

# The State of South Carolina



## Office of the Attorney General

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October 16, 1989

The Honorable L. Edward Bennett  
Chairman, Agriculture and Natural  
Resources Committee  
Post Office Box 11867  
Columbia, South Carolina 29211

Dear Representative Bennett:

You have advised that the South Carolina Wildlife and Marine Resources Department has been engaged in the practice of providing to other states wild turkeys that have been captured in this State. For each wild turkey so provided or transferred to another state, the National Wild Turkey Federation makes available certain funds to the Federation's South Carolina chapter. The funds are used within South Carolina by the chapter to support various wild turkey projects. You have inquired as to the legality of the use of state funded personnel to capture these birds. It is our understanding that there has been a general agreement that the cost of baiting, trapping and transporting wild turkeys averages somewhere around \$500.00 per bird. The Honorable Robert J. Sheheen, Speaker of the House of Representatives, has also expressed his interest in this question.

An opinion of this Office dated September 21, 1989, concluded that Section 50-11-400 (4) of the South Carolina Code of Laws (1976), which prohibits various acts related to buying or selling wild turkeys, was not violated by such a transfer of wild turkeys to another state. As noted therein, this State, through its state agency, receives no remuneration whatsoever for the transfer of the wild turkeys to other states, and therefore no sale has occurred. However, since the remuneration which is provided by the National Wild Turkey Federation to its South Carolina chapter appears to be going to a private fund for the use of a private organization, you have questioned this practice since state resources are used initially to capture the wild turkeys for the transfer for other states. On its face, it would appear that public resources are being used to benefit a private organization; further research indicates that such is not the case.

Article X, Section 5 of the State Constitution requires that taxes (public funds) be spent for public purposes. While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described in Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975):

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As a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents, or at least a substantial part thereof. Legislation [i.e., relative to expenditure of funds] does not have to benefit all of the people in order to serve a public purpose.

...

Id., 265 S.C. at 162. If only a negligible advantage results to the general public, such is not sufficient to bring an expenditure within the ambit of "public purpose."

Additionally, Article X, Section 11 of the State Constitution prohibits the pledging of the State's credit "for the benefit of any individual, company, association [or] corporation ... ." This provision has been construed to prohibit the expenditure of public funds "for the primary benefit of private parties." State ex rel. McLeod v. Riley, 276 S.C. 323, 329-30, 278 S.E.2d 612 (1981). Courts in other jurisdictions have permitted appropriations to private entities which use those funds to perform a proper "function for the state." Dickman v. Defenbacher, 128 N.E.2d 59 (Ohio 1955); Bedford County Hospital v. Browning, 225 S.W.2d 41 (Tenn. 1949); People v. Green, 47 N.E.2d 465 (Ill. 1943); Hager v. Kentucky Childrens Home Society, 83 S.W.2d 605 (Ky. 1904). In such cases, the direct appropriation of public funds to these private entities is, in effect, an exchange of value which results in the performance by those entities of a public function for the state. See, Op. Atty. Gen. dated November 16, 1983.

Considering the foregoing constitutional provisions, we note that recreation is an appropriate function of the state or a political subdivision. See, for examples, Section 5-7-30 and 4-9-30 (5) of the Code; Ops. Atty. Gen. dated March 16, 1988; February 2, 1988; June 10, 1955; April 2, 1987; and January 21, 1985, among others. Thus, public funds may ordinarily be expended for recreation purposes. Hunting, including hunting wild turkeys, and other outdoor activities conducted in areas inhabited by wild turkeys (i.e., hiking or bird- or game-watching) would be considered to be within the recreation function.

There is a memorandum of understanding between the South Carolina Wildlife and Marine Resources Commission ("Commission") and the National Wild Turkey Federation ("Federation") which sets forth the activities of each party relative to approval of the wild turkey projects, which are designed to maintain and increase wild turkey

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populations for the best interest of the people of South Carolina. The memorandum is to insure that the Commission is fully informed and has approved of all wild turkey projects and the expenditure of the Wild Turkey Super Fund therefor. <sup>1/</sup> Other documents enclosed with your letter indicate that funds will be used for wild turkey management, research, and restoration projects. Such projects would undoubtedly be designed to enhance the wild turkey population and its environment within this State, and further are of the nature that the South Carolina Wildlife and Marine Resources Department, as a state agency, would be empowered to do. See, for examples, Sections 50-11-500 et seq. of the Code (1988 Cum. Supp.). There is no indication in materials provided to this Office that any remuneration from the National Wild Turkey Federation to its South Carolina chapter inures to the benefit of any individual or group; instead, it inures to the benefit of the State of South Carolina and its citizens. The entire program is closely analogous to a situation involving an appropriation of public funds to a private entity which performs a public function.

For these reasons, it is the conclusion of this Office that the wild turkey transfer project as described above, with remuneration provided by the National Wild Turkey Federation to its South Carolina chapter for the benefit of the State of South Carolina and its citizens, would be a legal operation, meeting the requirements of expending tax funds for a public purpose, without pledging the credit of the State for the benefit of a private entity.

Of course, while we conclude that the above-referenced program is legal, it would be a matter of policy to be determined by the State Wildlife and Marine Resources Commission, as to whether the State should participate in such a program.

With kindest regards, I am

Sincerely,

*Patricia D. Petway*

Patricia D. Petway  
Assistant Attorney General

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REVIEWED AND APPROVED BY:

*Robert D. Cook*

Robert D. Cook  
Executive Assistant for Opinions

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<sup>1/</sup> A measure of accountability to the Commission is thus established, as is suggested in our opinion dated November 16, 1983, supra, when public funds are appropriated to a private entity which performs a public function.