

Opinion No. 307.

Migratory Bird Sanctuaries — Acquisition by U. S. in Montana.

HELD: The United States, under the Migratory Bird Conservation Act, may not acquire lands in Montana for migratory bird sanctuaries without consent by law of the State.

July 28, 1938.

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

Dear Mr. Weaver:

You have submitted the following:

“What authority has the Bureau of Biological Survey to come into our State and acquire land for the purpose of building sanctuaries for migratory wildfowl?”

The question is a very broad one, and no facts are stated.

In 1916 a covenant was signed and ratified between the United States of America and Great Britain for the protection of migratory birds in the United States and Canada. In 1936-37 a covenant was signed and ratified between the United States of America and the United Mexican States for the protection of migratory birds and animals. On July 3, 1918, the Migratory Bird Treaty Act was passed by Congress to give effect to the covenant with Great Britain. (40 Stat. 755, U. S. Code, Title 16, Sections 703-711.) The constitutionality of the Treaty with Great Britain and of the Act of July 3, 1918, was sustained by the United States Supreme Court in *State of Missouri v. Holland* (1920), 252 U. S. 416; see also *United States v. Lumpkin*, 276 Fed. 580.

The Migratory Bird Conservation Act was enacted by Congress February 18, 1929 (45 Stat. 1222, U. S. Code, Title 16, Section 715), and amended by Act of Congress June 15, 1935 (49 Stat. 381), in order to more effectively meet the obligations of the United States under the Migratory Bird Treaty with Great Britain. Under the latter Act, the Secretary of Agriculture is authorized to purchase or rent such

areas as have been approved for purchase or rental by the Migratory Bird Conservation Commission as inviolate sanctuaries for migratory birds (Section 5). Section 7 of this Act, however, provides:

“That no deed or instrument of conveyance shall be accepted by the Secretary of Agriculture under this act unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State.”

The State of Montana has not consented by law to the acquisition by the United States of lands in this state for the purposes specified in the Migratory Bird Conservation Act, although we are advised that various attempts have been made to secure favorable legislation from the Montana Legislative Assembly.

In this situation we do not think that the United States, through the Secretary of Agriculture or the Bureau of Biological Survey, may acquire land in Montana for bird sanctuaries without first securing the consent of the state by law to the acquisition of such lands for such purpose.

You are advised, however, that three actions have been commenced by the United States in the District Court of the United States for the District of Montana, Butte Division, for the purpose of acquiring, by condemnation proceedings, for bird sanctuaries and other purposes, lands surrounding and in the vicinity of the Red Rock Lakes in Beaverhead County. One of these actions is against the State of Montana, for the purpose of acquiring 3601.51 acres. It is alleged that this action is brought at the request of the Administrator of the Resettlement Administration for the following uses:

“Prevention of soil erosion; sanctuary for the propagation and protection of migratory waterfowl by providing nesting, resting, and feeding grounds in effectuation of the treaty between the United States and Great Britain, August 16, 1916 (39 Stat. 1702); refuge for other forms of wild life common to this area; and relief of unemployment by the construction of improvements and developmental work necessary for the use of the land in the manner herein described.”

This office has entered a special appearance, challenging the jurisdiction of the court. Should our motion to dismiss be overruled, this office will file answer and challenge the right of the United States to acquire these lands.

Two other actions have been filed by the United States in the same court against private individuals to acquire by condemnation proceedings lands in the same vicinity, aggregating 3172.49 acres. It is alleged that these actions are brought at the request of the Secretary of Agriculture "to provide for the reforestation and forestation of said lands; to prevent soil erosion; to aid in flood control; to prevent forest fires; to provide for the relief of unemployment by the erection and construction thereon and in connection therewith of useful public works including truck trails, bridges, dams, ditches and other public works necessary to said project" in the one case, and "to provide for the water conservation; prevention of soil erosion; sanctuary and refuge for the feeding, nesting and resting of migratory waterfowl and upland game birds, in effectuation of the treaty between the United States and Great Britain, August 16, 1916 (39 Stat. 1702); and relief of unemployment by the construction of new buildings, fences and other improvements necessary for the use of said land in the manner herein described" in the other case.

This office has filed petition for leave to intervene in both of these actions, and if petition is granted, will answer, challenging the right of the United States to acquire the lands. We deem it inappropriate to express a formal opinion concerning the right of the United States to acquire these lands in the Red Rock Lakes area in view of the pendency of these actions, except to say that we regard the right of the United States to be at least doubtful.