



STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 82- 120

The Honorable Marvin E. Smith
State Representative, Fiftieth District
123 N. E. 82nd Street
Topeka, Kansas 66617

Re: Fish and Game--Regulation of Hunting and Fishing
on Fee-Patented Lands Within the Boundaries of
an Indian Reservation

Synopsis: The Potawatomi Indian Tribe has no authority
to regulate non-Indian hunting and fishing on
reservation lands owned in fee by non-Indians,
and Indians have no right to trespass or hunt
upon such lands without the owner's permission.
Cited herein: K.S.A. 21-3721, 32-142a, 18 U.S.C.
§§1153, 1165, 3243.

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Dear Representative Smith:

You request our opinion as to whether the Potawatomi Indian
Tribe has authority to regulate non-Indian fishing and hunting
on reservation land owned in fee by non-Indians. Additionally,
you ask whether Indians have the right to trespass on such
lands and hunt without the owner's permission.

In Kansas Attorney General Opinion No. 75-209, former Attorney
General Curt T. Schneider opined that "the state of Kansas may
not impose its fish and game laws on Indians inside the [Potawatomi]
reservation." Additionally, in the same opinion, it was stated
that, upon the recognition of a tribal government by the United
States government, the Potawatomi had the right to regulate

hunting and fishing by non-Indians "on the reservation." Said opinion did not specifically state that the power to regulate hunting and fishing by non-Indians was limited to reservation lands belonging to the Tribe or held by the United States in trust for the Tribe. However, the subsequent decision of the United States Supreme Court in Montana v. United States, 450 U.S. 544 (1981), clearly establishes that the regulatory authority of the Potawatomi Tribe is so limited.

In the Montana case, the Crow Tribe of Montana, relying on treaties which created its reservation and on its inherent power as a sovereign, claimed the authority to prohibit all hunting and fishing by nonmembers of the Tribe on non-Indian property within reservation boundaries. In rejecting the Tribe's contention, the Supreme Court ruled that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." Id. at 561. Thus, it was held that even if a treaty had created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, "that power cannot apply to lands held in fee by non-Indians." Id. at 559. With regard to the Tribe's reliance on "inherent sovereignty" as a basis for its asserted regulatory power, the Court stated as follows:

"Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05."
450 U.S. at 565.

Finally, it should be noted that the Court held that 18 U.S.C. §1165, which makes it a federal offense to trespass on Indian land to hunt or fish without permission, "does not reach fee-patented lands within the boundaries of an Indian reservation." Id. at 563.

In our judgment, the Montana case clearly establishes that the power of the Potawatomi to regulate non-Indian hunting and fishing within the boundaries of the Potawatomi reservation, which power emanates from the Treaty with the Potawatomi, 1846 (see Kansas Attorney General Opinion 75-209), is restricted to lands belonging to the Tribe or held by the United States in trust for the Tribe. The Potawatomi may not regulate non-Indian hunting and fishing on reservation lands owned by non-Indians. Further, in our opinion, the fish and game laws of the state

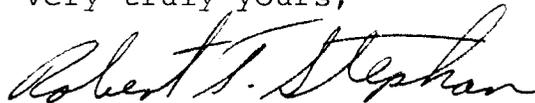
The Honorable Marvin E. Smith
Page Three

of Kansas apply on reservation lands owned in fee by non-Indians, and both Indians and non-Indians may be prosecuted for violations of said laws occurring on such lands. In this regard, it should be noted that the state of Kansas has jurisdiction, pursuant to 18 U.S.C. §3243, over offenses committed by or against Indians on Indian reservations, except as to certain major offenses (not including violation of fish and game laws), set forth in 18 U.S.C. §1153, for which exclusive federal jurisdiction exists. See State v. Mitchell, No. 53,334 (Kan. Supreme Ct., opinion filed April 3, 1982).

In regard to your question concerning hunting by Indians on reservation lands owned in fee by non-Indians, it is our opinion that Indians have no right whatsoever to trespass or hunt upon such lands without the owner's permission. In our judgment, Indians who engage in conduct proscribed by K.S.A. 21-3721 (criminal trespass) and K.S.A. 32-142a (hunting on posted land without written permission), on the aforesaid lands, are subject to criminal prosecution under the laws of this state, since such crimes are not among the major crimes enumerated in 18 U.S.C. §1153, for which exclusive federal jurisdiction exists. See State v. Mitchell, supra.

In summary, it is our opinion that the Potawatomi Indian Tribe has no authority to regulate non-Indian hunting and fishing on reservation lands owned in fee by non-Indians, and that Indians have no right to trespass or hunt upon such lands without the owner's permission.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Terrence R. Hearshman
Assistant Attorney General

RTS:BJS:TRH:jm