

Opinion No. 65-221

November 9, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Oliver E. Payne, Deputy Attorney General

TO: Mr. George D. Amaya, State Senator, P.O. Box 70, Gallup, New Mexico

QUESTION

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1. Under the Assimilative Crimes Act, would there be a conflict between the Federal and State laws on gambling if carried on in Indian country and gambling is illegal in the State?
2. If Federal law is silent on gambling and State law prohibits gambling, and such gambling is carried on in Indian country by Indians, is such gambling illegal and, if so, which court has jurisdiction over the offense?
3. Would the answer to question 2 be the same if the gambling operation was conducted in Indian country by non-Indians?
4. If the Federal law does not prohibit the gambling operation, and the State law does, what is the result if the tribal law is (a) silent on the subject (b) prohibits the operation (c) specifically allows the operation?
5. If the tribe grants to a non-Indian the right to conduct a gambling operation in Indian country, is the tribe bound by the agreement?
6. Do the answers to the above questions differ for Pueblo as distinguished from tribal Indians?
7. Can the State seize gambling devices being transported across lands under State jurisdiction to Indian country?

CONCLUSIONS

1. No.
2. It is illegal and the Federal courts have jurisdiction unless the Indian has been punished under tribal law.
3. The gambling is illegal but jurisdiction is in the State courts.

4. What the tribal law provides is immaterial unless the Indian has been punished for the offense under tribal law. If he has not been so punished, the Federal courts have jurisdiction over the offense.

5. No.

6. No.

7. Yes.

OPINION

{*360} ANALYSIS

Section 1152 of the Federal Criminal Code (18 U.S.C. 1152) extends the general laws of the United States to "Indian Country", except in the following situations: offenses committed by an Indian against the person or property of another Indian, offenses of Indians in the Indian country which have been punished under tribal law, and to any case, where by treaty stipulation, the exclusive jurisdiction over such offenses is secured to the Indian tribe. **Federal Indian Law**, United States Department of the Interior (1958).

The Assimilative Crimes Act (18 U.S.C. 513) has been held by the United States Supreme Court to be a general law and thus applicable to Indian country. **Williams v. United States**, 327 U.S. {*361} 711, 66 S. Ct. 778, 90 L. Ed. 962. The effect of the Assimilative Crimes Act is to incorporate the criminal laws of the several states into the laws of the United States so that violations will be prosecuted in the Federal courts as Federal offenses.

Congress defined "Indian Country" in 1948, 18 U.S.C. 1151. It includes all land within the limits of an Indian reservation under the jurisdiction of the United States, notwithstanding the issuance of any patent, and it includes rights-of-way running through the reservation. **Hilderbrand v. Taylor**, 327 F.2d 205.

The 1950 case of **United States v. Sosseur**, 181 F.2d 873 dealt with the subject matter of your question No. 1. An Indian was convicted in the District Court of the Western District of Wisconsin of operating slot machines on an Indian reservation located within the territorial boundaries of Wisconsin and he appealed.

The defendant had been granted a license by the Tribal Council to "place on Indian lands . . . any type of coin operated device licensed or taxed by the United States Government . . ." and in accordance with that license he had paid a federal tax of \$ 100 each on nine gambling devices. The court stated, "Of course, the payment of the federal tax was not a license to operate the machine", citing **Wainer v. United States**, 299 U.S. 92, 57 S. Ct. 79, 81 L. Ed. 58.

The court pointed out that gambling and the operation of gambling devices have not been declared offenses under federal law, and thus, under the Assimilative Crimes Act, the laws of Wisconsin were applicable with jurisdiction in the Federal courts to try an Indian charged with the offense.

In closing the court noted that the defendant Indian furnished the means by which non-Indians were enabled and induced to violate Wisconsin law, stating: "And while the actual acts here alleged to constitute a violation of the law were committed by an Indian on a reservation and hence were not in the jurisdiction of the State . . . the impact of those acts was on non-Indians as well as Indians, and they tended to undermine the enforcement by the State of its own laws. We think these circumstances rendered application of the Assimilative Crimes Act appropriate."

We have the same situation here since our Criminal Code makes gambling illegal. Section 40A-19-1, et seq., N.M.S.A., 1953 Compilation. The answer to your first question is no.

Question No. 2 is actually answered above. Unless the Indian conducting the gambling has **already been punished** by the tribal court, exclusive jurisdiction over the offense rests with the Federal courts. **United States v. Sosseur**, supra, 18 U.S.C. 1152.

The answer to your third question is no. It poses a situation where a non-Indian is conducting a gambling operation in Indian Country. In **Montoya v. Bolack**, 70 N.M. 196, 372 P. 2d 387 our Supreme Court stated as follows:

"There is not and never has been what might be termed 'exclusive federal authority' over Indian lands, merely because the lands are within an Indian reservation."

The Court elaborated more fully on this principle in the case of **State v. Warner**, 71 N.M. 418, 379 P. 2d 66. It was there pointed out that by congressional act (67 Stat. 590) states were granted "the right to assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility." After noting that New Mexico has not yet chosen to do so, the Court said that nonetheless the state courts "have jurisdiction over criminal offenses committed on an Indian reservation within {362} this state, by non-Indians, which are not against an Indian nor involving Indian property." Simply because the conducting of the gambling operation takes place on Indian land, it does not involve Indian property in the sense the phrase was used in **State v. Warner**, supra. The offense which would be charged would be gambling or the conducting of a gambling operation and thus it is not an offense against the person allowed to gamble so it is not an offense **against** an Indian by the non-Indian conducting the gambling operation. Accordingly, the state courts would have jurisdiction over the non-Indian charged with conducting a gambling operation.

Question no. 4 has been answered earlier. Unless the Indian has been punished for the offense under the Assimilative Crimes Act he is to be charged and tried in the Federal courts for the offense of gambling notwithstanding what the tribal laws may be.

If the tribe granted permission to a non-Indian to conduct a gambling operation on the Indian reservation, it could not be bound by such an agreement. It is an illegal contract and is unenforceable.

The same answers do apply to the Pueblo Indians. Their status has changed considerably since territorial days. The New Mexico Enabling Act contained a specific provision that "the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them." Act of June 20, 1910, 36 Stat. 557.

The constitutionality of this extension of Federal control over the Pueblos was upheld in the case of **United States v. Sandoval**, 231 U.S. 28. The Supreme Court held that Congress had expressed a clear intent to reverse the rule laid down by the territorial court in **United States v. Mares**, 14 N.M. 1, 88 Pac. 1128.

As the authors of **Federal Indian Law**, supra state:

"The development of plenary Federal control over the pueblos of New Mexico, inaugurated in the Enabling Act, confirmed in the Sandoval case, and carried into effect by the Pueblo Lands Act and supplementary statutes, characterizes congressional legislation, judicial decisions, and administrative policies in the period from 1910 to the present."

Thus for purposes of the questions posed in your request the Pueblos occupy the same status as reservation Indians.

The state could seize gambling devices being transported across lands under state jurisdiction to Indian country. Sections 40A-19-5 and 40A-19-10, N.M.S.A., 1953 Compilation.

Answers to the other questions presented in your request are unnecessary in view of our conclusions set forth herein.