LETTER OPINION
98-L-90

August 11, 1998

Mr. Dean C. Hildebrand
Director
Game & Fish Department
100 N Bismarck Expressway
Bismarck, ND 58501-5095

Dear Mr. Hildebrand:

Thank you for your letter asking whether non-tribal members must comply with state law when hunting on tribal trust land. You state that federal, state, and tribal officials have been giving the hunters conflicting advice and that "a very confusing situation" exists.

The fact conflicting advice is being given is not all together surprising since the law does not provide a simple answer to your question. "Whether a State may . . . assert its authority over the on-reservation activities of nonmembers raises '. . . difficult questions.'" New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983). Tribal sovereignty and federal preemption of state law complicate defining the state's jurisdictional boundaries over non-members hunting on trust land. The state has important interests at stake, but the tribe and federal government also have interests that require consideration. The varied interests of the tribe, state, and federal government must be recognized and then balanced in deciding whether non-tribal members are subject to state law when hunting on reservation trust land.

The Supreme Court addressed just the question you ask in New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983). New Mexico sought to regulate non-members hunting and fishing on tribal lands. The Court stated that New Mexico's jurisdiction does not rest on mechanical or absolute notions of either state or tribal sovereignty. Id. at 333. It is much more complicated and requires "'a particularized inquiry into the nature of the state, federal, and tribal interests at stake.'" Id., quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). State jurisdiction will be pre-empted if it

interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority. Id. at 334.

In balancing the interests, the Court looked at a number of factors. It began by noting general considerations supportive of Indian sovereignty. These include such matters as traditional notions of Indian sovereignty, the federal government's goal of promoting tribal self-government, self-sufficiency, and economic development, and the ability of tribes to manage their territory and resources. Mescalero at 334-35.

The Court also noted some general state interests at stake. If the state provides services in connection with the on-reservation activity in question, it has a heightened interest in regulating the activity. Mescalero. at 336. Also, "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention." Id.

To carry out its "particularized inquiry," the Court then examined more specific factors. Although it eventually found that New Mexico could not regulate non-tribal members hunting and fishing on tribal lands, its conclusion rested on the facts of the case. A different conclusion could well be reached on other reservations.

The Mescalero Apache, "[w]ith extensive federal assistance and supervision…established a comprehensive scheme for managing the reservation's fish and wildlife resources." Mescalero. at 325, 328. It constructed a six million dollar resort complex with federal financing. Id. at 327 n.3. It received substantial revenue from its hunting and fishing resources. Id. at 327 n.4. These resources were developed through a sustained cooperative effort by the tribe and federal government. Id. at 327-28. For example, the tribe established eight artificial lakes that, along with reservation streams, are stocked with fish by the tribe and the U.S. Fish & Wildlife Service (FWS). Id. at 328. The FWS also operated a fish hatchery on the reservation. Id. None of the reservation waters were stocked by the state. Id. The tribe and National Park Service developed the reservation's elk herd. Id. The tribe and federal government jointly conduct a comprehensive fish and game management program. Id. Finally, tribal bag limits and seasons are subject to approval by the Secretary of Interior and based on the reservation's conservation needs as assessed by annual game counts and surveys. Id. at 329, 339.

The Court also noted that the tribe owns all but 194 acres on its 460,000 acre reservation and that almost all reservation residents are tribal members. Mescalero at 326.

The Court then examined the state's interests.

> The State has failed to 'identify any regulatory function or service…that would justify' the assertion of concurrent regulatory authority….The hunting and fishing permitted by the Tribe occur entirely on the reservation. The fish and wildlife resources are either native to the reservation or were created by the joint efforts of the Tribe and the Federal Government. New Mexico does not contribute in any significant respect to the maintenance of these resources, and can point to no other 'governmental functions it provides,'. . .in connection with hunting and fishing on the reservation by nonmembers that would justify the assertion of its authority.
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> The State also cannot point to any off-reservation effects that warrant state intervention. Some species of game never leave tribal lands, and the State points to no specific interest concerning those that occasionally do. . . . The State concedes that the Tribe's management has 'not had an adverse impact on fish and wildlife outside the Reservation.'

Mescalero at 341-342. The Court added that New Mexico's financial interest in revenue from the sale of state licenses is insufficient to justify state regulation. Id. at 342-43.

The decision in Mescalero Apache does not establish a general rule that a state may not regulate non-member hunting on tribal trust lands. The unique facts of each case must be analyzed in the balancing of tribal, state, and federal interests. Because I am unaware of all the facts needed to make this decision for each of the reservations in North Dakota, I can only provide you with the framework governing the legal analysis and suggest that you continue to work with this office to reach a decision.

Here are some questions to ask when considering whether non-member hunters on trust land are subject to state law. Does the tribe have laws governing hunting? Are the tribal laws comprehensive? Are they actively enforced? Does the tribe have in place the infrastructure to manage the resource and does it in fact actively manage the resource? What kind of economic reliance does the tribe place on

non-member hunting? What has the state done to manage the resource? What services does the state provide to hunters on trust land? How has state law been applied in the past? What role has the federal government played in developing and managing the resource? Does the species migrate off the reservation? Does the species migrate off reservation trust land to reservation fee land? How frequent are migrations off the reservation and off trust land? Is the species endangered in any way if hunted under the tribe's regulatory regime?

I would like to add that there have been lower court decisions in which states have shown adequate state interests supporting the right to regulate hunting by non-members on trust land. In White Earth Band of Chippewa v. Alexander, 683 F.2d 1129, 1138 (8th Cir. 1982), the court found that Minnesota could enforce state hunting laws against non-members, including on reservation trust land. Minnesota has "a strong legitimate interest in regulation of hunting and fishing because of its investment in and historic management of reservation game and fish resources." Id. at 1137. And in United States v. Montana, 604 F.2d 1162, 1170 (9th Cir. 1979), rev'd on other grounds sub nom. Montana v. United States, 450 U.S. 544 (1981), Montana game laws were held to apply to hunting and fishing by non-members throughout the Crow Indian Reservation.

Although I have not given you a direct answer to your question, I trust that I have provided you with sufficient guidance so that you can answer it after your consideration of the factors described above. I know that your department has in the past been willing to seek to resolve tribal/state issues by agreement. Addressing this matter by agreement is worth keeping in mind.

I also note that in 1953 this office addressed the issue you raise. 1952-54 Att'y Gen. Op. 44. The opinion is brief, unclear, and its legal analysis is, at best, perfunctory. It concludes that state game and fish laws may not be enforced on "Indian Lands" within Indian reservations. It doesn't define "Indian Lands," but I assume the term refers to land owned by a tribe or tribal members. It is also uncertain whether the opinion applies to regulation of tribal members or non-tribal members, or both.

The basis for the conclusion is the state's enabling act. It states that the people of North Dakota "forever disclaim all right and title" to land owned or held by Indians or Indian tribes, and that until the United States extinguishes Indian title, "said Indian lands shall remain under the absolute jurisdiction and control of the Congress." 25 Stat. 676-677, § 4. Our constitution incorporates this provision of the enabling act. N.D. Const. Art. XIII, § 4.

The 1953 opinion misunderstood the disclaimer. It does not disclaim the state's regulatory jurisdiction on reservations. It disclaims only proprietary title to Indian land. "[T]he presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our consideration of state jurisdiction over Indian affairs or activities on Indian lands." Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 562 (1983). "The disclaimer of right and title by the State [of Alaska] was a disclaimer of proprietary rather than governmental interest." Organized Village of Kake v. Egan, 369 U.S. 60, 69 (1962). See also Draper v. United States, 164 U.S. 240 (1896); State v. Seneca-Cayuga Tribe, 711 P.2d 77, 87 (Okla. 1985); White Mt. Apache Tribe v. Arizona, 649 F.2d 1274, 1280 (9th Cir. 1981); Comment, "State Disclaimers of Jurisdiction over Indians: A Bar to the McCarran Amendment," 18 Land & Water Law Rev. 175, 186 (1983)("These disclaimers…have amounted to nothing more nor less than the state's constitutional echo of the principle of federal preemption of Indian affairs").

The 1953 opinion applies the "disclaimer" provision far too broadly. To the extent the 1953 opinion conflicts with this opinion, it is overruled.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

cmc/vkk