

No. 246

FISH AND GAME—PROJECTS CREATED AND ESTABLISHED UNDER CHAPTER 157 AND 167, LAWS OF 1941—PITTMAN-ROBERTSON ACT, projects defined

Held: The State Fish and Game Commission may authorize expenditures of state funds, set aside for the purpose of creating and establishing projects to be furthered by the United States Government under the Pittman-Robertson Act on lands owned by the federal government, private or state lands; but, in so doing, it must be understood the Fish and Game Commission shall have no power to accept benefits unless the projects created or established shall wholly and permanently belong to the State of Montana, and the title to all lands acquired or projects created from lands acquired by deed or gift shall vest in, be and remain in the State of Montana and shall be operated and maintained by it in accordance with the laws of the State of Montana.

September 19, 1941.

Dr. J. S. McFarland
State Game Warden
Fish and Game Commission
Capitol Building
Helena, Montana

Dear Dr. McFarland:

You have submitted the following questions for my opinion:

- “1. Can the State Fish and Game Commission authorize expenditures of State Funds, now set aside for the purpose, in making certain adjustments to food and cover and/or other minor improvements such as fencing and/or ordering areas ordered closed to hunting and related work on:
 - a. Lands owned by the Federal Government not at the present time improved?
 - b. Lands owned by the Federal Government but with certain improvements such as fencing, dams, dykes, temporary buildings or other improvements of minor or temporary nature?
 - c. Lands now held in private ownerships within the borders of the State?
- “2. Can the Fish and Game Commission authorize the expenditure of regular Department Funds on lands held in ownership by the Federal Government?

“These questions arise in connection with the establishment of wildlife preservation sanctuaries and nesting areas under the administration of the Federal Aid to Wildlife known as 50 Federal

Statutes 917 and commonly called the Pittman-Robertson Act. Senate Bill No. 53, known as the Assent Act, authorizes the State of Montana to accept the provisions of this Federal Act with certain specific reservations.

"Under paragraph No. 2 of the 'Assent Act,' it appears that the State is limited in the application of funds toward wildlife restoration on lands other than those either under State ownership or to be acquired by the State. It is desired to expend State funds on Federal and privately owned lands, provided the interests of the State are protected by cooperative agreement, lease, gift or devise. It appears that sufficient latitude is expressed in the Legislative Act to permit this in cases where there are proper agreements to protect the State's investment. Your answer to the above questions will no doubt clarify this matter."

The Congress of the United States passed and approved on September 2, 1937, an act known as the Pittman-Robertson Bill (see 50 Fed. Stat. 917). The act authorized the Secretary of Agriculture to cooperate with the states, through their respective state fish and game departments, in Wild Life Restoration Projects and among other things provided no money apportioned under the act as to any state should 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 the act and shall have passed laws for the conservation of wildlife which shall include a prohibition against the diversion of license fees paid by hunters for any other purpose than the administration of said state fish and game department, except that, until the final adjournment of the first regular session of the legislature held after passage of the act, the assent of the Governor of the State shall be sufficient. The Secretary of Agriculture and the state fish and game department of each state accepting the benefits of the act shall agree upon the wild life restoration projects to be aided in such state under the terms of the act and all projects shall conform to the standards fixed by the Secretary of Agriculture.

Under the provisions of Section 2 of said act "wild life restoration project" is defined as follows:

"For the purposes of this Act the term 'wild life restoration project' shall be construed to mean and include the selection, restoration, rehabilitation and improvement of areas of land and water adaptable as feeding, resting, or breeding places for wild life, including acquisition by purchase, condemnation, lease, or gift of such areas or estates or interest herein as are suitable or capable of being made suitable therefor, and the construction thereon or therein of such works as may be necessary to make them available for such purposes and also including such research into problems of wild life management as may be necessary to efficient administration affecting wild life resources, and such preliminary or incidental costs and expenses as may be incurred in and about such projects; the term 'State fish and game department' shall be construed to mean and include any department or division of department of another name, or commission, or officials, of a State employed under its laws to exercise the functions ordinarily exercised by a State fish and game department."

By reason of the provisions of Section 3 of the act there were appropriated funds from taxes imposed by Section 610, Title IV of the Revenue Act of 1932 (47 Stat. 169), on firearms, shells and cartridges, said funds to be set apart in the United States Treasury to be known as "The Federal Aid to Wildlife-Restoration Fund" and made available for the purposes of said act.

It was further provided, under Section 6 of said act, that any state desiring to avail itself of the benefits of the act should by its state fish and game department submit to the Secretary of Agriculture full and detailed

statements of any wild life-restoration project proposed for that state. If the Secretary of Agriculture finds such project meets with the standards set by him and approves said project, the state fish and game department shall approve only such projects as may be substantial in character and thereof as he may require; provided, however, the Secretary of Agriculture shall approve only such projects as may be substantial in character and design and the expenditure of funds authorized shall be applied to such approved subjects and if otherwise applied, they shall be replaced by the state, but before it may participate in any further apportionment of the act. If the Secretary of Agriculture approves the plans, specifications and estimates for the project, he shall notify the state fish and game department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside so much of the fund as represents the share of the United States payable under the act on account of such project, which sum so set aside shall not exceed seventy-five per centum of the total estimated cost therefor. No payment of any money apportioned under the act shall be made for any project until such statement of the project and the plans, specifications, and estimates thereof shall have been submitted to and approved by the Secretary of Agriculture.

Under Section 7 of the act it is provided that, when the Secretary of Agriculture shall find any project approved by him has been completed or, if involving research relating to wild life, is being conducted in compliance with said plans and specifications, he shall cause to be paid to the proper authority of said state the amount set aside for said project; provided, the Secretary of Agriculture may, in his discretion, from time to time make payments on said project as the same progresses; but these payments, including previous payments, if any, shall not be more than the United States pro-rata share of the project in conformity with said plans and specifications. And construction work and labor in each state shall be performed in accordance with its laws and under the direct supervision of the state fish and game department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with rules and regulations made pursuant to the act. The Secretary of Agriculture and the state fish and game department of each state may jointly determine at what times and in what amounts payments, as work progresses, shall be made under the act. Such payments shall be made by the Secretary of the Treasury, on warrants drawn by the Secretary of Agriculture against the said fund to such official or officials, or depository, as may be designated by the state fish and game department and authorized under the laws of the state to receive public funds of the state.

Section 8 provides that to maintain wildlife restoration projects established under the provisions of the act shall be the duty of the state according to their respective laws. In order to partake of the benefits accruing or to accrue under the provisions of the Pittman-Robertson Act, known as 50 Fed. Stat. 917, as aforesaid, our state legislature passed an act assenting to the provisions of said Pittman-Robertson bill, said act being Chapter 167 of the Laws of 1941; but said acceptance was made under certain restrictions and reservations—and in order to make them clear to you, I quote from said act as follows:

With reference to reservations contained within Chapter 167, Laws of 1941, Section 1 of said chapter reads in part as follows:

“ . . . The State of Montana does not by the passage of this act, nor by the consent herein given, surrender to the congress of the United States or any department of the government of the United States any of those rights which are retained by the people of the State of Montana or the State of Montana and which are guaranteed to them by the ninth and tenth amendments to the constitution of the United States, nor shall this act in any manner or at all be construed or held to be the State of Montana's consent to amending the constitution of the United States in any manner or at all relative to

its rights. Provided, however, that nothing herein shall be construed as giving consent to the purchase or acquisition of lands by the United States or by any of its departments or officers for establishing migratory bird sanctuaries under the migratory bird conservation act of the United States, or otherwise, and that the title to all lands acquired under the provisions of this act for wild life projects and projects construed thereon shall be and remain in the State of Montana."

The authority given to the Fish and Game Commission as set out in Section 2 of said Chapter 167, Laws of 1941, is as follows:

"The Montana fish and game commission is hereby authorized to perform such acts as may be necessary to the establishment and conduct of wild life projects as defined and authorized by said act of congress, provided every project initiated under the provision of this act shall be under the supervision of the Montana state fish and game commission, and no laws, rules or regulations shall be passed, made or established, governing the game or fur-bearing animals or the taking or capturing of the same in any such projects, except they may be in conformity with the laws of the State of Montana or rules promulgated by the Montana fish and game commission and the title to all lands acquired or projects created from lands purchased or acquired by deed or gift shall vest in, be and remain in the State of Montana and shall be operated and maintained by it in accordance with the laws of the State of Montana. The Montana fish and game commission shall have no power to accept benefits unless the projects created or established shall wholly and permanently belong to the State of Montana."

The power to acquire lands under said Chapter 167 is contained within the provisions of Section 3 thereof, which reads as follows:

"The Montana state fish and game commission, in the name of the State and with the approval of the governor, shall have the power to acquire by purchase, either for cash or upon installments, or lease or by gift or devise, or individually or in conjunction with the government of the United States or some department or bureau thereof, such lands or other property or interests therein as may be necessary for the purpose of carrying on any wild life restoration project created and established under the provisions of said Pittman-Robertson bill of the congress of the United States, and the State of Montana does reserve to itself, acting through its legislature, the right to direct the Montana fish and game commission to abandon any wild life restoration projects created and establish as the State of Montana may in its judgment think proper, provided said commission shall have no power to exercise the right of eminent domain to condemn or acquire property under this act."

It is provided in Section 4:

"In accordance with the other requirement of said act of congress, it shall be the law of this State, so long as this assent shall be unrepealed, that no license fees paid by hunters in the State of Montana shall be used or taken for any other purpose than the administration and use of the department of fish and game of the State of Montana."

You will note the provisions of Section 3 preclude or estop the state from exercising the right of eminent domain to condemn or acquire property under the act.

Said Chapter 167 of the Laws of 1941 was approved by our Governor on March 17, 1941, and thereby became immediately effective. It is well to note that upon the same day our legislature passed Chapter 157, which

has to do with the powers and duties of the Fish and Game Commission, and I call your attention particularly to the following from Section 1 of the act:

"It (meaning the Fish and Game Commission) shall have authority to acquire by purchase, condemnation, lease, agreement, gift, or devise, lands or waters suitable for the purposes hereinafter enumerated, and develop, operate and maintain the same for said purposes: (a) For fish hatcheries, nursery ponds, or game farms; (b) Lands or waters suitable for game, bird, fish, or fur-bearing animal restoration, propagation, or protection; (c) For public hunting, fishing, or trapping areas to provide places where the public may hunt, trap, or fish in accordance with the provisions of law or the regulations of the commission; (d) To extend and consolidate by exchange lands or waters suitable for the above purposes; (e) To capture, propagate, transport, buy, sell, or exchange any species of game, bird, fish, fish eggs, or fur-bearing animals needed for propagation or stocking purposes, or to exercise control measures of undesirable species."

It is further provided under Section 1 of the act:

"It shall have authority to enter into cooperative agreements with educational institutions and state, federal, or other agencies, to promote wild life research and to train men for wild life management. It shall have authority to enter into cooperative agreements with federal agencies, municipalities, corporations, organized groups of landowners, associations and individuals for the development of game, birds, fish, or fur-bearing animal management and demonstration projects."

Said section further provides:

"It shall have authority to divide the State into fish and game districts, and to create fish, game, or fur-bearing animal districts throughout the State of Montana * * *. It shall have authority to establish game refuges for the purpose of providing safe sanctuaries in which game and fur-bearing animals or game or non-game birds may breed and replenish. . . . It shall have authority to designate and protect certain areas as resting, feeding and breeding grounds for migratory birds, in which hunting and molestation shall be forbidden; . . ."

In other words, the legislature gave to the Fish and Game Commission—under Chapter 157 of the Laws of 1941—the authority to establish and create projects almost identical with those they were allowed to further under the Pittman-Robertson bill in conjunction with Chapter 167 of the Laws of 1941.

The definition of wildlife restoration projects set out in Section 2 of the Pittman-Robertson bill is quite broad indeed and allows the assenting state the right to do many things for the selection, restoration, rehabilitation and improvement of areas of land or water adaptable as feeding, resting, or breeding places for wildlife, including acquisition by purchase, **condemnation**, lease, or gift of such areas or estates or interests therein, as are suitable or capable of being made suitable therefor, and the construction thereon or therein of such works as may be necessary to make them available for such purposes and also including such research into problems of wildlife management as may be necessary to efficient administration affecting wildlife resources and such preliminary or incidental costs and expenses as may be incurred in and about such project.

Now as both Chapter 157 and Chapter 167 were passed by the legislature at the same time and approved by the Governor on the same day, i. e., March 17, 1941, it is reasonable to believe the legislature knew the contents of the bills and had knowledge of the benefits to be derived therefrom and the restrictions therein imposed.

Under the provisions of Chapter 167, the Fish and Game Commission has authority to do and perform such acts as may be necessary to the establishment and conduct of wildlife projects as defined and authorized by the Pittman-Robertson Act. However, it is well to bear in mind all this must be done under certain restrictions, i. e., every project initiated under the provisions of this act must be under the supervision of the Montana State Fish and Game Commission, and no laws, rules or regulations shall be passed, made or established governing the game or fur-bearing animals or capturing of the same in any such projects, except they be in conformity with the laws of the State of Montana or the rules and regulations promulgated by the Montana State Fish and Game Commission, and the title to all lands acquired or projects created from lands purchased or acquired by deed or gift shall vest in, be and remain in the State of Montana and shall be operated and maintained by it in accordance with the laws of the State of Montana. The Montana Fish and Game Commission shall have no power to accept benefits unless the projects created and established shall wholly and permanently belong to the State of Montana.

Under the provisions of said Chapter 167, the Montana State Fish and Game Commission has power to acquire by purchase, either for cash or upon installments, or lease or by gift or devise, or individually or in conjunction with the government of the United States or some department or bureau thereof, such lands or property or other property or interests therein as may be necessary for the purpose of carrying on any wildlife project created and established under the Pittman-Robertson bill. The state has the right to abandon any wildlife project any time it deems proper.

I see no provisions under Chapter 167 or Chapter 157, Laws of 1941, which preclude the State of Montana from instituting or carrying on wildlife projects on United States or private lands, just so long as every project created or established shall wholly and permanently belong to the State of Montana. If the United States government or any individual wants to grant, lease, or give or make any other kind of a conveyance to the State of Montana for a wildlife project, I see nothing in our statutes to prohibit their doing so provided all contracts or agreements entered into shall be in the State of Montana and every project so created or established shall be and remain wholly and permanently in the State of Montana.

As I construe the provisions of Chapter 157, Laws of 1941, the Fish and Game Commission is authorized to do about everything which it is authorized to do under Chapter 167, Laws of 1941, in conjunction with the Pittman-Robertson bill. Therefore, it is my opinion the State Fish and Game Commission should take advantage of the benefits derived from the Pittman-Robertson bill, rather than institute the projects under the powers granted in Chapter 157, Laws of 1941. If the projects are created and established under the Pittman-Robertson set-up, the state will pay twenty-five (25%) per centum on the dollar; and if instituted and created under the powers granted in Chapter 157, it will pay one hundred (100%) per centum on the dollar.

In entering into any contracts or agreements under the Pittman-Robertson set-up, the Fish and Game Commission must bear in mind it shall have no power whatsoever to accept benefits unless the projects created or established shall wholly and permanently belong to the State of Montana. If any individual person or the United States government or any department thereof wishes to deal with the state under this condition, I see nothing in our state law to prohibit their so doing.

The questions propounded are too general and it would appear to me each project or proposition will have to stand on its own merit and each be decided upon a given statement of facts.

Therefore it is my opinion the State Fish and Game Commission may authorize expenditures of state funds set aside for the purpose of creating and establishing projects to be furthered by the United States government under the Pittman-Robertson bill on lands owned by the Federal Government, private or state lands, but in so doing it must be understood the

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Sincerely yours,

JOHN W. BONNER
Attorney General