

CONSERVATION COMMISSION FISH & : Persons taking and possessing
GAME LAWS: : fish from private lakes are sub-
CRIMINAL PROCEDURE: : ject to prosecution unless they
: have obtained a Co. or State fish-
: ing permit, or the owner of said
: lake has obtained a game breeders
: permit and furnished such persons
: with a written statement as pro-
: vided in Secs. 55 & 56, Wildlife
: & Forestry Code of Missouri.

April 30, 1948

FILED NO. 13

Honorable L. Madison Bywaters
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Mr. Bywaters:

This will acknowledge your recent request for an official opinion which, for the sake of brevity, we are restating:

You inquire if persons owning a private lake and all lands completely surrounding said lake, may allow both residents and non-residents of this State to fish therein without a county or state fishing permit, upon the payment of a stipulated fee to the owners of said lake.

Section 8883, R.S. Mo. 1939, placed the ownership of and title to birds, fish and game not held by private ownership, legally acquired, in the State of Missouri.

Under Section 8908, R.S. Mo. 1939, it required anyone desiring to hunt and fish in this State to first obtain a license permitting same, and concluded with the following proviso:

"* * * Provided, no license shall be required to fish in privately owned lakes or ponds where a fee is charged for the privilege of fishing."

The 63rd General Assembly of the State of Missouri, specifically repealed Sections 8864 to 8882, both inclusive, Sections 8883 to 8971, both inclusive, Article 3, all in Chapter 47, R.S. Mo. 1939, and enacted in lieu thereof, twenty-seven new sections (See: pages 664-671, inclusive, Laws of Missouri, 1945).

Section 4, page 665, Laws of Missouri, 1945, goes even farther than did Section 8883, R.S. Mo. 1939, now repealed, by not even excepting from ownership and title to wildlife in the State that which was held by private ownership, and now reads:

"The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri. Any person who fails to comply with or who violates this Act or any such rules and regulations shall not acquire or enforce any title, ownership or possessory right in any such wildlife; and any person who pursues, takes, kills, possesses or disposes of any such wildlife or attempts to do so, shall be deemed to consent that the title of said wildlife shall be and remain in the state of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof."

The following decisions hold that such ownership to be in the State of Missouri. In State vs. Heger, 194 Mo. 707, l.c. 711, the Court in holding the ownership of wildlife to be in the State of Missouri, said:

"The Authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the State, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the State, and clothed by them with authority to make laws, may grant to individuals the right to hunt and kill game at such times, and upon such terms, and under such restrictions as it may see proper, or prohibit it altogether, as the Legislature may deem best.
(Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238; Geer v. State of Connecticut, 161 U.S. 519; American Express Co.

v. People, 133 Ill. 649; Ex parte Maier, 103 Cal. 476; State v. Rodman, 58 Minn. 393; Magner v. People, 97 Ill. 320; Phelps v. Racey, 60 N.Y. 10,)"

Also, in State vs. Willers, 130 S.W. (2d) 256, l.c. 257, the Court of Appeals in so holding, said:

"Of course, the statute protects only wild birds. The absolute ownership of wild birds is in the State. They are not subject to private ownership. The Legislature may pass such laws granting to individuals the right to kill such birds at such times, or prohibit the killing of them altogether, as the Legislature may deem best. State v. Heger, 194 Mo. 707, 93 S.W 252."

Wildlife is also defined in Section 3, page 665, Laws of Missouri, 1945, as follows:

"As used in this Act, unless the context otherwise requires:

* * * * *

"(b) The word 'wildlife' shall mean and include all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification, whether resident, migratory or imported, protected or unprotected, dead or alive; and shall extend to and include any and every part of any individual species of wildlife."

Section 17, page 669, Laws of Missouri, 1945, makes it a misdemeanor for any person to have in his possession or under his control any wildlife, except as permitted by this Act in the rules and regulations of the Conservation Commission, and said Section reads:

"Any person who shall have in his possession or under his control any wildlife, except in the manner, to the extent and at the time or times permitted by the provisions of this Act and the rules and regulations of the Commission, shall be deemed guilty of a misdemeanor; and any agent of the Commission, and any sheriff or marshal or deputy thereof is hereby permitted and authorized to take and confiscate any such wildlife from any person so possessing or controlling the same."

Section 26 of the same Act, page 671, Laws of Missouri, 1945, provides that no wildlife shall be pursued, taken, killed, possessed or disposed of except as permitted by such rules and regulations, and reads:

"No wildlife shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent and at the time or times permitted by such rules and regulations; and any pursuit, taking, killing, possession or disposition thereof, except as permitted by such rules and regulations, are hereby prohibited. Any person violating this section shall be guilty of a misdemeanor."

Section 27 of the same Act further provides that when there is no punishment provided for violation of the rules and regulations and this Act, any person found guilty of violating said rules and regulations or the Act shall be guilty of a misdemeanor, and reads:

"Any person violating any of the provisions of this Act wherein other specific punishment is not provided, any person violating any of such rules and regulations relating to wildlife, shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment in the county jail not exceeding three months or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Section 3 of the Wildlife-Forestry Code of Missouri, 1947, also provides that no bird, fish, animal or other form of wildlife shall be taken or possessed at any time except as permitted by these regulations and laws consistent with the Conservation amendment of the State of Missouri, and reads:

"No bird, fish, animal or other form of wildlife including their nests, eggs, homes and dens, in the State of Missouri, shall be molested, pursued, taken, enticed, poisoned, killed, transported, stored, served, bought, sold, given away, accepted, or possessed, in any manner, number, part, parcel or quantity, at any time, except as specifically permitted by these regulations, and any laws consistent with Article IV, Sections 40-46 of the Constitution of the State of Missouri."

Section 8 of said Wildlife-Forestry Code provides that wildlife may be taken or possessed only when a person has in his possession a prescribed permit, or when specifically allowed by said regulations to do so without a permit. Said Section reads:

"Wildlife may be pursued, taken, transported, shipped, bought, sold, given away, stored, served, used or possessed only by a person who at the same time has in possession the prescribed permit to do so or who is specifically allowed by these regulations to do so without permit."

Furthermore, Section 9, exempts a farmer fishing on his own farm when done as permitted by said regulations.

Section 19 and sub-section (a) of said rules and regulations require permits of residents of this State before taking and possessing fish, however, excepting therefrom, a resident who is under seventeen years of age. Said Sections read as follows:

"Subject to the provisions of these regulations, permits may be obtained

by residents of this state as evidences of granted and revocable privileges to pursue, take, transport, ship, buy, sell, store, serve, use or possess certain wild-life, throughout the state, except as otherwise specifically provided (see Sec. 19-D), upon the payment of the fees hereinafter stipulated.

"(A) Resident State Fishing Permit \$1.50.-- To pursue, take, possess and transport fish, minnows, crayfish, frogs and other amphibious species upon payment of a resident fishing permit fee of one dollar and fifty cents (\$1.50); provided, that a resident who is under seventeen (17) years of age may exercise these privileges without such permit; and provided also that convalescing veterans who are bona fide patients at a veterans' hospital located in the State of Missouri may exercise these privileges without permit when they are accompanied by and are under the supervision of an employee of the Veterans' Administration, and have in their possession a special permit provided for such purposes."

There is also a provision for a non-resident securing a permit to fish in this State.

Therefore, in view of the foregoing rules and regulations, and statutory provisions, permits are required of persons to take and possess fish in this State except those specifically exempted therefrom in the foregoing statutes and rules and regulations.

There is one way, and only one way, that the owner of a private lake in this State may permit persons to fish therein without a permit, and that is for said owner to take out a game breeder's permit. It follows that he will have to meet all the requirements for obtaining such a permit. These requirements will be found under Section 20, sub-section (b), and Sections 55 and 56 of the Wildlife-Forestry Code of the State of Missouri, which read as follows:

"Sec. 20. Subject to the provisions of these regulations, the following special permits may be obtained from the Commission upon the payment of stipulated fees as follows:

"(B) Game Breeder's Permit \$10.00--To maintain and operate a game farm, fish farm, minnow farm, frog farm, wildlife exhibit or a commercial lake and to exercise the privileges of a game breeder as herein permitted; upon the payment of a game breeder's permit fee of ten dollars (\$10.00), provided, that a commercial lake may be maintained and operated without such permit if fish are taken only within the seasons, limits, methods and conditions herein prescribed for the waters of this state. The Commission may waive such permit fee if the wildlife is held for scientific, educational or propagation purposes under the direction of the Commission or is held in a public zoo operated by a public agency."

"Sec. 55. Game held in captivity, permit required. Game and fur-bearing animals, as herein defined, may be propagated and held in captivity by the holder of a game breeder's permit, subject to the privileges and restrictions herein set forth. Such permit may be granted at the sole discretion of the Commission after satisfactory proof by the applicant that all such game was secured from a source other than the wild stock in this state, and that the applicant is equipped to confine such game for public safety, and to prevent wild game from becoming part of the enterprise; provided, however, that such proof may be waived by the Commission, at its option, in the renewal of any such permits; and provided, that all such game and the increase thereof, shall, within sixty (60) days, or sooner if removed

from the premises, be marked or banded for permanent identification; except that live deer and wild turkeys shall be so marked before shipment. Such identification marks, assigned by the Commission, shall be placed in the skin of the wing of birds, and in the skin of the ear or flank of animals and furbearers. The operation of any such enterprise, which may serve in any manner as a cloak or guise to nullify or make difficult the enforcement of these regulations, shall, at the discretion of the Commission, cause the suspension or revocation of such permit.

"Sec. 56. Privileges of game breeder.-- Game and fur-bearing animals, as herein defined, propagated and held in captivity according to these regulations by the holder of a game-breeder's permit, may be used, sold, given away, transported, or shipped at any time; provided, that all such game shall be accompanied by a written statement by the permittee indicating his permit number and showing truly the kind and number of each species sold, given away, transported or shipped, the name and address of the recipient, and that such game was possessed, sold, given away, transported or shipped by the permittee in full compliance with these regulations. Wildlife which has been propagated in captivity, or has been transported into this state, may be liberated to the wild only under the specific permission and supervision of the Commission."

CONCLUSION

Therefore, if the owner of said private lake has not taken out a game breeder's permit anyone else taking fish out of said lake without a county or state fishing permit is liable to prosecution under the Fish and Game Laws, and rules and regulations adopted by the Conservation Commission. If such a lake is not subject to over-flow or stocked from sources of the State, and the owner of said lake

meets all the requirements under the foregoing provisions, then said owner may take out a game breeder's permit. Thereafter, persons may take fish from said lake without first obtaining a county or state permit to fish therein, provided that the person taking such fish from said lake or having said fish in his possession shall also have in his possession at the same time a written statement from the permittee holding the game breeder's permit, which statement shall contain all the necessary requirements mentioned in Section 56, supra.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J.E. TAYLOR
Attorney General