

First Supplement to Memorandum 2014-57

Fish and Game Law: Technical Revisions and Minor Substantive Improvements: Part 1 (Draft Recommendation)

Memorandum 2014-57 presents a staff draft recommendation on *Fish and Game Law: Technical Revisions and Minor Substantive Improvements (Part 1)*.¹

The Commission has received a comment on that draft recommendation, attached as an Exhibit to this supplement, from Mr. Hal Thomas, a special deputy district attorney with the Butte County District Attorney's office. Mr. Thomas concurs with all aspects of the draft recommendation, with the exception of the proposed revision of Fish and Game Code Section 2014, the subject of this supplement.²

Unless otherwise indicated, all statutory references in this memorandum are to the Fish and Game Code.

BACKGROUND

Section 2014 authorizes the state to recover damages from a person that unlawfully or negligently takes or destroys an animal protected by law. Section 2014(d) lists three exceptions to the application of the section:

(d) This section does not apply to persons or local agencies engaged in agricultural pest control, to the destruction of fish in irrigation canals or works or irrigation drainages, or to the destruction of birds or mammals killed while damaging crops as provided by law.

In the tentative recommendation previously circulated in this study, the Commission had proposed that Section 2014(d) be revised in a new subdivision that would read as follows:

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. See Exhibit.

- (e) This section does not apply to any of the following:
- (1) Persons or local agencies engaged in agricultural pest control.
 - (2) The destruction of fish in irrigation canals or works or irrigation drainages.
 - (3) The lawful destruction of birds or mammals killed while damaging crops.³

As the instant recommendation is intended to make only technical or minor substantive improvements, the objective of that proposed revision was simply to make the paragraph more readable, by making the following changes:

- (1) Placing the three exceptions in individual numbered paragraphs.
- (2) Relocating the modifier “as provided by law” to what appeared to be a more grammatically appropriate location.
- (3) Using the simpler term “lawful.”⁴

In a previous comment on that proposed revision, Mr. Thomas expressed his belief that the absence of a comma preceding the phrase “as provided by law” was inadvertent, and that the phrase was actually intended to modify all *three* exceptions in the subdivision.⁵ Mr. Thomas asserted that the revision proposed in the tentative recommendation would substantively change existing law, by limiting the modifier to the last exception.

In a memorandum responding to this comment, the staff suggested that a resolution of the grammatical ambiguity urged by Mr. Thomas may be beyond the scope of this particular recommendation.⁶ The staff therefore recommended, in order to avoid the risk of codifying an incorrect interpretation of the subdivision, that the revision of Section 2014(d) be withdrawn from the final recommendation in this matter.

At the Commission’s October meeting, following testimony from Mr. Thomas,⁷ the Commission decided that the proposed revision of Section 2014(d) should be modified to make clear that the modifier “as provided by law” applies to all listed exceptions in the subdivision.⁸

In Memorandum 2014-57, the staff suggested implementing the Commission’s decision as follows:

3. Tentative Recommendation, p. 31.
4. Memorandum 2014-49, pp. 16-17.
5. *Id.*
6. Memorandum 2014-49, p. 17.
7. See Memorandum 2014-49, pp. 16-17.
8. Minutes (Oct. 2014), p. 5.

2014.

....

~~(d) This section does not apply to persons or local agencies engaged in agricultural pest control, to the destruction of fish in irrigation canals or works or irrigation drainages, or to the destruction of birds or mammals killed while damaging crops as provided by law.~~

(e) This section does not apply to any of the following:

(1) Persons or local agencies engaged in agricultural pest control, as provided by law.

(2) The destruction of fish in irrigation canals or works or irrigation drainages, as provided by law.

(3) The destruction of birds or mammals killed while damaging crops, as provided by law.⁹

This revision implemented the Commission's decision in a manner that involved the least possible disruption of existing language, and the least possible risk of inadvertently changing substantive law.

In the attached Exhibit, Mr. Thomas comments on this proposed revision as well.¹⁰ He expresses his belief that, while the above revision would improve existing law, the provision could be further clarified by using the word "lawful" in each of the numbered paragraphs, rather than the phrase "as provided by law," thus:

(e) This section does not apply to any of the following:

(1) Persons or local agencies engaged in lawful agricultural pest control.

(2) The lawful destruction of fish in irrigation canals or works or irrigation drainages.

(3) The lawful destruction of birds or mammals killed while damaging crops.¹¹

9. Memorandum 2014-57, pp. 8-9.

10. See Exhibit.

11. See Exhibit.

ANALYSIS

After further analysis of Section 2014(d), the staff is not certain that the “as provided by law” limitation should be applied to the first and second exceptions in the subdivision (relating to agricultural pest control and irrigation, respectively). The Legislature may have intended to provide unqualified immunity from state damages for any take or destruction of animals in connection with those important agricultural activities.

What would it mean to expressly add a “lawfulness” limitation to these first two immunity provisions? There are two ways in which such a limitation could be applied to these provisions: either to the underlying *activity*, or to the take or destruction of animals *resulting from* that activity. Those two possibilities are discussed below.

Lawful Activity

If a lawfulness limitation were applied to the underlying activities, the immunity from a state suit for damages would be available only if the pest control activity or irrigation facilities are conducted and maintained in full compliance with applicable regulatory law. Presumably, the state could then produce evidence of any noncompliance with the governing regulatory law to overcome the statutory immunity, and then pursue an action for damages in connection with those activities.

That may be good policy. The staff can imagine circumstances where unlawful pest control or irrigation should perhaps be grounds for denying immunity from a damages suit (e.g., where the intentional use of a prohibited pesticide directly leads to the otherwise preventable destruction of animals). On the other hand, the staff can also imagine trivial regulatory violations that do not in any way contribute to the destruction of animals, and should probably not be sufficient to defeat that immunity. It may be that this issue would be best handled under equitable “unclean hands” principles.

In any event, the staff has not found any authority addressing whether such a limitation currently exists. And if it does not, creating a new statutory limitation of that type would be a significant substantive change, well beyond the scope of the current recommendation.

Lawful Take or Destruction

If, instead, the first and second immunities in Section 2014(d) are limited to situations where the take or destruction of animals is lawful, the immunities become largely illusory. Recall that Section 2014 expressly authorizes the state to sue only for the *unlawful or negligent* take or destruction of certain animals. If the immunities for agricultural pest control and irrigation facilities were expressly limited to *lawful* take or destruction of animals in conjunction with those activities, the immunities would arguably have no substantive application.

There is also an appellate decision that sheds some light on this issue. In *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.*,¹² the Anderson-Cottonwood Irrigation District (“ACID”) was pumping water out of the Sacramento River for use in irrigation. The district’s “lawful irrigation activity,” was destroying protected salmon in an alleged violation of Section 2080 of the California Endangered Species Act. The state sought an injunction to require ACID to install screens on its intake pipes.

ACID argued, among other things, that the injunction was barred by the second exemption listed in Section 2014(d). The court rejected that argument, noting that Section 2014(d) only provides immunity from money damages, and not from injunctive relief.¹³

However, in next addressing ACID’s claim that the injunction was improper because the state had legal remedies it could pursue, the court expressed that “In this case, money damages are inadequate because, as we have noted, a damages remedy is precluded by section 2014.”¹⁴ The court then concluded that ACID had violated Section 2080, and ordered the requested injunction.¹⁵

In other words Section 2014(d) would have provided ACID immunity from a damages lawsuit under Section 2014, for engaging in destruction of salmon that was *unlawful* under Section 2080. This strongly suggests that at least the irrigation exception in Section 2014(d) is *not* conditioned on the “lawful” take or destruction of animals.

For both of these reasons, the staff is concerned that amending Section 2014(d) to expressly provide that the first two exceptions in the subdivision

12. 8 Cal. App. 4th 1554, 11 Cal. Rptr. 2d 222 (1992).

13. *Id.* at 1564.

14. *Id.* at 1565.

15. *Id.* at 1569.

apply only to lawful destruction of animals would also be a significant substantive change in the law.

RECOMMENDATION

As discussed above, the staff is concerned that expressly applying the “as provided by law” limitation in Section 2014(d) to the first and second immunities in the subdivision could significantly narrow the scope of those immunities. Such a change would seem to be too substantive for inclusion in the attached recommendation, which was intended to be mostly technical and uncontroversial.

The staff has made inquiries with the Department of Fish and Wildlife about this issue, hoping to talk with an expert in enforcement relating to agricultural activities, but has not yet been able to have that discussion. The staff also intends to visit State Archives to see if legislative history for the language at issue (which was enacted in 1935) will shed any useful light on the intended scope of the immunities.

Given the concerns discussed above, and the further time required to achieve greater certainty about whether or how Section 2014(d) should be amended, **the staff recommends that the revision of Section 2014(d) be deleted from the attached recommendation.** The matter will be revisited later in the ongoing study of Fish and Game law, when the Commission studies how to recodify Section 2014.

Respectfully submitted,

Steve Cohen
Staff Counsel

**EMAIL FROM HAL THOMAS,
BUTTE COUNTY DISTRICT ATTORNEY'S OFFICE
(NOVEMBER 25, 2014)**

Mr. Hebert, Thank you for the notes and proposed revisions that arise from your October 2014 meeting at U.C. Davis. We have reviewed Memorandum 2014-57 and concur with your proposals with one exception/comment. While the effort to revise FGC 2014 by adding the phrase "as provided by law" to the list of specific actions is an improvement, our mutual goal of increasing the clarity of codified law would be better served if the modifying term "lawful" were used instead of "as provided by law".

The revised sections would then read:

- (e) This section does not apply to any of the following:
- (1) Persons or local agencies engaged in lawful agricultural pest control activities.
 - (2) The lawful destruction of fish in irrigation canals or works of irrigation drainages.
 - (3) The lawful destruction of birds or mammals killed while damaging crops.

This is a similar construction used by the legislature in the 1988 enactment (Ch. 1059) that created Ch. 6.5 Control of Illegally Taken Fish and Wildlife. The use of the term "lawful" would bring the earlier FGC 2014 statute into consistency with the later enacted FGC 2581(a), (b), (c). The 1988 enactment created an administrative civil penalty system.

We will comment on the proposed changes proposed in Commission memorandum 2014-47 in separate correspondence. Thank you for your dedication to this important function.