

First Supplement to Memorandum 2016-34

Fish and Game Law: Tentative Recommendation (Outstanding Issues)

This supplement¹ presents public comment on Memorandum 2016-34 from Mr. Harold Thomas, representing the Butte County District Attorney's office. Mr. Thomas generally concurs with the staff recommendations in that memorandum.

On the subject of criminal forfeiture under the existing code, Mr. Thomas specifically concurs only with the staff recommendation that the Commission defer making any decision on the issues presented, to allow for consideration of additional public comment. He offers that a retired deputy District Attorney from his office with knowledge of drug forfeiture law has committed to providing future comment on those issues.

Respectfully submitted,

Steve Cohen
Staff Counsel

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.

EMAIL FROM MR. HAROLD THOMAS
(JULY 18, 2016)

Steve, Thank you for the opportunity to comment on the "Outstanding Issues Memorandum 2016-34". We continue to be impressed with the quality of the staff analysis in this at times arcane but important area of natural resources law.

1) Labeling of Statutorily Required Monetary Payment- We agree with your analysis of the fee vs. tax characterization of monetary payments. The statutory use of the term "privilege tax" has been eclipsed by more recent legislation and court decisions which define these terms. The policy concept of a fee assessed because of the users "privilege" in using the California's natural resources for private gain remains an important and viable concept underlying both tax and assessment conservation law.

2) Civil Forfeiture of Net- We concur with the staff's recommendation as an appropriate course of action.

3) Forfeiture of Property for Criminal Conviction- We concur with your staff's recommendation that additional public commentary would aid the analysis of this important criminal justice tool. We have consulted with our drug forfeiture expert, retired Butte County Deputy District Attorney Kevin Maloney who has committed to a future comment on the constitutionality of FGC 12157 and its related forfeiture sections. In brief, he points us to *Bennis v. Michigan* (1996) 516 U.S. 442,443 for the finding "that a long and unbroken line of United States Supreme Court cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put, even though the owner did not know that it was to be put to such use..." We believe the "innocent-owner defense" raised by staff is not necessary or appropriate in the context of fish and wildlife forfeiture law for a variety of constitutional and policy reasons. These points can be discussed in the context of a subsequent analysis. We note that the potential for summary post-conviction forfeiture of "grandad's shotgun" is a significant deterrent to the casual or negligent poaching of wildlife in our north state communities.

4) Far Offshore Fishery- We concur with the staff's suggestion for language clarifying the extent of the "far offshore fishery" definition.

While it is not clear if a representative from our office will attend the Los Angeles meeting on July 22, 2016, please include our comments in the record of your proceedings. Thank you again for this important review of California's natural resource protection law.