

No. 14

**PITTMAN-ROBERTSON ACT—STATES—ASSENTS—
JURISDICTION**

Held: State by assent to Pittman-Robertson Act would cede jurisdiction over wildlife in projects to extent that regulation by State cannot be inconsistent with Federal Government's purpose.

February 4, 1941

Honorable D. F. Fewkes
House of Representatives
State Capitol
Helena, Montana

Dear Mr. Fewkes:

You have requested the opinion of this office as to the general legal effect ensuing should the State Legislature see fit to assent to the provisions of an Act of Congress approved September 2, 1937, entitled, "An Act to provide that the United States shall aid the States in wildlife restoration projects and for other purposes," (50 Stat. 917) commonly referred to as the Pittman-Robertson Act, with particular reference to any loss by the State of Montana of its powers concerning the ownership, regulation, and control of wildlife and whether or not such assent may be conditional. You have submitted excerpts from several decisions referring to jurisdiction by the State, which excerpts are apparently an opinion that has been rendered in connection with this matter by someone.

In rendering this opinion, I shall attempt to set forth the general legal principles involved and, of course, refrain from any opinion as to economic or other considerations which are properly a part of legislative deliberation.

The decisions to which you have referred direct our attention to a line of cases involving the respective jurisdictions of the State and Federal Governments, in lands within states, by "consent" and cession by the States. While it does not appear from the Pittman-Robertson Act that the Federal Government is to acquire lands in its name, we will discuss the problems involved, to a partial extent, along the lines of the cases you have submitted.

At the outset, a few observations as to the general law concerning wildlife are pertinent. The authority of the State to regulate and control the common property in game is well established.

Geer vs. Connecticut, 161 U. S. 519;

Foster Packing Company vs. Haydel, 278 U. S. 1.

The State owns, or has the power to control, the game and fish within its borders, not absolutely or as proprietor or for its own use or benefit, but in its sovereign capacity as representative of the people.

La Coste vs. Department of Conservation, 263 U. S. 545;

Ward vs. Race Horse, 163 U. S. 504.

Neither consent nor submission by the States can enlarge the powers of Congress; but none can exist except those which are granted.

U. S. vs. Butler, 297 U. S. 1;

Ashton vs. Cameron County Dist., 298 U. S. 513.

The sovereignty of the State, essential to its proper functioning under the Federal Constitution, cannot be surrendered; it cannot be taken away by any form of legislation.

U. S. vs. Constantine, 296 U. S. 287.

Yet the State may make contracts or give consent in matters concerning the exercise of governmental power. The following excerpts from U. S. vs. Bekins, 304 U. S. 27, at page 52, contains an excellent statement of that principle:

"This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord (citing authorities). The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution. The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers. Const., Art. 1, Section 10, subd. 3 (citing cases). The State is free to make contracts with individuals and give consents upon which the other contracting party may rely with respect to a particular use of governmental authority."

And the court, in discussing a former decision involving the contention that a State had "renounced the plenitude of power inherent in her statehood," used the following pertinent language:

"As the States were at liberty upon obtaining the consent of Congress to make agreements with one another, we saw no room for doubt that they may do the like with Congress if the essence of their statehood is maintained without impairment. And we added that 'Nowhere in our scheme of government—in the limitations express or implied of our federal constitution—do we find that she (the State) is prohibited from assenting to conditions that will assure a fair and just requital for benefits received.'"

It would seem, therefore, that an assent by the State to the provisions of the Pittman-Robertson Act would not be repugnant to any provision of our Federal Constitution. If such assent could be said to surrender any of the sovereign powers of the State, essential to its proper functioning, then, of course, it would be invalid and of no effect as contravening the provisions of the Federal Constitution.

Generally speaking, jurisdiction over lands within the State may be acquired by the Federal Government by two methods: First, the Federal Government may acquire lands under Clause 17, Section 8, Article 1, of our Federal Constitution and secure the "consent" of the State to jurisdiction; or, secondly, the State may cede jurisdiction over lands within its confines to the Federal Government.

It was formerly held that if the consent of the State, in pursuance of the Federal Constitution, was actually given, under the terms of the Constitution, the State could not impose conditions inconsistent with exclusive jurisdiction in the National Government.

U. S. vs. Unzueta (dictum), 281 U. S. 138;

Palmer vs. Barrett, 162 U. S. 399.

And as a forerunner of such decisions, Mr. Justice Story, in U. S. vs. Cornell, 2 Mason 60, Fed. Cas. No. 14, 867, said:

"It may well be doubted whether Congress are, by the terms of the Constitution, at liberty to purchase lands for forts, dock yards, etc., with the consent of a state legislature, where such consent is so

qualified that it will not justify the 'exclusive legislation' of Congress there. It may well be doubted if such consent be not utterly void."

However, in *James vs. Dravo Construction Co.*, 302 U. S. 134, the above holdings were considerably modified by the following language:

"Clause 17 contains no express stipulation that the consent of the State must be without reservations. We think that such a stipulation should not be implied. We are unable to reconcile such an implication with the freedom of the State and its admitted authority to refuse or qualify cessions of jurisdiction when purchases have been made without consent of property which has been acquired by condemnation."

It thus becomes apparent that even in cases where lands are acquired by the said Government, under the Constitutional provision hereinbefore referred to, the consent by the State may be qualified to an extent which would be consistent with the purpose of the acquisition.

Under the second method of acquiring jurisdiction, that is, cession, it has been held that where national jurisdiction is derived from express cession by the State, the latter may, in its Act of Cession, qualify the jurisdiction granted by imposing such conditions as are "not inconsistent with the carrying out of the purpose of the acquisitions."

U. S. vs. Unzueta (dictum), 281 U. S. 138;

Benson vs. United States, 146 U. S. 325;

Palmer vs. Barrett, 162 U. S. 399.

"But the State may not subsequently modify the jurisdiction granted without the concurrence of the United States."

In *re Ladd*, 74 Fed. 31.

The most recent pronouncement of the United States Supreme Court, with reference to the national government acquiring jurisdiction through cession, is found in *Collins vs. Yosemite Park Co.*, 304 U. S. 518.

"There is no question about the power of the United States to exercise jurisdiction secured by cession, although this is not provided for by Clause 17, and it has been held that such a cession may be qualified.

"It has never been necessary, heretofore, for this Court to determine whether or not the United States has the constitutional right to exercise jurisdiction over territory, within the geographical limits of the State, acquired for purposes other than those specified in Clause 17. * * * The United States has large bodies of public lands. These properties are used for forests, parks, ranges, wildlife sanctuaries, flood control, and other purposes which are not covered by Clause 17. * * * As the National Government may, 'by virtue of its sovereignty' acquire lands within the borders of States by eminent domain and without their consent, the respective sovereignties should be in a position to adjust their jurisdictions. There is no constitutional objection to such an adjustment of rights. It follows that jurisdiction less than exclusive may be granted the United States."

And in the same case, the Court, in referring to agreements as to jurisdiction between the State and Federal Government, determined:

"The States of the Union may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratifications. It is a matter of arrangement. These arrangements the court will recognize and respect."

From the foregoing authorities, it would appear that, in cases where the Federal Government itself acquires lands for wildlife sanctuaries, it cannot do so under Clause 17. The jurisdiction acquired over such lands would be by cession from the States. The offer of cession under certain conditions might or might not be accepted by the Federal Government.

The principles announced in the foregoing cases are of value to the extent that, by way of analogy, they furnish a guide as to the effect of an assent in this particular instance. It must be pointed out that, if an assent to the Act is given by the state, whether it be absolute or conditional, the legislature may not, at a later date, impose further conditions which might not be acceptable to the Federal Government.

We fail to find any decisions from appellate courts which have determined the amount of jurisdiction, if any, given to the Federal Government by the States where a conditional or absolute assent to the Act has been given.

Under the Federal Highway Act, analogous Federal legislation, the Secretary of Agriculture was authorized to cooperate with the States, through their respective Highway Departments, in the construction of rural post roads. No money appropriated was to be expended in any State until it had, by its legislature, assented to the provisions of the Act. The Secretary of Agriculture and the State Highway Department of each State had to agree upon the roads to be constructed therein and the character and method of their construction. The construction work was to be done in accordance with State laws and under the supervision of the State Highway Department, subject to the inspection and approval of the Secretary and in accordance with his rules and regulations made pursuant to the Federal Act. The States were required to maintain the roads so constructed according to their laws. There were certain other provisions concerning the maintenance of the highway after its construction.

In a case which arose under these Highway Acts, the Supreme Court of the United States had occasion, in *Morris vs. DUBY*, 274 U. S. 135, to remark:

"An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.

"Conserving limitation is something that must rest with the road supervising authorities of the State, not only on the general constitutional distinction between national and state powers, but also for the additional reason, having regard to the argument based on a contract, that under the convention between the United States and the State, in respect of these jointly aided roads, the maintenance after construction is primarily imposed on the State. Regulation as to the method of use, therefore, necessarily remains with the State and cannot be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them."

It must be observed that the aid offered is for "wildlife restoration projects and other purposes." It is obvious that an assent to the Act by the State would cede at least a partial jurisdiction over the wildlife in the projects, to the extent that regulation or control thereof by the State could not be inconsistent with the Federal Government's purpose.

It should be further observed that the question as to whether or not the reservations of jurisdiction made by the State are inconsistent with

the carrying out of the purpose of the Act is a matter for the courts to determine. For this reason, I have pointed out the general background of cases involving jurisdiction.

I have refrained from quoting from the provisions of the Pittman-Robertson Act as its text is relatively short. I am, however, enclosing a copy of that Act. There have been ten regulations promulgated by the Secretary of Agriculture under Section 10 of the Act, which I would be pleased to show you if you so desire.

Sincerely yours,

JOHN W. BONNER
Attorney General.

PITTMAN-ROBERTSON ACT
16 USCA No. 669-669j

Section 1 (No. 669). COOPERATION OF SECRETARY OF THE
INTERIOR WITH STATES: CONDITIONS

The Secretary of the Interior is authorized to cooperate with the States, through their respective State fish and game departments, in wildlife-restoration projects as hereinafter in sections 669-669j of this title set forth; but no money apportioned under sections 669-669j 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 wildlife, shall have assented to the provision of Sections 669-669j of this title 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 September 2, 1937, the assent of the Governor of the State shall be sufficient. The Secretary of the Interior and the State fish and game department of each State accepting the benefits of sections 669-669j of this title shall agree upon the wildlife-restoration projects to be aided in such State under the terms of sections 669-669j of this title and all projects shall conform to the standards fixed by the Secretary of the Interior. Sept. 2, 1937, c. 899, S. 1, 50 Stat. 917; Reorg. Plan No. II, S. 4, (f), eff. July 1, 1939, 4 Fed. Reg. 2731, 53 Stat. 1433.

Section 2 (No. 669a). DEFINITIONS

For the purposes of sections 669-669j of this title 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. Sept. 2, 1937, c. 899, S. 2, 50 Stat. 917.

Section 3 (No. 669b). APPROPRIATIONS: DISPOSITION OF UN-
EXPENDED FUNDS

An amount equal to the revenue accruing during the fiscal year ending June 30, 1939, and each fiscal year thereafter, from the tax imposed

by Section 610, Title IV, of the Revenue Act of 1932 (47 Stat. 169), as extended and amended before or after September 2, 1937, on firearms, shells, and cartridges, is hereby authorized to be set apart in the Treasury as a special fund to be known as "The Federal Aid to wildlife-restoration fund" and is hereby authorized to be appropriated and made available until expended for the purposes of sections 669-669j of this title. So much of such appropriation apportioned to any State for any fiscal year as remains unexpended at the close thereof is authorized to be made available for expenditure in that State until the close of the succeeding fiscal year. Any amount apportioned to any State under the provisions of sections 669-669j of this title which is unexpended or unobligated at the end of the period during which it is available for expenditure on any project is authorized to be made available for expenditure by the Secretary of the Interior in carrying out the provisions of Sections 715-715d, 715e, 715f-715k, 715l-715s of this title. Sept. 2, 1937, c. 899, S. 3, 50 Stat. 917; Reorg. Plan No. II, S. 4 (f), eff. July 1, 1939, 4 Fed. Reg. 2731, 53 Stat. 1433.

Section 4 (No. 669c). APPORTIONMENT OF FUNDS; EXPENSES OF SECRETARY

So much, not to exceed 8 per centum, of the revenue covered into said fund in each fiscal year as the Secretary of the Interior may estimate to be necessary for his expenses in the administration and execution of sections 669-669j of this title and sections 715-715d, 715e, 715f-715k, 715l-715s of this title shall be deducted for that purpose, and such sum is authorized to be made available therefor until the expiration of the next succeeding ing fiscal year, and within sixty days after the close of such fiscal year the Secretary of the Interior shall apportion such part thereof as remains unexpended by him, if any, and make certificate thereof to the Secretary of the Treasury and to the State fish and game departments on the same basis and in the same manner as is provided as to other amounts authorized by sections 669-669j of this title to be apportioned among the States for such current fiscal year. The Secretary of the Interior, after making the aforesaid deduction, shall apportion the remainder of the revenues in said fund for each fiscal year among the several States in the following manner, that is to say, one-half in the ratio which the area of each State bears to the total area of all the States and one-half in the ratio which the number of paid hunting-license holders of each State in the preceding fiscal year, as certified to said Secretary by the State fish and game departments, bears to the total number of paid hunting-license holders of all the States: Provided, That the apportionment for any one State shall not exceed the sum of \$150,000 annually: Provided further, That where the apportionment to any State under this section is less than \$15,000 annually, the Secretary of the Interior may allocate not more than \$15,000 of said fund to said State to carry out the purposes of sections 669-669j of this title when said State certifies to the Secretary of the Interior that it has set aside not less than \$5,000 from its fish and game funds or has made, through its legislature, an appropriation in this amount, for said purposes. Sept. 2, 1937, c. 899, S. 4, 50 Stat. 918; Reorg. Plan No. II, S. 4 (f), eff. July 1, 1934, 4 Fed. Reg. 2731, 53 Stat. 1433.

Section 5 (No. 669d). SAME; CERTIFICATION TO STATES AND SECRETARY OF TREASURY; ACCEPTANCE BY STATES; DISPOSITION OF FUNDS NOT ACCEPTED

Within sixty days after September 2, 1937, the Secretary of the Interior shall certify to the Secretary of the Treasury and to each State fish and game department the sum which he has estimated to be deducted for administering and executing sections 669-669j of this title and sections 715-715d, 715e, 715f-715k, 715l-715s of this title and the sum which he has appropriated to each State for the fiscal year ending June 30, 1939, and on or before February 20 next preceding the commencement of each succeeding fiscal year shall make like certificates for such fiscal year.

Any State desiring to avail itself of the benefits of sections 669-669j of this title shall notify the Secretary of the Interior to this effect within sixty days after it has received the certification referred to in this section. The sum apportioned to any State which fails to notify the Secretary of the Interior as herein provided is authorized to be made available for expenditure by the Secretary of the Interior in carrying out the provisions of Sections 715-715d, 715e, 715f-715k, 715l-715s of this title, Sept. 2, 1937, c. 899, S. 5, 50 Stat. 918; Reorg. Plan No. II, S. 4(f), eff. July 1, 1934, 4 Fed. Reg. 2731, 53 Stat. 1433.

Section 6 (No. 669e). SUBMISSION AND APPROVAL OF PROJECTS; SETTING FUNDS ASIDE

Any State desiring to avail itself of the benefits of sections 669-669j of this title shall by its State fish and game department submit to the Secretary of the Interior full and detailed statements of any wildlife-restoration project proposed for that State. If the Secretary of the Interior finds that such project meets with the standards set up by him and approves said project, the State fish and game department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require: Provided, however, That the Secretary of the Interior 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 sections 669-669j of this title. 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. If the Secretary of the Interior 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 said funds as represents the share of the United States payable under sections 669-669j of this title on account of such project, which sum so set aside shall not exceed 75 per centum of the total estimated cost thereof. No payment of any money apportioned under sections 669-669j of this title 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 the Interior. Sept. 2, 1937, c. 899, S. 6, 50 Stat. 918; Reorg. Plan No. II, S. 4 (f), eff. July 1, 1939, 4 Fed. Reg. 2731, 53 Stat. 1433.

Section 7 (No. 669f). PAYMENT OF FUNDS TO STATES; LAWS GOVERNING CONSTRUCTION AND LABOR

When the Secretary of the Interior 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: Provided, That the Secretary of the Interior 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. 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 the Interior and in accordance with rules and regulations made pursuant to Sections 669-669j of this title. The Secretary of the Interior 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 sections 669-669j of this title. Such payments shall be made by the Secretary of the Treasury, on warrants drawn by

the Secretary of the Interior 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. Sept. 2, 1937, c. 899, S. 7, 50 Stat. 919; Reorg. Plan No. II, S. 4 (f) eff. July 1, 1939, 4 Fed. Reg. 2731, 53 Stat. 1433.

Section 8 (No. 669g). MAINTENANCE OF PROJECTS

To maintain wildlife-restoration projects established under the provisions of sections 669-669j of this title shall be the duty of the States according to their respective laws. Sept. 2, 1937, c. 899, S. 8, 50 Stat. 919.

Section 9 (No. 669h). EMPLOYMENT OF PERSONNEL, EQUIPMENT, ETC.

Out of the deductions set aside for administering and executing sections 669-669j of this title and sections 715-715d, 715e, 715f-715k, 715l-715s of this title, the Secretary of the Interior is authorized to employ such assistants, clerks, and other persons in the city of Washington and elsewhere, to be taken from the eligible lists of the Civil Service; to rent or construct buildings outside of the city of Washington; to purchase such supplies, materials, equipment, office fixtures, and apparatus; and to incur such travel and other expenses, including purchase, maintenance, and hire of passenger carrying motor vehicles, as he may deem necessary for carrying out the purposes of sections 669-669j of this title. Sept. 2, 1937, c. 899, S. 9, 50 Stat. 919; Reorg. Plan No. II, S. 4 (f), eff. July 1, 1939, 4 Fed. Reg. 2731, 53 Stat. 1433.

Section 10 (No. 669i). RULES AND REGULATIONS

The Secretary of the Interior is authorized to make rules and regulations for carrying out the provisions of sections 669-669j of this title. Sept. 2, 1937, c. 899, S. 10, 50 Stat. 919; Reorg. Plan No. II, S. 4 (f) eff. July 1, 1939, 4 Fed. Reg. 2731, 53 Stat. 1433.

Section 11 (No. 669j). ANNUAL REPORT TO CONGRESS

The Secretary of the Interior shall make an annual report to the Congress of the sum set apart in "The Federal aid to wildlife restoration fund," giving detailed information as to the projects and expenditures therefor. Sept. 2, 1937, c. 899, S. 11, 50 Stat. 919; Reorg. Plan No. II, S. 4 (f), eff. July 1, 1939, 4 Fed. Reg. 2731, 53 Stat. 1433.