

COMMISSION MEETING AGENDA BRIEFING

Meeting Date: May 16, 2024

Agenda Number: 8

Presenter: Stewart Liley

Corroborator: N/A

Agenda Title: Initial Discussion of the Bighorn Sheep Rule 19.31.17 NMAC.

1. Summary of Agenda Item

The Department will present a proposed amendment to extend the bighorn sheep rule for two more years as it is set to expire on March 31, 2025. This extension would align the Bighorn Rule with the expiration of the other Big Game rules and future rule development.

2. Background Information

During the previous rule development in 2024 the duration of the bighorn rule was shortened from four years to two years during the rule hearing. The decision to shorten the rule was based on potential proposed legislation from individuals or groups outside of the Department. No legislative changes have occurred pertaining to the draw quota statues and the Department is recommending continuing issuing bighorn licenses as it currently does.

3. Strategic Plan References and Possible Impacts of Agenda Item

The process as presented to the Commission meets the Conservation Services Program Objectives 1, 2 and 5 of the Department's Strategic Plan: FY 2019 – FY 2023

4. Considerations Regarding Duplications and/or Conflicts with Existing Rules or Statutes

None

5. Description and Summary of Public Involvement Process and Results

The Department will post proposed changes to the bighorn rule on its website.

Suggested Motion

This is a discussion item, and no motion is necessary, unless Commission discretion dictates otherwise.

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

April 5, 2022

The Honorable Nathan P. Small
Representative D-Doña Ana, District 36
PO Box 697
Doña Ana, New Mexico 88032
Email: Nathan.small@nmlegis.gov

Re: Opinion Request – New Mexico State Game Commission’s
Application of the term “Hunt Code”

Dear Representative Small:

You have requested an Attorney General opinion regarding whether the New Mexico State Game Commission’s application of the statutorily defined term “hunt code” to its rule regulating the hunt of bighorn sheep is lawful. More specifically, we understand you are asking whether multiple hunts for Desert bighorn sheep and Rocky Mountain bighorn sheep, both subspecies of the bighorn sheep species *Ovis canadensis*, in various locations throughout the state over the course of several days may be properly conducted under a single “hunt code”, as that term is defined by Section 17-2A-1. Based on our examination of the relevant constitutional, statutory and case law authorities, as well as the information available to us at this time, the short answer is yes.

As a preliminary matter, there are three basic rules of statutory construction that guide my analysis. The first rule is that the plain language of a statute is the primary indicator of legislative intent. Courts generally give the words used in a statute their ordinary meaning unless the legislature indicates a different intent. The court will not read into a statute language which is not there, particularly if it makes sense as written. The second rule is to give persuasive weight to long-standing administrative constructions of statutes by the agency charged with administering them. The third rule dictates that where several sections of a statute are involved, they must be read together so that all parts are given effect. *Filippi v. Board of County Commissioners of Torrance County*, 2018-NMCA-050,

¶ 7 (internal citations omitted). In this instance, these rules mean examining the Commission's and the Department's own interpretations of its enabling statutes as well as past practices.

For the purposes of Article 17 of the New Mexico Statutes Annotated, governing the regulation of game and fish and outdoor recreation in the state, the term "hunt code" is defined as "a description used to identify and define the species, weapon type and time frame authorized for a specific hunt". NMSA 1978, § 17-2A-1(A) (1996).¹ Next, "hunt code" subsequently appears in only one other statute in the whole of Article 17 governing the allocation of licenses for special drawings. See NMSA 1978, § 17-3-16 (1964, as amended through 2012). There, within the context of specifying how the fees for nonresident licenses issued in a special drawing in a high-demand hunt shall be assessed, the Legislature used the term "hunt code" in defining the term "high-demand hunt".² Aside from these two instances - one defining the term "hunt code" and the other using it in the context of defining "high-demand hunt" - the laws governing hunting licenses and permits do not otherwise dictate or circumscribe how the term "hunt code" should be used, leaving it to the discretion of the Commission and the Department to determine how to apply it, provided only that any hunt code include "the species, weapon type and time frame authorized for a specific hunt." See *Phelps Dodge Tyrone v. New Mexico Water Quality Control Commission*, 2006-NMCA-115, ¶ 25 (internal citations omitted) (courts will give administrative agencies considerable discretion to carry out the purposes of their enabling legislation and afford deference to an agency's interpretation of its own regulations).

In addition to ensuring that hunt codes contain all the information required by law, the Commission is also cognizant of and must give effect to the resident and nonresident allocations set forth in Section 17-3-16(B) when licenses are issued from special drawings. That is, special drawings require that at least eighty-four percent (84%) of the licenses must be issued to New Mexico residents, ten percent (10%) to nonresidents and residents who will be contracted with a New Mexico outfitter prior to application, and six percent (6%) to nonresidents who are not required to be contracted with an outfitter. NMSA 1978, § 17-3-16(B). While

¹The term "specific hunt" is not otherwise defined or used elsewhere in Article 17, but it would be fair to say that the specific hunts being discussed herein relate to the Rocky Mountain bighorn sheep (ram or ewe) and Desert bighorn sheep (ram) hunting seasons. See 19.31.7 NMAC.

²A high-demand hunt is one in which "(1) a hunt where the total number of nonresident applicants for a *hunt code* in each unit exceeds twenty-two percent of the total applicants and where the total applicants for a hunt exceeds the number of licenses available based on application data indicating that this criteria occurred in each of the two immediately preceding years; or (2) an additional *hunt code* designated by the department of game and fish as a quality hunt." NMSA 1978, § 17-3-16 (E) (emphasis added).

not at issue here, the statute also specifies that the fees for “a nonresident license for a special drawing in a high-demand hunt covered in Subsection B of this section” and provides for circumstances where the applications for licenses issued in a special drawing do not constitute the allocated licenses for either category in subsection B. NMSA 1978, § 17-3-16 (C)-(E). There is no question, however, that the Commission must factor the Section 17-3-16(B) allocation requirements into how hunt codes are applied to licenses issued from a special drawing, as licenses for bighorn sheep hunts are.

The suggestion that the manner in which the Commission assigns hunt codes for the bighorn sheep hunting season may be somehow inappropriate or illegal may stem from the fact that the assignment of hunt codes for bighorn sheep hunting seasons differs from the assignment of hunt codes for other game hunting seasons. For example, the hunt codes for elk, deer, barbary sheep, oryx or other game hunting seasons differ from the hunt codes for bighorn sheep in that the hunt codes for hunting other game are further assigned down to the hunt areas or GMUs and hunt dates. *See, for example*, 19.31.13.14 NMAC (deer hunts); 19.31.12.11 NMAC (barbary sheep); 19.31.12.12 NMAC (oryx); 19.31.14.12 NMAC (elk). Department Chief Stewart Liley has explained that, unlike bighorn sheep, the population levels of these other game animals, as demonstrated by the number of licenses available in each hunt area or GMU, support a greater number of hunters that can then be allocated between resident and nonresident hunters, as required by Section 17-3-16(B).

The same may not be said about the Rocky Mountain and Desert bighorn sheep population levels, again as evidenced by the number of licenses available, which are significantly less than the number of licenses available for most other game. This is especially true for bighorn sheep *ram* hunts, where there are only between one (1) and five (5) draw licenses available in a hunt area over a ten (10) to fourteen (14) day hunt window, compared to, for example, sixty five (65) draw licenses available for oryx in a single GMU or as many as two hundred and fifty (250) draw licenses available for Barbary sheep in a single GMU.³ Again, Chief Liley has explained that in order to meet the mandated minimum of 84% of special draw licenses for bighorn sheep hunts allocated to New Mexico residents and one tag to an outfitted hunter (nonresident or resident), there would have to be at least seven (7) licenses available in each hunt area under a single hunt code. Similarly, in order to meet the minimum 84% allocation for resident hunters and still be able to provide one tag for an outfitted hunter and one tag for a

³ See **2022-2023 New Mexico Hunting Rules and Information (hereinafter referred to as “NM Hunting Rules”)** at https://www.wildlife.state.nm.us/download/publications/rib/2022/hunting/2022_2023-New-Mexico-Hunting-Rules-and-Info.pdf

nonresident hunter, there would have to be at least fourteen (14) licenses available in each hunt area under a single hunt code. As mentioned previously, however, the population levels of Rocky Mountain and Desert bighorn sheep simply do not allow for the allocation of licenses under separate hunt codes for each of the hunt areas.

Hence, in order to satisfy the allocation requirements for resident and nonresident hunters set forth in Section 17-3-16(B), the Department has recommended and the Commission is being asked to approve, as it has before, rules for a bighorn sheep hunting season that combines the Rocky Mountain bighorn sheep (species) by sex and weapon type (the specific hunt) in several hunt areas and over several hunt windows under one hunt code. Similarly, it groups the hunting season for Desert bighorn rams in several hunt areas and over several hunt windows under one hunt code.

The Commission's current regulation governing the management and hunting of bighorn sheep in the 2022-2023 hunt season, is able to achieve compliance with Section 17-3-16 (B) by creating four (4) separate hunt codes that each identify the species, weapon type and time authorized for a specific hunt. 19.31.7 NMAC. Hunt Code BHS-1-201 prescribes hunting Rocky Mountain bighorn ram [the species], using legal sporting arms [weapon type], during various hunt dates [the time frame], in designated hunt areas. The only difference between Hunt Code BHS-1-202 and Hunt Code BHS-1-203 for Rocky Mountain bighorn ewes is the weapon type [the former legal sporting arms; the latter bow only] and the hunt dates. Finally, Hunt Code BHS-1-204 prescribes hunting Desert bighorn ram [the species], using legal sporting arms [weapon type], during various hunt windows [the time frame] in designated hunt areas. In practice, this means that the Department was able to offer twenty-six (26) licenses – twenty-two to residents and four (4) for nonresidents under Hunt Code BHS -1-201; forty-one (41) licenses under Hunt Code BHS-1-202 - thirty-four (34) to residents and seven (7) to nonresidents; seventeen licenses under Hunt Code BHS 1-203 - fourteen (14) to residents and three (3) to nonresidents; and twenty-four (24) licenses under Hunt Code BHS-1-204 - twenty (20) to residents and four (4) to nonresidents.

In sum, the current population levels of Rocky Mountain and Desert bighorn sheep make it impossible for the Commission and the Department to assign a single hunt code to each hunt area during each hunt window for the bighorn sheep hunting season without running afoul of the statutory allocation requirements for resident and nonresident hunters dictated by Section 17-3-16(B). We therefore believe that a court would agree that the Commission's application of the term "hunt code" to its rules regulating the bighorn sheep hunting season is lawful, in that it incorporates the elements [species, weapon

The Honorable Nathan P. Small
April 5, 2022
Page 5

type, time frame, specific hunt] that make up the definition of "hunt code", while also giving effect to the requirements of Section 17-3-16 (B).

Please be advised that this opinion is a public record, not subject to the attorney client privilege. As such, we may provide copies to the public. If this office may be of further assistance, or if you have any questions regarding this opinion, please do not hesitate to contact our office.

Sincerely,

A handwritten signature in blue ink that reads "Sally Malavé". The signature is written in a cursive, flowing style.

Sally Malavé
Assistant Attorney General
Director, Open Government Division

Cc: New Mexico State Game Commission
Michael Sloane, Director, New Mexico Department of Game and Fish