

December 15, 2010

Honorable Fran Pavley
Room 4035, State Capitol

**WILDLIFE PROTECTION: DEPREDATING MOUNTAIN LIONS:
CONTRACT - #1026664**

Dear Senator Pavley:

You have asked whether the prohibition against taking a mountain lion by means of poison, leg-hold or metal-jawed traps, and snares pursuant to Section 4809 of the Fish and Game Code applies to an employee of a federal government agency who is removing mountain lions to protect endangered Sierra Nevada bighorn sheep under contract with the Department of Fish and Game pursuant to Department of Fish and Game Agreement Number P0860007.

Background

We are informed that the Department of Fish and Game (hereafter DFG) has entered into a contract with the United States Department of Agriculture Wildlife Services Program (hereafter Wildlife Services), under which DFG has agreed to pay a total sum of \$599,544 from July 1, 2008, to June 30, 2011, inclusive, to Wildlife Services in exchange for, among other things, performance of predator management tasks, including the removal, as required, of mountain lions to protect endangered Sierra Nevada bighorn sheep (see DFG, Agreement Number P0860007, dated March 3, 2009, Agreement Summary, pp. 1 and 3 and Exhibit A, p. 2, Sec. 5(B)(1); hereafter Agreement P0860007).

The contract, discussed further below, generally requires Wildlife Services to conduct the predator management tasks as part of the program for the recovery of the Sierra Nevada bighorn sheep, and requires these tasks to be completed in a manner that is consistent with the California Endangered Species Act, the federal Endangered Species Act, and other federal, state, and local laws and regulations (see Agreement P0860007, Exhibit A, p. 2, Sec. 5(B)(1)).

The Federal Endangered Species Act and the Sierra Nevada Bighorn Sheep Recovery Plan

By way of background, the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 and following; hereafter ESA) represents a comprehensive scheme for the preservation of endangered species¹ and threatened species.² Two of the stated purposes of the ESA are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,³ [and] to provide a program for the conservation of [those] species” (16 U.S.C. Sec. 1531(b)). The ESA directs all federal agencies to use all methods and procedures which are necessary to preserve an endangered species (see 16 U.S.C. Sec. 1531(c)(1); *Tennessee Valley Authority v. Hill* (1978) 437 U.S. 153, 184-185).

Both the United States Secretary of the Interior and the Secretary of Commerce are responsible for administering and enforcing the ESA (16 U.S.C. Sec. 1532(15)). The Secretary of Commerce has jurisdiction over all but a few specified marine species (see 50 C.F.R. 222.101), while the Secretary of the Interior has jurisdiction over all other species (see 50 C.F.R. 402.01(b)). For purposes of this opinion, we are concerned with the Sierra Nevada bighorn sheep, the protection of which is under the jurisdiction of the Secretary of the Interior (hereafter secretary).

The determination whether to designate a species as endangered or threatened under the ESA lies with the secretary (16 U.S.C. Sec. 1533(a)(1)). The secretary is required to issue regulations necessary and advisable to provide for the conservation of the listed species (16 U.S.C. Sec. 1533(d)). The secretary, acting through the United States Fish and Wildlife Service, designated the Sierra Nevada bighorn sheep as an endangered species under

¹ An “endangered species” is defined under ESA to mean “any species which is in danger of extinction throughout all or a significant portion of its range ...” (16 U.S.C. Sec. 1532(6)).

² A “threatened species” is defined under ESA to mean “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range” (16 U.S.C. Sec. 1532(20)).

³ For purposes of the ESA, the terms “‘conserve,’ ‘conserving,’ and ‘conservation’ mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary” (16 U.S.C. Sec. 1532(3)). These methods and procedures “include, but are not limited to, all activities associated with scientific resources management, such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking” (16 U.S.C. Sec. 1532(3)).

the ESA on April 20, 1999, and the bighorn sheep currently remains on the endangered species list (see 50 C.F.R. 17.11(h)).⁴

Once a species is designated as endangered or threatened, the secretary is required to develop and implement a recovery plan for the conservation and survival of that species unless the secretary finds that a recovery plan will not promote the conservation of the species (16 U.S.C. Sec. 1533(f)). On February 13, 2008, the Recovery Plan for the Sierra Nevada Bighorn Sheep was adopted by the United States Fish and Wildlife Service, under the secretary's administration (see 73 Fed.Reg. 8345; United States Fish and Wildlife Service (2007) Recovery Plan for the Sierra Nevada Bighorn Sheep; hereafter recovery plan).

The recovery plan identifies predation by various predators, including mountain lions, among the factors limiting Sierra Nevada bighorn sheep recovery (see recovery plan, p. 9), and requires the implementation of a management plan to protect bighorn sheep from predation losses by monitoring mountain lions in bighorn sheep ranges and selectively removing mountain lions that are a threat to the bighorn sheep (recovery plan, pp. 49, 153-154). The recovery plan identifies DFG as the lead agency responsible for preparing and adopting a management plan to protect bighorn sheep herds from predation losses and for reducing potential predator influences on bighorn sheep winter habitat selection (recovery plan, p. 75). However, the recovery plan does not specify the means by which the removal of mountain lions must be accomplished.

We next consider whether Section 4809 of the Fish and Game Code⁵ governs the means by which mountain lions may be taken in pursuit of the recovery plan's predator management tasks, within the context of Agreement P0860007.

Proposition 117

The mountain lion is designated as a specially protected mammal⁶ in California pursuant to the California Wildlife Protection Act of 1990, which was approved by the voters as Proposition 117, an initiative measure, at the June 5, 1990, statewide primary election. The California Wildlife Protection Act of 1990 includes, among other things, Chapter 10 (commencing with Section 4800) of Part 3 of Division 4 (hereafter Chapter 10), which sets

⁴ The Sierra Nevada bighorn sheep is also currently listed as an endangered species pursuant to the California Endangered Species Act (Ch. 1.5 (commencing with Sec. 2050), Div. 3), F.& G.C.) (see 14 Cal. Code Regs. 670.5(a)(6)(H)).

⁵ All further section references are to the Fish and Game Code, unless otherwise provided.

⁶ The mountain lion in California is not listed as either an endangered or threatened species pursuant to the ESA or the California Endangered Species Act (Ch. 1.5 (commencing with Sec. 2050), Div. 3) (see 50 C.F.R. 17.11; 14 Cal. Code Regs. 670.5(a) and (b)).

forth the protected status of mountain lions and provisions governing the taking⁷ of mountain lions.

Section 4800, which is a part of Chapter 10, provides that it is unlawful to take, injure, possess, transport, import, or sell a mountain lion, or any part or product of a mountain lion, except as specifically provided in Chapter 10 or in Chapter 2 (commencing with Section 2116) of Division 3 (subd. (b), Sec. 4800).⁸ A violation of Section 4800 is a misdemeanor (subd. (c), Sec. 4800).

Chapter 10 authorizes the taking of a mountain lion only in limited circumstances. For example, Section 4801 authorizes DFG to remove or take, or to authorize an appropriate local agency to remove or take, a mountain lion that is perceived to be an imminent threat to public health or safety or that is perceived by DFG to be an imminent threat to the survival of any threatened, endangered, candidate, or fully protected sheep species. Chapter 10 also authorizes DFG to issue a permit to take a mountain lion upon confirmation that livestock or other property is being or has been injured, damaged, or destroyed by a mountain lion (Secs. 4802 to 4806, incl.), and authorizes an owner of a property, or the owner's employee or agent, to immediately take a mountain lion that is encountered in the act of pursuing, inflicting injury to, or killing livestock or domestic animals, subject to a report to, and investigation by, DFG (Sec. 4807).

However, Section 4809 provides as follows:

"4809. Mountain lions authorized to be taken pursuant to [Chapter 10] shall be taken by the most effective means available to take the mountain lion causing the damage or destruction, except that no mountain lion shall be taken by means of poison, leg-hold or metal-jawed traps, and snares." (Emphasis added.)

As can be seen, Section 4809 prohibits the use of poison, leg-hold or metal-jawed traps, and snares to take a mountain lion pursuant to Chapter 10.

There are no exceptions to the prohibition in Section 4809 against using poison, leg-hold or metal-jawed traps, and snares to take a mountain lion. Rather, Section 4809 applies if a mountain lion is authorized to be taken pursuant to Chapter 10, and taking a mountain lion in a manner that is prohibited by Section 4809 is unlawful (subd. (b), Sec. 4800). Thus, Section 4809 prohibits the use of poison, leg-hold or metal-jawed traps, or snares by any person or entity to take a mountain lion under any circumstance, including a

⁷For purposes of the Fish and Game Code, "take" means to "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill" (Sec. 86).

⁸Chapter 2 (commencing with Section 2116) of Division 3 governs the importation, transportation, and sheltering of restricted live wild animals. Nothing in that chapter authorizes the taking of a mountain lion for any purpose.

situation in which the mountain lion is an imminent threat to the survival of an endangered sheep species (see Sec. 4801).

Analysis of Agreement P0860007

Finally, we consider whether, under the terms of Agreement P0860007 itself, the ban on the use of poison, leg-hold or metal-jawed traps, and snares pursuant to Section 4809 applies to an employee of Wildlife Services in the performance of duties on behalf of DFG under that contract.

As discussed above, Agreement P0860007 requires Wildlife Services, among other things, to perform predator management tasks, including the removal of mountain lions to protect endangered Sierra Nevada bighorn sheep, in exchange for payment by DFG (Agreement P0860007, Agreement Summary). In this regard, the contract provides that Wildlife Services will assist in the live-capture of Sierra Nevada bighorn sheep and selected predators, as part of the recovery program (Agreement P0860007, Exhibit A, p. 3, Sec. 5(B)(4)). The contract requires the DFG contract manager to provide supplies, equipment, and trained personnel to assist in the live-capture of animals, as deemed necessary or when mutually agreed upon by both parties (Agreement P0860007, Exhibit A, p. 3, Sec. 5(B)(4)). The contract lists soft-catch leg-hold traps and leg snares among the techniques, methods, or tools that may be used or recommended for these purposes, but it does not require the use of those tools for purposes of managing or removing depredateing mountain lions (Agreement P0860007, Exhibit A, p. 3, Sec. 5(B)(4)).

In the description of the work to be performed under the contract, the contract states the following:

“1) Contractor will assist the DFG in detecting, controlling, monitoring and removing, as required, predators which threaten SNBS, including but not limited to: mountain lions, coyotes, bobcats, and black bears, as part of [DFG’s] SNBS Recovery Program. The Contractor shall provide two (2) full-time qualified animal damage control specialists, trained dogs, firearms, ammunition, and vehicles. This shall be done in a manner consistent with the California Endangered Species Act and Federal Endangered Species Act. All activities will be completed according to appropriate Federal, State, and local laws and regulations.” (Agreement P0860007, Exhibit A, p. 2, Sec. 5(B)(1); emphasis added.)

Thus, the contract requires the predator management activities performed under the contract to be completed according to state laws and regulations.

In interpreting Agreement P0860007, we begin with the general principle that contracts of the state or its agencies are interpreted in the same manner and under the same rules of construction as private agreements (see Sec. 1635, Civ. C.; *M. F. Kemper Const. Co. v. City of Los Angeles* (1951) 37 Cal.2d 696, 701).

Accordingly, interpretation of a contract consists of giving effect to the mutual intention of the parties to the contract, insofar as that intention is ascertainable and lawful (Sec. 1636, Civ. C.), and requires that the language of the contract be followed where it is clear, explicit, and not absurd (Sec. 1638, Civ. C.). The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other (Sec. 1641, Civ. C.). A contract is to be construed in a manner that makes it lawful, if it can be done without violating the intention of the parties (Sec. 1643, Civ. C.).

Applying these principles, we first look to the language of the contract itself. Agreement P0860007 clearly and explicitly requires predator management activities conducted under the contract to be completed according to federal, state, and local laws and regulations (Agreement P0860007, Exhibit A, p. 2; see Sec. 1638, Civ. C.). In this regard, as discussed above, Section 4800 makes it unlawful to take a mountain lion except as provided by Chapter 10, including Section 4809. Section 4809 limits the means by which mountain lions may be taken and applies directly to predator management activities described in Agreement P0860007. This limitation was in effect at the time that DFG and Wildlife Services entered into the contract (see Sec. 6, Proposition 117, approved June 5, 1990).

Furthermore, Agreement P0860007, on its face, does not require or authorize DFG or employees of Wildlife Services to perform tasks in a manner that would violate Section 4809. Although the contract states that traps and snares for the live capture of bighorn sheep and predators may be recommended or provided, it does not expressly state that these methods of removal are required to be used to take mountain lions (see Agreement P0860007, Exhibit A, p. 3). Moreover, this provision must be interpreted together with the requirement that the predator management activities be completed in accordance with the applicable laws (see Sec. 1641, Civ. C.). Reading these parts of the contract together, the use of traps and snares to take mammals, other than mountain lions, that deplete Sierra Nevada bighorn sheep would be consistent with the provisions of Agreement P0860007, to the extent that such a use is authorized by the applicable federal, state, and local laws and regulations.

Thus, in our view, the contract should be interpreted as a whole in order to give effect to the requirement that predator management activities under the contract be performed in accordance with federal, state, and local laws and regulations, including Section 4809 (see Sec. 1641, Civ. C.; Agreement P0860007, Exhibit A, p. 2, Sec. 5(B)(1)).

Reading Agreement P0860007 in the context of the recovery plan for the Sierra Nevada bighorn sheep, which that contract, in part, is intended to implement, provides further support for this view. The recovery plan does not require the use of poison, leg-hold or metal-jawed traps, or snares for the purpose of removing mountain lions that pose a threat to the Sierra Nevada bighorn sheep, and, as to the means of removing those mountain lions, specifies only that a predator management plan “should attempt to set up criteria to remove only lions that are a threat” and should include “selective, humane predator removal where needed” (recovery plan, pp. 49 and 153). Thus, compliance with Section 4809 for purposes of conducting predator management activities under Agreement P0860007 is consistent with the recovery plan’s provisions relating to the removal of mountain lions.

Therefore, we conclude that predator management activities on behalf of DFG by Wildlife Services under Agreement P0860007 must be conducted in compliance with Section 4809 which prohibits the use of poison, leg-hold and metal-jawed traps, and snares to take a mountain lion.

Conclusion

It is our opinion that the prohibition against taking a mountain lion by means of poison, leg-hold or metal-jawed traps, and snares pursuant to Section 4809 of the Fish and Game Code applies to an employee of a federal government agency who is removing mountain lions to protect endangered Sierra Nevada bighorn sheep under contract with the Department of Fish and Game pursuant to Department of Fish and Game Agreement Number P0860007.

Very truly yours,

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