Opinion No. 106.

Indians—Reservations—Licenses, Hunting and Fishing.

HELD: Indians, who have elected to take advantage of the provisions of the Federal laws, may require white people to pay fishing and hunting license, to fish or hunt on their lands.

May 19, 1937.

Mr. J. A. Weaver
State Fish and Game Warden
Capitol Building
Helena, Montana

Dear Mr. Weaver:

You ask for an opinion upon the following questions:

First, as to whether or not a white person would be required to have a license to fish on different Indian Reservations, and as to whether or not the tribal Indian Council is within its rights to issue an order requiring all white persons to obtain a special license from the tribal Indian Council to hunt or fish upon an Indian Reservation, or upon their allotments.

By the second provision of the Enabling Act (Section 4), providing for the admission of the State of Montana into the Union, it was declared:

> "That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States. * * * But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such Acts of congress may prescribe."

In the case of State vs. Big Sheep, Vol. 75, Mont 219, at Page 234, the court said:

> "Lands to which the United States has parted with title and over which it no longer exercises control, even if within the exterior boundaries of the reservation, are not deemed a part of the reservation. All other lands within the reservation boundaries are. What jurisdiction, if any, the United States may assert over lands within the boundaries of a reservation to which it has relinquished title completely—by reason of the fact that such lands lie within the reservation boundaries—is a matter into which we need not now inquire. Some general observations relevant to the subject are appropriate."

I would assume from your letter that various tribal Indian Councils have passed local laws imposing license fees, similar to the license fees imposed by the State as a right to fish and hunt.

Under the Act of congress, passed June 18, 1934, commonly known as the Wheeler-Howard Act, the same being public law No. 383, passed by the 73rd congress, 48 Stat. 984, congress extended the periods of trust placed upon Indian lands, and any restriction on alienation was extended until otherwise directed by congress. Section 16 of said Act authorized any Indian tribe to have the right to organize for its common welfare, and to adopt an appropriate constitution and by-laws. This Act of congress gave to the Indian tribes, in addition to all powers theretofore invested in them, the following rights:

First, to employ legal counsel * * * to prevent sale, disposition, lease, or encumbrance to their tribal lands.

Under this Act of congress, it would appear that the Indian tribal Council, having elected to be subject to the provisions of said Act, and their constitution and by-laws so permitting it, and said Indians having jurisdiction over their own lands, may regulate the right of fishing and hunting upon the same, and so regulating may require a non-member of the tribe to pay a license fee to them independently of the State Fish and Game Commission or the State of Montana.

The court said in the case of United States vs. Kagama, 118 U. S. Reports, 375, at page 381:

> "They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, **with the power of regulating their internal, and social affairs,** and thus they are not brought under the laws of the Union, but the state within whose limits they resided."

It would appear that the Indian Councils have the right to require the payment to their tribe of these license fees upon all lands held jointly by the tribe, or lands held by the United States government for the tribes, or on all unallotted lands, as well as allotted lands.

The court said in the case of United States vs. Pelican, 232 United States 442, at page 449:

> "In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. The same conditions, in substance, apply to the allotted lands which, when the Reservation was diminished were excepted from the portion restored to public domain * * *. But, meanwhile, the lands remain Indian lands set apart for Indians under government care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings, the government retaining control."

Under the above authority, it would appear that all Indian lands, whether allotted or unallotted, held separately or jointly, and all lands held for the use of the Indians, such as reservoir sites and similar lands, are subject to the exclusive jurisdiction of the United States government, and as the United States government, under the Wheeler-Howard Act, has authorized the tribal councils to adopt a Constitution and by-laws, and has given them certain powers of regulation in reference to their property and rights, it follows that the tribal council, having elected to come under the provisions of the Wheeler-Howard Act, are authorized to require a license from whites to fish and hunt upon said lands. However, if said lands have been patented, and if there are no restrictions in said patent, then such patented Indian lands are excepted herefrom, and the tribal council cannot require a special license permit to fish and hunt.

As to lands owned by white persons within the exterior boundaries of said reservation, said tribal council has no jurisdiction, nor right to impose a license fee for fishing and hunting because the United States government has ceded its jurisdiction and sovereignty over said lands, and the police power of the state extends to said lands.

Therefore, it is my opinion that the Indian tribal council, if they have elected to come under the terms of the Wheeler-Howard Act, have the right

to impose a license fee upon white persons to fish and hunt upon allotted and unallotted lands and upon tribal lands and upon lands held by the United States government, such as reservoir sites, etc., which are held for the use of said Indians.

Secondly, that the tribal council, under no circumstances, has the right to impose a license fee upon patented Indian lands, or upon lands owned by the state, or upon lands owned by the United States government which are not held for the use of the Indians, or upon lands owned by white persons or upon lands owned by Indians which have been patented, although all of these lands are within the exterior boundaries of the Indian reservation.