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OPINION	:	No. 82-808
of	:	DECEMBER 30, 1982
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THE HONORABLE DAN O'KEEFE, MEMBER OF THE CALIFORNIA SENATE, has requested our opinion on the following question:

Does the Fish and Game Commission have the authority to prohibit the captive breeding of raccoons for the pet trade?

CONCLUSION

The Fish and Game Commission has the authority to prohibit the captive breeding of raccoons for the pet trade.

ANALYSIS

This opinion addresses the question of whether the Fish and Game Commission has the requisite statutory authority to prohibit the captive breeding of raccoons for the pet trade. We answer it affirmatively.

To give the true subject of this opinion their proper due, we quote the following. The raccoon has been described as:

> ". . . any of seven species of New World mammals that have a black masklike marking across the eyes and a bushy tail with a pattern of black rings. The adult animal, including the head and the tail, is about 2 feet (60 cm) to 3.5 feet (105 cm) long. The head of the raccoon is broad and has a pointed muzzle, and the ears are of medium size. The coat is thick, long, and mostly gray, with black markings on the face and tail. Each foot has five long toes, and the forepaws are able to grasp and handle objects easily.
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> "Raccoons are intelligent animals that have readily adapted themselves to coexisting with man. They prefer bushes and woods near water, where they live alone or in a small family of mother and young. Raccoons are omnivorous, eating a wide variety of animal and vegetable foods, which they may first dip, or 'wash,' in water with their forepaws. They travel long distances at night in their feeding treks. In warmer, southern regions, raccoons are active all year round, while those in the North hibernate. *The breeding season occurs during the first half of the year*, *when each female bears an average of three or four young*.
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> "Raccoons range throughout most of North and Central America into South America, and they also occur on some West Indian and Bahamian islands. They belong to the genus *Procyon* in the family Procyonidae [in the order Carnivora, in the class Mammalia]. The most common species is *P. lotor*. The family also includes coatimundis, cacomistles, and pandas." (*Raccoon*, Encyclopedia Americana, vol. 23, p. 107 (1979 ed.).)

Section 2118 of the California Fish and Game Code[1] prohibits the importation, transportation, *possession* or release alive in this state, except under permit,

[1] All unidentified statutory references are to the Fish and Game Code.

of certain species of wild animals enumerated therein or of any other wild animal[2] which the Fish and Game Commission ("the Commission") may designate to, among other considerations, provide for its welfare.[3] By a regulation effective August 1981, promulgated for "the welfare of the animals," the Commission designated the raccoon as an animal "determined to be not normally domesticated in this state," thus bringing it within the rubric of the statutory definition of "wild animal" (§ 2116, fn. 2, *ante*), and prohibiting, pursuant to section 2118, its being imported, transported or possessed in California except under a permit issued by the Department of Fish and Game. (14 Cal. Admin. Code, § 671(b)(11).) By terms of the regulation however, such permits are *only* to be issued for "zoological gardens," research and film making (*id.*, § 671.1), and for situations where neutered male animals are involved (*id.*, § 671.2; 671; cf. § 2150); otherwise permits for the entry, transportation or possession of raccoons are to be refused (14 Cal. Admin. Code, § 671; cf. § 2122). We are asked whether the Commission had the requisite statutory authority to prohibit, as it in effect has, the captive breeding of raccoons for the pet trade.[4] We conclude that it did.

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[2] Section 2116 defines "wild animal" as "any animal of the class . . . mammalia (mammals) . . . which is not normally domesticated in this state as determined by the Commission."

[3] The pertinent subdivisions of section 2118 read in full as follows:

"*It is unlawful to* import, transport, *possess*, or release alive into this state, except under a revocable, nontransferable permit as provided in this chapter and the regulations pertaining thereto, *any wild animal of the following species*:

". . . . . .

"*(i) Such* other classes, orders, families, genera, and species of *wild animals which may be designated by the commission* in cooperation with the Department of Food and Agriculture, (a) when such class, order, family, genus or species is proved undesirable and a menace to native wildlife or the agricultural interests of the state, or *(b) to provide for the welfare of wild animals*.

"(j) Classes, families, genera, and species in addition to those listed above may be added to or deleted from the above lists from time to time by commission regulations in cooperation with the Department of Food and Agriculture." (Emphases added.)

[4] The Fish and Game Code is administered and enforced by the Department of Fish and Game (§ 702). General policies for the conduct of the Department are formulated by the Commission and its administrating director is to be "guided by such policies and is responsible to the commission for administration of the department in accordance therewith." (§ 703.) Section 2122 directs the Commission to promulgate regulations for the guidance of enforcing officers which are to include a list of the wild animals for which permits that may be issued under the law will be refused.

As in early English law where the right to ownership of wild game belonged to the King (*People* v. *Stafford Packing Co.* (1924) 193 Cal. 719, 727), the wild game of this state belongs to the people as a collective whole in their sovereign capacity and it is not subject to private dominion to any greater extent than the people through their Legislature may see fit to permit. (E.g., Civ. Code, § 656 (ownership of wild animals on land of person claiming them), and § 996 (ownership of furbearing animals raised in captivity).) (*People* v. *Stafford Packing Co.*, *supra*; *Kellogg* v. *King* (1896) 114 Cal.378, 388; *In re Makings* (1927) 200 Cal. 474, 481; *Takahasi* v. *Fish and Game Com.* (1947) 30 Cal.2d 719, 728; rev'd. on other grds., 334 U.S. 410 (1948), and see 334 U.S. 410, 422.)

In exercising its police power in this regard (*Svenson* v. *Engelke* (1931) 211 Cal. 500, 502; *In re Makings*, *supra*, 200 Cal. at 481, *Ex Parte Maier* (1894) 103 Cal. 476, 483, *Matter of Application of Cencinino* (1916) 31 Cal.App. 238, 243) the Legislature may regulate wild game as it deems best, subject only to constitutional limitations. (*Takahashi* v. *Fish and Game Com.*, *supra*, 334 U.S. at p. 422; *Ex Parte Kenneke* (1902) 136 Cal. 527, 528.) Indeed, as part of such regulation, the Legislature may, if it sees fit, *absolutely prohibit* the taking of wild game or *any traffic or commerce in it*, should that be deemed necessary for the animals' protection or preservation, or for the public good. (*Ex Parte Maier*, *supra*, 103 Cal. at 483.) And there, it has been held, a prohibition on the sale, barter or trade of wild game does "*not* destroy a right of property, because no such right exists." (*Ex Parte Kenneke*, *supra*, 136 Cal. at 529 (quail), quoting *American Express Co.* v. *State*, 133 Ill. 649, 23 Am. St. Rep. 641; see also *Adams* v. *Shannon* (1970) 7 Cal.App.3d 427, 435 (importation and possession of piranha).)

In 1974 the People through their Legislature amended the Fish and Game Law to expressly make a consideration of the health and welfare of wild animals a primary factor in the administration and enforcement of the Fish and Game Code. Section 2116.5 was enacted at that time stating:

> "The Legislature finds and declares that wild animals are being captured for importation and resale in California; that some populations of wild animals are being depleted; that many animals die in captivity or transit; that some keepers of wild animals lack sufficient knowledge or facilities for the proper care of wild animals; that some wild animals are a threat to the native wildlife or agricultural interests of this state; and that some wild animals are a threat to public health and safety. It is the intention of the Legislature that the importation, transportation, and possession of wild animals shall be regulated to protect the health and welfare of wild animals captured, imported, transported, or possessed, to reduce the depletion of wildlife populations, to protect the native wildlife and agricultural interests of this state against damage from the existence at large of certain wild

> animals, and to protect the public health and safety in this state." (Added Stats. 1974, ch. 1503, p. 3296, § 1.5.)

Section 2118, subdivision (i) (fn. 3, *ante*) was amended to specifically authorize the Commission to consider the factor of the animals' welfare when designating as "wild animals" animals other than those the Legislature had already enumerated as such to be subject to the statutory prohibitions on their being imported, transported, possessed or released in this state.[5] (Stats. 1974, ch. 1503, p. 3296, § 2.) (See also Stats. 1974, ch. 1503, p. 3299, § 5, amending § 2120 to make that factor a consideration as well when the Commission promulgates regulations governing the entry, transportation, keeping, confinement or release of wild animals lawfully imported into or possessed in this state; cf. §§ 2119, 2118, subd. (j).) The Commission, as mentioned has done this with respect to

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[5] We have no problem with the propriety of the Legislature's delegating to the Commission the power to add other animals than it itself had enumerated to the list of those to which the prohibition on importation, transportation and possession applies. While the Legislature may not abdicate its responsibility to exercise the legislative power of the state vested in it (Cal. Const., art. IV, § 1), and resolve the "truly fundamental issues" by delegating that function to others or by failing to provide adequate directions (i.e., adequate safeguards) for the implementation of its declared policies (*CEEED* v. *California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 325; *Clean Air Constituency* v. *California State Air Resources Bd.* (1974) 11 Cal.3d 801, 816-817), "legislative power may properly be delegated if channeled by a sufficient standard . . . [and] 'the legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the Legislature' [citations]." (*Kugler* v. *Yocum* (1968) 69 Cal.2d 371, 375-376.) With respect to the delegation here involved, the Legislature has made findings about the populations of wild animals being depleted, about their death and mistreatment in captivity, and about the need to consider their health and welfare. (§ 2116.5.) It has listed some animals the welfare of which requires that their importation, transportation and possession be restricted (§ 2118) and has authorized the Commission to add others to the list. (§ 2118(i)(j); cf. §§ 2118.5, 2119.) The legislation has been held to be not overly broad (*Adams* v. *Shannon*, *supra*, 7 Cal.App.3d at 434), and elsewhere administrative actions based upon a legislative standard of the "general welfare of the public" have been upheld against charges that they conferred unabridged discretion. (See *City & County of S.F.* v. *Superior Court* (1959) 53 Cal.2d 236, 250; *City of Santa Clara* v. *Santa Clara Unified Sch. Dist.* (1971) 22 Cal.App.3d 152, 163; *Garavatti* v. *Fairfax Planning Com.* (1971) 22 Cal.App.3d 145, 150; *Mitcheltree* v. *City of Los Angeles* (1971) 17 Cal.App.3d 791, 797; *Van Sicklen* v. *Browne* (1971) 15 Cal.App.3d 122, 126-127; *Candlestick Properties, Inc.* v. *San Francisco Bay Conservation Etc. Com.* (1970) 11 Cal.App.3d 557, 568; *Stoddard* v. *Edelman* (1970) 4 Cal.App.3d 544, 548-549.) We therefore find no unlawful delegation of legislative power; the primary objective standard of the legislation is set forth with sufficient clarity as to guide the Commission in "fill[ing] up the details by prescribing administrative . . . regulations to promote the purposes of the legislation and to carry it into effect. [Citation.]" (*Kugler* v. *Yocum*, *supra*, 69 Cal.2d at 376.)

the raccoon, and, with the exception of zoos, research and film making, and neutered male animals, that animal may not be imported into, transported within, or possessed in California without a permit. (14 Cal. Admin. Code, §§ 671(b)(11), 671.1, 671.2.) Possession of raccoons for breeding for the pet trade is effectively prohibited.

Clearly the Commission has been granted the requisite statutory authority to secure that result. By the plain terms of section 2118, subdivision (i) itself, the Commission has been given the power to restrict the possession of any animal whose welfare requires it, to such possession as is under permit *in accordance with the Commission's regulations*. (Cf. §§ 4000, 4010 (power of the Commission to regulate breeding of raccoons as fur-bearers despite private property rights therein) (e.g., Civ. Code, § 996); § 2120, *supra*, (power of the Commission to regulate keeping of wild animals lawfully possessed in California).)

It has been suggested, though, that the Commission's regulations (14 Cal. Admin. Code, §§ 671, 671.1, 671.2), authorizing as they do the granting of permits to import, transport or possess raccoons for some purposes (e.g., zoos, film making, research) while denying them for all other purposes (such as captive breeding for the pet trade), make an unwarranted distinction and create an unfounded and inappropriate classification which is constitutionally impermissible. The propriety of the classification, however, has been upheld. In *Adams* v. *Shannon*, *supra*, 7 Cal.App.3d 427 a dealer in tropical fish challenged the very same regulations of the Commission which effectively banned the importation of piranhas for commercial purposes while permitting their importation for zoos (aquaria) and research purposes. The court rejected the challenge thus:

> "We find no constitutional infirmity in the classification adopted by regulations 671 and 671.1 which authorize the granting of import permits for piranha to public aquaria for exhibition purposes, to zoological gardens, and for research while denying the granting of permits for other purposes. Classification is not per se prohibited by the equal protection clause of the Fourteenth Amendment to the United States Constitution. (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 [55 L.Ed. 369, 31 S.Ct. 337].) '"When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification."' (*Ferrante* v. *Fish & Game Com.*, 29 Cal.2d 365, 372 [175 P.2d 222]; see also *Bayside Fish Flour Co.* v. *Gentry*, 297 U.S. 422 [80 L.Ed. 772, 56 S.Ct. 513].) [¶] Here there is a clearly conceivable basis for the classification which has not been rebutted by appellant. The likelihood that piranha will be released into the waters of the state is small if the fish are imported by a responsible, knowledgeable

> scientific organization. It is much greater if the importation is for commercial purposes including the indiscriminate sale of live fish to the public." (7 Cal.App.3d at p. 434.)

Here too a similar "clearly conceivable basis for the classification" is present: the Commission could well have determined that the likelihood of harm to the welfare of raccoons would be small when they would be possessed by a responsible, knowledgeable scientific organization, and that harm to them would be much greater if they were possessed for breeding for "the indiscriminate sale to the public" for pets.[6] Indeed the legislative findings set forth in section 2116.5 regarding the detrimental effect captivity has on "wild animals" would support that determination. (See also § 2150, subds. (c)(e) (statutory exemptions from permit fees for zoos and research institutions).) We therefore find the classification established by the Commission for its issuance of permits is reasonably based and not improper.[7]

Our attention is also drawn to section 2150.5, also enacted in 1974 (Stats. 1974, ch. 1503, p. 3301, § 9), by which the Legislature excepted from the general prohibition on the importation, possession, transportation or release without a permit of wild animals the continued *possession* of wild animals lawfully acquired and possessed

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[6] Even where a zoo or research institution obtains a permit to import or possess a restricted animal such as raccoons, it still may not transfer ownership or possession of the animal without approval of the department (14 Cal. Admin. Code, § 671.1), and it still must properly confine it (*id.*, § 671.4).

[7] In line with this, we were also asked whether the Commission could lawfully impose special conditions on individual animal welfare permits or Class 3 breeder licenses it issues that it does not impose on other similar permits and licenses. From what we glean from the background material submitted with the opinion request, the "special condition" involved is a typed notation that appears on some permits that reads, "This permit does not authorize captive breeding of raccoons." The "condition" is thus a recitation of the purport of the Commission's regulations dealing with the possession of raccoons (cf. 14 Cal. Admin. Code, §§ 671(b)(11), 671, 671.2) and has no, nor was intended to have any, independent legal significance in and of itself. As the notation merely recites the scope of the limitation imposed by law on all permits and to which all permits are subject, its specific inclusion on some permits and perhaps not others is but reflective of an administrative concern for giving of notice of that limitation and is otherwise without consequence. And, of course, while one need not go beyond the Fourteenth Amendment to find support for the proposition that persons truly similarly situated must be treated equally by an administrative agency (*Yick Wo.* v. *Hopkins* (1886) 118 U.S. 356), the question of what constitutes a "similar situation" is another matter, and, as noted, where as here fundamental rights are not involved, an administrative agency has wide discretion to define that similarity by classification. (*Adams* v. *Shannon*, *supra*, 7 Cal.App.3d at 435.)

before January 1975, and their progeny, which would otherwise be restricted because of concern for their welfare. The section provides as follows:

> "Classes, orders, families, genera, and species which may not be imported, transported, possessed, or released alive in this state solely because of concern for the welfare of the animal may be possessed under permit when the owner can demonstrate that such animal was legally acquired and possessed in California before the effective date of this section. The department may require the owner of an animal which may be possessed under this section to mark or otherwise identify such animal and progeny, so as not to endanger the welfare of that animal, to the satisfaction of the department. *The owner shall not transfer such animal or progeny to any other person* without prior approval of the department." (Emphases added.)

It is claimed that the section is indicative of the Legislature's intent that the breeding of raccoons be permitted for the pet trade. We reject the contention.

An exception to a general statutory provision must be strictly interpreted (*City of National City* v. *Fritz* (1949) 33 Cal.2d 635, 636) lest it consume the general provision itself and become instead the rule. (65 Ops.Cal.Atty.Gen. 360, 370-371 (1982).) In addition, an exception, like any provision of a statute, must be construed in context and harmonized with both the statutory scheme as a whole (*California Mfgrs. Assn.* v. *Public Utilities Com.* (1979) 24 Cal.3d 836, 844) and the purpose for which it was enacted (*Select Base Materials* v. *Board of Equal.* (1959) 51 Cal.2d 640, 665; 65 Ops.Cal.Atty.Gen., *supra*). Accordingly we must read section 2150.5's exception for continued possession narrowly and in its proper context and setting.

"Since 1961 the Fish and Game Code has contained a comprehensive scheme limiting the importation of wild animals . . . into California" (*Adams* v. *Shannon*, *supra*, 7 Cal.App.3d 427, 430), and since 1970 their possession in California has been limited as well. (Stats. 1970, ch. 302, p. 578, § 1.) While these restrictions were originally motivated by desires to exclude undesirable animals and to protect native wildlife, the agricultural interest of the state and the public health and safety (see, e.g., § 2118), in 1974 the Legislature expressly declared its solicitude for the health and welfare of the animals themselves and amended the code accordingly to reflect that concern. Thus as we have seen, having found "that wild animals [were] being captured for importation and *resale* in California; that some populations of wild animals [were] being depleted; that many animals [were dying] in captivity or transit; [and] that some keepers of wild animals lack sufficient knowledge or facilities for the[ir] proper care . . ." (§ 2116.5), the Legislature empowered the Commission to appropriately restrict the importation, transportation and *possession* of such animals whose welfare required it. (§ 2118, subd. (i) as amended by Stats. 1974, ch.

1503, § 2, *supra*; see also § 2120 as amended by Stats. 1974, ch. 1503, § 5, *supra*.) As we have also seen, the Commission has determined that the welfare of the raccoon requires that restrictions be placed on the importation, transportation and possession of that animal in California. (14 Cal. Admin. Code, § 671, subd. (b)(1).) To construe the limited exemption found in section 2150.5 for the continued *possession* of raccoons and their progeny so as to permit the captive breeding of raccoons for commercial purposes of the pet trade would ignore the expressed concern of the Legislature for the animals' welfare as well as the Legislature's and the Commission's express findings as to the harm that those commercial purposes would cause the animals. (§ 2116.5; 14 Cal. Admin. Code, § 671, subd. (b)(11).) We cannot and do not construe it so. Furthermore, we are persuaded that the Legislature did not intend the exemption contained in section 2150.5 to be a fount of authority for the captive breeding of raccoons for the pet trade from the fact that its very terms require a permit to be obtained for the transfer to another person of a particular animal or its progeny. (§ 2150.5.) That type of restriction is simply not consistent with the concept of a pet trade in animals, and we believe that its imposition in the same section which created the exemption for continued possession is indicative of the Legislature's intent that the section's provisions not authorize that type of commercial activity. Rather we see it to have been intended as a means to permit continued possession by the owner of an animal who would be affected by the new legislative proscription, in order to avoid constitutional problems that might be inherent in a total ban on that possession. (See, e.g., 64 Ops.Cal.Atty.Gen. 192, 210-218 (1981).) In this vein we understand that when the Commission adds animals to the restricted list, it readily issues permits to owners who are affected for their continued possession.

The right and power to protect and preserve the wild game of this state are established prerogatives of the sovereign (*People* v. *Stafford Packing Co.*, *supra*, 193 Cal. at 727), and the necessity and importance of its conservation and protection has been recognized for the past [ninety] years. (*Id.*, at 724.) To ensure that such occur, the Legislature enacted the Fish and Game Code (cf. *ibid*; *Adams* v. *Shannon*, *supra*, 7 Cal.App.3d at 433-434) and charged the Fish and Game Commission with its oversight. As part of the task of overseeing the conservation, protection and preservation of wild animals we conclude that the Commission has been granted the requisite statutory authority to ban the captive breeding of raccoons for the pet trade.

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