

department the necessity for making a refund for a license. A party may apply for the wrong license, through ignorance of the law, and then wish a correction made; or, as has happened a few times, a licensee may misplace his original fishing license, purchase another, and then find his original license.

"In the past, we have always had these matters adjusted by having the licensee make claim on this department for the amount involved. However, the State Auditor now advises us that he cannot issue warrants for refunds.

"In order to cope with this situation, the Fish and Game Commission, at their meeting held January 12, set aside a fund of \$50.00, to be called Account Number 1199R—Refunds on Licenses. Will you kindly advise us how we should handle this fund so that the necessary refunds may be made without conflicting with the rules of the State Auditor's office?"

Section 34, Article V, of the Constitution, provides that "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant drawn by the proper officer in pursuance thereof, except interest on the public debt," and section 10, Article XII, of the Constitution, provides that "all taxes levied for state purposes shall be paid into the State Treasury, and no money shall be drawn from the treasury but in pursuance of specific appropriations made by law."

In giving effect to these provisions of the Constitution the supreme court in the case of *First National Bank v. Sanders County*, 85 Mont. 450, held that that portion of section 2222, Revised Codes 1921, which assumes to provide for a refunding to the county of the state's share of taxes returned to the taxpayer is inoperative. The state auditor could not lawfully follow the statutory direction in the absence of legislative appropriation.

The authority to make an appropriation is vested exclusively in the legislature, and no commission or individual has any power whatever to expend public money without a legislative appropriation therefor. (*Holmes v. Olcott*, 189 Pac. 202; 59 C. J. 235-240.)

Is the State Fish and Game Fund, out of which no doubt the said sum of

#### Opinion No. 501

#### Fish and Game Commission—Licenses —Refunds—Appropriations —Legislative Assembly.

HELD: Appropriating money for the purpose of enabling administrative officers to make refunds in proper cases is a matter exclusively for the legislature.

The legislature having made no appropriation, setting apart a fund out of which the State Fish and Game Commission may make refunds where the licensee has purchased the wrong license, or two of the same type of licenses, the Commission was and is without power to do anything in the premises.

March 26, 1934.

The following communication addressed to you by the State Game Warden has been referred to us for an appropriate opinion:

"Occasionally there arises in this

\$50.00 has been set aside, subject to appropriation on the part of the legislature? That body has acted on the assumption that it is. Section 3670, Revised Codes 1921, as amended by section 1 of Chapter 53, Laws of 1933, provides: "All sums collected or received from the sale of hunting and fishing licenses or permits, from the sale of seized game or hides, or from fines, damages collected for violations of the fish and game laws of this state, from the appropriations, or received by the Commission from any other source, shall be turned over to the State Treasurer, and placed by him in a special fund known and designated as the 'State Fish and Game Fund', provided, that out of any fines imposed by a court for the violation of this Act, the costs of prosecution shall be paid to the county where the trial was held, in any case, where the fine is not imposed in addition to the costs of prosecution. Said fund is hereby exclusively set apart and made available for the payment of all salaries, per diem, fees, expenses and expenditures of every source and kind whatsoever, authorized to be made by the State Fish and Game Commission under the terms of this Act, and said funds shall be expended for any and all such purposes, by said Commission, subject to the proper audit and allowance by the State Board of Examiners and by (to) appropriation by the Legislative Assembly of each session."

At its twenty-third regular session the legislature appropriated \$69,000.00 for salaries of administrative officers and employees and \$31,300.00 for salaries of fish hatchery employees from the fish and game fund and so much of said fund as may be necessary and available for capital, repairs and other operations, for each fiscal year of the biennium extending from July 1, 1933, to June 30, 1935, inclusive. No other appropriations were made out of the fund. The act setting apart the above and other amounts provides that all appropriations contained therein shall be used for the purposes designated and for no other purpose.

The legislative assembly having established the fish and game fund there cannot be any doubt that it is primarily under its control and subject to disposition only at its hands. (*State v. Clausen*, 229 Pac. 5; *B. F. Sturte-*

*vant Co. v. O'Brien*, 202 N. W. 324; *Robb. v. Knapp*, 171 Pac. 1156; *State v. Stover*, 27 Pac. 850; *Jackson v. Gallet*, 228 Pac. 1068; *Edwards v. Childers*, 228 Pac. 472; *Gamble v. Velarde*, 13 Pac. (2d) 559; *Holmes v. Olcott*, 189 Pac. 202; 59 C. J. 240. See also, *McAdoo Petroleum Corp. v. Pankey*, 294 Pac. 322.)

The legislature, then, having made no appropriation to meet the situation mentioned in the communication, it is our view that the Fish and Game Commission was and is without power to do anything in the premises. As has been already pointed out appropriating money for the purpose of enabling administrative officers to make refunds in proper cases is a matter exclusively for the legislature.