

**Opinion No. 254.**

**Fish and Game—Power of Commission to Fix Bag Limits—Rules and Regulations—Constitutional Law—Delegation of Legislative Power.**

HELD: Section 3653 gives to the Fish and Game Commission the power to make changes in bag limits of game fish.

The delegation of power to the Fish and Game Commission to change bag limits of fish, after investigation, and after finding that such change is necessary to assure the maintenance of an adequate supply thereof, is not a delegation of legislative power in violation of Sec. 1, Art. IV, Montana Constitution.

---

March 2, 1938.

Hon. J. A. Weaver  
State Fish and Game Warden  
The Capitol

Dear Mr. Weaver:

You have asked my opinion as to whether the State Fish and Game Commission has power to promulgate the following rule and regulation:

“Creel limit to be fifteen (15) fish per day or an aggregate not to exceed fifteen pounds per day.”

Section 3694, R. C. M. 1935, fixes the bag limit of fish in the following language:

"It shall hereafter be unlawful for any person to catch or take from the waters of this state more than twenty-five (25) fish in the aggregate, with a net weight of twenty (20) pounds and one (1) fish in any one (1) day, of the variety of fish designated herein as game fish, \* \* \*."

By Section 3653, R. C. M. 1935, the commission was given the power to fix bag limits on any species of game fish in any specified locality or localities or the entire state, when it shall find, after investigation, that such action is necessary to assure the maintenance of an adequate supply thereof. This section reads:

"It shall have authority to fix seasons and bag limits, or shorten or close seasons on any species of game, bird, fish, or fur-bearing animal, in any specified locality or localities or the entire state, when it shall find, after said investigation, that such action is necessary to assure the maintenance of an adequate supply thereof. The statutes now governing such subjects shall continue in full force and effect, except as altered or modified by rules and regulations promulgated by the commission."

By this section the legislature clearly and expressly gave to the commission the power to modify the statute by rules and regulations. The question remains, is that part of Section 3653, quoted above, valid or is it in violation of Section 1, Article IV of the Montana Constitution in that it delegates legislative power to the commission, a part of the executive department, one of the three departments among which the powers of the state government are divided by said constitutional provision.

It is sometimes difficult to draw the line which separates legislative power from administrative authority to make rules and regulations. The Supreme Court of Montana, the Supreme Court of the United States, and many other courts have frequently had occasion to consider this problem. It is impossible to lay down a rule which would make the line clear in all cases. The

courts and legal writers, however, have sought to apply certain principles in solving such controversies. It has been said that the legislative body "may not delegate the choosing of policies nor the duty of formally enacting the policy of the law, but it may formulate the policy as broadly and with as much or as little detail as it sees proper and it may delegate the duty of working out the details and the application of the policy to the situation it was intended to meet." (John B. Cheadle, *The Delegation of Legislative Functions*, 27 *Yale Law Journal*, 892.) This language was quoted with approval by Chief Justice Callaway in writing the opinion for the court in *Chicago Etc. Ry. Co. v. Board of R. R. Commissioners*, 76 *Mont.* 305, 313, 247 *Pac.* 162.

Mr. Justice Harlan, in *Union Bridge Co. v. United States*, 204 *U. S.* 364, declared:

"A denial of the right to delegate the power to determine some fact or the state of things upon which the enforcement of an Act depends would be to 'stop the wheels of government' and bring about confusion if not paralysis, in the conduct of public business."

In *Wichita R. R. v. Public Utilities Com.*, 260 *U. S.* 48, 67 *L. Ed.* 124, Mr. Chief Justice Taft said:

"The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency 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. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action."

Mr. Justice Matthews, speaking for the court in *Northern Pacific Ry. Co.*

v. Bennett, 83 Mont. 483, 272 Pac. 987, declared:

"Article IV of the Constitution does not require a detailed recitation in the statute of all of the matters to be considered by the commission, but only that general rules be given for its guidance and the ultimate facts which it must find before taking the prescribed action be declared, with, perhaps, provision for the correction of an erroneous ruling by appeal or review in the courts."

In Cooley's Const. Limitations, 8th ed., pp. 225, 226, we find the following:

"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. This maxim, however, does not preclude the legislature from delegating any power not legislative which it may itself rightfully exercise. The legislature must declare the policy of the law and fix the legal principles which shall control in a given case; but an administrative officer or body may be invested with the power to ascertain facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and particularize, they would miss efficiency in both provision and execution. \* \* \* Though legislative power cannot be delegated to boards and commissions, 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."

For a further discussion of these principles, see the cases hereinbefore referred to, and the following:

State v. Clark, 100 Mont. 365, 52 Pac. (2) 890;

Field v. Clark, 143 U. S. 649, 694;

United States v. Grimaud, 220 U. S. 506;

Hampton & Co. v. United States, 276 U. S. 394, 405.

Since the bag limit on fish must necessarily depend upon the supply,

obviously the legislature, meeting biennially, not only must find it exceedingly difficult to determine the fact of supply over the entire state as it exists at the time the law is enacted, but impossible of definite determination during the entire two year period. All it could do is to declare a policy and to fix a general limit as a guide. Changes in supply require changes in bag limit. Unless the legislature can give the power to the commission to make changes when it finds them to be desirable and necessary, it is deprived of the power "to act wisely for the public welfare." As was said in Locke's Appeal, 72 Penn. St. 491, 498:

"To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know. \* \* \* The legislature cannot 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 depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation."

In giving the power to the commission to fix bag limits on fish, the commission may not act capriciously. It is required first to make an investigation and determine whether such action is necessary to assure the maintenance of an adequate supply of fish.

This statute is not far different from the Act of Congress upheld by the Supreme Court of the United States in *Field v. Clark*, supra. Authority was conferred upon the President to **reduce the revenue and equalize the duties** on imports and to suspend by proclamation the free introduction of certain commodities, when he was satisfied that any country producing such articles imposed duties or other exactions upon the agricultural or other products of the United States, which he deemed to be reciprocally unequal

or unreasonable. It was there held that the act in question was not open to the objection that it unconstitutionally transferred legislative power to the President. The court in that case said:

“Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect.”

It is a well established rule that no statute will be declared invalid unless its nullity is made manifest beyond a reasonable doubt. Every presumption will be indulged in favor of the constitutionality of a legislative act.

For the reasons stated I am of the opinion that the act is valid and constitutional and that the commission has the power, after investigation, to make the proposed change in the bag limit of game fish, if it finds that such action is necessary to assure the maintenance of an adequate supply thereof.

The question presented and determined is purely a question of law, that is, the power of the Commission. This office is not a fact-finder and, of course, cannot and does not make any finding of fact, that is, find whether any changes in bag limits are necessary. That can be done only by the Commission, after an investigation, and a finding that it is necessary to assure an adequate supply of fish. The Commission does not have power to act arbitrarily or capriciously. Whether its findings are reviewable by the courts, we do not now determine. The Commission should act judiciously, having a due regard not only for the interests of the sportsmen of the state, but for the general welfare of the state, and the real purpose the legislature had in mind when it vested power in the Commission.