



VIA FACSIMILE TRANSMISSION AND U.S. MAIL; RETURN RECEIPT REQUESTED

February 21, 2007

Ruth Coleman, Director
Department of Parks and Recreation
PO Box 942896
Sacramento CA 94296-0001
Fax: (916) 324-1610

Daphne Greene, Deputy Director
OHMVR Division
Department of Parks and Recreation
PO Box 942896
Sacramento CA 94296-0001
Fax: (916) 324-1610

Michael Chrisman
Secretary for Resources
Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814
Fax: (916) 653-8102

Dirk Kempthorne
Secretary of the Interior
1849 C Street N.W.
Washington, D.C. 20240
Fax: (202) 208-6956

Re: Notice of Intent to Sue for Violations of Section 9 of the Federal Endangered Species Act for Taking Peninsular Bighorn Sheep By Significant Habitat Modification and Degradation

Dear Secretary Chrisman, Director Coleman, and Deputy Director Greene,

I am writing on behalf of the Center for Biological Diversity (“CBD”) and the Desert Protective Council (“DPC”), to inform you of violations of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (“ESA”). This letter is provided to you pursuant to the 60-day notice requirement of the ESA’s citizen suit provision. 16 U.S.C. § 1540(g)(2). The activities described in this notice violate the take provisions of the ESA and, if they are not curtailed, CBD and DPC intend to commence a civil action against you and other responsible state employees, acting in their official capacity, for violations of section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B).

Section 9 of the ESA specifically prohibits the “take” of a listed species, 16 U.S.C. § 1538(a)(1)(B), a term broadly defined to include harassing, harming, pursuing, wounding or killing such species, 16 U.S.C. § 1532(19). The term “harm” is further defined to include “significant habitat modification or degradation where it . . . injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. §17.3 “Harass” includes any “act or omission which creates the likelihood of injury to wildlife by annoying it to such and extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* The ESA’s legislative history supports “the broadest possible” reading of “take.” Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 704-05 (1995). Courts will enjoin habitat

destruction that rises to the level of take of listed species. Palila v. Hawaii Dept. of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988); Center for Biological Diversity v. Marina Point Development Associates, 434 F.Supp. 2d 789, 796, 800 (C.D. Cal. 2006)

The take prohibition applies to any “person,” 16 U.S.C. § 1538(a)(1), including state agencies, 16 U.S.C. § 1532(13). The ESA further makes it unlawful for any person or state agency to “cause to be committed” the take of a species. 16 U.S.C. § 1538(g). Violations of Section 9 are enforceable under the ESA’s citizen-suit provision. 16 U.S.C. § 1540(g).

Courts have repeatedly held that government regulations authorizing third parties to engage in harmful actions can constitute an illegal taking under Section 9 of the ESA. See Strahan v. Coxe, 127 F.3d 155, 158, 163-64 (1st Cir.1997), *cert. denied*, 525 U.S. 830 (1998) (state agency caused takings of the endangered right whale because it "licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in violation of [the ESA]"); Defenders of Wildlife v. Administrator, Env'tl. Protection Agency, 882 F.2d 1294, 1300-01 (8th Cir.1989) (federal agency caused takes of the endangered black-footed ferret through its “decision to register pesticides” even though other persons actually distributed or used the pesticides); Loggerhead Turtle v. City Council of Volusia County, 148 F.3d 1231, 1253 (11th Cir. 1998) (county’s inadequate regulation of beachfront artificial light sources may constitute a taking of turtles in violation of the ESA).

Peninsular bighorn sheep live in hot, desert regions with steep, open slopes, canyons and washes where the land is rough, rocky and sparsely vegetated in the Peninsular Mountain Ranges from the San Jacinto Mountains south into Baja California, Mexico. Final Determination of Critical Habitat for Peninsular Bighorn Sheep: Final Rule, 66 Fed. Reg. 8650 (February 1, 2001). The population segment of the Peninsular bighorn sheep north of the border was listed as endangered under the ESA on March 18, 1998.¹ 63 Fed. Reg. 13134. Peninsular bighorn live between 300 and 4,000 feet elevation and generally produce one lamb per year. 66 Fed. Reg. 8650. Lambing occurs from January through August; most lambs are born between February and April. 66 Fed. Reg. 8651. The primary threats to survival of the bighorn are habitat destruction and fragmentation, predation, human-related disturbance, disease, and low lamb recruitment. 66 Fed. Reg. 8650-51. Bighorn require open terrain to detect and avoid predators, are wide-ranging and can traverse long distances. 66 Fed. Reg. 8653-55.

The Service designated critical habitat for Peninsular bighorn sheep on February 1, 2001. 66 Fed Reg. 8650, 8652. The critical habitat designation was based on an ecosystem approach taking into account that the bighorn “requires many essential resources spread across the greater landscape that allows the species to adapt to natural and unnatural environmental processes.” 66 Fed. Reg. at 8653. The final designation includes 844,897 acres of land the Service deemed essential to the conservation and recovery of the Peninsular bighorn sheep. 66 Fed. Reg. 8655.

¹ In 1971, the Peninsular bighorn sheep was listed as a threatened species under the California Endangered Species Act (“CESA”), Cal. Fish & Game Code §§ 2050-2116. The species is also given special state protection as a Fully Protected mammal, Cal. Fish & Game Code § 4700(b)(2), meaning it may not be taken or possessed at any time.

In September 2006, the California Department of Parks and Recreation (“Department”) acquired title to more than 4,000 acres of land formerly known as the “Freeman Properties” in Imperial County California. See Exhibit 1 attached hereto (Map).² More than half of the newly acquired parcels – now generally denoted the “Desert Cahuilla lands” — are within the designated critical habitat for the Peninsular bighorn sheep. The use of this habitat by the endangered Peninsular bighorn sheep for feeding and foraging is well documented. Prior to the land being acquired by the Department, off-road vehicles (“ORVs”) used and abused these lands with impunity. Field investigations by Department personnel have detailed the wonton destruction of plants, soil structure, unique geological features, cultural sites, and paleontological resources. See California State Parks, Colorado Desert District, “Natural & Cultural Resources Overview, Desert Cahuilla Acquisition Project, Imperial County, California,” January 2006. Aerial photos also show the intense fragmentation of the Peninsular bighorn sheep habitat due to the completely unrestrained “trail blazing” and “route” proliferation by ORVs. Exhibit 1 (Map).

The use of ORVs can disrupt normal Peninsular bighorn sheep behavior and may alter their use of essential resources. U.S. Fish & Wildlife Service, Recovery Plan for Bighorn Sheep in the Peninsular Ranges, California, October 25, 2000 (“Recovery Plan”), at 43-44; see also 66 Fed. Reg. 8650-51. Due to habitat destruction and increasing development, the habitat available to Peninsular bighorn sheep is an increasingly narrow band along the east side of the Peninsular ranges. Recovery Plan at 10, 11 (map including Desert Cahuilla lands). Peninsular bighorn sheep seek shade under boulders and cliffs during hot weather and use alluvial fans and washes for forage. Recovery Plan at 6-7. Low elevation terrain and washes such as those found on the Desert Cahuilla lands provide an important source of high quality forage and washes in particular provide browse for longer in summer months than other areas. Recovery Plan at 7. Habitat fragmentation is a major threat to the Peninsular bighorn sheep, human disturbance along roads and trails can cause the bighorn to avoid areas, affecting movement and habitat use. Recovery Plan at 38-39.

ORVs destroy vegetation and the soil structure that allows vegetation used as food sources by the Peninsular bighorn sheep to grow in these hot, dry desert areas. The destruction of habitat used by Peninsular bighorn sheep for foraging by completely unrestricted off-road vehicle activity on lands owned and controlled by the Department constitutes a prohibited “take” under the ESA. In addition, excessive ORV use can also destroy the structure of cliffs that provide shade to the bighorn during hot weather. The destruction of vegetation that provides food for the bighorn and the destruction of soils and soil structure that will prevent these plants from flourishing and sustaining the bighorn in the future constitutes a prohibited “take” under the ESA. Because such take is the direct result of the California Department of Parks and Recreation’s actions authorizing continued destructive ORV use on the Desert Cahuilla lands, and the Department has the authority and discretion to prevent such harm, the Department has violated and continues to violate Section 9 of the ESA. Indeed, by allowing ORV use in critical habitat, that is, habitat that has been determined to be essential to the survival and recovery of the Peninsular bighorn sheep, the Department has violated and continues to violate, the take prohibitions of both the California and Federal Endangered Species Acts.

² Exhibit 1 is a map compiled by the Department from aerial photos. A GIS overlay of the designated critical habitat for the endangered Peninsular bighorn sheep was added.

Although the Department is well aware that the destruction of habitat essential to the endangered Peninsular bighorn sheep has occurred and continues to occur on the Desert Cahuilla lands, the Department nonetheless permits ORVs to use and abuse these lands without any restrictions. Because the Department owns and controls the newly acquired Desert Cahuilla property and has the power, authority and discretion to regulate ORV use on these lands, the Department is legally responsible for the harm to the endangered Peninsular bighorn sheep and the Department is in violation of Section 9 of the ESA.

Once title to the land was transferred to the Department, in September 2006, the Department had the power to control the use of these lands and was required to manage the land in accordance with the laws of the State of California including the California Public Resources Code and the Motor Vehicle Code. Cal. Pub. Res. Code § 5006 (Acquisition of property for state park system; “All real and personal property acquired by the department for the state park system shall be under the jurisdiction of the department immediately upon transfer of title to the state”; emphasis added); Cal. Pub. Res. Code § 5001 (Controlling authority; “The Department of Parks and Recreation has control of the state park system”).

The Department has the power to control ORV use on the Desert Cahuilla lands whether or not the area has yet been classified as a particular type of park unit. Cal. Pub. Res. Code § 5019.50 (All units included except wilderness areas; “All units that are or shall become a part of the state park system, except those units or parts of units designated by the Legislature as wilderness areas . . . , shall be classified by the State Park and Recreation Commission into one of the categories specified in this article”; emphasis added); see also Cal. Pub. Res. Code § 5002 (Areas constituting system; “All parks, public camp grounds, monument sites, landmark sites, and sites of historical interest established or acquired by the State, or which are under its control, constitute the State Park System”; emphasis added). The Department’s own regulations make it quite clear that even newly acquired lands that are not yet classified are nonetheless “units” of the park system and that the Department has the power to control access to and use of those lands by ORVs. 14 Cal. Code Reg. § 4301(t) (“Unit means any named and classified unit under the control of the Department of Parks and Recreation, as well as any Department projects which have not yet been named or classified”; emphasis added).

Pursuant to the California Fish and Game Code, the Department has the obligation to utilize its authority to conserve endangered species in general and the Peninsular bighorn sheep in particular. Cal. Fish & Game Code § 2055 (Conservation efforts by state agencies: “The Legislature further finds and declares that it is the policy of this state that all state agencies, boards, and commissions shall seek to conserve endangered species and threatened species and shall utilize their authority in furtherance of the purposes of this chapter”; emphasis added).³

³ It is the policy of the State of California to conserve habitat for endangered species such as the Peninsular bighorn sheep. Cal. Fish & Game Code § 2052 (“The Legislature further finds and declares that it is the policy of the state to conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat and that it is the intent of the Legislature, consistent with conserving the species, to acquire lands for habitat for these species.”). The

Just as in the Federal ESA, 16 U.S.C. §§ 1531(b), 1532(3); ESA §§ 2(b), 3(3), the term “conserve” under the California ESA means “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 this chapter are no longer necessary.” Cal. Fish & Game Code § 2061. Thus, under California law, the Department is charged with an affirmative obligation to use its authority to control activities on the Desert Cahuilla lands in order to protect the Peninsular bighorn sheep and its habitat so that the species can recover. The Department’s failure to do so is a violation of State law and the harm the Department has permitted and continues to permit to occur is also a violation of Federal law.

Under the California Public Resources Code, the Department of Parks and Recreation has the power to control ORV use on all lands owned and controlled by the Department. “The department shall administer, protect, develop, and interpret the property under its jurisdiction for the use and enjoyment of the public.” Cal. Pub. Res. Code § 5003 (Powers and duties of department); see also Public Resources Code section 5019.53 (“The purpose of state parks shall be to preserve outstanding natural, scenic, and cultural values, indigenous aquatic and terrestrial fauna and flora, and the most significant examples of ecological regions of California such as desert and desert mountains.”) The Department has both the power and the obligation to limit ORV on all units of the state park system (including on the Desert Cahuilla lands which have not yet been classified) as follows:

- (a) The use of motor vehicles in units of the state park system is subject to the following limitations:
 - (1) In state wildernesses, natural preserves, and cultural preserves, use is prohibited.
 - (2) In state parks, state reserves, state beaches, wayside campgrounds, and historical units, use is confined to paved areas and other areas specifically designated and maintained for normal ingress, egress, and parking.
 - (3) In state recreation areas, use is confined to specifically designated and maintained roads and trails.
- (b) The use of motor vehicles on lands in the state vehicular recreation areas is confined to areas and routes designated for that purpose.

Cal. Pub. Res. Code § 5001.8 (Use of motor vehicles; emphasis added). In addition, the regulations expressly prohibit the use of ORVs outside of designated units. 14 Cal. Code Reg. § 4352 (“No person shall operate an off-highway vehicle . . . except in designated units or portions thereof.”)

The Department is required to limit ORV use in various ways in all areas owned and controlled by the Department. There is simply no provision in the Public Resources Code or elsewhere that sanctions the Department’s current mis-management of these lands that allows ORV use outside of designated roads, trails, areas, or routes. In the interim period before the

acquisition and preservation of Peninsular bighorn sheep habitat as part of the Desert Cahuilla lands would fit squarely within that legislative purpose.

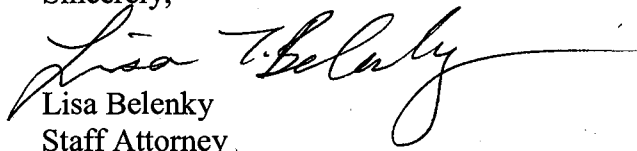
Department completes its unit classification process, which the Department has stated publicly could easily take 2 years or more,⁴ it must provide specific limits on ORV use on the Desert Cahuilla lands to protect the endangered Peninsular bighorn sheep from harm and harassment including the continued destruction of habitat essential to the species. The Department's current mis-management that permits ORVs to damage and destroy habitat utilized by the Peninsular bighorn sheep for foraging and feeding cannot lawfully continue.

In sum, since the title to the Desert Cahuilla lands was transferred to the Department of Parks and Recreation in September 2006, the Department has violated and is continuing to violate the take prohibition of Section 9 of the Endangered Species Act by permitting ORVs to damage and destroy habitat used by the endangered Peninsular bighorn sheep for feeding and foraging and thereby cause harm to this endangered species.

Accordingly, and pursuant to the citizen suit provisions of the ESA, 16 U.S.C. § 1540(g)(1)(A) & (2)(A), CBD and DPR put you on sixty-days' notice of our intention to commence a civil action to challenge the foregoing violations of law and any violations that may occur after service of this notice letter, and to seek their remediation in a court of law.

It is our practice to pursue negotiations whenever possible. In keeping with this policy, we invite all alleged violators to discuss their obligations under the ESA with us. If you have any questions about the issues raised in this letter, please feel free to contact me at any time.

Sincerely,



Lisa Belenky
Staff Attorney

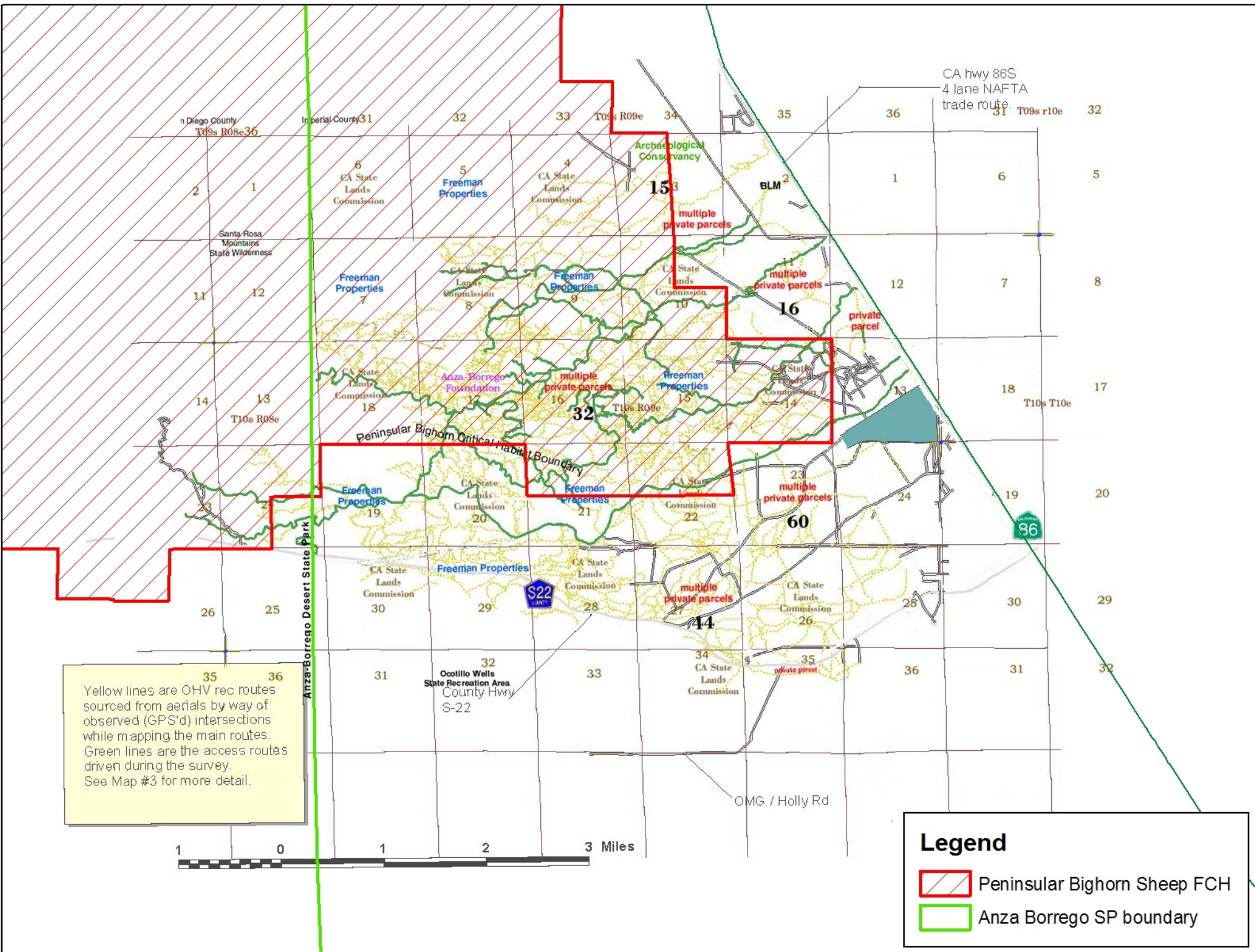
cc:

Nicholas Stern, Office of the Attorney General

Bruce Torgan, General Counsel, California Department of Parks and Recreation

⁴ Before classifying an area as a unit in the state park system the Department must "prepare an inventory of the unit's scenic, natural, and cultural features, including, but not limited to, ecological, archaeological, historical, and geological features." Cal. Pub. Res. Code § 5002.1.

Exhibit 1



CA hwy 86S
4 lane NAFTA
trade route.

Yellow lines are OHV rec routes sourced from aeriels by way of observed (GPS'd) intersections while mapping the main routes. Green lines are the access routes driven during the survey. See Map #3 for more detail.



Legend

- Peninsular Bighorn Sheep FCH
- Anza Borrego SP boundary