

Opinion No. 61-95

October 3, 1961

BY: OPINION OF EARL E. HARTLEY, Attorney General L. D. Harris, Assistant Attorney General

TO: Mr. Fred White, Assistant District Attorney, 112 N. Behrend, Farmington, New Mexico

QUESTION

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Does Attorney General Opinion 58-213, providing that a sheriff of New Mexico does not have the right to serve civil process on an Indian on the Navajo reservation, also apply with the same force and effect to allotted Indian land as far as service of process and also execution?

CONCLUSION

See analysis.

OPINION

ANALYSIS

Basically, Attorney General Opn. 58-213 would be applicable to allotted land and a sheriff of New Mexico could not serve process or levy execution on this land. However, the exact action the sheriff can take would seem to be determined by the applicable section of the United States Code Annotated, being 25 U.S.C.A., §§ 348 and 349.

The authority for allotment of Indian lands is contained in 12 U.S.C.A. 331, et seq., and it would appear unnecessary to quote from this section.

12 U.S.C.A. 348 provides:

"Upon the approval of the allotments provided for in Sections 331 to 334, inclusive, and 336 by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of legal effect, and declare that the United States does and will hold the lands thus allotted, for the period of 25 years, **in trust** for the sole use and benefit of the Indian to whom such allotment shall have been made. * * * and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, **in fee**, discharged of said trust and free of all charge or encumbrance whatever. * * *" (Emphasis added)

12 U.S.C.A. 349 states:

"At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in Section 348, then each and **every allottee shall have the benefit of and be subject to the laws, both civil and criminal of the state or territory in which they reside;** * * * provided further, that until issuance of fee simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States; * * *". (Emphasis added)

It is apparent that it must be determined whether or not the allottee has a patent in fee, and if the allottee does, it is the opinion of this office that the sheriff could serve civil process, execute, or any other action provided for by the laws of New Mexico applicable to any citizen of this State.

In **State v. Begay**, 63 N.M. 409 (1958), cert. den., 1958, the Supreme Court of New Mexico held that

"The state of New Mexico lacked jurisdiction over Indian lands within the state until and unless the title of the Indian or Indian tribes shall have been extinguished. Until such extinguishment of title, the lands involved are subject to the absolute jurisdiction and control of the Congress of the United States." P. 412

It is our opinion, in line with the holding of the Supreme Court of New Mexico, that until a patent in fee is given the allottee that the state courts and any officers thereof lack requisite jurisdiction for the valid service of process.

Reviewing your question, so long as the allottee has possession of the land, with the United States holding it in trust for him, Attorney General's Opinion 58-213 applies. Referring to 12 U.S.C.A. 349, we find it is spelled out that the allottees shall be subject to the exclusive jurisdiction of the United States until the issuance of a fee simple patent. If the allottee has received a patent in fee, he would be subject to the laws, both civil and criminal, of the State of New Mexico as provided in 12 U.S.C.A. 349.

We are forwarding a copy of Attorney General Opinion 58-213 for your consideration.