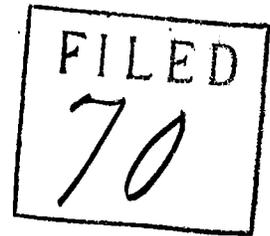


LANDS: Federal Government may acquire land in Missouri without the consent of the State for public use.

April 2, 1946



H-12

Honorable C. Vern Peak  
House of Representatives  
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for our official opinion on the following question:

"May the State of Missouri prohibit the Federal Government or any of its agencies from acquiring land in Missouri by cession, purchase, condemnation or otherwise?"

The constitutional authority pertaining to the right of the Federal Government to acquire lands within the various states which is cited most frequently in decisions on this question is Clause 17, Section 8, Article I, of the Constitution of the United States, Section 8 being a grant of powers to Congress, which is as follows:

"To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of government of the United States, and to execute like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock yards, and other needful buildings; \* \* \*"

It should be noted that the above clause contains no express authorization for the exercise of the power of eminent domain, and it is through decisions of the Supreme Court of

the United States that such powers have been attributed to the Federal Government.

In pursuance to the constitutional provision above noted, the General Assembly enacted (and reenacted in 1935) Section 12691, R. S. Mo. 1939, giving the consent of the State to the acquisition of lands for the following purposes:

"The consent of the State of Missouri is hereby given in accordance with the seventeenth clause, eighth section of the first article of the Constitution of the United States to the acquisition by the United States by purchase or grant of any land in this State which has been or may hereafter be acquired, for the purpose of establishing and maintaining postoffices, internal revenue and other government offices, hospitals, sanatoriums, fish hatcheries, game and bird preserves and land for reforestation, recreational and agricultural uses."

The consent given by the State of Missouri is much broader than the power of acquisition listed in the constitutional provision to which the above section refers. That consent, however, corresponds to the powers given the Federal Government by judicial interpretation.

The leading case on this question is Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 29 L. Ed. 264. In that case the question of the legislative authority of the Federal Government over the area comprising Fort Leavenworth, Kansas, was under discussion, and while the Supreme Court of the United States in that decision admitted that the framers of the Federal Constitution were of the opinion that the new Government could not acquire land in any State without the consent of such State, yet the Federal Government was held to have such power, in the following language, 1. c. 266 (L. Ed.):

" \* \* \* It would seem to have been the opinion of the framers of the Constitution that, without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings

for the defense of the country, or the discharge of other duties devolving upon it, and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the General Government of title to lands in the States. Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the General Government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the States, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the States to the purchase of lands within them for the special purposes named is, however, essential, under the Constitution, to the transfer to the General Government, with the title, of political jurisdiction and dominion. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.

"But not only by direct purchase have the United States been able to acquire lands they needed without the consent of the States, but it has been held that they possess the right of eminent domain within the States, using these terms, not as expressing the ultimate dominion or title to property, but as indicating the right to take private property for public uses when needed to execute the powers conferred by the Constitution; and that the General Government is not dependent upon the caprice of individuals or the will of State Legislatures in the acquisition of

such lands as may be required for the full and effective exercise of its powers. This doctrine was authoritatively declared in *Kohl v. U. S.*, 91 U. S. 367 (Bk. 23, L. ed. 449). \* \* \* \* \*

"When the title is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all state authority. \* \* \* \* "

There appears to be but one restriction on the right of the Federal Government to acquire land within this State by the right of eminent domain, and that is that the land must be acquired for a public use. The rule is briefly stated in *United States v. Certain Lands in City of Louisville, Ky.*, 78 F. (2d) 684, l. c. 686, as follows:

"The government of the United States is one of delegated powers. There is no constitutional provision expressly authorizing it to exercise the power of eminent domain. It is nevertheless well settled that this power belongs to the government as an attribute of its sovereignty. *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449; *Shoemaker v. United States*, 147 U. S. 282, 299, 13 S. Ct. 361, 37 L. Ed. 170; *Chappell v. United States*, 160 U. S. 499, 509, 510, 16 S. Ct. 397, 40 L. Ed. 510. Equally well settled is it that the right can only be exercised where the property is to be taken for a public use. \* \* \* \* "

The refusal of a State to give its consent to the acquisition of land by the Federal Government has only one effect, and that is to deny exclusive legislative jurisdiction to the Federal Government over such land, and that is subject to the further qualification that State legislative enactments may not interfere with the governmental use of such land. This rule is clearly set out in several decisions, but, for the purpose of brevity, we are quoting only from *Chicago, Rock Island and Pacific Ry. Co. v. McGlinn*, 114 U. S. 542, 29 L. Ed. 270, l. c. 271:

" \* \* \* \* But, in order that the United States may possess exclusive legislative power over

the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the State. This is the only mode prescribed by the Federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express Act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended.  
\* \* \* "

And the more recent case of James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155, 1. c. 165:

"It is not questioned that the State may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the Federal Government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders. Kohl v. United States, 91 U. S. 367, 371, 372, 23 L. ed. 449, 451. In that event, as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State and the State may qualify its cession by reservations not inconsistent with the governmental uses.  
\* \* \* "

Federal decisions have been very liberal in the interpretation of the words "public use" and have extended the words to include reforestation, prevention of soil erosion, flood control, wildlife conservation, and the retirement of sub-marginal lands or lands not suited primarily for conservation. A recent decision by a Federal District Court, In re United States, 28 F. Supp. 758, has summarized the various meanings given to the words "public use" in the following language, 1. c. 763, 764:

"It is clear that forestation, prevention of soil erosion and flood control have come

to be recognized in the mind of Congress as public necessities if we are to conserve our natural resources. Little question could be raised regarding the authority of the state to fulfill any of these programs. Likewise there can be no doubt that forestation, and flood control on even minor streams, and control of soil erosion even over a comparatively small area affect an interest which is 'national and general as contradistinguished from local or special.' The nature of the program for wildlife-reforestation projects indicates an activity involving a scope much more extensive than a single state. \* \* \*

" \* \* \* There can be no doubt that projects looking to flood control, re-forestation and prevention of soil erosion may in and of themselves affect that 'general welfare.' As to the establishment of game refuges there can be little doubt under any circumstance. It is quite possible that these projects for re-forestation and conservation and flood control may seem to affect only streams and lands within the particular state; that they are local only. But that seldom so results. Further, the projects are not to be considered separately but as part of the entire program contemplated by the acts. These activities may well be and are in aid of the 'general welfare' and hence in the 'public interest,' irrespective of the demands of the economic interests of the country. \* \* \* 'The authority to condemn \* \* \* extends to every case in which an officer of the government is authorized to procure real estate for public use.' Hanson Lumber Co. v. United States, 261 U. S. 581, 43 S. Ct. 442, 444, 67 L. Ed. 809.

"Counsel for the State with ability has traced the history of the State relative to the powers reserved to the states in the Confederacy of States, and later under the Federal Constitution. The question here obviously is whether the authority sought to be asserted is within such reserve powers. The answer is found

in the decisions of the Supreme Court that 'the general government is not dependent upon the caprice of individuals, or the will of state legislatures, in the acquisition of such lands as may be required for the full and effective exercise of its powers.' Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525, 530, 5 S. Ct. 995, 998, 29 L. Ed. 264, and other cases hereinbefore cited. The projects in question are necessary for the 'full and effective exercise' of the powers of the United States."

CONCLUSION

It is, therefore, the conclusion of this office that the United States Government may acquire land within the State of Missouri for public use without the consent of this State, by purchase or by exercise of the right of eminent domain, and that acquisition for public use would include reforestation, soil conservation, wildlife conservation, and flood control projects. It is our further opinion that the Federal Government may acquire exclusive legislative jurisdiction over such land only with the consent of the State of Missouri, and that in the absence of such consent, the territory acquired is subject to the general laws of the State of Missouri, so far as they do not interfere with the exercise of governmental functions by the Government of the United States.

Respectfully submitted,

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APPROVED:

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