

## Opinion No. 54-6041

November 22, 1954

**BY:** RICHARD H. ROBINSON, Attorney General

**TO:** Mr. Homer C. Pickens State Game Warden Department of Game and Fish Santa Fe, New Mexico

{\*511} I am in receipt of your letter requesting the opinion of this office concerning the jurisdiction of your department over violations by Indians and within Indian territory.

This office has contacted Mr. William A. Brophy, Field Solicitor for the United States Department of the Interior, and a man whom I am sure you know. Mr. Brophy's qualifications in the field of Indian law are superior, in our opinion, to those of any man in this area and probably superior to any lawyer in the United States. He has devoted a great number of years to work in this field and this office felt an opinion concerning jurisdiction of hunting and fishing on Indian lands would be of value only if Mr. Brophy concurred. With this in mind, Attorney General Robinson and myself contacted Mr. Brophy and solicited his assistance. Mr. Brophy was extremely cordial and was helpful beyond description.

The questions you asked will be answered in the order in which you asked them and are as follows:

1. Q. What jurisdiction does the State of New Mexico have over an Indian hunting or fishing off his own reservation or grant?

A. As a general rule, if there is no treaty or agreement between the United States and the Indian tribe recognizing or granting rights to Indians to hunt and fish outside the Indian country, an Indian hunting or fishing in New Mexico outside the Indian country is subject to the laws of the State of New Mexico the same as any other person. **Trujillo v. Prince**, 42 N.M. 337, 78 P. 2d 145, 151, and **Cohen Handbook of Federal Indian Law**, page 119.

In general, "Indian country" is defined in **18 U.S.C.A., § 1151**. It is possible for a treaty to have been made which could have the effect of making a state law inapplicable to Indians hunting and fishing outside the Indian country. In the event such a treaty provision exists, the cases seem to hold that state law does not apply to Indians hunting and fishing in such off-reservation areas. **U.S. v. Winans**, 198 U.S. 371, 49 L. Ed. 1089; **State v. McClure**, 268 P. 2d 629 (Mont. 1954); and **State v. Arthur**, 261 P. 2d 135 (Idaho 1953).

There appears to be some conflict in the holdings, however, as the Supreme Court of the United States, in the case of **Tulee v. Washington**, 315 U.S. 681, 86 L. Ed. 1115, 1119, while holding that a state could not charge a license fee for Indians hunting and

fishing in off-reservation areas by reason of the treaty, held that a state could regulate the amount of game taken and items of a purely regulatory nature.

The only Indian tribe in the State of New Mexico that has such a treaty appears to be the Navajos. Article 13 of the treaty with the Navajos, June 1, 1868, 15 Stat. 667, II Kappler -- Indian Affairs -- Laws and Treaties, 1015-1019, reads, in part, as follows:

"The tribe herein named . . . agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent {\*512} settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being."

There has been no court interpretation of this section, therefore, we have no method to determine the breadth of it. This section, however, appears to be one which would grant to the Indian tribe designated (the Navajo) the right to hunt, at least, in off-reservation areas.

Therefore, it is the opinion of this office that an Indian may be assessed a license fee and regulated off the reservation for hunting and fishing the same as any other person of the state, except the Navajos must be permitted to hunt free of charge off the reservation. This is by reason of the treaty provision above set out.

2. Q. What jurisdiction does the State of New Mexico have over a non-Indian hunting or fishing on an Indian reservation or grant, or over an Indian hunting or fishing over an Indian reservation or grant not his own?

A. The Supreme Court of the United States, in the case of **Draper v. U. S.**, 164 U.S. 240, 41 L. Ed. 419, held that where Indian transactions are not involved, the Indian country is generally considered to be a portion of the state within which it is located.

The New Mexico Supreme Court, in the case of **Tenorio v. Tenorio**, 44 N.M. 89, 98 P. 2d 838, expressly held that "unquestionably the lands of the Pueblo Indians in New Mexico are to be considered 'territorially' a part of the territory (now state) of New Mexico." The court expressed some doubt as to whether or not treaty reservations were a part of the State of New Mexico, but Mr. Brophy indicates that he is firmly convinced the reservations are a part of the State of New Mexico so far as non-Indian transactions are concerned.

Paragraph 2 of Article 21 of the Constitution of the United States provides that until the title of Indians shall have been extinguished, the lands shall be under the absolute jurisdiction and control of the Congress of the United States, but this clearly does not deprive the state of jurisdiction over offenses committed by a non-Indian against a non-Indian in Indian country, nor does it prevent the enforcement of the game laws against non-Indians in the Indian country.

There is an apparent prohibition against persons hunting on Indian lands who are non-Indians. I call your attention to 25 U.S.C.A., § 216, which reads as follows:

"Every person, other than an Indian, who, within the limits of any tribe with whom the United States has existing treaties, hunts, or traps, or takes and destroys any peltries or game, except for subsistence in the Indian country, shall forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and all peltries so taken, and shall be liable in addition to a penalty of \$ 500. (R.S. No. 2137.)".

There has never been a prosecution under this section in New Mexico so far as Mr. Brophy is aware, and the last four or five United States District Attorneys have declined to prosecute expressly under this provision where the person detected hunting on the Indian lands had permission from the Indian tribe to hunt.

{\*513} An Indian hunting or fishing on a reservation not his own is still an Indian in Indian country and is exempt from the game laws of the state. This can easily be seen by the cases cited in answer to question 1, and also upon reading Article 21, Section 2 of the Constitution of the United States.

Therefore, it is the opinion of this office that the State of New Mexico has jurisdiction to prosecute non-Indians violating the hunting and fishing laws of this State even though such violation occurs on an Indian reservation where the person violating the same is not an Indian.

3. Q. What jurisdiction does the State of New Mexico have over hides, skins, pelts, heads, and game animals, birds, or fish, or parts thereof, taken on an Indian reservation or grant and then transported without the Indian reservation or grant?

A. For the most part, question No. 3 has been answered in questions 1 and 2. If the pelts, hides, skins, heads, game animals, birds, or fish were taken by an Indian on an Indian reservation, he or his transferees would have a lawful right to transport them inside and outside the state in the absence of some Federal law to the contrary. **Pioneer Packing Co. v. Winslow**, 294 P. 557 (Wash. 1930). In that case, steelhead salmon were lawfully taken by Indians on an Indian reservation, boxed and iced and brought outside the reservation to be shipped outside the state. The fish were seized by the game commissioner because at the time of the seizure under the laws of the State of Washington it was unlawful to have steelhead salmon in one's possession for the purpose of shipping them outside of the state. The court held that the Indian who took the fish had the right to sell them to the firm that was shipping the fish and the shipper obtained a rightful possession of the fish and could prevent the state from interfering with the shipment.

The Federal laws that prevent possession of game animals etc. would be applicable to Indians and their transferees, but no state law could affect them.

Therefore, it is the opinion of this office that so far as possession of hides, skins, pelts, heads, and game animals, birds, or fish, or parts thereof, taken by a non-Indian on an Indian reservation, the state would have jurisdiction the same as though taken any where else in the state; but in the case of such items taken by an Indian on an Indian reservation and transported elsewhere, the state would have absolutely no jurisdiction whatsoever.

The questions asked and answered in this opinion are questions of extreme breadth and are extremely difficult questions to answer, principally because this state has very few decisions concerning activities of Indians or activities of persons on Indian reservations who are non-Indians. We have attempted to answer your questions and have in that attempt secured the help of Mr. Brophy. For this, we are greatly indebted to Mr. Brophy.

We sincerely hope that the above answers the questions submitted to us.

By: Fred M. Standley

Assist. Attorney General