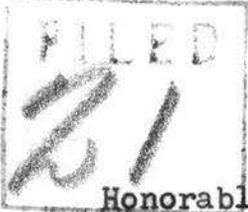


CONSERVATION
COMMISSION:
FISH:

Proprietor of private pond stocked with artificially propagated fish obtained from without the State of Missouri is required to have a Wildlife Breeder's permit.



July 6, 1955

Honorable Dick B. Dale, Jr.
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"Throughout this County there are a number of commercial fishing lakes and ponds, operated for profit by the landowners. These lake owners charge a set fee, usually One Dollar per pole, for fishing in their lakes; and no license issued by the Conservation Commission is required of the individual fisherman. The fish to supply these ponds are legally obtained from outside of the State of Missouri. There were no wild stock fish in these lakes and ponds prior to the time that the purchased fish were placed therein. All of the lake owners, except one, have purchased Wild Life Breeder's permits as authorized by Section 51 of the Wild Life Code of Missouri. Section 51 provides in part as follows, to-wit:

" 'Sec.51. Wildlife held in captivity, permits, privileges. -- Wildlife may be propagated and held in captivity by the holder of a wildlife breeder's permit, as provided herein. * * * 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

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same he has fully complied with this code. 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 question concerning this Office is whether such a commercial fish pond owner is required to buy a Wild Life Breeder's permit under Section 51 of the Wildlife Code of Missouri.

"In the event that the foregoing question is answered in the negative and that a Wildlife Permit is not necessary to conduct a commercial fishing lake or pond, the further question arises as to whether a Retail Vendor's Permit is required as provided under Section 50 of the Wildlife Code of Missouri. Section 50 reads in part as follows, to-wit:

" 'Sec. 50. Commercial fish: turtles: limits, sale. -- * * * Commercial fish taken from the aforementioned waters, or legally obtained from without the state, may be possessed, transported and sold by the holder of a wholesale fish dealer's or retail vendor's permit in any numbers during the prescribed open season. The holder of a wholesale fish dealer's or retail vendor's permit shall conduct such business exclusively at the location specified in the permit; provided, however that the holder of a retail vendor's permit may sell only cooked fish at locations other than that specified in the permit. The holder of a wholesale fish dealer's permit may sell, transport, ship, distribute and deliver such fish to an authorized retail vendor, or other wholesale fish dealer, and authorized retail vendors may transport, sell and deliver same exclusively to consumers.'

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"These two questions when reduced to a practical approach would appear to be answered by an interpretation of the word 'propagated' which is found in Section 51. As a practical matter there would be naturally some breeding from the time they are placed in the pond and the time they are caught and removed from the pond. It is contended by the refusing commercial pond owner that the fish are caught and removed from the pond before there is an opportunity for propagation or the breeding process to be completed. He further contends that he has no intent to breed fish but that his intention is to hold fish in captivity so that they can be caught and removed by fishermen. Even assuming the foregoing contentions are correct, it would seem to follow that if a commercial fish pond owner is not a breeder of fish, he is certainly a vendor of fish and should be required to purchase a retail vendor's permit under Section 50 of the Wild life Code of Missouri.

"It would appear from a reading of the Wildlife Code of Missouri, that a commercial fish pond owner should be required to purchase a permit from the Conservation Commission; however, it is not clear to this Office whether the Breeder's Permit or the Vendor's Permit is required.

"Any opinion and information from your Office concerning this matter will be greatly appreciated.

"Thanking you for your kind cooperation in this matter, I remain"

At the outset, it becomes pertinent to your opinion request to determine whether fish having the characteristics and being held in the manner described in your letter of inquiry are "Wild-life" within the meaning of that term as used in the Wildlife Code of Missouri.

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In this regard your attention is directed to the following definition of this term appearing in subsection (3) of Section 252.020, RSMo 1949, reading as follows:

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

"(3) The words 'wild life' 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 wild life."

We have also examined the definitions contained in the Wildlife Code of Missouri containing the rules and regulations of the Conservation Commission as revised to January 1, 1955, and find no other or further definition of the term therein. In this opinion we, therefore, accord to the term the meaning found in the statutory definition and assume that the Conservation Commission used it in like sense when incorporated in the rules and regulations of that body.

From the foregoing we conclude that fish are "wildlife," in which conclusion we are further supported by the holding of our Supreme Court in State v. Weber, 205 Mo. 36, in which it was held that the nature of fish and animals constituted the determinative factor as to whether they were, or are, ferea naturae.

We therefore examine, in addition to the sections of the Wildlife Code mentioned in your letter of inquiry, certain other provisions contained therein which we deem germane. Your attention is directed to Section 38 of such code reading as follows:

"Sec. 38. Permits required unless otherwise provided. - 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 this code to do so without permit." (Underscoring ours)

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Also, to subsection (B) of Section 46, reading as follows:

"(B) Wildlife Breeder's Permit \$20.00.- To maintain and operate a wildlife farm, or a wildlife exhibit, and to exercise the privileges of a wildlife breeder as herein permitted, upon the payment of a wildlife breeder's permit fee of twenty dollars (\$20.00)."

It therefore appears that the wildlife breeder's permit described under Section 51 and for which a fee is prescribed under subsection (B) of Section 46, is required for the proprietor of a pond such as is described in your letter of inquiry.

Passing on to consideration of the retail vendor's permit referred to in Section 50 of the Wildlife Code, it is to be noted that such permit is concerned with fish which might be "sold." It is our thought that the fish found in the ponds described in your letter of inquiry are not "sold" in the sense that this word is used in Section 50 of the Wildlife Code. It seems to us that no "sale" of the fish as such is consummated. On the contrary, what is actually "sold" is the privilege of fishing in the pond with the incidental right to retain such fish as may be caught. There being no sale of the fish as such, it, therefore, seems that this quoted section is inapplicable.

CONCLUSION

In the premises, we are of the opinion that the proprietor of a wholly owned pond stocked with artificially propagated fish obtained from sources without the State of Missouri is required to obtain the wildlife breeder's permit referred to in Section 51 of the Wildlife Code of Missouri.

We are further of the opinion that the provisions of Section 50 of the Wildlife Code, with respect to retail vendor's permits, are inapplicable for the reason that no "sale" of fish is made by the proprietor of the pond.

Honorable Dick B. Dale, Jr.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Will F. Berry, Jr.

Very truly yours,

John M. Dalton
Attorney General

WFB,Jr:lc