CONSERVATION COMMISSION:

FISH AND GAME PERMITS:

Necessary that persons secure fishing permits before fishing in private waters in this state.

File No. 69

July 23, 1949

Honorable James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

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

> "Please furnish this office with an opinion on the following facts:
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> "'Does a person who owns a private lake which is not fed by spring or streams but by an artesian well drilled at the owner's expense and upon these premises, no state money or state property has been used have to require the purchase of Missouri fishing license in order to permit patrons to fish in said private lake?'
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> "I am acquainted with the case of State of Missouri -vs- Taylor which was decided by the Supreme Court of Missouri in September, 1948, in which they hold that the wildlife of the State of Missouri is property of the State of Missouri, and by reason thereof the Wildlife and Forestry Commission can require the purchase of licenses before persons can fish in private owned, operated, and controlled lakes.
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> "It would seem to me that in the particular instance cited above that where the person owning the real-estate involved obtains his water supply for said lake from sources that in no wise come under the control of the State of Missouri and are wholly within the confines of the real-estate owned by said person, and where there has been no state aid or any part of the state employed or used that it is an extraordinary power that would require the purchase of fishing license before a person could fish in said private lake.

> "The owner has, of course, obtained the necessary operating permits and has in all ways complied with operation requirements and regulations, but the question of the individual license has come up and has caused a considerable amount of confusion."

From facts stated in your request we are assuming that the proprietor of said private pond or lake now holds a wildlife breeders permit under Sections 46(b) and 52 of the Wildlife Code of Missouri 1949. If such be the case, then by issuing said permit, at least by inference, the Conservation Commission is conceding that wildlife in such body of water was obtained from a source other than the wild stock in this state, as that is one prerequisite for issuing said permit. Sections 46(b) and 52, supra, read:

> "Section 46(b)-To maintain and operate a wildlife farm, wildlife exhibit or a commercial lake and to exercise the privileges of a wildlife breeder as herein permitted; upon the payment of a wildlife 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. Such permit fee may be waived 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."

> "Section 52 - Wildlife may be propagated and held in captivity by the holder of a wildlife breeder's permit, as provided herein. Such permit may be granted after satisfactory proof by the applicant that all such wildlife was secured from a source other than the wild stock in this state, and that the applicant is equipped to confine such wildlife for public safety and to prevent wildlife of the state from becoming a part of the enterprise; but such proof may be waived in the renewal of any such permits. Wildlife so propagated and held may be used, sold, given away, transported or shipped at any time, but the same shall be accompanied by a written statement by the permittee giving 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 as to the same he has fully complied with his code; provided, that no person other than a wildlife breeder or his bona fide employee may take any wildlife under the provisions of this section without having on his person the hunting or fishing permit

> required by this code for the taking of wildlife. Wildlife propagated in captivity or transported into this state may be liberated to the wild only under the specific permission and supervision of the Commission. The operation of any such enterprise in violation of this code or in any manner as a cloak or guise to nullify or make difficult the enforcement of this code shall be cause for the suspension or revocation of such permit."

The law seems to be very well established in this state as well as others that if said waters are subject to overflow into any public waters of the state even though it happen only occasionally, then anyone taking fish therefrom must first secure a fishing permit. However, a much closer question is presented here where the body of water is at no time subject to floods or overflow by or into public waters. We find the following principle of law in Vol. 22, American Jurisprudence, Section 44, page 699, which reads in part:

> "* * * A closed season may be established, and the catching of the fish by certain methods may be forbidden, by regulations which are applicable to private, as well as to public, waters. Likewise, a prohibition of the sale of fish during a closed season may apply to privately owned ponds and to fish privately propagated therein. The rule is different where there is no means by which fish can escape from the waters of a private owner; in such a case, he is thought to be the absolute owner of the fish while they are uncaught, * * *"

The 63rd General Assembly to some extent followed former statutory enactments in declaring the ownership of wildlife to be in the State of Missouri, however, we believe it is much broader than the former enactment. Section 8971.4, Mo. R.S.A. 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."

There are decisions in other states holding that under a similar statement of facts as presented in your request, that the state would have no right to require persons fishing therein, at the proprietor's invitation, to comply with the laws and regulations by first obtaining a fishing permit. (See Graves v. Dunlap, 1917 B Ann. Cases, 945, l.c. 952, 953, 954, 955 and 966, also Territory of Hawaii v. Hoy Chong, 1915A Ann. Cases, 1155-59 inclusive, and notes thereunder.) However, in view of former decisions in this state and a very recent one handed down by the Supreme Court, State v. Taylor 214 S.W. (2nd) 34, we are inclined to be of the opinion, that the state under such facts, still holds title to said fish for the purpose of regulation and may require persons fishing in such waters to first secure a fishing permit.

In State v. Taylor, supra, a person was caught dynamiting fish in a private pond. It so happened that the individual was not the proprietor of said pond neither had he secured the permission to dynamite said fish and therefore he was more or less a trespasser. The court in that case held that the ownership of fish while they are in a state of freedom is in the state not as a proprietor but in its sovereign capacity as the representative and for the benefit of all the people in common. The court further said: "We agree with appellant that 'title to fish reduced to one's possession by lawful means is released by the state to the taker,' but it does not follow that fish even in a private pond have been so reduced to possession as to vest unqualified title to them in the owner of the pond and thereby destroy all regulatory power of the State. * * *" Which is indicative that the court leans toward the view that the state is not deprived of regulatory power over fish in private waters.

In State v. Willers, 130 S. W. (2nd) 256, the court specifically holds that absolute ownership of wild birds is in the State of Missouri and not subject to private ownership. In so holding the court 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."

In State v. Heger, 93 S.W. 252, 194 Mo. 707, l.c. 711 the court 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 on the same page is a similar quotation for Geer v. Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793, which case is so often referred to in decisions of this kind as authority. See also State v. Bennett, 315 Mo. 1267.)

In State v. Weber, 205 Mo. 36, the defendant was found guilty and punishment assessed at a fine of $25. The defendant appealed from said judgment. There was in effect at the time the foregoing decision was rendered the following provision of the Game and Fish Act which reads in part:

> "'Sec. 1. The ownership of and title to all birds, fish and game in the State of Missouri, not held by private ownership, legally acquired, is hereby declared to be in the State, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession except the person so catching, taking or killing or having in possession shall consent that the title to said fish, birds and game shall be and remain in the State of Missouri for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing.* * *'"
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> "'Sec. 13. It is hereby declared unlawful to kill or attempt to kill any deer in the State of Missouri under one year of age. * * * It is also declared unlawful for any person to wound, kill or capture any deer in the waters of the streams, ponds or lakes within the jurisdiction of this State, or to have in possession or transport at any time the carcass of any deer, or any portion of such carcass, unless the same has thereon the natural evidence of its sex. Any person violating the provisions of this section shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars."

The evidence in the above case was that the defendant had in his possession and was offering for sale at his meat market in Kansas City, Missouri, the carcasses of several deer from which the natural evidence of sex had been removed. The evidence further discloses that the deer in question were fawned and raised in captivity on a Henry County, Missouri, stock farm owned by a Mrs. Casey. Said deer were killed there and their carcasses were shipped to the defendant in Kansas City, Missouri. The deer came from a herd raised on said farm descended from a pair of tame deer which were raised as pets on the Casey farm some 25 years

prior thereto. Said deer were kept in a pasture, allowed to run with cattle, all enclosed by a high fence. They were fed and cared for just like the cattle, said enclosure was never maintained as a game preserve nor were the deer raised or used for hunting purposes. A number of deer were killed each year during the holiday season and shipped to the defendant for sale at defendant's meat market. The defendant contended that the deer in question were not game animals and therefore did not come in the purview of game law.

The court held that the deer in question came within the meaning of the term 'game' and said:

> "As we have said, the deer in question come within the meaning of the term 'game,' which means animals ferae naturae, or wild by nature. It makes no difference that said deer were raised in captivity and had become tame, they are naturally wild. 'There is no property in wild animals until they have been subjected to the control of man. If one secures and tames them they are his property; if he does not tame them, they are still his so long as they are kept confined and under his control.' (Cooley on Torts (2 Ed.), 435; Manning v. Mitcherson, 69 Ga. 447; Amory v. Flyn, 10 Johns. 102; Com. v. Chace, 9 Pick. 15) That deer are animals ferae naturae is held by all the authorities and disputed by none.

The court further held that the defendant's ownership in said deer was such private ownership as is recognized in Section 1 of the Act but that deer is game within the meaning of the Act and Mrs. Casey had a right to sell and deliver said deer the same as any other personal property. However, the Legislature could enact legislation to preserve and protect such game and therefore the property rights of the defendant were not infringed.

In State v. Weber, supra, many cases are cited showing that under the police power of the state, the legislature can go almost as far toward regulating wildlife as it may do in the regulation of intoxicating liquors. While we do not want to burden this opinion with any unnecessary quotations, we do feel that it will be enlightening to at least include some remarks of the court in State v. Weber, supra. The court in its decision said:

> "No owner of deer raised in captivity has a better title thereto than has the hunter at common law to the deer captured or killed by him, and it has always been held that the State has authority to regulate the sale of such game, or prohibit it altogether. In Commonwealth v. Gilbert, 160 Mass. 157, it is said: 'In order to make the protection

> of the trout more effectual, it was deemed necessary by the Legislature to punish the sale, during the close season, of all trout except those which are alive. This was probably on account of the difficulty in distinguishing between trout which had been artificially propagated or maintained and other trout. On the construction contended for by the defendant, the law could not be so well enforced.' In People ex rel. Hill v. Hesterberg, 184 N.Y. 126, the court says: 'To the argument that the exclusion of foreign game in no way tends to the preservation of domestic game, it is sufficient to say that substantially the uniform belief of legislatures and the people is to the contrary, and that both in England and many of the States in this country legislation prohibiting the possession of foreign game during the close season has been upheld as being necessary to the protection of domestic game, on the ground that without such inhibition or restriction any law for the protection of domestic game could be successfully evaded;' citing Whitehead v. Smithers, L. R. (2 C.P. Div.) 553; Ex parte Maier, 103 Cal. 476; Mayner v. People, 97 Ill. 320; State v. Randolph, 1 Mo. App. 15; Stevens v. State, 89 Md. 669; Roth v. State, 51 Ohio St. 209; Commonwealth v. Savage, 155 Mass. 278."

The court quoted approvingly from another decision as follows:

> "* * * The Legislature may forbid the catching or selling of useful fishes during reasonable close seasons established for them; and to extend the prohibition so as to include such as have been artificially propagated or maintained is not different in principle from legislation forbidding persons from catching fish in streams running through their own lands. The statute under consideration falls within this power."

The court in State v. Weber held that there can be no doubt as to the constitutionality of Section 13 of said Act and held that so far as the constitutionality is involved that it differs in no material respect to many decisions specifically referred to, which hold that game imported notwithstanding same is the private property of the taker under the police power of the State, certain uses of private property may be prohibited for the welfare of the public and for better protection of game in this state. In conclusion the court said:

> "If the provision of section 13, which declares it unlawful to have in possession the carcass of any deer which has not thereon the natural evidence of its sex, should be construed as referring to deer in a wild state, and to such only, the evasion of the law would be an easy matter. Suppose the deer which defendant purchased and had in possession had been killed while in a wild state, there is no doubt that, the evidence of sex being removed, he would be guilty of a violation of the law; and, so far as the question of title or ownership is concerned, the title which a person holds to deer which he has raised and kept in captivity is no better than his title to the wild deer which he kills or captures, and reduces to his possession."

We think what has been said hereinabove in State v. Weber regarding the deer shipped to the market is likewise applicable to the regulation by the state of fish propagated and kept in this private body of water as related in your request, only now the statute enacted by the 63rd General Assembly vested ownership of all wildlife in the State of Missouri is much broader than the one that was in effect when the foregoing decision was rendered. In that decision, Section 1 of the Act read: "The ownership of and title to all birds, fish and game in the State of Missouri, not held by private ownership legally acquired, is hereby declared to be in the State, * * *" While the present statute 8971.4, Mo. R.S.A., reads in part: "The ownership of and title to all wildlife of and within this state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri. * * *" and "* * *said wildlife shall be and remain in the State of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof."

CONCLUSION

Therefore, while there is some authority to support the contention that the state cannot require persons to obtain fishing permits before fishing in said body of water, the greater weight of authority especially in this state, is that title remains in the State of Missouri to all wildlife for the purpose of control, management, restoration, conservation and

regulation of such wildlife and this is true of all wildlife regardless of whether same is imported dead or alive or has been reduced to so-called private ownership. In view of the foregoing, our conclusion must be in the affirmative, that it is necessary for persons desiring to fish in said private waters to first obtain a fishing permit as provided in the Wildlife Code, State of Missouri, 1949.

Respectfully submitted,

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APPROVED:

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