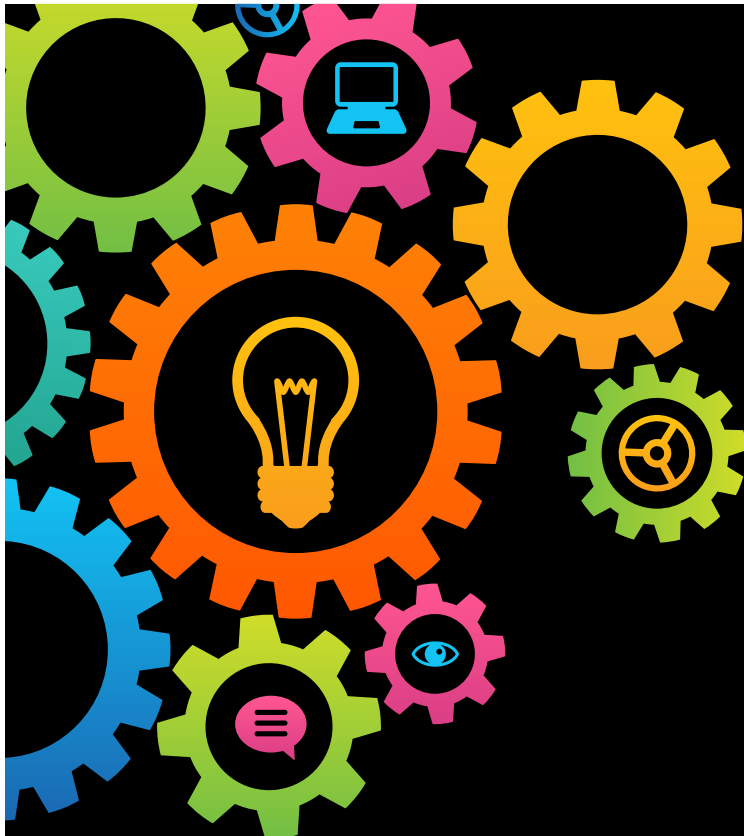


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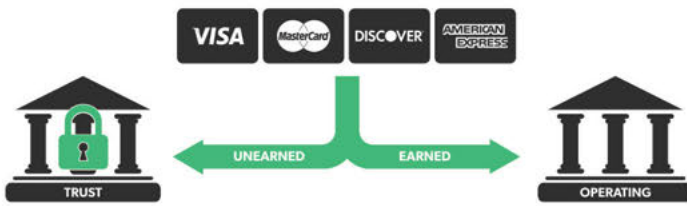


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