

Opinion No. 31-18

January 21, 1931

BY: Frank H. Patton, Asst. Att'y General

TO: Hon. A. P. Hill, Asst. Comptroller, Santa Fe, New Mexico.

{*25} In your letter of January 17th, inquiring first, as to whether or not operations of a second hand car depot should be required to pay the license fee provided in section 60-202, of New Mexico Statutes Annotated, 1929 Compilation, you state that the operation of gasoline pumps is merely for the purpose of filling used cars purchased by such depot. We assume that no gasoline is sold from such pumps or other containers.

{*26} The Statute in paragraph 60-201 defines distributors and retailers of gasoline under this section. A distributor is one engaged in the business of selling gasoline and motor fuel in this state, from refineries, tank farm, tank cars, receiving tanks or stations or in or from tanks, barrels, drums or other containers in quantities exceeding 56 gallons in any one sale or delivery, except persons engaged in selling exclusively in interstate commerce. A retailer is one other than a distributor who sells the above mentioned products in this state in amounts less than 56 gallons.

Under these provisions it is our opinion that one who uses and keeps gasoline in a pump or other container for private purposes and not for sale is neither a distributor or retailer and would, therefore, not be required to pay the annual license tax.

The second portion of your letter inquires as to whether or not you can collect the license tax from persons handling gasoline from pumps or other containers which are located upon Indian Reservations.

This presents an involved and difficult question and were it not for the fact that this office has previously rendered two opinions on this subject it would require a lengthy discussion.

In Opinion No. 879 of April 20, 1912, the late Frank W. Clancy when Attorney General of New Mexico confessed his inability to arrive at a satisfactory conclusion and suggested that a test case be made and settled by Judicial decision.

On July 31, 1929, this office rendered a lengthy opinion to the Comptroller, Gasoline Tax Dept., construing numerous provisions (Page 62) of the law upon this question.

The substance of these opinions are that the Statute requiring these taxes for distributors and retailers of gasoline is not enforceable in so far as it applies to such persons who are located upon Indian land.

The State Court is without jurisdiction and, no doubt, the Federal Court is also without jurisdiction because of the fact that the Statute is not a Federal Act.

Due to this general rule of law and to the further fact that the constitution of New Mexico, Article 21, Section 2 provides in part, that until title of such Indian or Indian tribes shall have been extinguished, the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States. It is therefore the opinion of this office that in so far as the Act applies to those located upon Indian Reservation and doing business as distributors and retailers that the license tax cannot legally be collected and that the Act is not enforceable in such cases.