

Opinion No. 31-75

March 5, 1931

BY: E. K. Neumann, Attorney General

TO: Mr. O. L. Anderson, Department of Game and Fish, Santa Fe, New Mexico.

{*48} You have requested this office, in your letter of March 4, to give an opinion as to the legality of making refunds to your license collectors who have, through error, remitted too much money to the State Treasurer, said remittance being credited to the Game Protective Fund.

We have given this matter considerable study and, pursuant to your suggestion, have also studied the briefs filed in the case of McAdoo Petroleum Corporation vs. B. F. Pankey, Commissioner of Public Lands, No. 3452.

In that case the Supreme Court of New Mexico held that a statute now cited as Section 132-110 of the New Mexico Statutes 1929 Compilation, which provides that any money erroneously paid on account of any lease of state lands should be repaid by voucher drawn by the Land Commissioner and warrant of the State Auditor upon the State Treasurer for the amount thereof, was void as being repugnant to Article 4, Section 30 of the New Mexico Constitution.

This constitutional provision is to the effect that with the exception of interest or other payments on the public debt money shall be paid out of the Treasury only upon appropriations made by the legislature.

On Motion of Rehearing it was suggested to the Court that in order to avoid hampering necessary and legitimate actions certain other elements should be considered. And, while the Court in its opinion did not determine the question as to moneys paid into the state or to a state agency in escrow on deposit and not yet earned, and did not determine questions dealing with special funds accrued in the Treasury for specific purposes, nevertheless the Court did hold:

"Where the proper administrative office has received the money as the property of the state and has covered it into the Treasury as such, it is thenceforth conclusively state property. Only the legislature may determine that it was erroneously exacted and may be returned."

In the matter which you have submitted to this office we are not confronted with the construction of any statute as was considered in the case above cited, and, for that reason, we think there is all the more reason to hold that to make refunds at this time from the Game Protective Fund by reason of moneys erroneously remitted and paid to such fund, would violate the provision of the Constitution.

As was said by the Supreme Court:

"To hold otherwise would be to inaugurate a system of continuous review of administrative officials of their own and their predecessors' acts. It would not only lead to great confusion in the administration of the state's business but it would open the door to fraud and to the irresponsible and irregular dissipation of the state's funds; evils the Constitution makers obviously intended to prevent."

For the foregoing reasons, therefore, we are of the opinion that your remedy lies with the legislature, and {^{*49}} that the refund cannot be made by the State Treasurer.

By: Frank H. Patton,

Asst. Att'y General