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December 4, 1979

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ATTORNEY GENERAL OPINION NO. 79-275

Mr. Fred Warders
Assistant Director
Kansas Fish and Game Commission
Box 54A, Rural Route 2
Pratt, Kansas 67124

Re: Forestry, Fish and Game--Nongame and Endangered
Species Conservation Act--Conservation of Threatened
and Endangered Species

Synopsis: The destruction of a threatened or endangered
species' habitat does not constitute a violation
of the Nongame and Endangered Species Conservation
Act, K.S.A. 1978 Supp. 32-501, et seq. However,
the Kansas Fish and Game Commission may, by regulation,
provide appropriate safeguards for the protection
of such habitats, and a violation of any such
regulation would be unlawful pursuant to sub-
paragraph (4) of K.S.A. 1978 Supp. 32-505(b).

* * *

Dear Mr. Warders:

You request our opinion as to whether the destruction of a
threatened or endangered species' habitat violates the provisions
of the Nongame and Endangered Species Conservation Act, K.S.A.
1978 Supp. 32-505, et seq.

K.S.A. 1978 Supp. 32-508 provides as follows:

"Except as otherwise specifically provided
in K.S.A. 1975 Supp. 32-505 or in a special
permit issued under K.S.A. 1975 Supp. 32-505
or in any rules or regulations adopted pursuant
to K.S.A. 1975 Supp. 32-505, the intentional

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taking of any threatened species indigenous to this state, which has been determined by the commission to be a threatened species in this state and is included in a list of such threatened species adopted pursuant to K.S.A. 1975 Supp. 32-504, shall constitute unlawful taking of a threatened species.

Unlawful taking of a threatened species is a class C misdemeanor." (Emphasis added.)

A similar provision relating to endangered species is set forth in K.S.A. 1978 Supp. 32-509, the only difference being that the unlawful taking of an endangered species is declared to be a class A misdemeanor. Both statutes are criminal in nature, requiring a rule of strict construction so as not to extend them to embrace acts or conduct not clearly included within the prohibitions set forth therein. State v. Waite, 156 Kan. 143, 145 (1942).

K.S.A. 1978 Supp. 32-502(i) defines the term "taking," as used in the act, as follows:

"'Take' and 'taking' mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct."

The only act, included within the above definition of "taking," which might be construed to refer to the destruction of a habitat, is that of "harming." Clearly, one cannot harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect a habitat. Although one might "harm" a habitat, the rule of strict construction of criminal statutes compels us to conclude that the term is used within the same context as all other acts set forth in the definition, i.e., it refers to an act which has a direct, physical impact upon a member of the species. In our judgment, the destruction of a threatened or endangered species' habitat, which may have an indirect, adverse effect on members of the species, does not constitute an unlawful taking of a threatened or endangered species under the definition set forth in K.S.A. 1978 Supp. 32-502(i).

However, it should be noted that the Fish and Game Commission may protect the habitat of threatened and endangered species

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pursuant to provisions of K.S.A. 1978 Supp. 32-505 and K.S.A. 1978 Supp. 32-507. Those statutes authorize the Commission to adopt rules and regulations to provide for the "conservation" of threatened and endangered species; "conservation," with regard to threatened and endangered species, is defined, in K.S.A. 1978 Supp. 32-502(b), to include "all methods and procedures . . . which are necessary to bring any threatened or endangered species to the point at which the methods, procedures and measures provided for such species pursuant to this act are no longer necessary." Pursuant to subparagraphs (3) and (4) of K.S.A. 1978 Supp. 32-505, any person violating a rule or regulation which pertains to a threatened or endangered species is deemed guilty of a class C misdemeanor. Since one method of conservation enumerated in K.S.A. 1978 Supp. 32-502(b) is "total protection of species or populations of wild life," it is apparent that the Commission may, by regulation, provide appropriate safeguards for the protection of the habitats of threatened and endangered species.

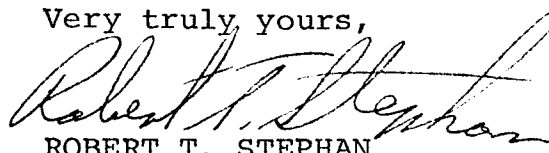
You also inquire as to whether the Fish and Game Commission has authority "to concur with or approve of an action which may destroy individuals of a threatened or endangered species, but will have no significant or adverse impact on the species as a whole, a local population of the species, or a major portion of its preferred habitat." The penalty provisions of the act, K.S.A. 1978 Supp. 32-508 and K.S.A. 1978 Supp. 32-509, quoted above, clearly recognize that the taking of a threatened or endangered species will not violate the act in the following circumstances: where the "taking" is specifically provided for in K.S.A. 1978 Supp. 32-505; where the "taking" is authorized by a special permit issued by the Commission pursuant to subsection (c) of K.S.A. 1978 Supp. 32-505; and where the "taking" is specifically provided for in rules and regulations adopted by the Commission pursuant to K.S.A. 1978 Supp. 32-505. In our judgment, the Commission may "concur with or approve" the taking of a threatened or endangered species whenever such taking does not constitute a violation of the act under the above cited statutes.

You state that the Commission has not adopted rules and regulations which would permit the taking of threatened or endangered species, but that it has been operating under an "unwritten policy" of approving certain actions, such as highway construction and other projects, which will likely have the effect of destroying

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individuals of certain threatened and endangered species. In our judgment, the Commission should, pursuant to the authority granted by K.S.A. 1978 Supp. 32-507, adopt rules and regulations which will codify its heretofore "unwritten policy," in order that all citizens of the state will be apprised of the circumstances under which the "taking" of a threatened or endangered species is not unlawful.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:BJS:TRH:jm