

CONSERVATION COMMISSION:
AND FISH AND GAME:

IN RE: Section 40(a) Article IV, Constitution
1945, is self-enforcing and it is not necessary
for the Legislature to enact a statute permitting
the Conservation Commission to promulgate rules
and regulations. Construing House Bill #366.

March 12, 1946



H.H.
Honorable Clark H. Gore
Prosecuting Attorney, Atchison County
Rock Port, Missouri

Dear Mr. Gore:

This will acknowledge receipt of your request for an
official opinion, which reads:

"I have a Fish and Game problem on which I
would appreciate your opinion.

"The Wildlife and Forestry Code of Missouri,
put out by the Conservation Commission, sets
out various rules and regulations, some of
which are duly enacted statutes, and others
are merely rules of the commission.

"The local game warden has made an affidavit
charging a man with fishing without a license
illegally using a trammel net, and catching
and having in his possession game fish in a
closed season.

"Of course Section 8918, R. S. Mo. 1939, makes
it a misdemeanor to fish without a license,
but the other violations are not covered by
statute and not too clear in the rules and
regulations of the commission. Sec. 62 and 55.

"I also have Senate Bill No. 366, which re-
peals the old fish and game law, and enacts
28 new sections in lieu thereof. This bill
attempts to give the commission authority
to enact rules and regulations, the violation
of which will be misdemeanors, and punishable
in courts of law. This authority is referred
to frequently in the bill, but is not specif-
ically given, as I read it.

"I would like to have your opinion on:

"1. Under present law, are violations of the

wildlife and forestry code punishable by criminal action as misdemeanors, when the acts complained of are not covered by statute?

"2. If this new bill is enacted, will the commission have power to make rules which will have the force of statute and be punishable in courts of law?

"I inclose my information (copy) in this case, and wish you would look it over. The defendant says nobody is going to make him buy a license or pay a find, and he will take the case to the Supreme Court to prove he is right.

In answer to your first inquiry, we are enclosing a copy of an official opinion rendered by this department under date of July 17, 1945, to Honorable John H. Keith, Prosecuting Attorney of Iron County, holding that Section 8967, R. S. Mo. 1939, fixes a penalty for the violation of reasonable rules and regulations adopted and promulgated by the Conservation Commission of the State of Missouri. It is our opinion that the enclosed opinion fully answers your first inquiry.

As to the second request in your letter, it is not the policy of this department to pass upon the validity of bills introduced by the General Assembly until same are finally passed and approved, except, of course, when such requests are made by members of the General Assembly or the Governor. This is not usually done for the reason that there is a great possibility that said bill may be amended or that said bill may never be enacted into a law.

However, upon an examination of Committee Substitute for Senate Bill No. 366, we find that Sections 26 and 27 of said bill clearly and specifically provide for punishment for violation of rules and regulations not heretofore provided for, and several other provisions in said bill provide for a special penalty for some particular violation. We do not find any specific authority in said bill for the Conservation Commission promulgating reasonable rules and regulations, however, we consider such statutory authority unnecessary. Section 40(a), Article IV, Constitution 1945, vests in the Conservation Commission the control, management, restoration, conservation and regulation of birds, game, fish, forestry and all wild life resources of the State of Missouri. Said provision reads, in part:

"The control, management, restoration, conservation and regulation of the bird, fish, game forestry and all wild-life resources of the state, including hatcheries, sanctuaries, refuges, reservations and all other property owned, acquired or used for such purposes and the acquisition and establishment thereof, and the administration of all laws pertaining thereto, shall be vested in a conservation commission consisting of four members appointed by the governor, not more than two of whom shall be of the same political party. * * *"

Section 44 of the same Article makes Sections 40 to 43, inclusive, self-enforcing and reads:

"Sections 40-43, inclusive, of this article shall be self-enforcing, and laws not inconsistent therewith may be enacted in aid thereof. All existing laws inconsistent with this article shall no longer remain in force or effect."

Furthermore, Section 45 of the same Article deals with the time said rules and regulations promulgated by the Conservation Commission shall become effective. Said section reads:

"The rules and regulations of the commission not relating to its organization and internal management shall become effective not less than ten days after being filed with the Secretary of State as provided in section 16 of this article, and such final rules and regulations affecting private rights as are judicial or quasi-judicial in nature shall be subject to the judicial review provided in section 22 of article V."

Also, Section 46 of the same Article requires the Conservation Commission to supply, upon request, printed copies of its rules and regulations, and reads:

"The Commission shall supply to all persons on request, printed copies of its rules and

regulations not relating to organization or internal management."

In *Marsh v. Bartlett*, 121 S. W.(2d) 737, an original proceeding in habeas corpus was instituted to release the petitioner from the custody of the sheriff of Dallas County, Missouri. The petitioner, Marsh, was arrested on May 28, 1939, and charged with catching a large mouth bass during a closed season as provided in Section 8270, R. S. Mo. 1939. The aforesaid statute fixed a closed season between April 1st and May 30th of each year. The petitioner's answer set up that said statute was repealed by the Constitutional amendment No. 4 (said amendment creating the Conservation Commission and prescribing its duties, etc.) and was supplemented by a regulation prior to the offense charged. Said regulation was adopted by the Conservation Commission on April 11, 1938, and established a closed season for catching such fish between April 1st and May 28th, for the year 1938, which regulation was in effect from and after April 11th of said year. The Supreme Court, in the above case, did not specifically hold that the Conservation Commission was authorized, under the above Constitutional amendment, to adopt rules and regulations for the control, management, restoration, conservation and regulation of fish, however, we think the court did, at least by implication, so hold. In *Marsh v. Bartlett*, the Court said:

"(10) The reference already made to the power the people reserved to themselves in section 57 of Article 4 with the express right to exercise the same without let or hindrance of the General Assembly, will be recalled to mind. This power, a political one, and the exercise of its functions is of the essence of sovereignty which resides in the people. In the Bill of Rights (sec. 1, art. 2) as found in the Constitution, Mo. St. Ann. Const. art. 2, Sec. 1, it is declared 'That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.' In view of these reservations of sovereignty and of the right to exercise functions thereof in the State's government, it seems self-evident that the exercise thereof in this particular instance to provide in the mode selected and to the extent effected by an enduring ordinance, policy-forming as to its subject matter and rule-delegating

as regards the administrative functions and imposed duties, was valid notwithstanding the general field for action by way of statutory enactments had theretofore been entered solely by successive legislatures. That condition, long existing, continued merely because until of late the people did not attempt to exercise their stated reserved authority.

"But the present attempt to exercise it does not deprive the legislative department of the government of its power or functions but relates to only a small portion of the power reserved to the people, the exercise of which suspends and supersedes the power of the legislature as to that portion alone which involves the subject matter and its governance as provided in said Amendment.* * *"

* * * *

"It therefore follows that penalizing and general section 8311 appropriately operates upon all violations of reasonable rules and regulations established by the Conservation Commission concerning the matters committed to it by said Amendment No. 4. The regulation under consideration here is apparently a reasonable one, and was in force and controlling on May the twenty-eighth last and the provisions thereof in effect. It is also obvious the Amendment is self-enforcing."

CONCLUSION

Therefore, in view of the foregoing constitutional provision, and especially Section 40, supra, providing that the Conservation Commission shall have control, management, restoration, conservation and regulation of birds, fish, game, forestry and wildlife resources and, furthermore, specifically making sections 40 to 43, inclusive, of Article IV of the Constitution of 1945, self-enforcing, it is the opinion of this department that the Con-

ervation Commission of the State of Missouri needs no statute to authorize it to promulgate and adopt reasonable rules and regulations for the control, management, restoration, conservation and regulation of birds, fish, game, forestry and all wildlife in the State of Missouri.

You further request that we examine the attached copy of an information you have filed in the case of State v. Charley Morrison. The form you enclosed is the usual form that most prosecuting attorneys have relied upon for violations of fish and game laws and regulations adopted by the Conservation Commission. We have no knowledge of any appellate court decision construing such information for the violation of rules and regulations adopted by said Commission. However, it has been and is now our opinion, and we have so advised prosecuting attorneys, that information drawn for the violation of rules and regulations adopted by the Commission should be pleaded and proved just as in the case of the violation of the Public Service Commission rules or those of other Boards and Bureaus. (See Anderson v. Kraft, 129 S. W. (2d) 85, l. c. 89 and 90; also, Moss v. Wells, 249 S. W. 411, l. c. 414; City of St. Louis vs. Barney Kruempler, 235 Mo. 710, l.c. 719; Wooldridge vs. Scott County Milling Co. 102 S. W. (2d) 958, l.c. 964 to 967.)

We are hereto attaching a form which we recommended for the violation of certain rules and regulations adopted by the Conservation Commission in another case.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ARH:mw