



## Animal Law Committee

### SWORD AND SHIELD: LAWSUITS AND CIVIC ACTION FURTHERING COEXISTENCE WITH WILDLIFE

By: Don Lipmanson

#### Introduction

As coyotes find habitable niches in Chicago and mountain lion sightings proliferate<sup>1</sup> in suburban Los Angeles, the public faces a stark choice: continuing centuries-old policies of exterminating “nuisance” animals or learning to co-exist with wildlife.

Historically, state and federal wildlife agencies have deployed hunters and trappers to solve wild animal “problems” by killing the purported offenders, individually or *en masse*. The U.S. Department of Agriculture’s Wildlife Services Division (WS) has spearheaded what wildlife advocates view as a century of brutal, unnecessary, and often counter-productive nationwide warfare on predators, primarily on behalf of the livestock industry.<sup>2</sup> The death penalty is being imposed on wildlife for sporadic predation upon domestic livestock or pets, or even for causing modest property damage such as a fence being pushed over or an irrigation hose punctured when megafauna seek food or water in times of scarcity.

However, as our nation has urbanized and suburbanized over the past century, both the physical landscape and societal attitudes toward wildlife have changed considerably. Development—in the form of

roads, shopping malls, houses and high fences—has greatly fragmented formerly huge, food-and-water rich expanses of wild land. Outside the largest national parks and designated wilderness areas, megafauna and

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## LETTER FROM THE CHAIR



Hello ABA TIPS Animal Law Committee (ALC) Vice-Chairs and Members,

This issue is dedicated to coexisting with wildlife. As humans continue to encroach on wildlife habitat our interaction with wildlife such as geese, coyotes, wild horses, and other wildlife will continue to increase. Many thanks to David Karopkin of NYC GooseWatch NYC, Don Lipmanson of Project Coyote, Nick Lawton of Meyers Glitzenstein & Eubanks, LLP, and Bruce Wagman of Schiff Hardin LLP, for their contributions on this topic. Special thanks to Joan Schaffner, Molly Armus, Jessica Cohen, David Dawsey, and Stefanie Wilson for their excellent work, commitment, and talent in producing ALC Newsletters.

The ABA Midyear Meeting was an especially exciting time for the ALC. Several ALC leaders met to discuss and create our three-year strategic plan. Chair-Elect Daina Bray was instrumental in organizing and helping the meeting run efficiently — thanks Daina! I also thank incoming Chair-Elect Jane McBride, Richard Angelo and Fran Ortiz, A.J. Albrecht, past ALC chairs Joan Schaffner and Yolanda Eisenstein, and TIPS Scope & Correlation Committee members Stacy Tees and Barbara Costello for their valuable input on ways ALC can advance its mission and goals. A copy of the new strategic plan will be available this spring.

Joan Schaffner and Richard Angelo did an excellent job presenting the proposed resolution/report on trap-neuter-vaccinate-return of community cats to TIPS Council at the ABA Midyear Meeting. Many thanks to Joan Schaffner, Richard Angelo, Robert Peck, Jim Carr, Kate Fitzpatrick, Kimberly Ockene, and to other ALC members who provided input, drafted, and/or reviewed the proposed resolution. Also thanks to everyone for supporting it.

There is a wonderful opportunity for you to attend ALC's CLE, *Transcending Challenges in Risk and Crisis Management: Protecting Animals, People and Clients/Organizations*, at the TIPS Spring Conference in Chicago on April 28, 2017 from 8:30 a.m.-10:00 a.m. The CLE will focus on how to protect animals, people, and clients during wildlife rescue, in zoos, adventure parks, and at equestrian events. **The deadline to register is April 11, 2017.** For more information see [http://shop.americanbar.org/PersonifyImages/ProductFiles/269440834/267469\\_ABA\\_Tips%20Brochure\\_web.pdf](http://shop.americanbar.org/PersonifyImages/ProductFiles/269440834/267469_ABA_Tips%20Brochure_web.pdf). Special thanks to Robson Forensic for sponsoring this event.

Thanks to all for your continued support of the ALC and please contact me if you would like to get more involved with our work. [🔗](#)

Best,  
Stacey Evans

### Newsletter Editorial Board

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A complete list of ALC subcommittees is available on the Committee homepage found [here](#).

## SWORD AND SHIELD...

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their prey lost the vast expanses of land, where they once thrived in habitat rich in food and shelter but with minimal human presence. Wildlife has responded to this ecological pressure either by retreating into ever-smaller enclaves, where intensified competition for resources usually leads to population declines, or by learning to survive and even prosper in the presence of humans. Unintentionally, “civilization” has pushed coyotes, mountain lions, and bears into our neighborhoods, raising ethical and practical problems about how to “manage” this new ecological relationship.

### Science-Based Knowledge Promotes Co-existence

Humanity has a long history of inadvertently or intentionally eradicating entire species of wildlife. What appears new is a science-based understanding of how people drive other species into extinction,<sup>3</sup> giving us the opportunity to make deliberate, conscious decisions whether to extirpate or to coexist with the many species of undomesticated animals now showing up in neighborhoods.

For the broad sector of the public that favors coexistence, legal institutions and civic activism provide complimentary means to further that goal. Environmental groups have relied on decades-old federal laws—*inter alia* NEPA, ESA, the Clean Water Act—and their implementing regulations as grounds for lawsuits aimed at stopping logging, mining, dam construction and road-building plans that threaten the continued existence of wolves, wolverines, lynx, grizzly bears, desert tortoises, and a host of other rare or at-risk species of fauna and flora.<sup>4</sup> The myriad of environmental protection groups and their legal staffs that sue for enforcement of wildlife protection laws and regulations are helping preserve the ecological insights and political solutions devised by earlier generations of wildlife advocates. As long as current federal environmental protection statutes remain relatively intact, lawsuits to compel their enforcement likely will remain a foremost tool for fostering human coexistence with wildlife.



### Political Agendas to Kill

Yet in the current political climate, where resource extraction tops the new federal executive’s political agenda, these key environmental protection laws and rules appear destined for non-enforcement, if not outright repudiation, by federal agencies. The current Congressional majority seems intent on eliminating all protections for wolves, grizzly bears, and other predators perceived as threats to ranching and farming.<sup>5</sup> In non-coastal western states, where wolves either have maintained small populations in remote national forests or have migrated out of Yellowstone National Park following their reintroduction in 1996, near-total suppression of predators appears the dominant management approach. Opposition to federal and state ESA protections there is fierce, fueled by hunting and agricultural interests.

Legislatures in Idaho<sup>6</sup> and Wyoming<sup>7</sup> fund aerial gunning of gray wolves, while New Mexico’s Game and Fish Department adamantly opposes 20 years of federal and private efforts aimed at expanding a very small, genetically bottlenecked population of Mexican gray wolves via release of captive-bred individuals in remote areas of the state.<sup>8</sup>

Given this reality, civic discussion plus sustained, decentralized political action will likely become the most effective means for persuading state and local government agencies and property owners to abandon their historic readiness to kill wildlife engaging in instinctive behaviors. These approaches have yielded results on the West Coast, where states and counties are becoming laboratories for developing and testing wildlife coexistence strategies.

### West Coast States Test Wildlife Coexistence Strategies

Washington state<sup>9</sup> and Oregon<sup>10</sup> have developed elaborate wolf management plans that declare a preference for non-lethal methods where control seems necessary. In 2014, California’s Fish and Game Commission, encouraged by massive public lobbying and despite objections from agency staff and ranchers,

granted state ESA protection to a fledgling population of gray wolves, who re-entered the state from Oregon and re-established a first pack 80+ years after their complete eradication from California. A stakeholder working group recently completed California's wolf management plan<sup>11</sup>; however, that ESA listing is now the subject of a legal challenge, brought on grounds of arbitrariness by the Pacific Legal Foundation on behalf of the California Farm Bureau Federation and the California Cattlemen's Association.<sup>12</sup>

While the presence of wolves or mountain lions in a particular landscape seems to galvanize the stronger passions, the omnipresence of coyotes puts them at the center of the debate around human coexistence with wildlife. Unlike wolves, coyotes can tolerate and thrive living close to humans, in suburbs and even urban neighborhoods, as well as on open range. Affection for this rather fearless, dog-like species, coupled with appreciation for the rodent control services they provide, has created sufficient political pressure to persuade homeowners associations, golf courses, and city and county governments to forego trapping, shooting, or poisoning coyotes. It also has spurred efforts to ban coyote killing contests, where prizes typically are awarded to those who kill the most, or the largest, coyotes over the course of a weekend.<sup>13</sup>

Recently, a state court lawsuit<sup>14</sup> brought by a coalition of wildlife advocacy groups<sup>15</sup> in a large rural California county produced at least a temporary victory for advocates of coexistence, one which may represent a turning point in decades of conservationist efforts to push back against WS's affinity for using guns, traps, and poisons as the primary means of solving conflicts between wildlife and humans. Filed in 2015, that suit challenges a unanimous decision by Mendocino

County's Board of Supervisors to renew their "cooperative services agreement" with WS—aimed at "protect[ing] residents, property, livestock, crops, and natural resources from damage caused by predators and other nuisance wildlife"<sup>16</sup>—without first requiring an Environmental Impact Report (EIR) required under California's Environmental Quality Act (CEQA).<sup>17</sup>

Public attendance at the county supervisors meeting was large, animated, and polarized, pitting wildlife advocates against ranchers who view coyotes as a threat to their sheep and vineyard owners who believe coyotes are a menace to irrigation systems.<sup>18</sup> Under pressure from the lawsuit and from a considerable segment of the public, supervisors agreed to a settlement that requires the county to 1) suspend its participation in and funding of any wildlife management agreement with WS, unless the county first prepares and certifies a CEQA-compliant EIR and bases any new agreement on the EIR's findings; 2) hire an independent consultant to prepare the EIR, with plaintiffs having a say in choosing the consulting firm; and 3) pay plaintiffs \$25,000 in attorney fees and costs.<sup>19</sup>

## Conclusion

At a time when Congress and the executive branch attempt to diminish the scope and application of federal wildlife protection laws and regulations, civic actions and legal entities at the state and local level are poised to become the best (and perhaps the only) locus for policies and practices that promote coexistence with wildlife. They, at least, tend to be geographically accessible and relatively open to hearing the demands of people who want to end the war on wildlife. ⚖️

*Don Lipmanson is a criminal defense attorney practicing in Northern California, former Mendocino County Planning Commissioner and Advisory Board Member for Project Coyote.*

1 Dana Goodyear, Lions of Los Angeles, *THE NEW YORKER*, 44-51, Feb. 13 & 20, 2017, at <http://www.newyorker.com/magazine/2017/02/13/lions-of-los-angeles>.

2 Richard Conniff, America's Wildlife Body Count, *N.Y. TIMES*, Sept. 17, 2016, <https://www.nytimes.com/2016/09/18/opinion/sunday/americas-wildlife-body-count.html?r=0>. For a detailed history and assessment of Wildlife Services' assault on predators, see Christopher Ketcham, The Rogue Agency, *HARPER'S MAG.*, 38-44, Mar. 2016.

3 See generally ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* (2014).

4 See e.g., Environmental Protection Information Center, Groups Sue to Save Rare, Mink-like Carnivore in California, Oregon (Dec. 6, 2015), <http://www.wildcalifornia.org/blog/lawsuit-challenges-failure-to-protect-coastal-marten/>. The article describes a 2015 lawsuit filed by Earthjustice challenging the U.S. Fish and Wildlife Service's failure to protect the once-common coastal marten under the ESA. This weasel-like mammal is reportedly extinct in 83% of its historic range, with fewer than 100 surviving in California's coastal forests plus an indeterminate "very small number" in Oregon.

5 See Center for Biological Diversity, Politics of Extinction, [http://www.biologicaldiversity.org/campaigns/esa\\_attacks/table.html](http://www.biologicaldiversity.org/campaigns/esa_attacks/table.html) (last visited Feb. 13, 2017) (periodically updated list of Congressional bills aimed at diminishing the scope and application of the federal Endangered Species Act).

6 See Wolves in Idaho's 'Lolo Zone' Being Gunned Down by Government, *WILDLIFE NEWS*, Feb. 13, 2016, <http://www.thewildlifeneews.com/2016/02/08/wolves-in-idaho-lolo-zone-being-gunned-down-by-government/>.

7 See Stephanie Spear, Conservation Groups Challenge Kill-at-Will Policy for Wyoming Wolves, *ECOWATCH*, Sept. 11, 2012, <http://www.ecowatch.com/conservation-groups-challenge-kill-at-will-policy-for-wyoming-wolves-1881641148.html>.

8 Susan Montoya Bryan, New Mexico seeks to stop feds from releasing wolves, *SANTA FE NEW MEXICAN*, A10, May 13, 2016, [http://www.santafenewmexican.com/life/features/new-mexico-seeks-to-stop-feds-from-releasing-wolves/article\\_c645218e-5f7f-59b7-b4d0-bedbeef1d850.html](http://www.santafenewmexican.com/life/features/new-mexico-seeks-to-stop-feds-from-releasing-wolves/article_c645218e-5f7f-59b7-b4d0-bedbeef1d850.html).

9 See Washington Department of Fish and Wildlife, Wolf Conservation and Management Plan, (Dec. 2011), <http://wdfw.wa.gov/publications/00001/>.



- 10 See Oregon Department of Fish and Wildlife, Oregon Wolf Conservation and Management Plan, Or. Admin. Rules, Div. 110 (amended Jan. 2014), <http://www.dfw.state.or.us/OARs/110.pdf>.
- 11 See California Department of Fish and Wildlife, Conservation Plan for Gray Wolves in California, Parts I & II (Dec. 2016), <https://www.wildlife.ca.gov/conservation/mammals/gray-wolf>.
- 12 Superior Court of San Diego County, case no. 37-2017-3866-CU-MCV-CTL; see also Ryan Sabalow, Ranching groups challenge gray wolf's endangered status in California, SACRAMENTO BEE, Jan. 31, 2017, <http://www.sacbee.com/news/politics-government/article129837699.html>.
- 13 Jeremy Miller, Bounty Hunters, HARPER'S MAG., 69-75, Jan. 2017.
- 14 Petition and Complaint for Writ of Mandate, No. SCU-K-CVPT-15-66119 (Super. Ct. Mendocino Cnty, Cal., July 27, 2015.)
- 15 Plaintiffs include Animal Legal Defense Fund, Animal Welfare Institute, Mountain Lion Foundation, Natural Resources Defense Council, Project Coyote and Center for Biological Diversity.
- 16 Notice of Settlement and Joint Motion to Enter Judgment Pursuant to CCP 664.6, Exh. A, Animal Legal Defense Fund et al. v. Mendocino County, No. SCU-K-CVPT-1566119 (Super. Ct. Mendocino Cnty, Cal., May 8, 2016) [hereinafter Notice of Settlement].
- 17 Glenda Anderson, Mendocino County renews contract with wildlife trappers, PRESS DEMOCRAT, B1, June 16, 2015, <http://www.pressdemocrat.com/news/4079290-181/mendocino-county-renews-contract-with>.
- 18 Coyotes purportedly will bite into a plastic drip line when water is not otherwise available.
- 19 Notice of Settlement, supra note 16. The Settlement Agreement can be found at [https://www.biologicaldiversity.org/campaigns/wildlife\\_services/pdfs/2016-04-12\\_ALDF\\_et\\_al\\_v\\_County\\_of\\_Mendocino-Settlement\\_Agreement.pdf](https://www.biologicaldiversity.org/campaigns/wildlife_services/pdfs/2016-04-12_ALDF_et_al_v_County_of_Mendocino-Settlement_Agreement.pdf).

## FIGHTING FOR LIFE...

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also their place in the natural landscape.

Questions a lawyer will need answered in order to appreciate all the ramifications of the legal issues may include:

1. How many members of the species are there in the target area and what is the population density there? These are two foundational questions, especially in cases involving the propriety of wildlife management practices—the hunting/culling by government agencies. They are related to the calculated “carrying capacity” of the land on which they live, *i.e.*, how many animals of the species can the land support so that they are healthy and nourished. This is a consideration in cases where the number of animals that may/should be removed by government or private action is before the court.
  2. What is the typical population growth rate of the species (if that has been studied)? This is another key statistic that may have some variability depending on habitat, population size and health, and other factors, and is directly related to the question of how many animals of a species are properly in a given area.
  3. Are the species carnivores, or omnivores, or, in the same vein, are they predators or prey? And what do they eat? These basic attributes
- about the species will provide important considerations to their ability to survive, and will lead to further exploration to determine whether their food source exists in sufficient quantity to support a healthy population. The answer to these questions will, in turn, lead to the often vital information about where the animals travel in the course of a day or a week, and even when during the day they travel, which defines both the habitat and protection they may need. In cases involving wildlife management and protection, the past, present, and future range of the species is often a substantive data point and these questions will develop the underlying facts for this evidence.
4. What is their reproductive behavior—are they mammals like us who breed year-round, or do they have a particular time of year when they are more likely to have dependent young? This information is especially helpful in determining issues surrounding possible harm to populations at risk. It is a generally accepted principle of conservation biology that the most important members of any species—in terms of promoting stability and growth—are the mothers with young, and the young themselves. Therefore, if a particular time frame can be identified in which the numbers of those animals are peaking, thoughtful wildlife managers will limit negative impacts on the species during that period.