

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Trout Affidavit

April 2000

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Trout Affidavit*, 30 Cal. L. Revision Comm'n Reports 319 (2000). This is part of publication #209 [*2000-2001 Recommendations*].

STATE OF CALIFORNIA

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CALIFORNIA LAW REVISION COMMISSION

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April 13, 2000

To: The Honorable Gray Davis  
*Governor of California*, and  
The Legislature of California

Fish and Game Code Section 2357 makes it unlawful to carry trout into an area where the season is closed, unless a notarized affidavit was previously made in duplicate in the area where the trout were taken and the duplicate was left on file with the notary. The Law Revision Commission recommends that this provision be repealed, because it is unused and contrary to common expectations, and because a notary is not a proper repository of an affidavit.

This recommendation is submitted pursuant to Government Code Section 70219.

Respectfully submitted,

Howard Wayne  
*Chairperson*



## TROUT AFFIDAVIT

Fish and Game Code Section 2357 makes it unlawful to carry trout into an area where the season is closed, unless a notarized affidavit was previously made in duplicate in the area where the trout were taken<sup>1</sup> and the duplicate was left on file with the notary.<sup>2</sup> The provision appears to pertain to dead trout, not live specimens.<sup>3</sup> Presumably, it is intended to facilitate determination of whether the trout were lawfully taken.<sup>4</sup>

The Law Revision Commission has been directed to review

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1. To “take” trout means to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill” trout. Fish & Game Code § 86. (Unless otherwise indicated, all further statutory references are to the Fish and Game Code.)

2. The statute provides:

2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the notary public before whom the affidavit is made.

3. Section 2357 is in a chapter of the Fish and Game Code entitled “Importation and Transportation of *Dead* Birds, Mammals, Fish, Reptiles, and Amphibia,” in an article called “*Dead* Wild Birds, Mammals, Fish, Reptiles, and Amphibia.” (Emphasis added.) The immediately preceding chapters are “Importation, Transportation, and Sheltering of Restricted *Live* Wild Animals” and “Importation and Transportation of *Live* Plants and Animals.” (Emphasis added.) The latter chapter includes an article on “Aquatic Plants and Animals,” which is further evidence that live fish are not within the scope of Section 2357.

For provisions on placing live fish and other aquatic plants and animals in California waters, see Sections 15200-15202.

4. An angler who possesses trout where the season is closed may be accused of taking the trout out of season. In defense, the angler may contend that the trout were taken where the season was open. If the angler raises this defense, the angler could support it by presenting the affidavit required by Section 2357. Without the required affidavit, the angler risks prosecution pursuant to that statute.

this provision, because its operation is problematic.<sup>5</sup> It is questionable whether a notary public is a proper repository of an affidavit.<sup>6</sup> The requirement that a duplicate of the affidavit be filed with the notary also appears unnecessary, because an angler's possession of the original should be sufficient proof of the angler's proper activity.

Rather than correcting these technical imperfections in the statute, the Commission recommends its repeal. The provision is obscure, even within the sport fishing community. It appears to be unpublicized and unenforced.<sup>7</sup> The statutory requirements are also burdensome and inconsistent with common expectations.

Fishing is a highly regulated activity<sup>8</sup> and other restrictions on transporting fish may be appropriate,<sup>9</sup> but Section 2357

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5. Gov't Code § 70219; see also *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 86 (1998).

6. See Gov't Code § 8205 (duties of notary public).

7. The requirement is not mentioned in *1999 California Sport Fishing Regulations*, a booklet the Department of Fish and Game distributes to anglers to inform them of applicable restrictions. When contacted by a researcher from the Institute for Legislative Practice, Fish and Game personnel were surprised to learn of the statute's existence. See Yang & Kelso, *Transportation of Trout Into Closed Areas* (Inst. Legis. Prac. 1998). Legal research disclosed no reported cases construing the statute.

8. See, e.g., 14 Cal. Code Regs. §§ 1.74 (salmon punch card and steelhead trout catch report-restoration card), 7.00 (bag and possession limits, fishing seasons), 7.50 (waters subject to special restrictions on fishing methods and gear, bait, seasons, size limits, bag and possession limits, fishing hours), 8.00 (supplemental restrictions on taking and possessing trout and salmon).

9. See, e.g., Sections 2356 (removal of trout from state), 2358 (shipping trout into area where season is closed); 14 Cal. Code Regs. § 135 (importation of fish commercially taken out-of-state); *Johnson v. Gentry*, 220 Cal. 231, 30 P.2d 400 (1934) (upholding statute prohibiting transportation of salmon through specified ocean districts of State in closed season); *Van Camp Sea Food Co. v. Department of Natural Resources*, 30 F.2d 111 (S.D. Cal. 1929) (Supreme Court has repeatedly recognized power of state to prohibit shipment of game lawfully taken within its borders to points without state, and to prohibit possession of game within state, when shipped from points without state); *Adams v. Shannon*, 7 Cal. App. 3d 427, 86 Cal. Rptr. 641 (1970) (upholding prohibition on importa-

appears to achieve no purpose. It criminalizes a failure to act (failure to obtain a notarized affidavit) under circumstances where even a conscientious trout angler is unlikely to be aware of the statutory requirement.<sup>10</sup> It is not a necessary or reasonable means of enforcing the trout season.<sup>11</sup> The statute may be repealed without adverse effect.

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tion and possession of piranha); *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. 2d 56, 63, 130 P.2d 256 (1942) (state is owner of its fisheries for benefit of its citizens and can impose any condition on taking and use, after taking, of fish within its waters, reasonably necessary for conservation of its fisheries and beneficial use of its citizens).

Section 2001 (unlawful possession) restricts the time period during which trout may be possessed, but does not impose a geographic limitation on transportation of trout. See Smith & Kelso, *Possession of Fish During "Open Season Where Taken" Pursuant to Fish & Game Code Section 2001: A Brief Legislative History* (Inst. Legis. Prac. 2000).

10. A statute that criminalizes a failure to act in circumstances where a reasonable person would not think there was an obligation to act is inconsistent with established principles of fairness and due process. *Lambert v. California*, 355 U.S. 225, 227-29 (1958) (where person did not know of duty to register and there was no proof of probability of such knowledge, person may not be convicted consistently with due process); but see *State v. Huebner*, 252 Mont. 184, 827 P.2d 1260, 1263 (1992) (hunters are responsible for knowing laws pertaining to their sport). The Institute for Legislative Practice has reviewed Section 2357 and concluded that it is constitutionally suspect, although perhaps not unconstitutional. See *Transportation of Trout Into Closed Areas*, *supra* note 7.

11. The lack of necessity is evident from the lack of a similar affidavit requirement, and existence of a contrary provision, for black bass and spotted bass. See Section 2360 (black bass and spotted bass lawfully taken may be carried into area where season is closed). The apparent lack of enforcement (*supra* note 7) is further evidence that Section 2357 is unnecessary.

Although the affidavit required by Section 2357 would be relevant in a prosecution for taking trout out of season, other means of proof exist. Possession of trout where the season is closed is strong circumstantial evidence that the possessor took the trout out of season. See Section 2000 (possession of fish is prima facie evidence that possessor took fish); compare *H. Thoreau*, 8 Writings 94 (1906), *quoted in* Oxford Dictionary of Quotations, p. 696 (Oxford Univ. Press, 4th ed. 1992) ("Some circumstantial evidence is very strong, as when you find a trout in the milk."). The prosecution may also introduce other evidence (e.g., evidence that the trout was recently caught and the defendant had not recently been in an area where the season was open), as may the defense (e.g., witnesses who recently saw the defendant catch or possess trout in an area where the season was open).

## PROPOSED LEGISLATION

### **Fish & Game Code § 2357 (repealed). Trout affidavit**

SECTION 1. Section 2357 of the Fish and Game Code is repealed.

~~2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the notary public before whom the affidavit is made.~~

**Comment.** Section 2357 is repealed because it is unused and contrary to common expectations, and because a notary is not a proper repository of an affidavit. See Gov't Code § 8205 (duties of notary public).

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