



United States Department of the Interior

OFFICE OF THE SOLICITOR

Pacific Southwest Region

2800 Cottage Way

Room E-1712

Sacramento, California 95825-1890

October 24, 2007

IN REPLY
REFER TO:

Via Overnight Delivery

Michael F. Brown
Chief Executive Office
County of Santa Barbara
1105 Santa Barbara Street
Santa Barbara, California 93101

Michael Ghizzoni, Esquire
Assistant County Counsel
Office of the County Counsel
County of Santa Barbara
105 East Anapamu Street, No. 201
Santa Barbara, California 93101

Subject: County of Santa Barbara
Alleged Take of California tiger salamander

Gentlemen:

Investigations by the United States Fish and Wildlife Service (Service) indicate that Santa Barbara County is responsible for the take¹ of a California tiger salamander (*Ambystoma californiense*) (CTS), which was found dead on September 13, 2004, in a newly excavated ditch at a County construction site. Although the Fish and Wildlife Service recommended that the County obtain an incidental take permit prior to initiating the construction activities that precipitated this take of CTS, the County proceeded to engage in construction activities without coverage for incidental take of species listed under the Federal Endangered Species Act. In addition, beginning in May 2005, as reported to the Service in December 2005, the County Alcohol, Drug, and Mental Health Service (ADMHS) engaged in ground disturbing activities on a parcel just south of the County's Administrative and Animal Shelter sites, excavating a 141-foot long trench (24" wide) for plumbing, placing an in-line grinder 36" below the surface, and excavating an eighty-six-foot electrical trench (18" deep, 18" wide). While the Service has concurred in the continuation of certain types of work on the County project (completion of the

¹Take, as defined under the Federal Endangered Species Act, means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19).

two County Public Administration and Animal Shelter building projects, to include excavation for the water line, power lines, and television cable, placement of eighteen inch footings below ground for a trash enclosures and an entry way), the activity in relation to the ADMHS site was not covered by an incidental take permit nor had the Service concurred that these activities would have no effect on CTS. The Service alleges that these activities violated the Federal Endangered Species Act (ESA), 16 U.S.C. § 1531, et seq.

In 2000, the Santa Barbara Distinct Population Segment (DPS) of California tiger salamander was listed as an endangered species under the ESA. At the time of the first violation, the Santa Barbara DPS of California tiger salamander was listed as threatened by the Service (69 Fed. Reg. 47212, August 4, 2004). The August 18, 2005, decision of Judge Alsup in *Center for Biological Diversity, et al., v. FWS, et al.*, No C-04-04324-WHA (N.D. California) reinstated endangered status for the DPS, and it was thus listed as endangered at the time of the ADMHS activities. Take of a species listed as endangered or threatened under the Endangered Species Act is prohibited. 16 U.S.C. § 1538(a)(1)(B) and (G), and 1538(g); 50 C.F.R. § 17.21(a) and (c) and 50 C.F.R. § 17.31(a). The Service's investigation of the County's activities has been referred to this office for the initiation of legal action.

From the Service's investigation, it appears that the County proceeded with construction activities in an area that the Service advised was within the dispersal distance for California tiger salamanders from a known CTS breeding pond and in an area that could provide upland habitat for salamanders. By letter of July 2, 2003, the Service advised the County that it did not concur in the County's determination that the proposed project was not likely to result in take of California tiger salamanders. The Service recommended that the County conduct protocol surveys, or if surveys were not feasible, that the County apply for an incidental take permit. (July 2, 2003, Service letter to County). The County determined to proceed with the development project without conducting protocol surveys to establish presence or absence of CTS and without obtaining an incidental take permit.

On September 13, 2004 (a Monday), biologist Vince Semonsen found a dead California tiger salamander in a trench that the County had opened the previous Friday, in laying a new gas line for the County Administration Building Project. The CTS was identified positively by the Santa Barbara Museum of Natural Science. Mr. Semonsen informed the Service of his finding of the specimen. By letter dated September 16, 2004, to the Fish and Wildlife Service, the County notified the Service that a dead California tiger salamander had been found at the construction project.

Subsequent to this incident, the County and the Service have had several communications regarding ongoing construction activities, resulting in Service concurrence to the County's requests to proceed with certain activities (January 6, 2005, Service concurrence in County request to proceed with two projects involving ground disturbance at the Administration Building Site; and May 5, 2005, Service concurrence in County's request to complete the two County buildings along Foster Road). However, late in 2005, the Service was informed that ADMHS

conducted ground-disturbing activities on a parcel just south of the County's Administration and Animal Shelter sites, beginning in July 2005, with the digging of a plumbing trench and an electrical trench. The Service had not concurred in this project, nor was it covered by an incidental take permit.

From the Service's investigation, the County's activities resulted in the direct take of California tiger salamander, a specimen of which was found dead in a County-excavated trench. In addition, the County, even after this incident, continued to engage in unpermitted ground-disturbing activities in which the Service did not concur, resulting in habitat modification and potential destruction of burrows and upland estivation sites for California tiger salamander. In the Service's view, the County's activities have resulted in take of the California tiger salamander, in violation of the ESA. Pursuant to the Act, the Service may assess civil penalties for violations of the ESA, and the Service has requested that this Office initiate the process for assessing such penalties. This process is initiated through issuance of a Notice of Violation.

Before proceeding with issuance of a Notice of Violation to the County, however, the Service would like to explore whether the County is interested in resolving this matter through negotiation. To settle the alleged violations, the Service would seek the County's acquisition, preservation, and restoration of known habitat for the California tiger salamander. The Service would suggest the following terms as a means of resolving this matter:

- County acquisition, preservation and restoration of known California tiger salamander habitat. The Service suggests the "Gill Pond" (TWDA-10 on the August 2001 Santa Barbara County California tiger salamander Habitat Map, located on Assessor Parcel Number 129-170-006 in eastern Santa Maria on Dominion Road) and a surrounding 300-foot buffer. Settlement would include development and implementation of a Service-approved restoration, management and monitoring plan and preparation of a Property Analysis Record (PAR) to determine the amount of funding necessary to manage the property in perpetuity as California tiger salamander habitat. Based on the PAR, the County would establish and fund a non-wasting endowment to be used to manage the property in perpetuity. The County would also grant and convey a perpetual conservation easement to the site to a nonprofit, Service-approved third party, allowing the Service reasonable access to the site. These requirements are similar in nature to what is typically required of an applicant for an incidental take permit.
- In each Planning and Development Department land use and/or grading permit issued within the range of California tiger salamander in Santa Barbara County, the County commits to include a condition that requires all permit applicants prior to initiating ground-disturbing activities to first coordinate with the Ventura Fish and Wildlife Office and to complete protocol surveys deemed necessary by the Service. The County must also agree to enforce such conditions. While at present the County may include conditions that require coordination with the Service if it

is determined that take may occur, these conditions are proving ineffective, as the applicants, not wanting to receive the determination that take may occur, do not coordinate with the Service prior to undertaking projects.

Please respond in writing indicating whether this constitutes a direction the County would be willing to go to resolve this matter. You may contact Steve Henry at the Ventura Fish and Wildlife Office (805-644-1766) if you have any questions. If the County does not respond by November 30, 2007, or if it indicates that it is not interested in pursuing settlement on these terms, the Service will proceed to enforce this violation through issuance of a Notice of Violation.

Thank you for your attention.

Sincerely,

Daniel G. Shillito
Regional Solicitor

A handwritten signature in black ink that reads "Kerry O'Hara". The signature is written in a cursive style with a large, prominent "O" in the middle name.

Kerry O'Hara
Assistant Regional Solicitor

cc: Steve Henry
Katie Drexhage
Resident Agent-in-Charge, Torrance OLE