

DARRELL F. SMITH, THE ATTORNEY GENERAL
STATE CAPITOL
PHOENIX, ARIZONA
July 15, 1966

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DEPARTMENT OF LAW OPINION NO. 66-1

REQUESTED BY: WENDELL G. SWANK, DIRECTOR
Arizona Game and Fish Department

- QUESTIONS:
1. Do title 17, A.R.S. and lawful regulations of the Arizona Game and Fish Commission apply on the Navajo Indian Reservation to all persons who are not members of the Navajo Tribe?
 2. Do officers of the Arizona Game and Fish Department have authority to enter the Navajo Reservation and enforce State law and regulations pertaining to hunting and fishing (Navajo tribal members excluded)?

- ANSWERS:
1. Yes
 2. Yes

The relevant powers and duties of the Arizona Game and Fish Commission are set forth in A.R.S. 17-231:

"A. The commission shall:

1. Make rules and regulations and establish services it deems necessary to carry out the provisions and purposes of this title.
2. Establish broad policies and long range programs for the management, preservation and harvest of wildlife.
3. Establish hunting and fishing regulations and prescribe the manner and methods which may be used in taking wildlife.
4. Be responsible for the enforcement of laws for the protection of wildlife." (Emphasis added)

A.R.S. § 17-201 obligates the State Game and Fish Department to enforce the state law as it relates to wildlife:

"A. The laws of the state relating to wildlife

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shall be administered by the game and fish department. Control of the department is vested in the game and fish commission. . . ."

The duties of the commissioner, rangers, and wildlife managers are enunciated in A.R.S. § 17-211(E) which provides:

"1. Execute all warrants issued for a violation of this title.

2. Execute subpoenas issued in any matter arising under this title.

3. Search without warrant any aircraft, boat, vehicle, box, game bag or other package where there is sufficient cause to believe that wildlife or parts thereof is possessed in violation of law.

4. Inspect all wildlife taken or transported and seize all wildlife taken or possessed in violation of law, or showing evidence of illegal taking.

5. Seize as evidence devices used illegally in taking wildlife and hold them subject to provisions of § 17-240.

6. Generally exercise the powers of peace officers with primary duties the enforcement of this title.

7. Seize devices that cannot be lawfully used for the taking of wildlife and are being so used and hold and dispose of same pursuant to § 17-240. Laws 1958, Ch. 80, § 2, as amended Laws 1962, Ch. 98, § 23."

The United States Supreme Court has, on several occasions, considered the applicability of state penal statutes

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to acts by and between non-Indian occurring upon Indian lands and reservations. In United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869 (1881), that court held that in the absence of Congressional legislation or of treaty to the contrary, the State courts of Colorado rather than the Federal courts, had jurisdiction over the crime of murder occurring on an Indian reservation by a non-Indian against a non-Indian.

Subsequently, in Draper v. United States, 164 U.S. 240, 17 S.Ct. 107, the court considered a similar factual situation wherein the Enabling Act of Montana contained the following provision:

"And said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States."

The court found that such reservation,

". . . was not intended to deprive that state of power to punish for crimes committed on a reservation or Indian lands by other than Indians or against Indians." p. 109.

In more recent times, it was said in People v. Martin, 326 U.S. 496, 499, 66 S.Ct. 307 (1946):

"For that case (U.S. v. McBratney) and others which followed it all held that in the absence of a limiting treaty obligation or congressional enactment, each state had a right to exercise jurisdiction over Indian reservations within its boundaries." (Emphasis supplied.)
See also United States v. McGowan, 302

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U.S. 535, 58 S.Ct. 286; Williams v. Lee,
358 U.S. 217, 79 S.Ct. 269.

Our state courts have also had occasion to consider Arizona's jurisdiction over Indian reservations. After citing the McBratney decision at length, this proposition of law was expounded in Porter v. Hall, 34 Ariz. 308, 321, 271 Pac. 411:

"We have no hesitancy in holding, therefore, that all Indian reservations in Arizona are within the political and governmental, as well as geographical boundaries of the state, and that the exception set forth in our Enabling Act applies to the Indian lands considered as property, and not as a territorial area withdrawn from the sovereignty of the State of Arizona."

The provision in our Enabling Act referred to above is quite similar to that considered in Draper v. United States, supra.

Having established Indian reservations as being within the geographical and political limits of the State of Arizona, consideration was then given to the power of our state to control and preserve wildlife within its boundaries.

"Under the common law, the title to game animals and fish was held to be in the state for the use and benefit of its citizens, and the killing or taking and use of such game was subject to governmental control and regulation in the interest of the common good. These principles passed to America with the rest of the common law of England and, except as changed by statute or contrary to

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our customs or conditions, are the law of Arizona. Section 3043, Rev. Code 1928. The legislature of Arizona may, therefore, make such provision as it thinks proper for the preservation and conservation of the game animals and fish of the state, by regulating the taking or killing and use of any and all kinds of game, in any part of the state, and during any period, and upon any reasonable terms, so long as such regulation does not deny due process of law and the equal protection of law guaranteed to all persons by the state and federal constitutions." (Emphasis supplied.) Begay v. Sawtelle, 53 Ariz. 304, 306, 88 P.2d 999.¹

The federal statute applicable to hunting and fishing upon Indian reservations, U.S.C.A. 18 § 1165, provides as follows:

"Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United

¹This opinion cannot be read as including Indians on an Indian reservation within the jurisdiction of the State Fish and Game Commission. See, for example, Williams v. United States, 321 U.S. 711, 66 S.Ct. 778, and Donnelly v. United States, 228 U.S. 243.

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States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than [sic] \$200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited. Added Pub.L. 86-634, § 2, July 12, 1960, 74 Stat. 469." (Emphasis supplied.)

The underlined portion of the quoted statute indicates its inapplicability to state officers seeking to enforce the wildlife laws of Arizona. Furthermore, U.S.C.A. 18 § 1165 is based on U.S.C.A. 25 § 216, originally enacted June 30, 1834, Cl61 § 18, 4 Stat. 730, providing:

"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."

This statute was repealed June 25, 1948, c 645, § 21, 62 Stat. 862. The changes Congress made in enacting U.S.C.A. 18 § 1165 and repealing 25 § 216 indicate legislative intention. By including the words "without lawful authority," Congress clearly granted the several states the right to have peace officers, having lawful authority, enter Indian lands and

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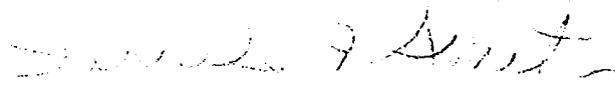
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reservations to insure compliance with state laws by non-Indians therein. That such lawful authority exists there can be no doubt. A.R.S. 17 § 201, 17 § 211, 17 §231; People v. Martin, 326 U.S. 496, 66 S.Ct. 307; Begay v. Sawtelle, 53 Ariz. 304, 88 P.2d 999.

It is the opinion of this office that Title 17 A.R.S. and lawful regulations of the Fish and Game Commission apply on the Navajo Reservation to all persons other than members of the Navajo tribe.

It is further the opinion of this office that the enforcement officers of the Fish and Game Department have lawful authority to enter Indian Reservations for the purpose of enforcement of state laws applied to non-Indians. Such non-Indians are still required to comply with U.S.C.A. 18 § 1165, i.e., obtain permission, by permit or otherwise, to hunt or fish on Indian reservations.

Respectfully submitted,


DARRELL F. SMITH
The Attorney General

DFS:mr

NOTE: See also ex parte Crosby, 149 Pac. 989 (1915).