CONSERVATION COMMISSION: Right to seine rough fish in private
FISH AND GAME: lake.

November 5, 1942

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Honorable Robert P. C. Wilson III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Sir:

We are in receipt of your letter of October 21, 1942, requesting an official opinion on the following:

> "One of our Platte County citizens owns a piece of property upon which is located a lake formed by overflow from the Missouri River. His property entirely encloses the body of water in question. He desires to take the rough fish from this water on his place for purposes of sale. He has what is known under the Regulations of the Conservation Commission as a 'Commercial License', which would enable him to properly dispose of the fish if he is able to acquire them legally. He would like to seine the rough fish from this water before the winter freeze destroys them, and sell them under his 'Commercial License.' My problem is whether or not he can do so. I know that the Conservation Commission does not attempt to enforce its regulations on bodies of water privately owned where a fee is charged to fish, and it would seem to me that a proper analogy to draw from that would be that they cannot enforce their regulations against this man who owns the lake and all the land surrounding it. Will you please advise?"

The law in this state as well as in other states is well established that the title to all wildlife is in the state. Section 8883, R. S. Missouri 1939 reads:

> "The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the state of Missouri not now 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, killing or having in possession shall consent that the title of said birds, fish 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. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same and said possession shall be consent to such title in the state."

In State vs. Springfield Gas & Electric Co., 204 S. W. 942, l. c. 945, the court said:

> "* * * * * * * Section 6508, R. S. 1909, vests ownership of, and title to, fish in the state, and this without regard to the character of the stream or creek in which the fish may be. State v. Weber, 205 Mo. 36, 102 S. W. 955, 10 L. R. A. (N.S.) 1155, 120 Am. St. Rep. 715, 12 Ann. Cas. 382. * "

In State vs. Blount, 85 Missouri 543, l. c. 547, the court specifically defines the right that anyone may have in game, that it can be no more than a qualified property right, that he may

hunt and take such game on his premises to the exclusion of others but in order to preserve fish, the state may exercise its police power and forbid the taking except by prescribed methods. In so holding the court said:

> "It is further contended by counsel, that if the statute means this, that it is a violation of both the constitution of the state and the United States, which forbids the taking of private property for public use. While conceding the ingenuity of the argument made in support of this proposition, I cannot admit its soundness. The property which a man hath in animals, feroe naturoe, is a qualified property; that is, he may have the privilege of hunting taking and killing them on his own premises, to the exclusion of others. He has but a transient property in these animals, usually called game, so long as they continue within his premises. 2 Black Com. 394. This qualified, transient property, is not taken away by the statute. One who may have the right to take fish from such waters as are specified in the statute, is not denied the right to do so, but, in order to the preservation of fish and prevent their destruction, the state, in the exercise of its police power, simply forbids them from being taken by the use of certain prohibited methods. He can exercise such right in any other method than those which the statute prohibits.
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> "In the exercise of this power the state, in various statutes, forbids the killing or capturing of certain kinds of game within certain periods of the year, and forbids their capture by the use of certain means during the other periods of the year, and such laws have never been supposed to be obnoxious to constitutional provisions declaring that private property shall not be taken for public use without compensation. "

In State vs. Weber, 205 Missouri 36, l. c. 48, the court held the title to deer raised and kept in captivity is no better

than the title to wild deer which is killed or captured and reduced to his possession. In so holding 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."

Also, in State vs. Weber, supra, l. c. 44, the court 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 State vs. Weber, supra, l. c. 47-48, the court held that the state may prohibit catching and selling fish and such prohibition even extends to such as have been artificially propagated or maintained. In so holding the court said:

> "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 artifically 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.'"

In State vs. Weber, supra, l. c. 46, the court further said that the defendant was the owner under a statute similar to Section 8883, R. S. Missouri 1939, since Mrs. Casey from whom defendant purchased the deer had raised and held them in captivity up to the time they were sold to defendant, that defendant's ownership was such private ownership in game as is recognized in Section 8883, R. S. Missouri 1939, that Mrs. Casey had the right to sell the deer as any other property belonging to her, but that deer is game under the law, and the state has the power to enact laws to preserve and protect game and that the property rights of the defendant were in no way infringed.

In Windsor vs. State, 12 L. R. A. N. S. 869, l. c. 872-873, the court quoted from Stevens vs. State approvingly wherein it was held that no individual has any property rights in game other than such as permits the individual to acquire and even when game is captured and reduced into possession his ownership in it may still be regulated. In so holding the court said:

> "* * * * * * * * * * From all these considerations to which we have adverted, the just and rational construction to be put upon the statute in question is that all oysters taken from any of the waters of this state must be culled, and that all oysters less than 2½ inches from hinge to mouth, whether taken from natural beds or from private lots, are 'unmerchantable oysters,' and that anyone having such oysters in his possession is liable to the penalty provided therefor.
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> "In reference to the second contention of the appellant, that Sec. 8 is an infringement of the 14th Amendment to the Constitution of the United States, which declares that no one shall be deprived of life, liberty, or property without due process of law, little need be said. In Tyler v. State, 93 Md. 311, 52 L. R. A. 101, 48 Atl. 480, this court said: 'We recently

> held in Stevens v. State, 89 Md. 669, 43 Atl. 929, that it is entirely within the power of the state to prohibit the having in possession, or exposing to sale, in this state, within the closed season, game which has been taken either within the state or elsewhere. The same principle would apply to a prohibition against having in possession oysters of which more than a specified portion were of a size declared by law to be unmerchantable.' In Stevens v. State, supra, the court said: 'The authorities agree that the ownership of all game animals and birds is in the people in their sovereign capacity,- that is, in the state,- and no individual has any property rights in game other than such as the state may permit him to acquire, and even when game has been captured and reduced into possession by the individual with the permission of the state, his ownership in it may be regulated and restrained by appropriate legislation enacted for considerations of state or the benefit of the community. In other words, the cases hold that the question of enjoyment in this field is one of public policy, and not of private right.' * * * * * * * * * * * * * * *"

In People vs. Horling, 100 N. W. 691, l. c. 692-693-694, the court likewise held that the state could regulate the taking of fish from a lake on property belonging to defendant which lake was close to the Grand River that occasionally overflowed into said lake. In so holding this is what the court said in part:

> "On the part of the defendants, they offered evidence tending to show that since 1851 the defendant John W. Horling has been the owner and in possession of the land upon which this bayou or lake is situate; that he owns all the land around said lake or bayou, and that the same is not a meandered lake; that over 15 years ago he put up notices, painted wooden signs, and nailed them on the trees in the vicinity of the lake, telling

the public that it was private property, and that no fishing was allowed in said lake or bayou, and that said signs have ever since been kept up to notify the public; that the bank of the river very seldom overflows, but once a year the river would get high enough so that the water would flow into the old inlet, which would last sometimes 15 days; the water would subside in the river, then the river would be entirely shut off, and the bayou or lake would have no connection with any public waters until the next spring freshet came; that there is no water in the ditch to exceed 20 to 25 days in any one year; the rest of the time the bayou or lake is entirely disconnected from any other waters; that there is no inlet to said lake; that the inlet from the river has no defined channel, except where it breaks through the high bank near the river; that this is dry so much of the time that it is overgrown with tame grass and becomes good pasture land; that during the last 30 years the owner of the land has piped and tiled cold spring water from the adjoining land down to this lake, and during all these years has planted little fishes in said lake, obtained from surrounding pools of water, such as carp, bass, sunfish, and pickerel; that on account of the planting of these fish (not obtained from any public fish hatchery) this bayou or lake has become well stocked with fish, so that the fishing is much better than in Grand river, and people resorted there to fish to such an extent that it became necessary, and the owner of the land put up signs forbidding trespassing, and notifying the public that it was a private lake, and that fishing was not allowed; that on the day alleged in the complaint and warrant the respondents were fishing with a net, which they claimed they had a right to do, as it was private property; they set these nets near the place where the cold water pipes and tile made the water fresh, and where the fishes were in the habit of frequenting to get cool water.

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"* * * * * * * * *'To fish is a privilege accorded by the state, and the question of individual enjoyment is one of public privilege, and not of private right. "Unless the catching of fish," as is said by one writer, "is conducted with reason, either the fish may be altogether esterminated, or the enjoyment of the right by one may interfere with the equal enjoyment of the right by others." Hence, for the protection of fish, a valuable article of food and merchandise, the control of which is in the state, and to preserve equality in the right to fish, the state has an undoubted right to regulate the manner in which they shall be caught, and to protect their migrations.'

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"* * * * * * * * *There may be and doubtless are various and perhaps many, lakes, ponds, sloughs, and bayous in the state which are so far private property that the owner may drain them, or fill them up without infringing any public or private right, but which, so long as they are permitted to remain in their actual condition, are places where fish common to the waters of the state are propagated and raised. And, while this is so, the statute makes no distinction between bodies of water thus situated and those in respect to which public rights or private easements exist. Its language applies to all alike. Indeed, the power to protect and preserve the fish in the waters of the state would be practically nugatory, if, as is contended, it was confined to streams and water courses, and was excluded in case of all bodies of water which were so far subjected to private ownership that the owners would have a right to drain them or fill them up, and thus destroy them as bodies of water. *

"* * * * * * * * * * * * * * * 'We are unable to see how the mere fact that said lake, instead of having a continual connection with the river, has such connection only during periods of high water, can have any essential bearing upon the rights which the owner of the soil has in the fish that happens for the time being to be

> in the lake. It is impossible, therefore, to distinguish the present case from those arising in relation to other waters in the state to which the statute is applicable. The public interest is involved in both in the same way, if not to the same extent, and the public interest in both is such as to justify legislative interposition.'"

In the case of State vs. Heger, 194 Missouri 707, l. c. 711, the court in discussing the question of the ownership of wild game and the unanimity of opinion that such ownership is vested in the people of the state, said:

> "The authorities are uniform in holding that 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. (Cases cited.)
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> "* In the leading case upon this subject (Geer v. Connecticut, 161 U. S. 519), Mr. Justice White, says:
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> "'From the earliest traditions the right to reduce animals ferae naturae to possession has been subject to the control of the lawgiving power.' In speaking of this power in Haggerty v. Ice Mfg. & Storage Co., supra, Sherwood, J., said: 'The exercise of this power has been definitely traced back even as far as the time of Solon, who forbade the Athenians to kill game. And in France, as early as the Salic law, the right to reduce a part of the common property in game to possession and consequent ownership

was regulated by law. Such regulations prevailed in every country in continental Europe and in England. Treating of this subject, Blackstone says: "There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals ferae naturae, as are known by the denomination of game, with the right of pursuing, taking and destroying them, which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren or free fishery.....In the first place, then, we have already shown, and indeed it cannot be denied, that by the law of nature every man, from the prince to the peasant, has an equal right of pursuing and taking to his own use all such creatures as are ferae naturae, and, therefore, the property of nobody, but liable to be seized by the first occupant, and so held by the imperial law even so late as Justinian's time..... But it follows from the very end and constitution of society that this natural right, as well as many others belonging to a man as an individual, may be restrained by positive laws enacted for reasons of State or for the supposed benefit of the community." (2Bl. Co., 410.) This prerogative of the king as an attribute of government recognized and enforced by the common law of England by appropriate and oftentimes severe penalties and forfeitures, was vested in the colonial governments threw off the yoke of the mother country, that right of sovereignty passed to and was vested in the respective States. This sovereign attribute and power as existent in the States of this Union has often been exercised by them by passage of laws in the most of these States for the protection and preservation of game; and it seems never to have been called in question. Numerous adjudications attest this fact. In such cases the common ownership of game, which otherwise would remain in the body of the people, is lodged in the State to be exercised like all governmental powers in the State in its sovereign capacity, to be exercised in trust for the benefit of the people and subject, of course, to such regulations and restrictions as the

> sovereign power may see fit to impose. Such regulations appropriately fall within the domain of the police power of the State.'"

You further state that this citizen has taken out a "Commercial License". Section 62 of the Wildlife & Forestry Code of Missouri 1942, provides non-game fish may be taken by the holder of a commercial fishing permit during the prescribed open season by seines, etc., from the Missouri and Mississippi rivers exclusively.

Also, Section 37 of the Code provides for a fee for such commercial fishing permit and reads in part:

> "To possess, and use trotlines, throw lines, jug lines, hoop nets and seines, except minnow nets or seines, in the taking of non-game fish from the Missouri or Mississippi Rivers exclusively, and to sell such fish, and to sell mussels, in accordance with these regulations, upon the payment of a Resident Commercial Fishing Permit fee as follows:
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> "For each 100 linear yards or fraction thereof of seine.....$10.00
> For each hoop net..... 1.00
> For jug lines of not to exceed 100 hooks in the aggregate and for any number of trotlines or throw lines..... 1.00"

All of which indicates such licensee shall sell non-game fish in this State when taken exclusively from the Missouri and Mississippi Rivers.

Therefore, it is the opinion of this Department that the State may, in the exercise of its police power, regulate the taking of fish in this State from any waters regardless of the nature of same. That authority to regulate the taking of fish is vested in the Conservation Commission under Section 16, Article 14, of the Constitution of Missouri and in view of the regulations adopted by the Commission in the Wildlife and Forestry Code of Missouri 1942, supra, such citizen cannot seine

rough fish in said lake without special permission of the Conservation Commission of the State of Missouri.

Respectfully submitted

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APPROVED:

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