



United States Department of the Interior



FISH AND WILDLIFE SERVICE

5600 American Boulevard West, Suite 990
Bloomington, Minnesota 55437-1458

IN REPLY REFER TO:

FWS/MBSP-WSFR

NOV 4 2011

Honorable Frank Foster
Michigan House of Representatives
S-1486 House Office Building
P.O. Box 30014
Lansing, MI 48909-7514

Dear Mr. Foster:

Thank you for the inquiry on your behalf from Jason Pucas of your staff on November 1, 2011, in which he requested our review of House Bill No. 4684, a bill to amend 1994 PA 451 entitled Natural Resources and Environmental Protection Act, with regard to U.S. Fish and Wildlife Service (FWS/Service) authorities. In particular, he asked whether the bill conflicts with Federal grant requirements and State assent legislation, and also whether the bill constitutes a diversion under the Wildlife Restoration Act (PR Act) and regulations prescribed in 50 CFR 80. After reviewing the legislation, it is our opinion that the bill is in conflict with Federal requirements, violates State Assent Legislation, and diverts State license revenue and assets.

Federal Grant Requirements

When land is acquired and managed, or facilities are developed and maintained using grant funds, they are conducted in accordance with the Acts, regulations, policies, and standards contained in the FWS Manual. The Manual Chapters are not mutually exclusive and while individual chapters may discuss certain aspects of grant administration, they cannot be applied without considering other relevant sections, the Act, and regulations.

The citation included in the legislation is taken out of context and therefore incomplete causing incorrect interpretation. The entire section appears below (FWS Manual Part 522 FW 21). Please note that the section begins with a caveat that prevents interference with grant program purpose.

*21.5 What recreational activities and related facilities may States allow on lands they acquire, develop, or manage with Federal Assistance funds?
The State fish and wildlife agency determines what recreational activities*

and related facilities to allow on Federal Assistance supported lands, based on authorizing legislation.

*A. The statutes and applicable regulations prohibit a State fish and wildlife agency from allowing recreational activities and related facilities that would **interfere** with the purpose for which the State acquired, developed, or is managing the land. This means that the State fish and wildlife agency **may not allow an activity or facility that would interfere** with the fulfillment of the grant objectives for restoration, conservation, management, and/or enhancement of fish, wildlife, plants, and their habitats eligible for funding through the programs listed in section 21.1. (Bold added)*

B. The statutes and applicable regulations require that grants used to acquire, develop, or manage lands must have a purpose consistent with the Wildlife Restoration and Sport Fish Restoration Acts, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), or the Landowner Incentive Program (non-Tribal):

(1) States generally allow fish or wildlife-dependent activities (e.g., hunting, trapping, fishing, birding, wildlife photography, or viewing platforms) because these activities do not interfere with the purpose.

(2) States may allow recreational activities and related facilities that are not fish or wildlife-dependent (e.g. bicycling, swimming, rock climbing, kennels, stables, horseback riding) if they determine that the activities will not interfere with the purpose for which they acquired, developed, or are managing the land.

C. For the Federal Assistance programs identified in section 21.1 that fund activities on private lands, It is the responsibility of the State and the private landowner to agree on allowable recreational activities and related facilities, consistent with sections 21.5 A and B.

D. At the request of the State fish and wildlife agency, the Service will confer on recreational activities or related facilities.

In practice, it is the role and responsibility of the Service to provide oversight and evaluate whether the Michigan Department of Natural Resources' (DNR) decision to allow a non-wildlife dependent recreational use is in compliance with grant requirements, the Acts, and other relevant regulations.

Wildlife and Sport Fish Restoration Programs Division (WSFR) routinely exercises this monitoring responsibility by conducting field trip reviews the authority for such reviews is established in Federal Regulations (50 CFR 80 Subpart H, General Grant Administration)

80.90 What are the grantee's responsibilities?

(e) Giving reasonable access to work sites and records by employees and contractual auditors of the Service, the Department of the Interior, and the Comptroller General of the United States.

(1) Access is for the purpose of:

(i) Monitoring progress, conducting audits, or other reviews of grant-funded projects; and

(ii) Monitoring the use of license revenue

Numerous field reviews have been conducted in Michigan; formal field trip reports have been prepared, and the DNR has been informed of non-compliance issues, and, if not resolved, will jeopardize their ability to continue to receive federal funds (50 CFR 80.11 and 50 CFR 80.136).

State Assent Legislation

Michigan's Assent Legislation (MCL 324.40501) is required by the PR Act and Federal Regulations, 50 CFR 80, Subpart B, State Fish and Wildlife Agency Eligibility.

§ 80.10 Who is eligible to receive the benefits of the Acts?

States acting through their fish and wildlife agencies are eligible for benefits of the Acts **only if they pass and maintain legislation** (bold added) that:

(a) Assents to the provisions of the Acts;

(b) Ensures the conservation of fish and wildlife; and

(c) Requires that revenue from hunting and fishing licenses be:

(1) Controlled only by the State fish and wildlife agency; and

(2) Used only for administration of the State fish and wildlife agency, which includes only the functions required to manage the agency and the fish- and wildlife-related resources for which the agency has authority under State law.

As required, Michigan's assent legislation prevents the diversion of license fees for "any purpose other than game and fish activities under the administration of the department." Legitimate purposes are defined in Federal law as "only those functions required to manage the fish and wildlife-oriented resources of the State for which the agency has authority under State law." To comply with Federal regulations, Michigan's Assent Legislation limits use of license fees to only those activities "necessary to conduct and establish wildlife restoration, management, and research projects and areas."

Any legislation that mandates, constrains, or prevents the DNR Fish and Wildlife Agency from exercising their responsibility to restrict, limit or manage uses, diminishes their authority to act or ability to control assets for the benefit of wildlife, or directs the use of assets for non-wildlife purposes, violates the State's own assent law requirements.

Per the requirements of the PR Act and Federal regulations, a State is unable to receive Federal funds when State assent legislation is compromised or inadequate to protect State license revenue, license acquired assets, or otherwise unable to maintain the provisions of the Act.

Diversion of License Revenue and Assets

As outlined in assent legislation, the DNR is responsible for protecting hunting and fishing license revenues received and assets purchased against diversion, or the use of such funds or assets for purposes unrelated to the administration of the fish and wildlife agency. License revenue is defined in 50 CFR 80, Subpart C, License Revenue and, among other things, includes land and equipment acquired with license revenue.

WSFR is responsible for the apportionment of congressionally-authorized funds to the various States, Tribes, Territories and the District of Columbia in the form of grants. WSFR is also responsible for monitoring the various fish and wildlife agencies to ensure that license fee revenue and assets, and grants are administered as required by Federal and State laws, regulations and policies. This includes periodic audits by the Office of Inspector General and resolution of audit findings by completing actions required by the Corrective Action Plan (CAP).

The basis for this Federal responsibility is the Statutory prohibition against diversion of license fees:

"Prohibition Against Diversion [Pub. L. 106-553, Sec. 1(a)(2) [title IX, Sec. 902(h)], Dec. 21, 2000, 114 Stat. 2762, 2762A-124], provided that: "No designated State agency shall be eligible to receive matching funds under this title [enacting section 1356a of Title 43, Public Lands, amending sections 669a, 669b, 669c, 669g, and 4406 of this title, and enacting

provisions set out as notes under this section] if sources of revenue available to it after January 1, 2000, for conservation of wildlife are diverted for any purpose other than the administration of the designated State agency, it being the intention of Congress that funds available to States under this title be added to revenues from existing State sources and not serve as a substitute for revenues from such sources. Such revenues shall include interest, dividends, or other income earned on the foregoing."

The following regulation (50 CFR 80, Subpart B) identifies the conditions that would require the FWS to declare a state ineligible to receive WSFR funds.

80.11 How does a State become ineligible to receive the benefits of the Acts?

A State becomes ineligible to receive the benefits of the Acts if it:

(a) Fails materially to comply with any law, regulation, or term of a grant as it relates to acceptance and use of funds under the Acts;

(b) Does not have legislation required at §80.10 or **passes legislation contrary to the Acts** (bold added); or

(c) Diverts hunting and fishing license revenue from:

(1) The control of the State fish and wildlife agency; or

(2) Purposes other than the agency's administration.

80.21 What if a State diverts license revenue from the control of its fish and wildlife agency?

The Director may declare a State to be in diversion if it violates the requirements of §80.10 by diverting license revenue from the control of its fish and wildlife agency to purposes other than the agency's administration. The State is then ineligible to receive benefits under the relevant Act from the date the Director signs the declaration until the State resolves the diversion.

In 2011, the Final Certificates of Apportionment places Michigan in the top five states with an allocation of \$11.7M in funds for Sport Fish and \$12.8M for Wildlife Restoration including over \$2.3M for Basic and Enhanced Hunter Education and Safety.

Recommendation

To avoid the loss of Federal funding, we suggest the House Committee modify the bill to

Mr. Foster

6

meet the requirements above. At a minimum, this would include deleting any language that removes or restricts the ability of DNR to control uses of and activities impacting land purchased with license fees or acquired, managed, or maintained under WSFR grants.

Thank you for the opportunity to provide comments regarding HB 4684 as it relates to our WSFR Programs and authorities. If there are any questions or if further clarification is needed, contact my Staff Biologist, Lucinda Ochoada at (612) 713-5135.

Sincerely,



Acting For

James B. Hodgson, Chief
Wildlife and Sport Fish Restoration Programs

Enclosures

cc: Ms. Lucinda Ochoada, U.S. Fish and Wildlife Service
Mr. John Christian, U.S. Fish and Wildlife Service