

NatureScot submission 16 March 2023

PE1859/HH: Retain falconers' rights to practise upland falconry in Scotland

NatureScot's responses to the questions raised by the Committee are as follows.

Purpose / defence in law

The Committee has asked whether a distinction can be made in law between actively hunting mountain hares and flying an eagle for exercise, flight displays or other business purposes. If an eagle inadvertently catches a mountain hare during the course of these other activities, a defence in law is provided by section 10(3)(c) of the Wildlife and Countryside Act 1981 (as amended), referred to below as 'the 1981 Act'. The eagle's handler may establish a defence if **all** of the following conditions are met:

1. That eagle taking the hare was the incidental result of a lawful operation or other activity
Provided the handler has permission to fly the eagle over the land and is not actively hunting illegal quarry there is a lawful purpose for flying the eagle.

2. The handler **took reasonable precautions** to avoid the eagle catching a mountain hare
Reasonable precautions would include avoiding areas known to support a high population density of mountain hares. Evidence of reasonable precautions might include correspondence with estate staff confirming that they rarely or never see mountain hares on the land. Nighttime surveys with either a lamp or thermal imaging equipment can provide a good indication of mountain hare abundance.

3. The handler **did not foresee, and could not reasonably have foreseen**, that the eagle would catch a mountain hare.

The likelihood of an eagle catching a mountain hare in area with a low population density of mountain hares is very small. If the handler takes reasonable precautions and avoids flying their eagle in areas likely to support a high abundance of mountain hares, they can mount

a defence that they could not reasonably have foreseen that the eagle would catch a mountain hare.

4. The handler took such steps as were reasonably practicable to minimise the damage.

Once the eagle spots a mountain hare there is no practicable action that the handler can take to recall their bird. However, the handler should attempt to recapture the eagle as soon as is reasonably practicable.

The likelihood of an eagle catching a mountain hare depends on the abundance of mountain hares on the land. The likelihood of an eagle catching a mountain hare is very low or non-existent in the following areas of Scotland.

- Mountain hares are absent from the island of Arran and the Uists. They have not been recorded on the Cheviots, Ochils, Lomond Hills, Sidlaws or Hill of Fare.
- Mountain hares are absent or occasional visitors to lowland habitats in Scotland
- Mountain hares are present at low population densities in the Highlands and Islands to the west and north of the Great Glen and in Argyll. This area includes more than half of the upland habitats in Scotland.

The likelihood of a golden eagle catching a mountain hare is higher on moorland in eastern Scotland. Upland areas known to support a higher abundance of mountain hares include the Eastern Grampians, Moray, Cairngorms, Monadhliath, Angus Glens, Perthshire and Lammermuir Hills. However, mountain hare abundance is patchy and some mountains and moorlands in eastern Scotland do have lower population densities.

These broad distinctions are supported by Jeff Watson's authoritative book on the golden eagle. The chapter on food notes that hares and grouse are the preferred prey of golden eagles in much of northwest Europe and they only seek alternative food sources when such prey are scarce. In the North and West Highlands, golden eagles feed on a wide range of prey items and mountain hares make up a small proportion of their diet. In the East Highlands, golden eagles have a much narrower diet with hares and grouse making up most of the prey items.

Licensing

NatureScot can issue licences to take or kill mountain hares for specific purposes listed under section 16(3) of the 1981 Act.

Preventing serious damage and conserving natural habitats

At the time of writing, there were 21 licences to control mountain hares in place to prevent serious damage to trees or to conserve natural habitats: 13 in Highland, 6 in Aberdeenshire; 1 in Moray; and in 1 Perthshire. Some of these licences cover large areas of open moorland where the aim is to encourage natural regeneration of native trees. These licences may include falconry as a method of killing. For example, one mountain hare licence for preventing serious damage to young trees covers several thousand hectares of open moorland surrounding distinct blocks of woodland. This licence already permits falconry as a method of killing hares.

Educational purposes and photography

An educational falconry display, filmmaking or photography would be covered by licensable purposes under section 16(3) of the 1981 Act. However, before NatureScot can issue such a licence it must be satisfied that there is no other satisfactory solution. For example, the applicant would have to demonstrate that there was no other way of making a wildlife documentary, such as using existing footage of a golden eagle hunting a mountain hare or using in a location where there is already a control licence. Carrying out a falconry display or photography in a location where there is a low likelihood of the eagle catching a mountain hare would be a satisfactory solution.

Any other social, economic or environmental purpose

For this purpose, the proposals must 'give rise to, or contribute towards the achievement of, a significant social, economic or environmental benefit.' The principle is the same as the 'imperative reasons of overriding public interest' (IROPI) test used to assess European Protected Species licences. The magnitude of benefits required to meet this licensing purpose may be less than for the IROPI test but the benefits would still have to be *significant*. This is taken to mean that the activity proposed will achieve, or contribute towards, a social, economic or environmental benefit of some note. In other words, the benefits must not be minor, and should concern projects of recognised importance.

During the development of the new licensing system for mountain hares, NatureScot had several discussions with representatives from falconry bodies and individual stakeholders to understand their concerns. One area discussed was whether falconry is of sufficient cultural significance to fit the any other social, economic or environmental purpose. NatureScot's view is that hunting mountain hares with birds of prey is not widely practised enough in Scotland to satisfy this purpose.

Legislative change

The Petitioner has asked for a legislative change to enable licences to be granted for killing or taking mountain hares for the purpose of falconry. This could be achieved by amending section 16 (3) of the 1981 Act to include falconry as a purpose.

The protection afforded by adding mountain hares to Schedule 5 of the 1981 Act means that they can no longer be killed for sporting or recreational purposes. Creating a licensable purpose for falconry would set a precedent for adding other sporting purposes, such as shooting. This is likely to increase the pressure to permit shooting of mountain hares under licence, which would negate the effect of adding them to Schedule 5.

The licensable purposes under section 16 (3) of the 1981 Act apply to all species of animals listed on Schedules 5, 5A, 6 and 6A of that Act, including brown hare (during the closed season), pine marten and red squirrel. Adding falconry to the list of licensable purposes, would allow individuals to apply for a licence to hunt brown hares during the closed season and, perhaps other species of mammal, when they have previously been refused a licence for other purposes. This loophole could undermine the effectiveness of protection for these animals in certain situations.

There are currently no recreational or sporting purposes listed under section 16 (3) of the 1981 Act which allow taking or killing. This means that there is no route to apply for a licences for certain hobbies that took place in the past, such as collecting specimens of rare butterflies and moths or taking seed from rare plants to grow in gardens. Therefore, creating a licensable purpose of falconry could open the way for requests to allow animals and plants to be taken for a wide range of recreational purposes, not just sporting.

Contact for further information

Should you require any further information or advice from NatureScot regarding this case or other licensing questions please contact our Licensing Team (Tel: 01463 725364 or email Licensing@nature.scot).