

No. 307

**FISH AND GAME—PITTMAN-ROBERTSON PROJECTS,
Approval of, Laws Applicable to**

- Held:
1. All construction work and labor performed on wildlife-restoration projects under the Pittman-Robertson Act should be performed in accordance with the laws of the State of Montana under the direct supervision of the State Fish and Game Department, subject to the inspection and approval of the Secretary of the Interior;
 2. The maintenance of all wildlife-restoration projects established under the provisions of the Pittman-Robertson Act shall be the duty of the State of Montana under its laws;
 3. The Montana State Fish and Game Commission has the authority to perform all acts as may be necessary to the establishment and conduct of wildlife-restoration projects, as defined and authorized by the Pittman-Robertson Act, provided every

project initiated under the provisions of the Montana Act, shall be under the supervision of the Fish and Game Commission;

4. The title to all 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;
5. 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;
6. All Pittman-Robertson projects, having to do with the acquisition of lands, either by purchase, gift, lease or devise, must be approved by the Governor, and not by the Attorney General, the function of the latter being to give to the Commission all necessary legal advice, as well as his opinions upon questions of law relating to its department, when called upon so to do;
7. The state reserves the right, acting through its legislature, to direct the Fish and Game Commission to abandon any and all wildlife-restoration projects;
8. The Fish and Game Commission has no power to exercise the right of eminent domain to condemn or acquire property under the Montana Act;
9. All acquisitions of land, or interest therein, for Pittman-Robertson projects, must be made by purchase, gift, lease or devise and by no other method;
10. 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 in accordance with the laws of the State of Montana.

December 4, 1941.

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

Attention: Mr. B. F. Vosburgh
Coordinator Pittman-Robertson Division

Dear Dr. McFarland:

You have presented to this office for approval the following Pittman-Robertson projects:

Posting on game preserves and closed areas;
Water facilities and wildlife habitat development;
Central wild life restocking project;
Halfway Lake Migratory Waterfowl and Sharptail Grouse Refuge;
Morris Upland Game Bird Seedstock & Migratory Waterfowl Refuge;
Bitterroot Valley Wildlife Habitat Development;
Cascade County Wildlife Habitat Development.

I know of no law which requires the Fish and Game Commission or the Coordinator of the Pittman-Robertson Division to present projects under the Pittman-Robertson Act to the Attorney General for his approval. There is, however, a provision of law which requires the Fish & Game Commission to obtain the Governor's approval on all acquisitions of land for Pittman-Robertson projects, as required under the provisions of Section 3, Chapter 167, Laws of Montana, 1941, which will be hereafter noticed.

It would appear to me the right or wrong of these projects, or any that may hereafter follow, would first depend upon the law applicable thereto and, second, to those matters and things within the knowledge and discretion and under the immediate supervision of the Fish & Game Commission, over which this office has no control. In other words, the function of the Attorney General, insofar as matters pertinent here are concerned, should and will be confined to law questions without attempting in any way to usurp or take over the administrative duties and functions of the Fish & Game Commission or any other department connected with Pittman-Robertson projects. With this understanding as a guide to these and future projects, we proceed to review the provisions of 50 U. S. Stat. at Large 917 and Chapter 167, Laws of Montana, 1941, pertaining to projects under the Pittman-Robertson Act. Should any provision be not clear, I will be pleased to assist you further in the interpretation thereof.

On September 2nd, 1937, Congress approved 50 U. S. Stat. at Large 917, known as the Pittman-Robertson Act, which provides that the United States shall aid the states in wildlife-restoration projects, and for other purposes.

Under Reorganization Plan II, Section 4 (f) of 53 U. S. Stat. at Large, 1433, the functions of the Secretary of Agriculture relating to the conservation of wildlife, game and migratory birds were transferred to the Secretary of the Interior and therefore your department will deal with the **Secretary of the Interior** instead of the **Secretary of Agriculture**.

Under the provisions of Section 1 of the Pittman-Robertson Act, the Secretary of Agriculture was authorized to cooperate with the states through their respective Fish & Game Commission Departments in wildlife-restoration projects. Under said section, the Secretary of Agriculture and the State Fish & Game Department shall agree upon wildlife-restoration projects to be aided under the terms of the act. All projects are to conform to the standards fixed by the Secretary of Agriculture.

Under Section 2 of said act, wildlife-restoration projects are defined thus:

"For the purpose of this act the term 'wildlife-restoration project' shall be construed to mean and include 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 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 official or officials, of a State empowered under its laws to exercise the functions ordinarily exercised by a State fish and game department."

For the purpose of simplifying the construction of the Federal and State Acts here under consideration, I have taken the liberty to break down certain provisions thereof, believing that in so doing you will receive a clearer picture of the restrictions and limitations covered under the acts, as well as the benefits to be derived therefrom.

The following has to do with Sections 6, 7 and 8 of 50 U. S. Stat. at Large 917:

STATEMENTS TO BE FURNISHED

Any State desiring to avail itself of the benefits of this Act shall by its State fish and game department submit to the Secretary of

Agriculture full and detailed statements of any wildlife-restoration project proposed for that State. If the Secretary of Agriculture finds that such project meets with the standards set up by him and approves said projects, the State fish and game department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require.

PROVISO APPROVAL

Provided, however, That the Secretary of Agriculture shall approve only such projects as may be substantial in character and design and the expenditure of funds hereby authorized shall be applied only to such approved projects and if otherwise applied they shall be replaced by the State before it may participate in any further apportionment under this Act.

LIMITATION

Items included for engineering, inspection, and unforeseen contingencies in connection with any works to be constructed shall not exceed 10 per centum of the cost of such works and shall be paid by the State as a part of its contribution to the total cost of such works.

NOTICE OF APPROVAL

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.

ALLOCATIONS

The Secretary of the Treasury shall thereupon set aside so much of said fund as represents the share of the United States payable under this Act on account of such project, which sum so set aside shall not exceed 75 per centum of the total estimated cost thereof.

RESTRICTION ON PAYMENTS

No payment of any money apportioned under this Act shall be made on 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.

PAYMENTS ON APPROVED COMPLETED PROJECTS

When the Secretary of Agriculture shall find that any project approved by him has been completed or, if involving research relating to wildlife, 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.

PROVISO, INSTALLMENTS DURING CONSTRUCTION

Provided, That 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.

CONSTRUCTION WORK AND LABOR PERFORMED IN ACCORDANCE WITH STATE LAW

Any 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 this 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 this 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.

STATE MAINTENANCE OF ESTABLISHED PROJECTS

To maintain wildlife-restoration projects established under the provisions of this Act shall be the duty of the States according to their respective laws.

The following has to do with Sections 1, 2 and 3 of Chapter 167, Laws of Montana, 1941:

ASSENT TO ACT OF CONGRESS KNOWN AS PITTMAN-ROBERTSON BILL, WITH CERTAIN RESERVATIONS

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 the 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.

That the title to all lands acquired under the provisions of this act for wildlife projects and projects construed thereon shall be and remain in the State of Montana.

AUTHORITY OF FISH AND GAME COMMISSION

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 provisions 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 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.

POWER TO ACQUIRE LANDS

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.

RESERVATION OF RIGHT TO ABANDON WILDLIFE-RESTORATION PROJECTS

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 wildlife-restoration projects created and established 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.

Now let us endeavor to analyze certain provisions of these acts which are of vital interest to your department.

Under Chapter 167, Laws of 1941, Montana gave its assent to the Pittman-Robertson Act but with certain reservations. These reservations are set out under the heading, "ASSENT TO ACT OF CONGRESS KNOWN AS PITTMAN-ROBERTSON BILL, WITH CERTAIN RESERVATIONS," shown above.

Thus it can be seen the State of Montana—in giving its assent to the Pittman-Robertson Act—made it clear, under Section 1 of said Chapter 167, Laws of 1941, that it would not surrender to congress or any department of the Federal Government any of those rights which are retained by the people of the State of Montana and which are guaranteed to them by the ninth and tenth amendments to the Constitution of the United States which are as follows:

AMENDMENT 9

"The enumeration, in this constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

AMENDMENT 10

"The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the states respectively or to the people."

Neither does the State of Montana consent to the amending of the Constitution of the United States in any manner or at all relative to its rights, nor give its consent to the purchase or acquisition of lands by the United States, or any of its departments or officers, for establishing migratory bird sanctuaries under the migratory bird conservation act of the United States, or otherwise. And above all things it was made clear all the title to all lands acquired under this act for wildlife projects and projects construed thereon shall be and remain in the State of Montana.

It is clear the Fish & Game Commission may perform such acts as may be necessary to the establishment and conduct of wildlife projects defined and authorized under Section 2 of said 50 U. S. Stat. at Large 917; but it must be understood every project initiated under the provisions of the Montana act shall be under the supervision of the Fish & Game Commission, and the Commission is without authority to make or establish any rules or regulations governing fur-bearing animals or the taking or capturing of the same in any project except in conformity with the laws of the State of Montana or rules promulgated by the Fish & Game Commission. The title to all lands purchased or 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.

It is equally clear 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.

The Fish and Game Commission must bear in mind all projects for the acquisition of lands whether by purchase, gift, lease or devise must be presented to the Governor for his approval.

Under the provisions of Section 2 of the Pittman-Robertson Act, acquisition of lands may be taken through condemnation proceedings. Under Section 3 of Chapter 167 of the Laws of Montana of 1941, the Commission shall have no power to exercise the right of eminent domain to condemn or acquire property. Therefore, the Commission will govern itself accordingly and acquire land only through **purchase, gift, lease or devise** as provided in Section 3 of the act.

The Commission should bear in mind that, after a Pittman-Robertson Project has been established, its maintenance is a burden resting upon the State of Montana and not the federal government.

It should likewise be noted any project construction work and labor shall be performed in accordance with our state laws and under the direct supervision of the Fish and Game Department.

Concerning matters with reference to water facilities and the like, I suggest the Commission interview the Montana Water Conservation Board, as it will no doubt be able to give the Commission valuable information and assistance with reference thereto.

Leases of land for wildlife-restoration projects should contain a provision which would allow the State, at its option, to remove improvements within a reasonable time after the termination of a lease and, likewise, a provision to the effect the state reserves the right, acting through its legislature, to abandon the project at any time during the term for which the lease is made.

Therefore, it is my opinion:

1. All construction work and labor performed on wildlife-restoration projects under the Pittman-Robertson Act should be performed in accordance with the laws of the State of Montana under the direct supervision of the State Fish and Game Commission, subject to the inspection and approval of the Secretary of the Interior;
2. The maintenance of all wildlife-restoration projects established under the provisions of the Pittman-Robertson Act shall be the duty of the State of Montana under its laws;
3. The Montana State Fish and Game Commission has the authority to perform all acts as may be necessary to the establishment and conduct of wildlife-restoration projects as defined and authorized by the Pittman-Robertson Act, provided every project initiated under the provisions of the Montana Act shall be under the supervision of the Fish and Game Commission;
4. The title to all 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;
5. 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;
6. All Pittman-Robertson projects having to do with the acquisition of lands, either by purchase, gift, lease or devise, must be approved by the Governor, and not by the Attorney General, the functions of the latter being to give to the Commission all necessary legal advice, as well as his opinions upon questions of law relating to its department, when called upon so to do;
7. The State reserves the right, acting through its legislature, to direct the Fish and Game Commission to abandon any and all wildlife-restoration projects;

8. The Fish and Game Commission has no power to exercise the right of eminent domain to condemn or acquire property under the Montana Act;
9. All acquisition of land, or interest therein, for Pittman-Robertson projects must be made by purchase, gift, lease or devise and by no other method;
10. 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 in accordance with the laws of the State of Montana.

Sincerely yours,

JOHN W. BONNER
Attorney General