

BIOPOLITICAL MANAGEMENT OF MOUNTAIN LIONS, TULE ELK, AND BLACK BEARS IN CALIFORNIA

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Abstract: The hunting of mountain lions (*Felis concolor*), tule elk (*Cervus elaphus nannodes*), black bears (*Ursus americanus*), and other mammals has become controversial in California. Litigation by animal protection groups has resulted in several rulings regarding procedures used to adopt hunting regulations. The process has resulted in all hunting regulations being adopted pursuant to the California Environmental Quality Act. Although the process has been expensive and frustrating, and hunting opportunities have been foregone, many benefits in terms of the public's increased awareness of key issues facing wildlife populations have resulted from the litigation.

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Nowhere in North America has the fascination with black bears affected the management of the species more than in California. Although Californians have been enamored with black bears since settlement, prior to the 1970s most of the interest in bear management was expressed by the approximately 15,000 individuals that hunted black bears. Public interest was primarily related to bear hunting season length, bag limits, and the use of trailing hounds to hunt and/or pursue black bears. However, the nonhunting public's recent interest in black bears and other wildlife has had significant ramifications for management of black bears and other large mammals.

BACKGROUND

In the late 1960s Californians began to demonstrate a heightened interest in the protection of the environment. One result of this increased interest was the enactment of the California Environmental Quality Act (CEQA) in 1970. The CEQA is patterned after the National Environmental Policy Act (NEPA) and is designed to disclose potential impacts on the environment from proposed projects, provide alternatives to such projects, and provide mitigation measures to offset significant impacts resulting from them. The CEQA was initially only applied to "construction" type projects. However, in 1975, animal protection groups asked the California Superior Court to stop the black bear hunting season because the impacts on the bear population from hunting were not known. The Superior Court did not stop the bear season and the animal protection groups elevated their case to the California Supreme Court. In 1976 the Supreme Court upheld the bear season but ruled that by its very nature, hunting has the potential to cause significant impacts on a population and therefore hunting regulations promulgated by the Fish and Game Commission (Commission) are subject to the CEQA

(Wildlife Alive et al. v. Chickering et al. 1976).

The CEQA Guidelines (Section 781.5, Title 14, California Code of Regulations) provide that state agencies whose activities include protection of the environment within their regulatory programs may prepare functionally equivalent environmental documents. In 1977 legal counsel from the State Attorney General's Office, representing the Commission, developed a format for functionally equivalent documents. The format consists of identifying the circumstance that requires regulatory change, describing what change is proposed, identifying the factual basis for the need to change, proposing alternatives to the proposed change, supporting information (references) for the change, and any mitigation measure(s) required as a result of the change. Additionally, the process requires that the Department of Fish and Game (DFG) respond in writing to all comments (oral and written) received from the public regarding changes to the regulations.

After the Commission has completed the process, the documentation is forwarded to the California State Office of Administrative Law (OAL). The OAL reviews the documentation and determines if the regulatory changes are necessary, if the rationale for the changes is clear, and if all the comments received from the public are addressed. Assuming all of the above criteria are met, the OAL certifies the documents pursuant to the Administrative Procedures Act (APA) and the regulations are implemented. All subsequent regulatory changes made by the Commission have followed this process.

With this new process, the DFG and the Commission appeared to be in compliance with state law (CEQA and APA) regarding establishing hunting regulations. Although the level and frequency of involvement of individuals and organizations opposed to bear hunting appeared to be low, the controversy regarding hunting of bears and other large mammals continued.

MOUNTAIN LIONS

During the period of 1972 to 1986, state law classified mountain lions as a fully protected species (prior to 1972 mountain lions were classified as game mammals and were hunted). In 1986 the Legislature reclassified the mountain lion as a game mammal, and in 1987 the Commission adopted regulations that provided for the take of up to 190 mountain lions from limited areas of the state. As a result of this action several animal protection groups filed suit in California Superior Court, San Francisco County, to block the lion hunt. Although there was much debate as to the status of the lion population outside of the courtroom, the legal issue was one of compliance with the CEQA. The state lost the suit. In essence, the court ruled that the current functional equivalent documents (APA documents) the Commission was utilizing to comply with the CEQA were inadequate.

In 1988 the DFG revised and significantly expanded the supporting documentation for the proposed mountain lion hunt by preparing 2 separate documents: an APA document for use by the OAL and a stand-alone environmental document to comply with the CEQA (DFG 1988a). After lengthy public meetings, the Commission approved a mountain lion hunt for 1988 with essentially the same conditions, seasons, and bag limits as the proposed 1987 season.

Animal protection groups again sued the DFG and the Commission to stop the 1988 mountain lion hunt. As was the case with the 1987 mountain lion law suit, the 1988 suit was heard in the Superior Court of California, San Francisco County. Again, the case involved considerable emotional debate revolving around the status of the lion population; however, the issue before the court was still compliance with the CEQA. Although the DFG had significantly expanded the mountain lion environmental document, the court ruled that the final environmental document should have been circulated for additional public review. The court's rationale was that new information had been added to the final environmental document as a result of the DFG's responses to comments received regarding the draft environmental document. The state appealed this decision to the Third Appellate Court. The appellate court upheld the Superior Court's ruling.

In 1989 the DFG did not recommend a mountain lion hunting season because the 1988 case was still under appeal. As a result of the DFG's efforts to provide for limited sport hunting of mountain lions in 1987 and 1988, Proposition 117, the Wildlife Protection Act (WPA) was drafted by several conservation and/or animal protection organizations. The WPA ballot

initiative classified the mountain lion as a fully protected mammal that cannot be hunted. Additionally, the WPA mandated that 30 million dollars be spent annually to acquire wildlife habitat (specifically, mountain lion, deer, and wetland habitat). However, the WPA did not provide any new funds to accomplish the mandated habitat acquisition. The WPA was approved 52% to 48% by the voting public in June of 1990.

TULE ELK

Tule elk, the smallest subspecies of the north American elk, are only found in California. Historically, about 500,000 tule elk inhabited the great central valleys of California. Massive habitat conversion and unregulated market hunting resulted in their near extinction by the late 1860s when only 1 small population (less than 20 individuals) was known to exist in the southern San Joaquin Valley. As a result of reintroduction efforts, tule elk populations were established in 3 areas of the state by 1930.

By the 1960s, periodic hunts were held to reduce elk damage to alfalfa and fences in one area of the state (the Owens Valley). Animal protection groups protested these hunts based on the belief that tule elk should be classified as an endangered species. As a result of intense lobbying in the United States' Congress and the California Legislature, the state enacted statutes in 1971 that prohibited the hunting of tule elk until the statewide population exceeded 2,000 individuals. Additionally, the law required the DFG to relocate tule elk to suitable areas throughout the state. Congress also passed legislation that required federal agencies to cooperate with the "conservation of the tule elk."

As a result of total protection and the DFG's aggressive elk relocation program, the statewide tule elk population exceeded 2,000 individuals by 1987. Based on the fact that more than 2,500 tule elk existed in 19 widely distributed herds, the DFG recommended to the Commission that they authorize limited sport hunting of tule elk in 1988.

Both an APA document and a CEQA environmental document were prepared for proposed tule elk hunting (DFG 1988b). When the Commission adopted the tule elk hunting regulations, animal protection groups sued the DFG and the Commission to stop the hunt. The tule elk case was heard in the Superior Court of California, Sacramento County. Although the tule elk case involved considerably less public debate over the status of the population than the mountain lion case, the issue before the court was again compliance with the

CEQA. The state lost the suit. The court ruled that the DFG's environmental document was "promotional" and that supporting information cited in the document was not readily available to the public, and therefore should have been incorporated into the document.

As a result of the 1988 Sacramento Superior Court decision, the DFG expanded the tule elk environmental document (DFG 1989). Animal protection groups chose not to challenge this new document, and tule elk hunting has occurred every year since 1989.

BLACK BEAR

In 1989 animal protection groups sued the Commission and the DFG to stop the black bear hunting season. Although the suit included several causes of action related to the status of the bear population, the primary basis of the suit was compliance with the CEQA.

The DFG had not prepared an expanded environmental document for the 1989 black bear hunting season, as they had for the tule elk hunting season, because no changes had been proposed for the bear hunting regulations. Consequently the only documentation to support bear hunting was the document prepared to meet the criteria of the APA process. The state's legal representative argued in court that because there was no change in the hunting regulations, there was no new project to "trigger" the preparation of an environmental document. The state lost the suit. The court ruled that even though no changes were made to the hunting regulations, the action by the Commission was discretionary because the Commission had the option not to authorize a bear season. Additionally, the court ruled that there were changed circumstances based on the fact that an average of 1,250 bears are killed by hunters on an annual basis and environmental changes such as land development, timber harvest, wildfires, and climatic events (drought) also occur. No bear hunting occurred in California in 1989.

In 1990 the DFG prepared an environmental document for black bear hunting (DFG 1990). After the Commission adopted bear hunting regulations, animal protection groups again sued to stop the hunt. The court, the DFG, and the animal protection groups agreed to bifurcate the case and have separate rulings on the use of archery equipment to take bears and the general bear hunting season where muzzle-loading and center-fire rifles and pistols can be used to kill bears. The court ruled that the document was adequate in terms of compliance with the CEQA for the general

bear hunting season. However, the court ruled that the DFG did not fully disclose the controversy regarding the potential impacts of bears being wounded by individuals using archery equipment. Consequently, in 1990, persons were allowed to hunt bear with rifles and pistols but not with archery equipment. During her oral ruling, the judge was clear that the legislature, not the court, was the appropriate forum for the philosophical issue of whether it is appropriate to hunt black bears. The animal protection groups appealed this decision. The Third Appellate Court refused to hear the appeal. In 1991, based on a new, expanded environmental document (DFG 1991), the Commission adopted regulations for bear hunting that allowed the use of rifles, pistols, and archery equipment. The animal protection groups chose not to file suit regarding the 1991 black bear hunting regulations.

DISCUSSION

An obvious question is, how could a situation deteriorate to the point where the Commission and the DFG would be sued 4 consecutive years for failure to promulgate regulations in accordance with state law? There are numerous factors that contributed to the continued litigation between the state and the animal protection groups. One significant factor was the changing interpretation of state law. As indicated, the Commission had promulgated regulations from 1976 to 1987 under the assumption that the functionally equivalent process approved annually by the OAL was in full compliance with both the APA and the CEQA. The court's ruling in the 1987 mountain lion suit was that the functionally equivalent format developed to meet the criteria of the APA and to meet the intent of the 1987 Supreme Court decision regarding the CEQA was inadequate. The judge indicated that the CEQA requires a more thorough analysis of the project and the potential impacts on the environment. Hence, a long-standing Commission and DFG procedure regarding promulgating regulations was ruled inadequate. This decision has resulted in the DFG now preparing 2 separate documents for all regulatory actions: 1 to satisfy the CEQA and 1 to satisfy the APA.

In 1990 the court ruled that the DFG did not fully disclose controversial issues. The 1990 black bear environmental document failed to discuss the suggestion of one author (Benke 1989) regarding alternative archery hunting strategies. This author suggested that hunters be allowed to use arrows equipped with a "pod" containing succinylcholine chloride to hunt wildlife. His theory was that animals would "die quickly and

without needless misery." Although the scientific literature is replete with information indicating that succinylcholine chloride is not a "humane drug," the court ruled that the DFG was obligated to disclose Mr. Benke's suggestion, summarize the available information on the subject, and make a reasoned analysis and a conclusion based on the analysis. The court ruled that, because the DFG's 1990 environmental document failed to disclose Mr. Benke's work and the public controversy surrounding the use of archery equipment to hunt bears, and because Section 203.1 of the Fish and Game Code requires the Commission to consider the "welfare of individual animals" when adopting hunting regulations, the document was ruled to be inadequate in terms of compliance with the CEQA.

Section 203.1 of the Fish and Game Code states "when adopting regulations pursuant to Section 203 (bird and mammal hunting), the commission shall consider populations, habitat, food supplies, the welfare of individual animals and other pertinent facts and testimony." Prior to the 1990 court ruling referencing this section in relation to pain and suffering of individual bears, the DFG had interpreted the section to deal with an animal's welfare in terms of individual nutrition and population health as it related to habitat quality and quantity. The logic in this interpretation was in the fact that Section 203.1 is tied to the section that provided the Commission with the authority to authorize hunting seasons. Hunting seasons are designed to kill individual animals. Consequently, all subsequent environmental documents prepared by the DFG have discussed the welfare of individual animals including discussions relating to pain and suffering from being shot and/or killed with a bullet or an arrow. Additionally, for black bear, individual pain and physiological and emotional suffering issues related to the use of trailing hounds to hunt and/or pursue bears are discussed.

Another factor in the state's lack of ability to prevail in court prior to 1990 was the approach of the legal counsel for the respective parties. The counsel for the animal protection organizations was aggressive and effective. Their fees were apparently tied to the outcome of the case. Additionally, it was important for their "reputation" in the animal protection arena to be victorious. Consequently, they presented a very aggressive case that played heavily on emotional issues involving hunting of black bears and other large mammals.

Conversely, until 1990, the state was represented by counsel assigned to the case by the Attorney General's Office. As civil servants their fees were the same

regardless of the outcome of the case. The "firm's" (State of California) reputation and future financial status is generally not damaged by an animal protection law suit. Thus, there was no incentive to develop a "winning" track record. These factors played a key role in the style of the state's defense, which, in contrast to the petitioners, was very tentative. Until private counsel was retained by the DFG and the Commission in 1990, the state's case basically relied on arguing procedural points and failed to respond to the causes of action regarding wildlife population status or data interpretation made by the petitioners' counsel. In 1990, when private counsel was retained to represent the state, issues raised by the petitioners' counsel were addressed and often the accuracy of the petitioners' claims were questioned. This tactic resulted in immediate rewards to the state in the form of restoring the 1990 general (rifle and pistol) bear hunting season.

Another shortcoming of the state was the lack of staff with specific training and expertise in preparing hunting-related environmental documents that would withstand a CEQA challenge. As indicated above, the interpretation of the APA, the CEQA, and Section 203.1 of the Fish and Game Code appeared to evolve with each new legal challenge. As the DFG would correct one inadequacy, another would be identified by the court. DFG staff preparing environmental documents were generally program coordinators who dealt with biological issues regarding a particular species and did not have specific CEQA expertise (although many quickly developed it). This lack of CEQA experience initially resulted in preparation of environmental documents that were not in full compliance with the court's interpretation of CEQA.

CONCLUSION

The controversy surrounding mountain lion, tule elk, and black bear management in California, and the subsequent litigation, has been a mixed blessing. On the negative side, it has been extremely expensive and frustrating and resulted in foregone hunting opportunities in 1989 and to a lesser degree 1990. The costs of the 1989 black bear litigation approached \$400,000. This figure includes Attorney General fees, opposing counsel fees, DFG staff time, and lost revenue from license and tag sales. The total cost of the 6 law suits is unavailable, but clearly exceeds 1 million dollars. Funds required for litigation are taken directly from the DFG's operating budget and hence, numerous DFG programs and activities were curtailed or did not occur due to lack of funds. More important than

economic issues, however, is the adversarial climate that has developed between hunting and animal protection groups as a result of the litigation. As with black bears and almost all other species of wildlife, the most significant threat to populations is loss of habitat or habitat value. Nowhere is this more true than in California with its population of 30 million humans. Controversy dealing with sport hunting has made it more difficult for the biologist to guide the various wildlife organizations to rally around common interests and/or issues such as habitat loss and/or conversion.

Although the positive aspects of the controversy are difficult to quantify, they outweigh the negative aspects. The public's awareness of issues facing wildlife has increased. Although the sport hunting "debate" has been highly emotional at times, the controversy has led the public to seek out more information on issues facing black bears and other wildlife. This increased awareness of issues facing California's wildlife can provide numerous, long-term benefits to the resource. As an example, numerous groups (both nonhunting and hunting) interested in wildlife are focusing their attention on changing public land-management practices such as livestock grazing and road construction that are having negative impacts on wildlife in some areas of the state.

The exercise of annually disclosing goals, objectives, and issues related to black bear management has been extremely valuable. Not only does this annual disclosure provide the public with the opportunity to review and comment on the stewardship of black bears and other hunted wildlife in California, it provides the DFG with an opportunity to analyze data and research needs and seek public support for its management programs.

Finally, the controversy has brought to the forefront the fact that California is changing rapidly. California's estimated 15,000-18,000 black bears must share the state with 30 million humans and 132,000 lawyers. One of every 9 people living in the United States resides in California. As California's human population continues to soar by more than 800,000 new residents annually, (the current population of Montana or twice the population of Wyoming) its demographics also change. Much of the population increase is a result of immigration; the state's ethnic diversity is astounding. By the year 2000 there will be no racial majority in California. With the increased ethnic diversity comes an ever increasing span of cultural values relating to wildlife.

In addition to cultural values toward wildlife, social values also are affecting wildlife in the state. More

than 90% of Californians live in urban areas. Three out of four children in California will be raised in single-parent households. This situation has resulted in a urbanized, high-tech, fast-paced society in which approximately 10% of the individuals support traditional hunting opportunities and approximately 10% oppose all hunting of wildlife (DFG 1987, Southwick 1993).

The challenge for wildlife managers will be to foster and maintain a strong interest and concern for wildlife from the 80% of the "neutral" population. This can be accomplished by providing the public with easily understood, reliable information concerning wildlife in a timely fashion. Managers must also increase their interactions with all members of the public, including groups having differing philosophical views from the "traditional management" viewpoint.

The consequence of inactivity is clearly evident in California. The WPA passed (52% to 48%) by the voters in June of 1990 essentially removed all mountain lion management authority from the DFG. Since the Governor did not take a position on the WPA initiative until just before the election, the DFG was prohibited from actively providing information in a timely manner (campaigning). Hence, instead of having readily available, factual information provided by the state, the public was forced to rely on statements, developed primarily via emotions, provided by organizations supporting or opposing the initiative.

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