

This case was written by Doreen Etelbah Gatewood for the purpose of entering the
2000 Aboriginal
Management Case Writing Competition.

TITLE: White Mountain Apache Tribe Trophy Elk Hunting Program

Historically, hunting was an important part of The White Mountain Apache way of life and played an important role in religious and ceremonial aspects of the tribe. The importance of hunting continued after the White Mountain Apaches were settled on the Fort Apache Indian Reservation.

On reservation hunting and fishing rights generally are exclusive to the Indian tribal members for whom the reservation was created but courts have held that a tribe can also authorize and regulate non-member hunting and fishing on land held in trust by the United States for Indians.

The White Mountain Apache Tribe has turned reservation wildlife resources into a source of revenue by marketing the opportunity to hunt and fish on the reservation. This marketing approach has attracted wealthy non-member hunters and increased reservation tourism. The White Mountain Apache Tribe of east-central Arizona manages its trophy elk population on a sustainable basis while charging non-members hunters a significant fees to hunt elk on the reservation.

Congress, recognizing the obligation of the United States, and in response to the strong expression of Indian people for self-government, passed the 1975, Indian Self-determination and Education Act which encourages tribal self-governance and self-sufficiency. However, these federal policies did not preempt concurrent state licensing and regulation.

Background

Over the years the White Mountain Apache Tribe (WMAT) has fought many battles to protect its sovereignty and maintain the right to manage its lands. The White Mountain Apache homeland occupies approximately 1.6 million acres of land ranging in elevation from 2,500 feet in the Sonoran desert to over 11,400 feet in subalpine conifer forest in east-central Arizona. The White Mountain Apaches do not see themselves as separate from Mother Earth, but feel they are one with the land. Apaches traditionally used hunting not for sport but to provide food and clothing.

The Fort Apache Reservation was established by a series of executive orders in 1871. The WMAT elected to accept, and is organized under, the Indian Reorganization Act (IRA) of 1934. Major features of the IRA include the organization of formally constituted and federally supported tribal governments and an effort to develop reservation economies. Until the mid 1970's, the tribe allowed the application of Arizona's hunting regulations to the reservation. However, Arizona has not taken civil and criminal jurisdiction over the reservation under the Public Law 83-280.

In 1973, state regulated elk hunts on the reservation were terminated by tribal leaders. The WMAT maintained that they alone have "the absolute, inherent, retained sovereign right to use and enjoy the reservation, and its use by its members and all others" (Constitution of the White Mountain Apache Tribe). The WMAT also felt they had the right to manage their natural resources on the reservation based on Congress' confirmation of retained tribal power to regulate "internal [affairs] and social relations" (*United States v. Kagama*, 118 U.S. 375, 382 (1886)).

Pursuant to that authority, the WMAT has adopted codes regulating hunting and fishing in comprehensive detail. Because the territorial component is an important aspect of retained tribal sovereignty, the WMAT may condition a non-member's right to enter Indian lands, in compliance with tribal hunting and fishing codes.

Although the WMAT can not impose criminal sanctions on non-members, violations of tribal ordinances are punishable by fines, confiscation of hunting gear (including vehicles) and expulsion or exclusion from the reservation.

The conservation code further states the "Tribal Council, Tribal Court, and such other Tribal entities as are designed by tribal law, shall have absolute, original, and exclusive jurisdiction to regulate and adjudicate all matters pertaining to wildlife found on the reservation, whether resident or migratory, native or introduced, and all matters pertaining to the recreation resources of the reservation."

A long history of mutual distrust and lack of cooperation between the state and the tribe also promoted the WMAT to assert its authority to regulate hunting on the reservation. Subsequent hunts were managed by the tribe's Wildlife and Outdoor Recreation Division (WORD). The WORD was given the responsibility of protecting, developing and managing the fish and wildlife resources occurring within the boundaries of the reservation for the primary benefit of present and future generations of the WMAT.

However, this did not stop the state from continuing to enforce state regulations. Arizona Game and Fish Law Enforcement officers would patrol all major highways leaving the reservation and issue citations to non-member hunters

for illegal possession of game killed on the reservation. The tribe was left with no other option than to purchase state permits for non-member hunters. Under protest each year the tribe took a list of that year's hunters along with a check to purchase permits for that season. Only then could hunters transport harvested animals off the reservation. The State of Arizona maintained that the authority and responsibility for maintenance and management of the state's wildlife resources, including those on reservation, are vested in the Arizona Game and Fish Commission and Department by Arizona State Law.

In the early 1980's the WMAT (*White Mountain Apache Tribe v. Arizona*) went to the Ninth Circuit Court to affirm its right to regulate hunting on the reservation. In *White Mountain Apache Tribe v. Arizona* the court held that the state of Arizona could enforce its regulations against non-members on the reservation if its interest in conservation outweighed the tribal and federal interest in exclusive tribal jurisdiction. However, in 1984 the White Mountain Apache Tribe shared in the Supreme Court victory of the Mescalero Apache Tribe. The Supreme Court reasoned in *Mescalero Apache Tribe v. New Mexico* that tribal sovereignty, coupled with a federal goal of promoting tribal self-determination, effectively preempted the state of New Mexico from interfering with tribal affairs through enforcement of state regulations against non-members on the reservation.

Thus the sovereignty of tribes to manage fish and wildlife resources on reservations was firmly established and the WMAT began to fully assert its power to regulate non-member hunting on their reservation.

History of the Elk in the White Mountains

Prior to the introduction of the Rocky Mountain Elk (*Cervus elaphus nelsoni*) in Arizona, the native Merriam's elk (*Cervus elaphus merriami*) occurred throughout much of the southwest. This indigenous subspecies was thought to be the largest of all the elk subspecies. The extirpation of Merriam's elk is thought to have occurred due to over hunting and/or overgrazing by cattle and sheep. The last Merriam's elk may have been taken in 1898 near Mount Baldly on the reservation. To the contrary, some tribal members believe that the Merriam's elk was never completely extirpated and that they interbred with the Rocky Mountain elk to produce the current trophy bull elk.

The Arizona Game and Fish Department and the Elks Clubs of Arizona began to restore elk to Arizona as early as 1913, by introducing Rocky Mountain Elk from Yellowstone National Park. The elk quickly expanded their range and soon occupied the northwestern and eastern portions of the reservation.

Arizona Game and Fish Department (AGFD) identified the entire Fort Apache Indian reservation as hunting unit 25 in their state regulations. AGFD records showed that at least 3,150 non-member permits were issued from 1946-1960 and another 3500 permits were issued during 1961-1972. The AGFD issued these permits for \$150.00 each and required the permittee to also have an additional tribal license. Despite the fact that the harvesting of elk took place on tribal lands, the tribe to date has not received any of the revenues collected by the state.

Elk Management

In 1973 when the WORD took over the hunt they first reduced the number of permits issued from 700 to thirty and increases the permit from \$150.00 to \$1,500.00. In these early years it was difficult for the WMAT to sell a permit because almost no one knew of the White Mountain Apache Tribe's wildlife resources and many questioned whether it even existed but the tribe persisted.

In 1976 Philip Stago (a member of the WMAT) became director of the WORD. Under Stago's direction the hunts became fully guided and included lodging and meals. In 1979 a second camp was opened and the number permits were increased to 32 and now sold for \$2,500.00. As the quality of the hunt increased and the tribes reputation for producing large trophy elk grew so did the demand for permits.

In the 1990's a third camp has been established on the west side of the reservation and the three camps now serve a total of 70 hunters annually.

The quality of a trophy elk hunting program is generally judged by its production of record book animals. From 1977 to 1995, hunters have taken ninety bulls elk that were recorded in either Boone and Crockett or Safari Club record book. In comparison, this is approximately the same number of record elk that have been taken from the entire state of Montana since record keeping began in 1932. In addition since 1980 hunters have enjoyed a 90 to 95 percent success rate.

Today hunters travel from all over the world and pay \$12,500.00 for an opportunity to hunt one of these bulls on the reservation. Hunters have included celebrities and international dignitaries such as: country western singer Goerge Strait; professional golfers, Greg Norman and Jack Nicholas; race car driver, Dale

Earnhart; and Prince Abdorezza Pahlavi, of Paris France. In addition, a waiting list of approximately 100 hunters is maintained. Because there are few openings and the waiting period is long, the waiting list has been closed. Presently, the only avenue available for a hunter is to book a hunt through a sealed bud auction. Four permits are auctioned each year to the highest bidders and some have sold for as high as \$35,000.00

The majority of the individuals involved in planning and conducting the hunts have always been tribal members. No more than two non-tribal members have ever simultaneously been guides. Despite the emphasis on employing tribal members, the biggest complaint from tribal members about the trophy elk hunt is the lack of opportunity for additional tribal members to become involved in the hunt.

To maintain the reputation of the hunt the WORD established a guide training program in 1995. All new guides must train under a current guide for two years before they can guide a hunter alone. The guide must also complete training in CPR, First aid, hunter safety, customer service and be able to score an elk using the Boone and Crockett method. Support staff must also attend these training sessions.

As the trophy elk hunting program thrived, the WORD developed an elk management plan to promote and ensure the continued existence of a healthy and viable elk population. This plan is based on habitat availability, biological needs, and future constraints. Further the tribe manages the elk on a biological basis to maintain the overall productivity and quality of the herd. The elk management

plan is adaptive and will change in objectives and strategies as knowledge of the elk population and habitat is honed.

Funding

The WMAT has a substantial interest, in continuing and further improving the trophy elk hunt because the revenue generated by this program come from the reservation itself, and are used for essential tribal services. Funds received by the tribe from these hunts go into the tribes main operating account. Nonetheless, the WMAT still needs additional funding for qualified personnel, and policy directives to generate funds from other natural resources much as they have with the trophy elk hunt.

For most states the primary support of all wildlife management programs and activities come from sales of state hunting and fishing licenses. Monies to support wildlife management in the state of Arizona come solely from the Federal Aid in Wildlife Restoration Act of 1937, also known as the Pitman-Robertson Act and the Dingell-Johnson/Wallop-Breaux Act. This legislation provides for a manufactures' excise tax on firearms, handguns, factory-made ammunition, certain archery equipment and boat fuel. Money collected by the federal government is allocated to the state wildlife agencies on a 3:1 matching grant basis, based on each state's land area and number of licensed hunters. Despite the fact that tribal lands are included in the state's land area tribes are not eligible to receive a portion of these funds. Native American groups proposed an amendment to the Act to allow tribes to directly receive monies from the federal program. However, organizations such as the International Association of Fish and Wildlife Agencies (IAFWA)

continue to lobby against any such changes. The IAFWA feel that the federal government and not hunters and anglers are responsible for assisting tribes develop natural resources.

Tribes want and need this aid because 53 million acres of Indian trust land in the U.S. represent suitable habitat to support wildlife and fish resources. Further, tribal programs contribute significantly toward meeting national demands for hunting, fishing, and outdoor recreation, accounting for millions of recreational use days annually.

Despite the success of this program there is still tension between the tribe and the State of Arizona. The WMAT feels that the state is willing to do everything possible to achieve their real goal which is the management of all natural resources (mainly water) on the reservation. Sixty percent of all cold water streams in the state of Arizona lie within the boundaries of the reservation. However, the WORD tries to maintain cooperative management efforts with state and federal management agencies, as well as other off-reservation groups.

Conclusion

The Supreme Court decision in *Mescalero Apache Tribe v. New Mexico* was unanimous in favor of preemption and stands as a statement as to which the court may in the future review conflicts between tribal and state laws.

It is important that the WMAT and other tribes continue to assert their power to regulate non-member hunting on Indian lands. Because, developing wildlife and other natural resources on Indian reservations can be successful and the White Mountain Apache Tribe's trophy elk hunt is a good example of this.

The Apaches respect and admire the elk and want to be part of a trophy hunting program that brings respect and admiration to the tribe. In the past and still today some tribal members fear and did not hunt the elk because they believe it has evil spiritual powers. However, the elk is valued as a species and has meaning to the tribe that goes beyond the monetary return from the hunt.