Opinion No. 70-05

January 22, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: The Honorable Joseph M. Montoya United States Senator United States Senate Washington, D.C.

QUESTION

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Do the provisions of New Mexico's Air and Water Quality Acts, respectively Sections 12-14-1 through 12-14-13 and 75-39-1 through 75-39-12, N.M.S.A., 1953 Compilation, apply to problems of pollution created by privately-owned industries located on Indian land?

CONCLUSION

Yes.

OPINION

*{*8}* **ANALYSIS**

A similar question was addressed by this office in Attorney General Opinion No. 65-25, issued February 9, 1965. That opinion announced a conclusion identical with this one, but several important court decisions handed down since its issue have greatly clarified the relationship between state and federal responsibilities in the area of Indian affairs.

The fundamental nature of the relationship between state governments and Indian reservations was described more than one hundred years ago. In **Worcester v. Georgia,** 31 U.S. 518 (1832), Chief Justice Marshall declared that Indian reservations possess many of the attributes of sovereignty, and that general application of state laws within reservation boundaries is improper. Though on its face an absolute prohibition against state regulation of reservation matters, the **Worcester** rule yielded to modification and closer analysis when confronted with varying specific problems. When basic facets of tribal life, customs, and self-government were not at issue, the Supreme Court began to alter the **Worcester** doctrine to permit a measure of accommodation between Indian sovereignty and state law. **Langford v. Monteith,** 102 U.S. 145 (1880); **United States v. McBratney,** 104 U.S. 621 (1881); **Utah & N.R. Co. v. Fisher,** 116 U.S. 28 (1885).

Concurrently with these judicial developments, the United States Congress and the New Mexico courts began to explore other specific areas in which state laws could be made

applicable to Indian reservations. In 1929, Congress authorized the states to enforce health and sanitation laws on Indian lands, and to enforce compulsory school attendance by Indian children. 25 U.S.C. **§** 231. Since 1934, federal policy has permitted a gradual assumption by the states of other types of civil and criminal jurisdiction over reservation matters. 18 U.S.C. **§** 1162; 28 U.S.C. **§** 1360. New Mexico courts have determined that while principal jurisdiction over reservation affairs lies with the United States and the Indians themselves, this jurisdiction is not and was never intended to be exclusive. **State v. Begay,** 63 N.M. 409, 320 P.2d 1017 *{*9}* (1958); **Batchelor v. Charley,** 74 N.M. 717, 398 P.2d 49 (1965). In affirming the right of the Indian people of New Mexico to participate in this State's elections, **Montoya v. Bolack,** 70 N.M. 196, 372 P.2d 387 (1962), our Supreme Court emphasized that reservations are not completely separate entities existing outside the political and governmental jurisdiction of the State. In a recent case, the New Mexico Court of Appeals upheld the extension of the State's taxing power to the incomes of Indians living and working on Indian land. **Ghahate v. Bureau of Revenue,** 80 N.M. 98, 451 **P.** 2d 1002 (1969).

The **Batchelor** and **Ghahate** cases, and the decision reached by the United States Supreme Court in **Organized Village of Kake v. Egan,** 369 U.S. 60 (1962) provide excellent analyses of the present limits of state authority over Indian reservations. In reviewing its own decisions on the matter, the Court declared in **Kake:**

"In the latest decision, Williams v. Lee, 358 U.S. 217 (1959) . . . we held that Arizona had no jurisdiction over a civil action brought by a non-Indian against an Indian for the price of goods sold the latter on the Navajo reservation. The applicability of state law, we there said, depends upon 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them,' 358 U.S., at 220. Another recent statement of the governing principle was made in a decision reaffirming the authority of a State to punish crimes committed by non-Indians against non-Indians on reservations: '(I)n the absence of a limiting treaty obligation or Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries,' New York ex rel. Ray v. Martin, 326 U.S. 496 (1946).

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

The two criteria which the courts of this state will employ in assessing the validity of state regulation of reservation affairs appear in the **Ghahate** and **Batchelor** cases, cited above. The first requirement to be met is the compatibility between the operation of the state law and the proprietary rights of the Indians in their lands. In the **Batchelor** case, the New Mexico Supreme Court observed:

"Civil jurisdiction over a suit on a promissory note against an Indian who does not live on a reservation is clearly a governmental and not a proprietary interest, and it follows that Article XXI, Section 2 of the New Mexico Constitution does not deny jurisdiction to the state court under the facts of the instant case."

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"A similar disclaimer clause in the Alaska Statehood Act was construed by the Supreme Court of the United States . . . to be only a disclaimer of proprietary, rather than of governmental interest. We followed the . . . construction . . . in construing our disclaimer clause."

The second criterion in the application of state law is the effect such application would have on tribal self-government. The language of the **Batchelor** decision is again instructive:

"As to matters not within the prohibition of the constitutional provisions supra, the test of state court jurisdiction is whether the state action infringes on the right of **reservation** Indians to make their own laws and be governed by them. Williams v. Lee, 358 U.S. 217 (1959)."

Thus, the application of state antipollution laws to industries located on Indian land is valid, provided that the operation of those laws neither impairs the proprietary interest of the Indian people in their lands nor limits the right of the tribe or pueblo to govern matters of tribal relations. It is clear that the regulation of industrial discharges is not a matter fundamental to tribal relations, and that the state supervision of environment pollution will not limit, in any meaningful manner, the right of the several Indian peoples to govern themselves. Similarly, the extension of pollution controls to *{*10}* industries located on Indian land will not affect the ownership or control of the land, and will at most impose certain limitations on the operation of facilities erected on the land. Since no attempt directly to limit or control land use is contemplated, no interference with Indians' proprietary rights is foreseen.

Since the extension of New Mexico's anti-pollution laws cannot reasonably be said to violate either of the principles heretofore discussed, it is clear that the State of New Mexico may enforce its Air and Water Quality Acts on Indian lands.

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