

Opinion No. 51-5382

July 10, 1951

BY: JOE L. MARTINEZ, Attorney General

TO: Mr. Elliott S. Barker State Game Warden Santa Fe, New Mexico

{*68} This is in reply to your letter of May 11, 1951, and to your supplementary verbal request of May 29, as to the application to the State Game and Fish Department's appropriation for the 40th and 41st fiscal years of Chap. 181, Laws of 1951, levying a charge of 5% against your appropriated funds to be paid over into the General Fund for administrative overhead and the application of the direct charge against your departmental fund made by the 1951 General Appropriations Act.

The General Appropriations Act, Chap. 227, Laws of 1951, appropriates \$ 1,034,000 for the Department of Game and Fish for each of the ensuing fiscal years and also levies a charge against that appropriation of \$ 50,000 for each fiscal year to be paid into the State General Fund for general administrative overhead. Sec. 22 of that Act provides that:

"If any items included in this general appropriations act are appropriated in special acts, the appropriations in said special acts shall apply and the comparable appropriations in this general appropriations act, whether of the same amounts or larger or smaller amounts, shall be null and void."

The funds for the State Game and Fish Department are provided by the revenues produced from the sale of hunting and fishing licenses, guide licenses, bait licenses, fur dealers' and trappers' licenses, and game and fish preserve operators' licenses. All of these moneys are required by law to be paid to the Game and Fish Department and thence to the State Treasurer to be deposited to the credit of the State Game Protection Fund.

It is my opinion that the appropriations for the Game and Fish Department are thus provided for by special Act; therefore, § 22 of the General Appropriations Act must apply. Thus the appropriation of \$ 1,034,000 for the Department of Game and Fish provided in the Act becomes null and void and the surcharge made on the appropriation for administrative overhead likewise becomes a nullity.

The State Game Commission may expend, for operation of the Game and Fish Department, in accordance with lawful budget procedures, those moneys provided for by Special Act, which are paid to the State Treasurer and credited to the Game Protection Fund.

Sec. 43-108, N.M.S.A., 1941 Compilation, enumerating the general powers and duties of the State Game Commission, says:

{*69} "The State Game Commission shall have general control over the collection and disbursement of all monies collected or received under the State laws for the protection and propagation of the Game and Fish, which money shall be paid over to the State Treasurer to be credited to the Game Protection Fund and shall not be transferred to another fund; and this act shall be guaranty to the person who pays for hunting and fishing licenses and permits, that the money in said fund shall not be used for any purpose other than as provided in this act, * * *."

This enactment of Chap. 35, Laws of 1921, places a legal restraint on the fiscal officers and supplies a strong moral restraint on subsequent legislatures to leave the Game Protection Funds alone; however, it could not legally restrain subsequent legislatures, for the legislature has full power to undo that which it has done and later enactments of such a body are necessarily controlling.

It is my opinion that the legislature, by the 1951 Appropriations Act and by the Administrative Overhead Act, in no way intended to contravene this prior enactment.

Chap. 181, Laws of 1951, provides for a 5% levy to be appropriated against the annually budgeted expenditures of those state funds appropriated or earmarked for special purposes. This classification necessarily includes the Game Protection Fund.

Sec. 3 of this Act provides that:

"Providing that no amount shall be appropriated from any fund under the provisions hereof in those cases in which such appropriations would result in withholding by the Federal Government of funds for which the departments or agencies concerned would otherwise be eligible."

This section is particularly pertinent when applied to the State Game and Fish Department. Sec. 669, Title 16 of the United States Code, providing for the conditions under which State Game and Fish Departments could receive funds and other aid from the Federal Government for wild life restoration projects, says:

"* * * but no money appropriated under §§ 669-669(j) of this title to any state shall be expended therein until its legislature, or other state agency authorized by the State Constitution to make laws governing the conservation of wild life, shall have assented to the provisions of §§ 669-669(j) of this title and shall have passed laws for the conservation of wild life which shall include a prohibition against the diversion of license fees paid by hunters for any other purpose than the administration of said State Game and Fish Department * * *"

Our statutes, §§ 43-114 and 43-115, were enacted to permit our state to participate in the Federal Wild Life Restoration Projects program.

Sec. 777 of Title 16, U.S.C., which provides the conditions under which the states may participate in the Federal aid program of Fish Restoration and Management Projects is

similar to the provisions for participation in the Federal Wild Life Restoration Projects program. This section reads:

"No money apportioned under this chapter to any state, except as hereinafter provided, shall be expended therein until its legislature or other state agency authorized by the State Constitution to make laws governing the conservation of fish, shall have assented to the provisions of this chapter and shall have passed laws for the conservation of fish, which shall include a prohibition against the diversion of license fees paid by fishermen for any other purpose than the administration {*70} of said State Fish and Game Department * * *"

HB 65, passed by the legislature during its recent session, now Chap. 66, Laws of 1951, specifically authorizes the participation in the Federal Fish Restoration and Management projects program and reads as follows:

"Sec. 1. The State of New Mexico hereby assents to the provisions of the act of Congress of the United States of America, entitled 'An Act to provide that the United States shall aid the states in Fish Restoration and Management Projects and for other Purposes', approved August 9, 1950 (P.L. 681, 81st Congress), and the State Game Commission is hereby authorized and directed to perform all such acts as may be necessary to the conduct and establishment of cooperative Fish Restoration and Management Projects, as defined by said Act of Congress and in compliance with said Act, and rules and regulations promulgated by the Secretary of Agriculture thereunder.

Sec. 2. The State Game Commission is authorized to receive any monies to which the State of New Mexico may become entitled under the aforesaid act of Congress, such monies, when received, to be deposited with the Treasurer of the State of New Mexico to the credit of the State Game Protection Fund, expended for the purposes designated, and withdrawn as other monies are withdrawn from the State Game Protection Fund."

The foregoing chapter is similar to the enactment in 1939 to permit participation in the Wild Life Restoraton Project program. These sections, coupled with the previous enactment of the legislature, § 43-108, N.M.S.A., which I have previously set forth in part, supply an absolute prohibition against diversion of funds obtained from the sale of hunting and fishing licenses as required by the two Federal acts which I have quoted as a condition precedent to participation in those aid programs.

It is my opinion that if such diversion as proposed by the Administrative Expense Act, Chap. 181, Laws of 1951, is made in the State Game Protection Fund, that participation by our State in both Federal aid programs would be cut off, since this prohibition against diversion of these funds was enacted as a condition precedent to participation in the Federal Wild Life Restoration program and the Federal Fish Restoration and Management Projects programs.

The enactment of HB 65 as Chap. 66, Laws of 1951, by the Legislature at its recent session, impliedly reaffirmed the earlier prohibition against the diversion of hunting and fishing license funds by authorizing participation in the new Federal Aid program.

It is my opinion that the exemption provided by Sec. 3 of Chap. 181, Laws of 1951, which I have quoted, is necessarily applicable to the State Game Protection Fund. Therefore, I must conclude that no appropriation may be made from the State Game Protection fund for General Administrative Overhead.

I trust that this answers your inquiry fully.