

GOVERNMENTAL IMMUNITY FOR DEADLY MOUNTAIN GOAT

James C. Kozlowski, J.D., Ph.D.

© 2016 James C. Kozlowski

Under the Federal Tort Claims Act (FTCA), the federal government in general, and the National Park Service in particular, is held liable for negligence under the state law of the jurisdiction where the injury occurred. Immunity from liability, however, is retained under the FTCA discretionary function exception. In general, immune discretionary functions include governmental decisions grounded in social, economic, and political policy considerations. For federal agencies that provide resource based public recreational opportunities, such immune discretionary functions usually involve an exercise of agency discretion in balancing resource preservation and visitor safety.

States and local governmental entities in many jurisdictions have similar statutory immunity which precludes negligence liability under an applicable state tort claims act for agency decisions which involve an exercise of discretion and judgment in balancing resource protection and public safety in public parks and recreation.

As illustrated by the case described herein, under the FTCA discretionary function exception, the National Park Service was found immune for alleged negligence in the management of aggressive wildlife in Olympia National Park.

#### WHEN GOATS ATTACK

In the case of *Chadd v. United States of America, National Park Service*, 794 F.3d 1104; 2015 U.S. App. LEXIS 12943 (9<sup>th</sup> Cir. 7/27/2015), the issue before the federal appeals court was whether the National Park Service could be sued for negligence under the FTCA after a mountain goat attacked and killed a visitor to Olympic National Park.

Established in 1938, Olympic National Park ("Olympic" or the "Park") spans 922,650 acres and hosts three million visitors each year. Among the many species of animal residing in Olympic is the mountain goat, which is not native to the area, having been introduced into the Park decades ago. Mountain goats possess dangerously sharp horns, and males typically weigh around 242 pounds. Prior to the incident in this case, there had been three reported, non-lethal attacks on people by mountain goats at other national parks, none of which were known to officials at Olympic.

Normally, mountain goats are reclusive animals, but the goats at Olympic frequently seek out areas visited by humans because of the salt humans leave behind. After repeated exposure to humans, goats can become habituated to their presence, which entails the loss of the mountain goat's fear response. Around 2004, when the goat population at Olympic was near 300, officials at the Park began receiving reports that some goats were becoming habituated; by 2006, goats began displaying aggressive behavior, such as standing their ground, following or chasing humans, pawing the ground, and rearing up.

Park officials decided to investigate the situation personally. They hiked the trails and observed the mountain goats demonstrating progressively habituated and sometimes aggressive behavior. Officials placed collars on the goats with Global Positioning System devices in order to track their movements and to collect further data.

Based on these observations, the Park began warning visitors about the goats' behavior. Visitors were given verbal warnings, and warning signs were posted on trails. Officials began employing aversive conditioning techniques, such as shooting the goats with paint balls and bean-bags, in order to change the goats' behavior. Officials focused their efforts on a few areas, including Klahhane Ridge. Nonetheless, officials continued to receive reports in 2009 and 2010 about a large male goat chasing visitors and displaying other signs of aggression.

Officials began discussing other management options for the problematic goat, but, as stated by Park Ranger Sanny Lustig, the solution "was not clear-cut." Sometime before July 30, 2010, Olympic Superintendent Karen Gustin, Wildlife Branch Chief Dr. Patti Happe, and Ranger Lustig met to discuss management options for the goat. They coordinated their reporting and hazing efforts and decided to intensify the aversive conditioning. Dr. Happe was to investigate the possibility of relocating the goat.

On July 30, she emailed Washington State Department of Fish and Wildlife biologist Dr. Donny Martorello to ask whether they "had an option for translocation." She described the goat and stated that it was "not responding to [their] efforts to have him keep . . . a greater distance from people." Dr. Happe wrote that, because the goat had been "increasingly aggressive," Olympic wished to "explore other management options for [the goat], including relocation from the area."

Over the next two months, there were continued reports of goats pawing the ground, preventing hikers from passing, and acting aggressively. On October 16, 2010, Robert Boardman and his wife, Susan Chadd, were hiking on the Switchback trail to Klahhane Ridge with a friend, Pat Willits, when a large male goat attacked Boardman, goring his leg with its horns and severing his femoral artery. Boardman died of his wound. Park officials found and destroyed a 370-pound male goat with blood on its horns within hours of the attack.

Plaintiff Chadd on her own behalf and as representative of Boardman's estate, filed suit against the United States and the National Park Service (the "Service") under the Federal Tort Claims Act (FTCA), alleging that Park officials breached their duty of reasonable care by failing to destroy the goat in the years leading up to Boardman's death. The federal district court dismissed the suit and Chadd appealed.

#### DISCRETIONARY FUNCTION IMMUNITY

As noted by the federal appeals court, "[t]he United States has waived its sovereign immunity with regard to tort liability under the Federal Tort Claims Act under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). However, under the FTCA "discretionary function exception," the court acknowledged the United States retains "sovereign immunity for any claim based upon the exercise or performance or the failure to

exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

As described by the court, the FTCA discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." Further, the court acknowledged that the FTCA discretionary function exception is "designed to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort," i.e., a claim for damages for negligence which resulted in injury or death.

As noted by the federal appeals court, "[t]he Supreme Court has established a two-step process for evaluating whether a claim falls within discretionary function exception. In the first step, the court would examine "whether the government's actions are discretionary in nature, acts that involve an element of judgment or choice."

In making this examination, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. If there is . . . a statute or policy directing mandatory and specific action, the inquiry comes to an end because there can be no element of discretion when an employee has no rightful option but to adhere to the directive.

#### SPECIFIC ACTION MANDATED?

In this particular instance, Chadd alleged that the National Park Service "should have destroyed the goat before it killed Boardman, and that the Service's failure to do so constituted negligence." Accordingly, in determining the applicability of the FTCA discretionary function exception, the federal appeals court would first determine whether "a statute or policy directing mandatory and specific action" required the Service to destroy the goat before it attacked Boardman.

As noted by the federal appeals court, if no such mandate existed, then "the Service's management of the goat necessarily involved an element of judgment or choice," and "the first prong of the discretionary function exception is satisfied."

As described by the federal appeals court, "[t]he Service's Management Policies manual (the "manual") is the basic Service-wide policy document of the National Park Service" and is mandatory unless specifically waived or modified by the Secretary, the Assistant Secretary, or the Director." Further, NPS did not dispute "this manual governed the Service's actions in the lead-up to Boardman's death." In particular, the federal appeals court noted that Section 8.2.5.1 of the Management Policies manual provided the following instruction: "The saving of human life will take precedence over all other management actions." That being said, the court also found "the manual qualifies this obligation" in the following manner:

The Service will do this within the constraints of the 1916 Organic Act. The primary—and very substantial—constraint imposed by the Organic Act is that

discretionary management activities may be undertaken only to the extent that they will not impair park resources and values. Moreover, the obligation to "reduce or remove known hazards" is limited by what is "practicable and consistent with congressionally designated purposes and mandates."

In the opinion of the federal appeals court, these statements in the manual indicated "there are many factors the Service must consider while ensuring human safety in the national parks, such as 'park resources and values,' what is 'practicable,' and 'congressionally designated purposes and mandates'." Further, the court noted that the manual explicitly provided that "these management policies do not impose park-specific visitor safety prescriptions." As a result, federal appeals court concluded "[t]he means by which public safety concerns are to be addressed is left to the discretion of superintendents and other decision-makers at the park level."

In the opinion of the federal appeals court, "[s]uch discretion includes whether to eliminate potentially dangerous animals." In particular, the court noted that manual contained "guidance specific to exotic (that is, non-native) species, such as the mountain goats at Olympic." Specifically, the manual provided that non-native species "will be managed—up to and including eradication—if (1) control is prudent and feasible, and (2) the exotic species creates a hazard to public safety."

Since the manual did not specify how exotic species were to be managed, the appeals court found "no particular, mandatory course of action for managing an exotic animal that is threatening public safety." Similarly, the court found Olympic's park-specific "Nuisance and Hazardous Management Animal Plan" did not specify "a particular management technique when confronted with a dangerous exotic species." On the contrary, the plan outlined various "management objectives" and "management alternatives."

Chadd, however, claimed a mandatory directive had been issued when the park superintendent had testified that the Service "moves to the next level of management techniques or series of levels if the problem isn't going away or doesn't seem to be resolved." The federal appeals court disagreed. As characterized by the court, the superintendent's statement "does not indicate that there is a general policy or directive *requiring* such action or prescribing the *timing* of it." (*Emphasis of court.*) On the contrary, the court found "nothing in the plan mandates an escalation of management techniques." Similarly, the court found Olympic's "Mountain Goat Action Plan" did not mandate a particular course of action.

Olympic's Mountain Goat Action Plan lists three forms of hazing as appropriate incident management techniques, but it does not specify how or when they should be deployed. The Mountain Goat Action Plan does not even mention animal destruction, in contrast with the Cougar Action Plan. There was, therefore, no extant statute, regulation, or policy directive that required Park officials to destroy the goat prior to Boardman's death.

## NEGLIGENCE IRRELEVANT

While acknowledging that there was no "mandatory directive prescribing a specific course of

conduct,” Chadd argued that “reasonable care” required Park officials to “shoot the goat.”

As noted by the court, “reasonable care” is only required when there is a legal basis for a negligence claim. If discretionary function immunity was applicable, the federal appeals court acknowledged that there is no basis for negligence liability, even if “Park officials abused their discretion” in “deciding how to manage the problematic goat.” According to the court, “at step one of the discretionary-function-exception analysis, all that matters is that there was, in fact, discretion.”

#### POLICY BASED DECISION?

Having found no mandatory directive or policy for managing this particular mountain goat, the federal appeals court proceeded to the second step of the process established by the Supreme Court to determine the applicability of the FTCA discretionary function exception. Specifically, given some degree of discretion and “element of judgment” on how to manage the situation, the court would consider whether “that judgment is of the kind that the discretionary function exception was designed to shield,” viz., “government actions and decisions based on social, economic, and political policy.”

As noted by the court, such discretionary immunity is “not confined to the policy or planning level,” but extends to “the actions of Government agents” at all levels from the agency director to agents in the field, like park rangers.

It does not matter, then, if the decision at issue was made by low-level government officials, rather than by high-level policymakers. It is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case.

In this particular instance, Chadd contended “Park officials had only one choice: comply with their own policies requiring them to prioritize human life and kill the goat.” As characterized by the court, Chadd’s argument simply reiterated her claim that reasonable care under the circumstances necessitated killing the goat. According to the court, in determining the applicability of the FTCA discretionary function exception, it was irrelevant “whether there was only one reasonable course of action.” Rather, the relevant question before the court was whether the course of action chosen was “*susceptible* to a policy analysis.” (*Emphasis of court*) In other words, “the design of a course of governmental action is shielded by the discretionary function exception,” but “the implementation of that course of action is not.”

Chadd had argued that Olympic's "failure to escalate up the levels of the Nuisance and Hazardous Management Animal Plan" was a failure to implement a designed course of governmental action, viz., safety measures already in place. According to Chadd, “the goat was an obvious health hazard that was a matter of safety and not policy” based upon “repeated acknowledgments by Park officials that the goat was dangerous and aggressive.” Further, Chadd noted testimony that the hazing techniques used by officials were known to have only a “temporary effect.” In addition, as evidence of a failure to implement a designed course of action, Chadd cited the park superintendent’s own statement that “the usual practice is to

'ramp up' management techniques when one is not working," in particular given "the history of incidents surrounding mountain goats in Olympic." The federal appeals court rejected Chadd's argument.

## COMPETING POLICY INTERESTS

According to the federal appeals court, "so long as a decision involves *even two competing policy interests*, it is 'susceptible' to policy analysis and is thus protected by the discretionary function exception." (*Emphasis of Court*)

In this particular instance, the court found two such policy considerations existed; one involved visitor safety and the other addressed the public's desire "to see the goats."

Both Dr. Happe and Olympic Deputy Superintendent Todd Suess submitted declarations stating, "The mountain goat is an appealing, iconic animal within Olympic . . . and is an attraction to park visitors. In the past, the park has encountered significant opposition to possible plans to remove some of the goats." In light of the public's interest in preserving Olympic's goats, Park officials implemented several non-lethal management options, such as hazing, and explored the possibility of relocating the goat.

Accordingly, in the opinion of the federal appeals court, "the Service's policy of prioritizing human safety over all other considerations," did not necessarily create a directive that Park officials exterminate problematic mountain goats. Contrary to Chadd's public safety assertions, the court found "nothing that forbids Park officials from protecting the goats to facilitate the public's enjoyment of the species." According to the court, there was "no contradiction between the goat's status as an exotic species and Olympic's desire to implement safety measures short of destruction." Moreover, in implementing "the policy of prioritizing human safety," the federal appeals court found "the means by which local officials ensure human safety is left to the discretion of superintendents and other decision-makers at the park level."

Such discretion includes decisions about animal destruction. Moreover, the Service's policy manual lists several competing objectives that Park officials had to consider in assessing the goat situation, including "park resources and values."

Thus, in addition to the policy issues mentioned by Park officials, the Service's guidelines cite many competing considerations that Olympic should have taken into account when deciding how to deal with the problematic goat. Whether Park officials actually took into consideration the policy objectives listed in the Service's guidelines is irrelevant because the challenged decision "need not be *actually* grounded in policy considerations, but must be, by its nature, *susceptible* to a policy analysis." (*Emphasis of court*)

Further, as noted by the court, "if a regulation allows the governmental employee discretion, as it did here, there is a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."

Accordingly, in this particular situation, the court found “Park officials need only point to some support in the record that the decisions taken were 'susceptible' to policy analysis for the discretionary function exception to apply.” Specifically, in the opinion of the court, “the implementation of the safety regulation was itself subject to competing policy concerns.”

## CONCLUSION

As a result, since “the decision to use non-lethal methods to manage the goat was susceptible to policy analysis,” the federal appeals court held “the discretionary function exception applies,” barring federal liability in this case. The federal appeals court, therefore, affirmed the order of the federal district court dismissing Chadd’s claims against the United States.

NOTE: In contrast, the federal district court in *Francis v. United States* denied discretionary function immunity for a similar fatal wild animal attack in a national forest. See: “Fatal Bear Attacks Test Immunity Laws,” Law Review, *Parks & Recreation*, Dec. 2009 Vol. 44, Iss. 12 <http://cehdclass.gmu.edu/jkozlows/lawarts/12DEC09.pdf>

\*\*\*\*\*

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail: [jkozlows@gmu.edu](mailto:jkozlows@gmu.edu) Webpage with link to law review articles archive (1982 to present): <http://mason.gmu.edu/~jkozlows>