



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

May 12, 1975

Opinion No. 75- 209

Honorable Robert F. Bennett
Governor
Office of the Governor
State Capitol Building
BUILDING MAIL

Dear Governor Bennett:

You ask for our views concerning the applicability of Kansas fish and game laws to certain circumstances involving the Potawatomie Indians and the regulation of hunting and fishing on the reservation.

Generally, disputes between groups of Indians and state governments concerning fish and game regulations can be divided into three categories: (1) the regulation of Indian hunting and fishing on the reservation; (2) the regulation of Indian hunting and fishing off the reservation; and (3) the regulation of hunting and fishing by non-Indians on the reservation.

In considering the first question, whether states may regulate hunting and fishing done by Indians on the reservation, courts have usually ruled that this was an impermissible exercise of state police power. Reservations and other allotted lands are held in trust by the federal government, thus, they are under the jurisdiction of federal or tribal governments. Therefore, most states have not attempted to exercise regulatory powers on the reservation and the few attempts were generally not successful. Kansas is in a unique situation as regards the rights of Indians because the Federal government has provided that Kansas shall have jurisdiction over offenses committed by Indians on the reservation. Title 18, U.S.C. § 3243 states thus:

"Jurisdiction is conferred on the State of
Kansas over offenses committed by or against Indians

on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the Laws of the United States committed by or against Indians on Indian reservations."

This statute appears to grant the State of Kansas complete police powers on the reservation. It was on the basis of this statute that Attorney General John Anderson, Jr. concluded in his opinion of March 31, 1959, that the Potawatomie Reservation was subject to the fishing and hunting laws of the State of Kansas.

Since 1959, several cases involving the rights of Indians to hunt and fish on their reservations without state interference have been heard in the Federal courts. In light of those cases, we cannot but conclude the opinion dated March 31, 1959, is very likely erroneous.

In Menominee Tribe v. U.S., 391 U.S. 404, 20 L.Ed. 2d 697, 88 S.Ct. 1705 (1968), the Supreme Court of the United States considered a factual situation very similar to our present situation. The Menominee Tribe had been living on a reservation in Wisconsin under the terms of a treaty dating back to 1854. The treaty did not make specific mention of tribal rights to hunt and fish on the land, but the Court implied that such rights were guaranteed by the treaty by virtue of the long history of such rights being a part of Indian treaties. In 1954, the Congress passed the Termination Act, 25 U.S.C. § 891-902, which provided that the laws of Wisconsin "shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within [its] jurisdiction." The Court, after examining the legislative history of the act, made it clear that if treaty rights of Indians are to be abrogated by the United States government, the government must do so explicitly. The Court stated it thus:

"We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists (see Lone Wolf v Hitchcock, 187 US 553, 564-567, 47 L Ed 299, 305-307, 23 S Ct 216) "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." Pigeon River Co. v Cox Co., 291 US 138,

160, 78 L Ed 695, 705, 54 S Ct 361. See also Squire v Capoeman, 351 US 1, 100 L Ed 883, 76 S Ct 611."

While there are differences between the present situation in Kansas and that presented to the Court in the Menominee case, the rule of law expressed by the Court is clear and applicable. Treaty rights of Indians may not be abrogated by Congress or the States except by clear and definitive action. Abrogation will not be implied.

The Treaty with the Potawatomie, 1846, 2 Kappler 557 makes no specific mention of hunting and fishing rights being guaranteed to the Potawatomie Nation. The treaty does provide that the Nation shall have "full and complete possession." In reviewing the historical development of the Potawatomies' relationship with the United States, it is clear that hunting and fishing were considered to be part of "full and complete possession." From 1789 until present, the Potawatomie have concluded no fewer than thirty-five separate treaties with the Federal government. The vast majority of these guarantee hunting and fishing not only on the reservation, but on all lands owned by the Federal government that had been ceded to it by the Potawatomie. It is indisputable that the Potawatomie considered fishing and hunting a necessary and integral part of possessing land. Thus, it is my opinion that the term "full and complete possession" would include the right to hunt and fish. (See U.S. v. Winans, 198 U.S. 31, Menominee v. U.S., 391 U.S. 404 (1968), Chippewa v. Minnesota, 334 F. Supp. 1001 (C.D. Minn. 1971).

Therefore, the Potawatomie have a treaty right to hunt and fish on their land. This right has not been specifically curtailed, regulated, or abrogated by the Federal government. It is therefore, my conclusion that the State of Kansas may not impose its fish and game laws on Indians inside the reservation.

The second question to be answered is whether the state may regulate fishing and hunting by Indians off the reservation. Unlike many treaties, the Treaty with the Potawatomie Nation, 1946 does not delineate the rights of Indians in the land that was ceded to the United States under the terms of that treaty. Article 2 of the treaty states the pertinent aspects thus:

"ARTICLE 2. The said tribes of Indians hereby agree to sell and cede, and do hereby sell and cede, to the United States, all the lands to which they have claim of any kind whatsoever, and especially the tracts or parcels of lands ceded to them by the treaty of Chicago, and subsequent thereto, and now, in whole or in part, possessed by their people,

lying and being north of the river Missouri, and embraced in the limits of the Territory of Iowa; and also all that tract of country lying and being on or near the Osage River, and west of the State of Missouri; it being understood that these cessions are not to affect the title of said Indians to any grants or reservations made to them by former treaties."

The article clearly and unequivocally states that the Potawatomie Nation is giving up "any kind of claim whatsoever" to the ceded land. We can find no language in the treaty which would indicate that Indians wanted to retain their hunting and fishing rights. In treaties with other tribes, phrases or articles were included which implied that the Indians were retaining some rights in the ceded land. This is not the case with this treaty. Therefore, it is my opinion that the state may regulate hunting and fishing by all people in Kansas (including Indians) outside the actual reservations.

Finally, the question is raised as to the extent of regulation the State of Kansas may impose on non-Indians hunting and fishing on the reservation. It should first be noted that there should be no hunting and fishing inside the confines of an Indian reservation without the permission of the tribe or Federal government. 18 U.S.C. 1165.

Since 1972, the Potawatomie have not had a tribal government recognized by the United States government. In order for the tribe to afford itself all the benefits afforded Indians by the Federal government, it is necessary that a tribal government be recognized. Title Twenty-Five of the United States Code enumerates various rights, privileges, and benefits accorded Indians by our Federal government. Among these rights is the right to regulate hunting and fishing on the reservation. However, the extent of regulation and the police powers accorded the tribe can only be arrived at by negotiation between the tribe and the Federal government. As long as the Potawatomie are without a recognized tribal government, it is impossible for them to exercise police powers on the reservation. The reason for this requirement is obvious. Otherwise, several groups claiming to have police powers on the reservation could be trying to enforce different regulations, leaving the general population in a state of confusion.

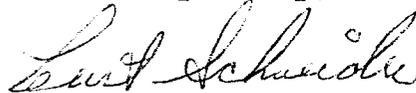
In the absence of a tribal government, the responsibility of policing the reservation would be with the Federal government which has in turn delegated that responsibility to the State of Kansas through 18 U.S.C. 3243. Therefore, the State of Kansas has the responsibility

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of regulating fishing and hunting on the reservation in regards to non-Indians until such time as our Federal government recognizes a tribal government of the Potawatomie.

In conclusion, it is my opinion, first, that the State of Kansas may not regulate hunting and fishing done by Indians on their reservation; secondly, that the state may regulate hunting and fishing done by Indians when they are outside the reservation; and lastly, that the state may also regulate all hunting and fishing by non-Indians on the reservation until such time as the Federal government returns that power to a tribal government.

Yours very truly,



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