

Opinion No. 48-5176

October 29, 1948

BY: C. C. McCULLOH, Attorney General

TO: Marcelino P. Gutierrez District Attorney Santa Fe, New Mexico

{*171} In your letter of October 28, 1948 you requested the opinion of this office upon several matters in connection with the forthcoming election.

You state that it has been the practice of the various county clerks to deposit all election supplies, including ballots, in the ballot boxes for distribution to the precinct election officials on election day. You say that the size of the ballot to be used in this General Election makes such a practice impossible, and ask whether or not it is permissible for the County Clerks to deliver the ballots, both official and sample, to the proper election officials, in the sealed packages which have been delivered to the county clerks by the printers, without depositing same in the ballot boxes.

Section 56-324 NMSA, 1941 Compilation, insofar as is material, provides as follows:

"It shall be the duty of the county clerk to deliver or arrange for the delivery by messenger, or otherwise, as provided in the Election Code, to the judges of election, designated to receive the same, in each of the several precincts and election districts, the following supplies for election purposes:

"(a) One (1) metal ballot box, and where there are counting judges, an additional metal ballot box, with their respective padlocks and keys . . .

(f) Official and sample ballots and forms of affidavits used by voters requiring assistance . . ."

Section 56-309 NMSA, 1941 Compilation, provides in part as follows:

"The county clerk of each county shall provide for each precinct and election district in the county a number of ballots equal to ten (10) percent in excess of the total number of names of electors legally registered as shown by the registration books as finally completed. Where the number of registrants is less than one hundred (100), at least ten (10) additional ballots in excess of the number of registrants shall be so forwarded. The county clerk shall cause these certificates {*172} and supplies to be delivered to the judges of election before the opening of the polls . . ."

Nowhere in these sections is there to be found any requirement that the County Clerk must place the ballots in the ballot boxes for delivery to the judges of election in the various election districts. Such a practice is commendable, for all election supplies are then together and not easily lost. When such is not possible, however, it is my opinion

that delivery of the ballots in the manner proposed by you complies with the law, for the only requirement imposed upon the county clerk is that he deliver the election supplies to the proper persons before the opening of the polls.

You further state that in various counties, large numbers of voters will likely need assistance and you ask whether it would be permissible for the election officials to form a double line of voters so that those voters not needing assistance would not be forced to wait for those who do need such assistance to mark their ballot.

Section 56-313 NMSA, 1941 Compilation, provides for the method of voting, as follows:

"When **an elector** presents himself at the polls to vote, such voter shall announce his name in an audible tone. The election officials shall thereupon ascertain whether **such elector** is registered. For such purpose, each of the duly qualified election officials, or the official challenger of each of the two (2) dominant political parties, shall have the right at all times to inspect the registration book. A challenge may be interposed by an election judge, clerk, or by the party challenger permitted within the polling place . . ."

Section 56-319, paragraph 9 NMSA, 1947 Supplement, relating to instructions to election officials provides:

"When **an elector** presents himself to vote, require the voter to announce his name so that all of the **election officers** may hear such name. Thereupon the **judges of election** shall ascertain from the original affidavits of registration whether such elector is registered. If registered, one judge of election shall announce the name of the voter as such name is registered. **Each** of the poll clerks shall enter such name as it appears on the registration book, in the poll book, with the street address of the voter, where possible. **Each** of the election clerks shall keep one poll book and shall observe that the other clerk enters the name of each voter as it is on the registration book, . . .

Thereupon the **judges** of election shall insert . . . the number of the ballot of such voter."

It is the sense of the preceding sections that voters shall present themselves before **all** of the election officials, one voter at a time. It would be impossible for the election officials to determine whether two voters appearing simultaneously were both qualified, since all judges must hear the name of the voter, and since all of them have the right to examine the registration book to determine whether the voter is registered. Further, each poll clerk must enter the name of the voter in his respective poll book. Also, Section 56-313 imposes upon the poll clerks the duty of assisting those voters who require assistance. While rendering such assistance, no further action could be taken by the remainder of the election officials since the poll clerks must be present to write in the names. We therefore conclude that two lines of voters would be improper since the officials must process each elector separately.

You further inquire whether or not the Sheriffs of San Juan and McKinley Counties may post deputies at the polling places located on the Indian Reservation to maintain proper order during the election.

{*173} Section 15-3802 of the 1941 Compilation provides that "The sheriff shall be the conservator of peace within his county . . .", and he or his deputies would have full right to be in the polling places, subject to the restrictions in Section 56-528 of the 1941 Compilation, which provides:

"No sheriff, deputy sheriff, constable, marshal, deputy marshal, policeman, state policeman, motor patrolman, or peace officer shall during the conduct of any election, enter any election booth nor shall any such official in any polling place give or offer to give any advice, counsel, aid or assistance of any kind to any official or voter therein, except to assist in preserving the peace when requested so to do by any election official and where occasion for such assistance is apparent . . ."

Such would be the situation in polling places off of the Indian reservation. The general rule with respect to jurisdiction of states within the Indian reservation is set forth in 42 C.J.S., Indians, Section 79 b., as follows:

"Under the statutes it is generally held that the federal courts have jurisdiction over crimes committed within Indian country or reservations **by or against Indians**, and that such jurisdiction is exclusive of that of state courts."

Further, in Subsection c. of the above cited, it is said:

"In the absence of contrary reservation of power by treaty or statute, it is a general rule that state courts have jurisdiction to prosecute non-Indians for crimes committed within Indian country or reservations where the crime does not involve an Indian victim."

Certain reservations of power were made in our Enabling Act, which is also Article 21, Section 2 of the Constitution of New Mexico, as follows:

"The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; **and that until the 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;** . . ."

This reservation apparently is not sufficient to bring the Indian land in New Mexico within the exclusive criminal jurisdiction of the Federal Government. In 27 Am. Jur., Indians. Section 51, it is said:

"It has been ruled that a clause in an enabling act merely providing that 'Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States' does not deprive the state courts of such exclusive jurisdiction over crimes on Indian reservations not committed by or against Indians."

Such was the rule of the Supreme Court of the United States in *Draper v. U. S.*, 164 U.S. 240, 17 S. Ct. 107. In that case, one negro killed another negro on the Crow reservation in the State of Montana. The defendant was tried and convicted of murder in the United States Circuit Court of Montana. In construing an Enabling Act identical with that of New Mexico, the court held that the Federal Court had no jurisdiction, and ordered the defendant turned over to state authorities.

Therefore, it would seem that in {*174} New Mexico, the state has jurisdiction over crimes committed by non-Indians against non-Indians, but not over any crimes where an Indian is involved, and that peace officers of the State of New Mexico may be stationed at the polling places to preserve order, providing that they do not attempt to exercise criminal jurisdiction over incidents where Indians are involved, **either** as the law violator or the victim.

In this connection, I wish to call your attention to Section 56-501 of the 1941 Compilation which states that it shall be the duty of election officers and peace officers to keep the entrance to the polling place unobstructed and to arrest any person obstructing the same. If the obstructing person were an Indian, serious doubts would arise as to the jurisdiction of any state or county peace officer to arrest such person, in view of the limited jurisdiction of the state upon the reservation.

In your final inquiry you state that some of the poll clerks at the polling places within the Indian reservation are unable to speak the Navajo language, and you ask whether a Navajo interpreter may be used so that the poll clerks will be able to render assistance to the voter.

Section 56-329 of the 1941 Compilation provides in part as follows:

"(2) Any qualified elector who shall declare before the judges of election that he is unable to mark his ballot without assistance because he is unable to read either the English or Spanish language sufficiently well to do so, **shall be assisted in marking his ballot by the two (2) poll clerks, but by no other person or persons.**"

Further, Section 56-319, Paragraph 8 of the 1947 Supplement provides as an instruction to election officials as follows:

the judges and clerks of elecwhile voting is going on, except the judges and clerks of election, one accredited challenger appointed in writing by a county chairman or precinct chairman from each political party represented on the ballot, state police or other peace officers performing official duty, and electors engaged in voting and also

counting judges and clerks where appointed. Watchers at the polls may be appointed by a majority of the county candidates and may be present."

However, these sections did not contemplate electors who spoke languages other than English or Spanish, and to rule that interpreters could not be used would result in a wholesale disenfranchisement of the Navajo electorate. Such a practice is not favored by the courts. See *Gallegos v. Miera*, 28 N.M. 565, 215 Pac. 968, where it was held that in the absence of a statute so providing, mere irregularities in the manner of conducting an election will not destroy the validity of such election, nor the probative value of the ballots cast therein as evidence.

We feel that an interpreter may be used, but suggest that both dominant political parties agree on an interpreter, or that each party furnish an interpreter in order to avoid any question of partisanship and improper influence upon the voter who is unable to speak a language understood by other than the interpreter, and who is unfamiliar with the method of voting.

By W. R. KEGEL,

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