

Second Supplement to Memorandum 2016-47

Fish and Game Law: Discussion of Issues

The Commission¹ is developing a proposed recodification of the Fish and Game Code. As a step in that process, the staff is preparing a draft tentative recommendation, which will include the subject matter of the preliminary staff drafts that have been presented to date.

Before completing the draft tentative recommendation, the staff needs guidance from the Commission on several issues. This memorandum discusses one of those issues, the use of the word “game” as an adjective.

This issue was first raised in a letter from Mr. Sonke Mastrup, who was writing as the executive director of the Fish and Game Commission.² He pointed out that there are provisions in the code that use the word “game” at the beginning of a list of animal types, thus: “game bird, mammal, fish, reptile, or amphibian.” When “game” is used in that way, does it only modify “bird” or does it also modify “mammal,” “fish,” “reptile,” and “amphibian?” Mr. Mastrup identifies this as a source of confusion in the code. The Commission decided that it would take a closer look at the issue.³ That is the purpose of this memorandum.

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

“GAME” ANIMALS GENERALLY

In considering the proper use of the word “game” to modify a type of animal, it is important to consider the likely consequences of using that term.

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 Memorandum 2014-57, pp. 16-17, Exhibit p. 3.

3. Minutes (Feb. 2015), p. 7.

It seems fairly clear that the term “game” is a limitation. For example, “game bird” is a specific category of bird, which is narrower than the category of all birds. So any use of the word “game” in a statute will likely narrow the effect of the statute, making it applicable only to a specific subset of a type of animal, rather than to all animals of that type.

What are “game” animals? The existing code provides a clear answer for birds and mammals, because the categories of “game bird” and “game mammal” are expressly defined:

§ 3500. Game birds

- (a) Resident game birds are as follows:
- (1) Doves of the genus *Streptopelia*, including, but not limited to, spotted doves, ringed turtledoves, and Eurasian collared-doves.
 - (2) California quail and varieties thereof.
 - (3) Gambel’s or desert quail.
 - (4) Mountain quail and varieties thereof.
 - (5) Sooty or blue grouse and varieties thereof.
 - (6) Ruffed grouse.
 - (7) Sage hens or sage grouse.
 - (8) Hungarian partridges.
 - (9) Red-legged partridges including the chukar and other varieties.
 - (10) Ring-necked pheasants and varieties thereof.
 - (11) Wild turkeys of the order Galliformes.
- (b) Migratory game birds are as follows:
- (1) Ducks and geese.
 - (2) Coots and gallinules.
 - (3) Jacksnipe.
 - (4) Western mourning doves.
 - (5) White-winged doves.
 - (6) Band-tailed pigeons.
- (c) References in this code to “game birds” means both resident game birds and migratory game birds.

§ 3950. Game mammals

3950. (a) Game mammals are: deer (genus *Odocoileus*), elk (genus *Cervus*), prong-horned antelope (genus *Antilocapra*), wild pigs, including feral pigs and European wild boars (genus *Sus*), black and brown or cinnamon bears (genus *Euarctos*), mountain lions (genus *Felis*),⁴ jackrabbits and varying hares (genus *Lepus*), cottontails, brush rabbits, pigmy rabbits (genus *Sylvilagus*), and tree squirrels (genus *Sciurus* and *Tamiasciurus*).

4. But see Section 3950.1(a) (“Notwithstanding Section 3950 or any other provision of this code, the mountain lion (genus *Felis*) shall not be listed as, or considered to be, a game mammal by the department or the commission.”).

(b) Nelson bighorn sheep (subspecies *Ovis canadensis nelsoni*) are game mammals only for the purposes of sport hunting described in subdivision (b) of Section 4902.

The defined category of “game birds” appears to consist of those birds that may be taken for sport or food, as distinguished from the categories of “fully protected birds”⁵ and “nongame birds,”⁶ which generally cannot be taken.⁷

Similarly, the category of “game mammals” appears to consist of those mammals that may be taken for sport or food, as distinguished from “fur-bearing mammals,”⁸ which are taken for a commercial purpose, and “fully protected mammals”⁹ and “nongame mammals,”¹⁰ which generally cannot be taken.

This strongly suggests that the use of “game” in a statute is intended to signal that the statute applies to animals that may be lawfully taken for a noncommercial purpose (rather than all animals). This is consistent with the dictionary definition of “game,” which includes “animals under pursuit or taken in hunting; *especially: wild animals hunted for sport or food.*”¹¹

There is no statutory definition of “game fish,” “game reptile,” or “game amphibian.” In light of the discussion above, it seems likely that those terms would be understood to mean animals of those types that can lawfully be taken for a noncommercial purpose.

The foregoing should be kept in mind when thinking about whether or not to add the word “game” to expressly modify a category of animal. Such a decision could significantly affect the scope of the provision.

PATTERNS OF USAGE

In reviewing all of the Fish and Game Code provisions that use “game” as a modifier, the staff identified three distinct usage patterns:

- (1) *Provisions where the intended application of “game” is unambiguous on its face.* In these provisions, the word “game” is clearly paired with a type of animal, with no question as to whether it might apply to

5. Section 3511.

6. Section 3800(a).

7. Exceptions include Sections 3801 (sparrows and starlings), 3801.5 (nongame birds injuring crops).

8. Section 4000.

9. Section 4700.

10. Section 4150.

11. See <<http://www.merriam-webster.com/dictionary/game>> (emphasis added).

another type of animal.¹² **With one exception, such provisions do not require further analysis or adjustment and are not discussed further in this memorandum.** The exception is provisions that refer to “game fish.”¹³ There is no statutory definition of “game fish.” This creates some scope for misunderstanding. **The possibility of defining the term “game fish” is discussed further below.**

- (2) *Provisions where the intended application of “game” is ambiguous on its face, but reasonably clear in context.* The existing code contains an article that governs “domesticated game breeding.”¹⁴ The first provision of the article requires that a person who raises, imports, or keeps “domesticated game birds or domesticated game mammals” procure a “domesticated game breeder’s license.”¹⁵ Several other provisions (all but one in the “domesticated game breeding” article) refer to “domesticated game birds and mammals” or “game birds and mammals.”¹⁶ It is clear from context that these provisions are talking about the domesticated game birds and domesticated game mammals that are kept by domesticated game breeders. **The staff recommends that these provisions be revised to refer expressly to “game mammals” where they now only refer to “mammals.”**
- (3) *Provisions where the intended application of “game” is ambiguous on its face.* This is the scenario pointed out by Mr. Mastrup, where the word “game” precedes a list of animal types and there is no clear evidence indicating whether “game” modifies the first type of animal only, or all of the listed animals. Thus: “game bird,

12. See Sections 203 (“resident game birds, game mammals”), 204 (“game birds”), 314 (“resident or migratory game birds or game or fur-bearing mammals”), 325 (“game mammals, other than deer, and fur-bearing mammals and resident game birds”), 356 (“migratory game birds”), 2005 (“game bird, game mammal, or game fish,” “game mammals”), 2720(b) (“game mammals, and game birds”), 2225 (“resident or migratory game bird”), 2350 (“game bird”), 2352 (“resident or migratory game bird”), 2353 (“migratory game birds”), 2401 (“domesticated game birds”), 3003.1(c) (“game mammal”), 3003.1(d) (“game mammals”), 3004.5(b) (“game birds”), 3004.5(j)(2) (“big game mammals”), 3005.5 (“game mammal, game bird”) 3031(a)(4) (“migratory game birds, resident small game mammals”), 3039 (“game bird”), 3051(f)(4) (“game mammals”), 3200 (“domesticated game birds or domesticated game mammals”), 3209 (“domesticated game birds”), 3214 (“domesticated game mammals”), 3217 (“game bird,” “domesticated game bird”), 3240.5 (“domesticated game bird,” “domesticated migratory game bird”), 3270 (game birds”), 3300 (“domesticated migratory game birds,” “migratory game birds”), 3301, 3302, 3303, 3305, 3306, 3308, 3309, 3310, and 3311 (“domesticated migratory game bird”), 3406(a) (“game birds, and game mammals”), 3501, 3502, and 3504 (“game bird”), 3508 (“wild game bird,” “domesticated game bird”), 3514, 3515, and 3516 (“exotic nonresident game birds”), 3682.1, 3682.2, and 3684 (“upland game bird”), 3700.1 (“migratory game bird”), 3800 (“migratory game birds”), 3806 (“resident game birds, “migratory game birds”), 3950.1 (“game mammal”), 3960(b) (“big game mammal”), 3960(c) (“big game mammal”), 4011 (“game mammals”), 4150 (“game mammal”), 4301 (“domestically raised game mammals”), 4304 (“game mammals”), 12013(e) (“migratory game birds”).

13. Sections 307, 2003(b), 2005, 8183.

14. Section 3200 *et seq.*

15. Section 3200.

16. See Sections 2400, 3201, 3205, 3206, 3208.

mammal, fish, reptile, or amphibian.” There are only six sections that fall into this category.¹⁷ **Those provisions are analyzed below.**

HISTORICAL ANALYSIS

All but one of the six provisions that present ambiguous use of the word “game” have their origins in the original 1933 enactment of the Fish and Game Code.¹⁸ (The exception is Section 3080, which was added in 1998. The historical analysis discussed below does not apply to that section.)

The 1933 Code defined the term “game bird,” which was distinguished from “predatory birds,” and “nongame birds.”¹⁹ The Code did not define “game mammal.” Instead, it categorized mammals as “predatory mammals,” “fully protected mammals,” “deer,” “fur-bearing mammals,” and “other.”²⁰ Fish, reptiles, and amphibians were not divided into categories.²¹

Given the fact that the 1933 Code had an express term that it used for “game birds” but no term to differentiate “game mammals” from all types of mammals, or to differentiate “game amphibians” and “game reptiles” from all reptiles and amphibians, it is not surprising that the word “game” was paired with “bird,” but not with those other types of animals.

In 1957, the defined term “game mammal” was added to the Fish and Game Code.²² The same bill amended two sections that had referred to “game birds and mammals” so that they instead referred to game birds and “game or fur-bearing mammals.”²³ This suggests that the Legislature assessed the need for that kind of clarification and made it only where it was needed. In the provisions that were not amended (i.e., most of the provisions that we are analyzing), the Legislature may have concluded that clarification was not needed because the provisions were intended to apply to game birds and *all* mammals, reptiles, or amphibians.

The staff has two reservations about relying too heavily on that historical analysis. First, the historical record is not absolutely clear. The analysis set out

17. See Sections 307, 1502, 2003, 3002, 3080, 3086.

18. 1933 Cal. Stat. ch. 73.

19. See 1933 Cal. Stat. ch. 73, §§ 1174, 1175.

20. See 1933 Cal. Stat. ch. 73, §§ 1230-1345.

21. The terms “bird,” “fish,” and “mammal” are separately defined in the code, and each definition makes clear that the defined term includes only animals of that type that are “wild” or “feral.” See Sections 22, 45, and 54.

22. 1957 Cal. Stat. ch. 1972, § 16.

23. 1957 Cal. Stat. ch. 1972 (amending Sections 304 and 307).

above requires an assumption that the Legislature acted carefully and intentionally in every instance. An alternative explanation is that the early code was drafted without a clear recognition of the ambiguity we are analyzing (in part because the term “game mammal” did not exist in the code). And when the ambiguity was recognized, the Legislature did not comprehensively address it. In other words, the fact that all of the relevant provisions were not amended may have been the result of inadvertence, rather than design.

Second, and most importantly, it is not clear that the Legislature’s intentions in 1933 or 1957 should be controlling. Much has changed in the last 80 years, with respect to both the physical condition of wildlife in California and the mission of the Department of Fish and Wildlife. Reliance on legislative intent from nearly a century ago may not provide a good justification for revisions that are at odds with modern conditions.

POLICY ANALYSIS

Each of the six ambiguous sections presents a slightly different policy question. For that reason, they are discussed separately below.

Section 307. Declining population

Section 307 provides (with bold added to emphasize use of the term “game”):

307. (a) Whenever after due investigation the commission finds that **game fish, resident or migratory birds, game or fur-bearing mammals, amphibians, or reptiles** have decreased in numbers in an area, district, or portion of an area or district to the extent that a scarcity exists, the commission may reduce the daily bag limit and the possession limit on those **game fish, birds, mammals, amphibians, or reptiles** that are in danger of depletion, for a period of time that the commission may specify, or until new legislation addressing the scarcity becomes effective.

...

It seems fairly clear that Section 307 is intended to apply to animals that may be taken for noncommercial purposes. The substantive effect of the provision is to authorize a reduction in the “daily bag limit” and “possession limit” for animals that are in danger of depletion. Reduction of the bag limit and possession limit would only be relevant for animals that can be lawfully taken.

For that reason, the staff recommends that Section 307 be revised to refer only to game animals in the tentative recommendation. A note following Section 307 could ask for comment on the proposed revisions.

Note that Section 307 already contains the undefined term “game fish.” If the Commission accepts the staff’s recommendation, the proposed revision of Section 307 would also include the undefined terms “game amphibian” and “game reptile.” As discussed further below, under the heading “References to ‘Game Fish,’” it would probably be helpful to define those terms.

Section 1502. Feeding Wildlife

Section 1502 provides (with bold added to emphasize use of the term “game”):

1502. The department, in accordance with policies established by the commission, may provide for the feeding of **game birds, mammals, or fish** at such times as natural foods therefor are not available, and may provide suitable area or areas for such feeding, and may for those purposes expend such money as is necessary from the Fish and Game Preservation Fund.

The staff is not sure whether this section is intended to apply only to game animals, or whether it was intended to apply to all mammals and fish (in addition to game birds). It is conceivable that the original purpose of the provision was to authorize the feeding of *game* animals only, as a measure to conserve populations of those animals as a permanent resource. Under that narrow interpretation, the provision would not authorize the feeding of wildlife generally.

Alternatively, the section might have been intended to authorize the feeding of all wild mammals and fish, to ensure the continuity of any species, without regard to whether they are game animals. However, that interpretation is hard to square with the fact that the section is expressly limited to *game* birds. If the section is intended to authorize the feeding of nongame mammals and nongame fish, what policy purpose is served by excluding nongame birds?

Given the uncertainty as to the provision’s meaning, the staff recommends that it be presented in the upcoming tentative recommendation without change. Instead, a note following the section should invite public comment on whether it should be revised to refer to all mammals and fish, only game mammals or fish, or some other combination of categories.

Section 2003. Contests

Section 2003 provides (with bold added to emphasize use of the term “game”):

2003. (a) Except as specified in subdivisions (b), (c), and (d), it is unlawful to offer a prize or other inducement as a reward for the taking of a **game bird, mammal, fish, reptile, or amphibian** in an individual contest, tournament, or derby.

(b) The department may issue a permit to a person authorizing that person to offer a prize or other inducement as a reward for the taking of a **game fish**, as defined by the commission by regulation, if it finds that there would be no detriment to the resource. The permit is subject to regulations adopted by the commission. The application for the permit shall be accompanied by a fee in the amount determined by the department as necessary to cover the reasonable administrative costs incurred by the department in issuing the permit. However, the department may waive the permit fee if the contest, tournament, or derby is for persons who are under 16 years of age or have a physical or mental disability, and the primary purpose of the contest, tournament, or derby is to introduce those anglers to or educate them about fishing. All permits for which the fee is waived pursuant to this subdivision shall comply with all other requirements set forth in this section.

(c) This section does not apply to a person conducting what is generally known as a frog-jumping contest, or, in waters of the Pacific Ocean, what is generally known as a fish contest.

(d) This section does not apply to a person conducting an individual contest, tournament, or derby for the taking of a **game bird or mammal**, if the total value of all prizes or other inducements is less than five hundred dollars (\$500) for the individual contest, tournament, or derby.

The fact that Section 2003 is *regulating* take suggests that it need only apply to lawful sport hunting and fishing. If that is correct, then it need only apply to animals that can lawfully be taken for a noncommercial purpose. That inference might be enough to justify revising the provision in the tentative recommendation, to make it applicable to game birds, *game* mammals, and *game* fish. A note following the revision could ask for comment on whether such revisions are appropriate.

An alternative theory would be that the section was intended to apply to all mammals and fish, thereby prohibiting poachers conducting fishing and hunting contests. That strikes the staff as improbable. But if the Commission sees significant uncertainty on this point, the provision could be presented in the tentative recommendation without change, followed by a note asking for comment on whether and how to revise the “game” language.

The staff recommends the first approach.

Section 3002. Shooting from vehicle

Section 3002 provides (with bold added to emphasize use of the term “game”):

3003. It is unlawful to shoot at any **game bird or mammal**, including a marine mammal as defined in Section 4500, from a powerboat, sailboat, motor vehicle, or airplane.

It might be possible to construe Section 3003 as regulating sport hunting, which might support an inference that it should only apply to game mammals (rather than all mammals). However, there is a significant problem with that inference: marine mammals are not “game mammals” and they generally cannot be hunted. So it is clear that Section 3003 currently forbids shooting from a vehicle at a nongame mammal. That weighs against the notion that Section 3003 should be construed as applying only to game mammals.

If, instead, the provision were revised to expressly apply to all mammals, that would raise a significant policy question: if the law prohibits shooting from a vehicle at a nongame mammal, why doesn’t it prohibit shooting at a nongame bird (or a fully protected bird)? More concretely, why should it be a crime to shoot from a powerboat at a duck, but not a crime to shoot from the same boat at an egret (which is unlawful to take)?

In light of the uncertainty discussed above, the staff recommends that Section 3002 be presented in the upcoming tentative recommendation without change. Instead, a note following the section should invite public comment on whether and how the game language should be revised.

Section 3080. Donation of birds and mammals

Section 3080 provides (with bold added to emphasize use of the term “game”):

3080. (a) For the purposes of this section, “donor intermediary” means a recipient who receives a **game bird or mammal** from a donor to give to a charitable organization or charitable entity.

(b) A person may possess a **game bird or mammal** during a period other than the open season for that **game bird or mammal**, up to the possession limit allowed for that **game bird or mammal** during the open season, in any of the following circumstances:

(1) The person possesses a hunting license and a validated tag or tags for the species possessed, or a copy of the license and tag or tags. The license and tag or tags shall have been issued to that person for the current or immediate past license year.

(2) The person is a donor intermediary who received the **game bird or mammal** from a donor described in paragraph (1), and has a written confirmation of the donation that is signed and dated by the donor, and a photocopy of the donor’s hunting license and the applicable validated tag or tags from the current or immediate past license year.

(3) The person is a donor intermediary who received the **game bird or mammal** from a donor described in paragraph (1), and has a written confirmation of the donation signed and dated by the donor, which includes the donor’s name, address, hunting license number, and applicable tag numbers for the species possessed. The license and tag or tags shall be for the current or immediate past license year.

(c) The documentation required by subdivision (b) shall be made available to the department as described in Section 2012. There is no required format for the documentation. Any written documentation containing the required information shall be deemed to comply with this section. A charitable organization or charitable entity receiving and distributing a **game bird or mammal** for a charitable or humane purpose shall maintain the documentation described in paragraph (2) or (3) of subdivision (b) for one year from the date of disposal.

(d) This section does not authorize the possession of a game bird contrary to regulations adopted pursuant to the federal Migratory Bird Treaty Act (16 U.S.C. Sec. 703 et seq.).

(e) On or before January 1, 2015, and subject to the requirements of subdivision (d), the commission shall recommend legislation or adopt regulations to clarify when a possession limit is not violated by processing into food lawfully taken **game birds or mammals**.

It seems fairly clear that Section 3080 is regulating the disposition of birds and mammals taken by sport hunting. The section refers to the “open season” and “possession limit” for the animal at issue, terms that only have relevance for animals that may be hunted. The section also requires the donor to show a valid license and tag for the animal. Again, that would only be possible for animals that can be hunted.

The staff recommends that Section 3080 be revised, for purposes of the tentative recommendation, to expressly apply only to game birds and game mammals. A note could be added asking for comment on whether the changes are appropriate.

Section 3086. Birds and mammals in cold storage

Section 3086 provides (with bold added to emphasize use of the term “game”):

3086. Cold storage plants and frozen food locker plants shall make and keep a complete detailed record of all **game birds or mammals** stored in such plants. A record of each **game bird or mammal** shall be made at the time it is received at the plant for storage.

The record shall be open for inspection at all times by wardens of the department.

Section 3086 is located in the same article as Section 3080, entitled “Possession of Birds and Mammals *After Season.*” (Emphasis added.) This implies that the purpose of Section 3086 is to regulate the disposition of birds and mammals taken in sport hunting, after the close of the season for hunting those birds and mammals. It also seems very likely that a frozen food locker would only contain animals that are used as food. While any kind of animal *could* be eaten, only game animals are typically taken for that purpose.

And, as with other sections discussed earlier, the staff has a hard time seeing a policy justification for a rule that would apply Section 3086 to nongame mammals, while making it inapplicable to nongame birds.

On balance, the staff believes that Section 3086 should be construed as applying only to game animals and recommends that the provision be revised along those lines for purposes of the tentative recommendation. A note could be added asking for comment on the change.

REFERENCES TO “GAME FISH”

As noted above, there are a few provisions that refer to “game fish,” without any applicable statutory definition of that term. Those provisions are set out below for reference (with the relevant “game” language emphasized in bold):

Section 307. Animal scarcity

307. (a) Whenever after due investigation the commission finds that **game fish**, resident or migratory birds, game or fur-bearing mammals, amphibians, or reptiles have decreased in numbers in an area, district, or portion of an area or district to the extent that a scarcity exists, the commission may reduce the daily bag limit and the possession limit on those **game fish**, birds, mammals, amphibians, or reptiles that are in danger of depletion, for a period of time that the commission may specify, or until new legislation addressing the scarcity becomes effective.

...

Section 2003. Contests

2003. ...

(b) The department may issue a permit to a person authorizing that person to offer a prize or other inducement as a reward for the taking of a **game fish**, as defined by the commission by regulation, if it finds that there would be no detriment to the resource. The permit is subject to regulations adopted by the commission. The application for the permit shall be accompanied by a fee in the amount determined by the department as necessary to cover the reasonable administrative costs incurred by the department in issuing the permit. However, the department may waive the permit fee if the contest, tournament, or derby is for persons who are under 16 years of age or have a physical or mental disability, and the primary purpose of the contest, tournament, or derby is to introduce those anglers to or educate them about fishing. All permits for which the fee is waived pursuant to this subdivision shall comply with all other requirements set forth in this section.

Section 2005. Use of lights

2005. (a) Except as otherwise authorized by this section, it is unlawful to use an artificial light to assist in the taking of a game bird, game mammal, or **game fish**.

Section 8183. Bait nets

8183. ...

(f) Any **game fish** caught incidentally in bait nets shall be released by use of a hand scoop net or by dipping the cork line.

In those provisions, the staff finds it likely that the term “game fish” is being used to refer to a fish that can be lawfully taken for a noncommercial purpose. The staff sees no other plausible meaning.

If the Commission agrees, the tentative recommendation could include a new statutory definition of the term, along the lines discussed above.

As noted earlier, it might make sense to also refer to a “game amphibian” and “game reptile” in Section 307. If so, it would be helpful to define those terms as well.

The staff recommends the inclusion of the following definition in the tentative recommendation (with the section number to be determined later), along with a Note asking for public comment:

Section ____. “**Game fish,**” “**game amphibian,**” and “**game reptile**”

____. The terms “game fish,” “game amphibian,” and “game reptile” mean a fish, amphibian, or reptile that can be lawfully taken for a noncommercial purpose.

Comment. Section ___ is new. It is added for drafting convenience

Note. Proposed Section ___ would define the undefined term “game fish,” which is used in existing Fish and Game Code Sections 307, 2003, 2005, and 8183. The terms “game amphibian,” and “game reptile” would also be defined. **The Commission invites comment on whether the proposed definition would change existing law in a problematic way.**

CONCLUSION

While this memorandum recommends proposing some revisions to clarify the application of the word “game” in provisions where its application is unclear, it would also be entirely appropriate to make no recommendations on that issue in the tentative recommendation and simply ask for public comment on the matter. All of the staff’s recommendations are based to some extent on guesswork, and it might be prudent to be more conservative in approaching these issues.

How would the Commission like to proceed?

Respectfully submitted,

Brian Hebert
Executive Director