

Opinion No. 44-4624

December 14, 1944

BY: C. C. McCULLOH, Attorney General

TO: Mr. Elliott S. Barker, State Game Warden, Santa Fe, New Mexico

In your letter received December 14, 1944, you refer to Section 43-234 of the New Mexico 1941 Compilation and inquire whether this section is applicable to the consul of a foreign government located in this state who desires to hunt in accordance with the law in this state. Section 43-234 provides as follows:

"It shall be unlawful for any unnaturalized, foreign born resident of New Mexico, or of adjoining states, to hunt for, capture, kill or wound any wild bird or game animal within this state; and to that end it shall be unlawful for any unnaturalized, foreign born resident of New Mexico, or of the adjoining states, to use or have in his possession, or under control within this state, any shotgun or rifle of any kind.

"For the purposes of this act (Sections 43-234 -- 43-239) any unnaturalized, foreign born person who shall reside or live in this state, or in any of the adjoining states, for five (5) consecutive days. shall be considered a resident and be liable to the penalties imposed for violation of the provisions of this act (Sections 43-234 -- 43-239)."

In my opinion, this section is applicable to all persons who are not citizens of the United States. However, the penalty provided by law for violation of this section could not be enforced in the state courts because of the official status of the consul. Section 371, Title 28, U.S.C.A. provides in part as follows:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states: Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls."

This federal law has been construed by the courts of the State of New York in *People vs. Savitch*, 190 N. Y. Supp. 759, 116 Misc.. Reports, 303 and again in *Savie vs. City of New York*, 196 N. Y. Supp. 442 in which case the court used this language:

"Consuls are accepted and expelled by the federal government, and not by the state government, and therefore, while lawfully acting and representing the sovereignty from which they received their appointment, they are very properly made subject to prosecution only in the federal courts."

The question might arise whether the consul involved could lawfully hunt in this state. Section 43-301 of the New Mexico 1941 Compilation, sub-sections 7 and 8 provide as follows:

"(7) Any citizen of the United States, not a bona fide resident of this state, shall be entitled to procure a non-resident hunting or fishing license.

"(8) Any person not a citizen of the United States shall be entitled to procure a resident fishing license if he has lived in this state for the six months immediately preceding application, or, if not, such resident, he may procure a non-resident fishing license."

Under this language it is seen that the State Game Department is not authorized to issue a hunting license to a person who is not a citizen of the United States, and if the consul violates the provisions of the state law, it is true he would be immune from prosecution in the state courts. However, the offense might be sufficient grounds for the federal government to request his government to recall him as such official representative.