

Opinion No. 65-25

February 9, 1965

BY: OPINION OF BOSTON E. WITT, Attorney General Roy G. Hill, Assistant Attorney General

TO: Edwin O. Wicks, M.D., Dr. P.H., State Health Director Department of Public Health, 408 Galisteo Street, Santa Fe, New Mexico

QUESTION

STATEMENT OF FACTS

For the purpose of this opinion it will be assumed that an installation operated by non-Indians on Indian reservation land leased from the Indians, by polluting the air, is causing a nuisance or danger to the public health or unreasonably impairing the public comfort and convenience outside the Indian land. It is further assumed that there is a properly enacted statute providing that the Department of Public Health promulgate and enforce minimum air pollution regulations with statewide effect. The statute defines air pollution as follows:

" ' air pollution" includes, but is not limited to, the emission of smoke, particulate matter, soot, cinders, ashes, toxic and radioactive substances, fumes, vapors, gases and industrial odors and dusts which constitute a nuisance or danger to the public health, or unreasonably impair the public comfort and convenience."

The assumed statute also provides that the Department of public Health may enforce its regulations by injunction in the district courts.

QUESTION

Under the facts set out above could the Department of Public Health enforce its regulations against the installation located on the reservation land leased from the Indians?

CONCLUSION

Yes.

OPINION

{*44} ANALYSIS

The answer to your question hinges on whether or not the district courts would have jurisdiction to enjoin an activity such as described in the statement of facts. This is

because the activity described is located on Indian reservation land, and when Indians or their reservation lands are involved jurisdiction of state courts can be a problem.

In the situation described above will the non-Indian operation be shielded from state court jurisdiction because of its locations? We think not. It is controlling that the effect of the air pollution is outside the reservation land and caused by non-Indians.

State jurisdiction over Indians and reservation lands has been the subject of several recent United States and New Mexico Supreme court decisions. **Kake Village v. Egan**, 369 U.S. 60, 82 S. Ct. 562, 7L, Ed, 2d 573; **Batchelor v. Charley** No. 7500, New Mexico Supreme Court; **State v. Warner**, 71 N.M. 418, 379 P.2d 66, {*45} **Montoya v. Bolack**, 70 N.M. 196, 372 P.2d 387. Because of **Kake Village v. Egan**, supra, the New Mexico Supreme Court has been able to more clearly define the state's jurisdiction over Indians and their lands.

Article XXI, Sec. 2, Constitution of New Mexico provides as follows:

"[Control of unappropriated or Indian lands -- Taxation of federal government, non-resident, and Indian property] 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 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; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and property are taxed, any lands and other property outside of an Indian reservation, owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress; but all such lands shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe."

In **State v. Begay**, 63 N.M. 409, 320 P.2d 1017 the New Mexico Supreme Court used the following language to describe the effect of the quoted constitutional section:

"The State of New Mexico lacks jurisdiction over Indian lands within the state until and unless the title of the Indian or Indian Tribes shall have been extinguished. Until such extinguishment of title, the lands involved are subject to the absolute jurisdiction and control of the Congress of the United States."

Subsequent to **Begay** the New Mexico Supreme Court decided **Your Foods Stores, Inc. (NSL) v. Village of Espanola**, 68 N.M. 327, 361 P.2d 950. The Court, speaking of Article XXI, Sec. 2, supra, and the terms upon which New Mexico was admitted to the Union observed that New Mexico had no room for a claim to governmental power of the Indians or Indian lands except where such jurisdiction had been specifically granted by Act of Congress or sanctioned by decisions of the United States. In **Montoya v. Bolack**, supra, our Supreme Court presented an extensive review of cases involving Indian jurisdiction in New Mexico, other states and in the United States Supreme Court. The Court noted that the **Begay** decision need not have been placed upon an "exclusive jurisdiction" of the federal government basis since it involved the trial of an Indian for a crime occurring on the reservation. One of the United States Supreme Court cases reviewed in **Montoya v. Bolack**, supra, was **Kake Village v. Egan**, supra, and the following language was quoted from that decision:

"These decisions indicate {*46} that even on reservations state laws may be applied to Indians unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."

The Supreme Court of the United States also made the following remarks regarding the disclaimer portion of the Alaska Statehood Act which is substantially the same as the New Mexico constitutional language quoted above:

"The disclaimer of right and title by the State was a disclaimer of **proprietary rather than governmental interest**. (Emphasis added.)

Following this in the opinion it was stated:

". . . 'Absolute' . . . carried the gloss of its predecessor statutes, meaning undiminished, not exclusive . . ."

After concluding its review our Supreme Court made these important statements:

"From all of the above, it is obvious that the Navajo Indian Reservation is not a completely separate entity existing outside of the political and governmental jurisdiction of the State of New Mexico. The state has some (and, we might say, considerable) jurisdiction, and there is not and never has been what might be termed 'exclusive federal authority.'"

In **State v. Warner**, 71 N.M. 418, 379 P.2d 66 the Supreme Court held that to the extent **State v. Begay**, supra, conflicted with **Your Food Stores, Inc. (NSL) v. Village of Espanola**, supra, and **Montoya v. Bolack**, supra, it was overruled.

Batchelor v. Charley, supra, is the latest New Mexico case involving Indian jurisdiction. The Court in this case reaffirms the position that Art. XXI, Sec. 2 of our Constitution is a disclaimer of proprietary interests only. In addition the Court set forth an additional test

of state court jurisdiction, i.e., whether the state action impinges on the right of reservation Indians to make their own laws and be governed by them.

From the above we can see that we must submit your question to the two tests set out in **Batchelor v. Charley**, supra. Will enforcement of air pollution regulations under the facts set out above have a proprietary effect on Indian lands? Clearly it will not. It will not affect the title or right of possession of the land. It seems just as clear that control of air pollution is a governmental function. Will an enforcement impinge on the right of reservation Indians to make their own laws and be governed by them? Under the facts set out above any action taken will be against a non-Indian; an injunction as suggested will have the effect of causing a non-Indian to stop polluting the air over non-Indian land. This will not violate the right of reservation Indians to make their own laws and be governed by them. Consequently, as noted above, we conclude yes to your question.