AMENDMENT No. 4: (1) The amendment does not empower the Conservation Commission to make its own laws independent of the Legislature. (2) A statute enacted by the Legislature empowering the Conservation Commission to make its own laws would not be valid. (3) Amendment does not authorize Commission to determine who shall buy licenses to hunt, etc. And four other questions.

February 5, 1937

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Mr. Sydney Stephens, President
Restoration and Conservation Federation
Columbia, Missouri

Dear Mr. Stephens:

In your letter of January 29th, you submitted a number of questions relating to constitutional amendment No. 4, adopted at the last November election.

In rendering you an opinion, we shall attempt to answer each question in its numerical order. The first question is as follows:

I.

> "Does the amendment transfer from the legislature to the commission the regulatory functions pertaining to the control, management, restoration, conservation and regulation of the bird, game, fish, forestry and all wildlife resources of the state?"

The first sentence of Amendment No. 4 creates a Conservation Commission and is as follows:

> "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 now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the CONSERVATION COMMISSION, to consist of four members to be appointed

> by the Governor, not more than two of whom shall be members of the same political party."

Prior to the enactment of Amendment No. 4 and to the effective date, July 1, 1937, the game and fish laws of Missouri have been, and will continue to be, administered by the Game and Fish Commissioner, as provided in Section 8204, R. S. Mo. 1929. Under Section 8209, R. S. Mo. 1929, entitled, "The duties of Game Commissioner", it is the duty of said commissioner to "enforce all laws now enacted and which may be enacted for the protection, preservation and propagation of game, animals, birds and fish of this state, and to prosecute, or cause to be prosecuted, all persons who violate such laws".

Your attention is called to the fact that under Section 8209, the rights and duties of the Fish and Game Commissioner are almost identical with the wording of Amendment No. 4 in the following:

> " * * * in the administration of the laws now and hereafter pertaining thereto".

In short, your question is to the effect, does Amendment No. 4 permit the Conservation Commission to make its own laws relative to the control, management, restoration, conservation and regulation of fish, game and wild life of the State of Missouri? We think not. By the plain wording of the Amendment itself, quoted supra, the Conservation Commission accepts the laws as they now exist and administers the same, not through a Fish and Game Commissioner, but by a Conservation Commission, the members of which are appointed by the Governor and the Amendment sets forth the qualifications, terms of office and compensation. The laws, which the Conservation Commission are to enforce and accept are Sections 8204 to 8315, R. S. Mo. 1929, inclusive.

The acts, which the Fish and Game Commissioner now performs with reference to the fish and game laws of the state, will be superseded by the Conservation Commission. And, when the acts of the Fish and Game Commissioner conflict, as enumerated in the Revised Statutes, from Sections 8204 to 8315, Amendment No. 4 repeals the same.

By a careful consideration of the wording of the Amendment, itself, and in interpreting the words in their ordinary meaning, we can not discern wherein the people of the state, by passing such an amendment, have delegated to the Commission the authority and right to make laws independent of our legislative branch of government governing the control, management, restoration, conservation and regulation of the fish and game of the state,

> "including hatcheries, sanctuaries, refuges, reservations and all other property now owned, or used for said purposes, or hereafter acquired for said purposes and the acquisition and establishment of the same,"

This, we think, refers to the hatcheries, sanctuaries, etc., which are now in existence and the control, management, regulation and conservation of which is now governed by Sections 8204 to 8315, inclusive.

Section 1, of Article IV, of the Constitution of Missouri, is as follows:

> "The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'The General Assembly of the State of Missouri.'"

We recognize that the will of the people is supreme and that we are dealing with an amendment which was initiated by the people themselves, yet we can not interpret the amendment as disregarding the Section, quoted, supra, and taking away from the Legislature the power to make laws and delegating such a power to the Conservation Commission. Our government is divided into three branches, the legislative, executive and judicial. The Conservation Commission, in carrying out its duties under the amendment and the laws of the state, functions under the executive branch of our government. The Constitution in providing the duties of each branch of the government guards zealously the right of any branch to encroach upon the rights of any other branch.

It may be that the authors in framing Constitutional Amendment No. 4 had in mind that said amendment would be self-executing and needed no enabling acts and it must be admitted that portions of the Act are self-executing, but we think in the instant point under discussion, Cooley on Constitutional Limitations, Vol. I, page 167, gives a general rule with reference to self-executing, and provides as follows:

> "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, and the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law".

Applying that principle to your question, the amendment by its terms, places the enforcement, conservation, etc., of our fish, game and wild life of the state in the hands of the Conservation Commission by "merely indicates principles, without laying down rules by means of which those principles may be given the force of law".

Conceding for the sake of argument that Amendment No. 4 is a complete act within itself, wholly independent of the Legislature, or any laws now in existence, would it be possible for the Commission to enforce any law relating to the control, management, etc., of the fish, game and wild life of the State of Missouri, when the amendment itself does not provide for any penalties or prosecutions for violation of the terms of the amendment? Thus, it will be noted that if such a situation existed, the Conservation Commission would be powerless to prosecute or punish anyone violating any law it might see fit to enact. Cooley on taxation illustrates the above principle as follows:

> "Thus, a constitution may very clearly require county and town government; but if it fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential. Rights in such a case may lie dormant until statutes shall provide for them, though in so far as any distinct provision is made which by itself is capable of enforcement, it is law, and all supplementary legislation must be in harmony with it."

Another argument which we deem is effective is the fact that the Amendment contains the following:

> "The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect."

Thereby conceding that the Legislature had the power to enact laws in aid of the amendment and that the amendment itself is not self-enforcing in its entirety and was not independent of and empowered to enact its own laws. We think if the amendment undertook to give the Conservation Commission the power to make laws governing the wild life of the state, that the laws should have been set forth and contained in the amendment itself. In other words, enumerated definitely. We deem the second paragraph of the amendment relating to the right of eminent domain and the manner in which it is to be exercised, to be self-executing.

The question whether an amendment is self-executing in its entirety is discussed in the case of State vs. Kyle, 166 Mo. l. c. 302, as follows:

> "There are a number of provisions in the Constitution of this State, that are unquestionably self-executing, and require no legislation to put them in operation. The test in such cases is, can the Constitution as amended be enforced without the aid of legislation? 'The question in every case is whether the language of a constitutional provision is addressed to the courts or the Legislature; does it indicate that it was intended as a present enactment, complete in itself as definite legislation, or does it contemplate subsequent legislation to carry it into effect? This is to be determined from a consideration both of the language used and of the intrinsic nature of the provision itself. If the nature and extent of the right conferred and of the liability imposed are fixed by the provision itself, so that they can be determined by the examination and con-

> struction of its own terms, and there is no language used indicating that the subject is referred to the Legislature for action, then the provision should be construed as self-executing, and its language as addressed to the courts'".

In discussing the Constitutional Amendments 44 and 44a and the Legislature's right to enact laws in aid thereof, the Supreme Court, in the case of Fahey vs. Hackmann, 291 Mo. l. c. 378, said:

> "This is a grant of power to the General Assembly not theretofore possessed by it, under the limitations in the Constitution as it stood before this amendment. The amendment is quite long, but all other provisions therein are self-enforcing. The amendment might have directed the issuance and sale of these bonds through some other agency of the State, and thus made the whole amendment self-enforcing. It might have made the amount of the issue definite, and interest rate definite, and the time of payment definite, and then authorized the Board of Fund Commissioners to issue, register and sell the bonds, and the State Treasurer to pay to the proper parties. The framers, however, did not do this, but left it to the General Assembly to accomplish the purpose of the amendment by a legislative act. By this amendment, or rather by the portion quoted above, which is found in the first sixteen lines thereof, legislative discretion was left (1) as to the amount of the bonds issued, subject of course to the limitation of fifteen millions, (2) as to the rate of interest, subject to a limitation of five per cent, and (3) the time of payment, subject to the limitation of twenty years. It required a legislative act before these bonds could be issued or sold. But it is urged that the material portions of the amendment are self-enforcing, and that the whole is but a mandate from the framers to the General Assembly to give effect to the amendment. In this connection it will be noted that in the middle of the amendment appears this sentence: 'The Legislature <u>shall</u> enact such laws as may be necessary to carry into effect this amendment.'"

We are, therefore, of the opinion that Amendment No. 4 itself does not confer upon the Conservation Commission the right to make laws governing control, management, restoration, conservation and regulation of fish, game and other wild life of this state.

II.

> "Would a statute enacted by the legislature which undertook to provide such regulations be valid under the constitution as now amended?"

The above question must be considered from the standpoint of the Legislature delegating powers to make laws to a commission. In the decision of Merchants Exchange vs. Knott, 212 Mo. 617, the court makes this statement:

> "The General Assembly cannot delegate legislative power. The law-making power must remain where the Constitution places it".

Cooley on taxation, Vol. I, page 224, also enunciates this principle in the following language:

> "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for these to which alone the people have seen fit to confide this sovereign trust."

We are, therefore, of the opinion that such a statute, as mentioned in your question, would not be valid.

III.

"Does the amendment authorize the commission to determine who shall buy licenses to hunt, fish, trap or otherwise take and retain wildlife?"

The above question is closely related to question II, answered supra, and in R. S. Mo. 1929, with amendments now contained in the law with reference to licenses. The right to delegate the making of such laws to boards and commissions is discussed by Cooley on taxation in Volume I, page 231, as follows:

> "Boards and commissions now play an important part in the administration of our laws. The great social and industrial evolution of the past century, and the many demands made upon our legislatures by the increasing complexity of human activities, have made essential the creation of these administrative bodies and the delegation to them of certain powers. Though legislative power can not be delegated to boards and commission, the legislature may delegate to them administrative functions in carrying out the purposes of a statute and various governmental powers for the more efficient administration of the laws."

In this connection, we are of the opinion that the Legislature could empower the Conservation Commission to make all reasonable rules and regulations in the administration and enforcement of the law relating to licenses.

IV.

"Under the terms of the amendment will the legislature or the commission determine and fix the amount of fees for such licenses?"

In view of our conclusions relating to your Questions I, II and III, this question must again be treated from the standpoint as to whether or not the Legislature can delegate such a power to the Commission. Having heretofore held that the amendment itself did not give the Commission power to make its own laws, it would naturally include fixing the fees, but having held in question III that the Legislature could empower the Commission to make reasonable rules and regulations, we must further consider this question from the standpoint as to whether or not the "determining and fixing

the amounts of fees for such licenses", is a rule, regulation or a law. The following principle of law governing the power of the Legislature to delegate which we think distinguishes between delegating the power to make a law and the power to determine facts is quoted approvingly in the case of Field vs. Clark, 143 U. S. 649:

> "The Legislature can not delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action independent. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which can not be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

In the decision of Wyatt vs. Board of Health, 200 Mass. 474, the power of the Legislature delegating authority to administrative boards to change a general law is discussed as follows:

> "The legislature can not delegate authority to an administrative board to change a general law for all the people of the commonwealth, where it has no local or special reason for seekkng the aid of such a board."

In the decision of Wichita Railway Company vs. Public Utilities Commission, 260 U. S. 48, the court decides to the effect that the delegation of power to a board must be confined to determine finding of facts:

> "In creating an administrative board to apply to the details of rate schedules the regulatory police power of the state, the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. If the board is required, as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding."

In the decision of Merchants Exchange vs. Knott, 212 Mo. 1. c. 640, the Supreme Court of Missouri discussed and distinguishes between a law and a rule as follows:

> "Legislative power in Missouri is, therefore, lodged with the General Assembly and not elsewhere except as to such of it as may be delegated under the provisions of that instrument--for instance to cities in matters of local concern. Briefly, legislative power is the power to make laws. What is a law? 'Municipal law,' says Chancellor Kent, 'is a rule of civil conduct prescribed by the supreme power of a State.' (1Kent Com. (14 Ed.), 447.) That definition is part of Sir William Blackstone's, which adds, 'commanding what is right and prohibiting what is wrong.' In his notes to Blackstone (1 Sharswood's Blk. Comm., p. 44) Judge Sharswood defines a law to be: 'A rule of civil conduct prescribed by the supreme power in a State, commanding what is to be done, and prohibiting the contrary. * * * * * * * * * * * ** Measured by the foregoing definition of law, can the statute stand? We think not. We are of opinion that the power to bind and loose, to inaugurate or suspend the operation of the law, to say when and where it is law is of necessity an inherent and integral part of the law-making power, not to be delegated to, and wielded by, any commission. True, the act was passed by the General Assembly, approved by the Chief Executive and stands published as authenticated law, but to all intents and purposes it is only a barren ideality, having such life as is thereafter breathed into it from an unconstitutional source. No Missourian may know whether it applies to him or his concerns, as a rule of civil conduct, or will ever apply until in the opinion' of the commissioners it 'may be' considered necessary'.

> "The General Assembly may not clip itself of one iota of its lawmaking power by a voluntary delegation of any element of it--by putting its constitutional prerogatives, its conscience and wisdom, 'into commission.' On this point Judge Cooley says in an oft quoted passage (Cooley's Const. Lim. (6Ed.), 137): 'One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws can not be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted can not relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.'"

We think the decision in the Knott case is further applicable to the point under discussion, l. c. 644, as follows:

> "Again, it is argued by the Attorney General that a class of cases holding that, while a Legislature cannot delegate its power to make a law, yet it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend, sustains the constitutionality of the present statute.
>
> Many cases attest the soundness of the proposition that the Legislature in making a law can delegate a power such

> as just indicated. For instance, Crowley v. Christenac, 137 U. S. 86; Locke's Appeal, 72 Pa. St. 491; Land & Stock Co. v. Miller, 170 Mo. 253. See, also, authorities cited, supra, in this paragraph. But the power delegated to the commission by the Act of 1907 is not the power to determine a fact. It is the wholesale, unregulated power to say, in effect, there shall be an operating law or no law, to any where the law shall operate, on whom and when. This phase of the case, having been heretofore fully developed, needs no further attention, beyond saying that no man in Missouri holds his property or rights, subject to the unregulated discretion of any other man."

We are of the opinion that the amendment does not now give the power to the Conservation Commission to determine and fix the amount of fees for licenses (such fees are now fixed by the Legislature, under Section 8254, R. S. Mo. 1929); that the legislature could not delegate to the C mmission power to fix the amount of fees, as this would exceed delegating to a board or commission the power to make rules and regulations and would delegate to such board the power to make a law. In some instances, boards are empowered to fix fees, but there must be a regulated power and not an unregulated power. To permit the Conservation Commission to fix the fees without limitation or without regulation would be to grant the Conservation Commission a roving commission to determine who shall or shall not be liable to purchase licenses; to place a greater license fee on one section of the state than on another; in fact, to place exorbitant license fees. This, we think, the amendment has not done and the Legislature could not do.

V.

"Does the amendment dedicate to the ex-

> clusive use of the commission for the purposes for which it was created the fees, monies and funds arising from the collections of such fees and from the transactions of the commission? If it does, will it be necessary for the legislature to appropriate such fees to the use of the commission?"

The next to the last paragraph of Amendment No. 4 relates to the fees and funds arising from the operation and enforeement of the fish and game laws under the Conservation Commission. The paragraph is as follows:

> "The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose."

This portion of the amendment we construe as a mandate to the Conservation Commission to apply and use all fees, monies or funds coming into its hands for the control, management, restoration, etc., of the fish, game, forestry and all wild life resources of the state, the same not to be used for any other purpose. In 1933, the Legislature, Laws of 1933, page 415, passed an Act to the effect that:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or

> regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer."

Section 8304, R. S. Mo. 1929, relates to the disposition of the fees under the fish and game laws as now in force, said section being in part as follows:

> "All moneys sent to the state treasurer in payment of licenses issued under the provisions of this article, shall be set aside by the state treasurer, and shall constitute a fund known as 'the state game protection fund,' for the payment of salary of the state game and fish commissioner, and his office and other necessary expenses. For the payment of deputy game and fish commissioners, and their necessary expenses; also the buying, shipping, keeping, propagating, and preserving of game and fish. The liability of the state for per diem, salaries and expenses, of deputy game commissioners appointed under this chapter or otherwise, and for all other services and expenses incurred for any purpose, or in consequence of this chapter shall be limited to the amount of moneys in the state game protection fund, and in no event shall the state pay out any such salaries or expenses,

> or be liable in any way therefor, except to the extent of such game protection fund and any contract, express or implied, of the state game and fish commissioner to the contrary notwithstanding. * * * *".

We think that the paragraph in Amendment No. 4, quoted supra, relating to the fees, the fees should be paid into the state treasury and appropriations made by the Legislature as is the usual custom because the paragraph quoted supra does not state that the funds shall remain in the hands of the Conservation Commission, nor does it state that the fund shall stand appropriated without any action by the Legislature. In other words, that portion of the amendment relating to fees and monies does not conflict with Section 1 of the Laws of 1933, page 415, nor is not in direct conflict with Section 8304, quoted supra.

VI.

> "Would it be valid under the constitution as now amended for the legislature to enact a law declaring that the amendment, the statutes remaining in force as not being inconsistent with the amendment and the regulations promulgated by the commission shall be the law of the state relating to the control, management and regulation of the bird, fish, game, forestry and wildlife resources, and that any violation thereof will be a misdemeanor and punishable as such?"

In view of our opinion regarding the first four questions which you have submitted, we are of the opinion that it would be valid for the Legislature to declare that the amendment, the statutes now in force not inconsistent with the amendment and the regulations promulgated by the Commission not arbitrary, or exceeding the power given to the Conservation Commission by the amendment to be the laws of the state relating to the control, management and regulation of the fish, game and wild life resources. In fact, we think that that situation now exists even though no such statute be passed by the Legislature.

VII.

> "Would such a statute in your opinion provide the commission with authority to carry out its functions as provided in the amendment?"

We think a statute, as mentioned in your question No. 6 would provide the Commission with authority to carry out its duties as provided in the amendment. In view of our answer to your question No. 6, a mere omnibus statute containing the matters contained in question No. 6 would not increase or diminish the powers of the Conservation Commission which it would have irrespective of such a statute.

Respectfully submitted

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APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

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