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Indians--State Jurisdiction over Real Estate Developments on Tribal Lands

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COMMENTS

INDIANS—STATE JURISDICTION OVER REAL ESTATE DEVELOPMENTS ON TRIBAL LANDS

The recent appearance of large scale real estate developments on leased Indian lands has attracted public attention to the intricate maze of jurisdictional problems arising from the complex Federal-State-Indian relationship. Spurred by the spector of a sprawling, unregulated metropolis wreaking political and environmental havoc from its sanctuary within protected Indian lands, States such as New Mexico are attempting to assert their maximum powers to regulate and tax such developments. Indian tribes, on the other hand, are aware that the refuge from state taxation and control which reservation lands may provide is one of their most marketable features. They are concerned for Tribal sovereignty and control over the use of their reservations and are resisting the imposition of state authority. Conceding that both have valid interests, and realizing that the developments themselves raise a plethora of social, political, and legal issues far beyond the scope of a single article, it will be the purpose of this paper to explore one such development and its attempted resolution of state-Indian jurisdictional questions.

Seizing upon the economic opportunities afforded by the proposed construction of a flood-control dam and reservoir, California Cities negotiated a 99-year lease with the Pueblo de Cochiti for the purpose of developing a resort community with a potential population of 50,000. The lease was signed in 1969 and in 1970 a charter for the Town of Cochiti Lake was approved by the Pueblo and appended to the lease. In the interim, California Cities had encountered financial difficulties and had conveyed its interests in the lease to Great Western Cities, Inc., the present developer. Late in 1970 the Attorney General of New Mexico filed suit against various Department of Interior and Bureau of Indian Affairs officials seeking a declaration that they had acted without authority in approving the creation and existence of the Town of Cochiti Lake. The suit maintained that their actions were void, and that the State had sole and exclusive authority to create a municipality within its borders.[1] In June 1971 the suit was dismissed with prejudice by the United States District Court for the District of New Mexico. The dismissal was based on a stipulation between Great Western Cities, the Town of

1. New Mexico *ex rel.* Maloney v. Russell, Civil No. 8745 (D.N.M., *dismissed* June 4, 1971).

Cochiti Lake, and the State of New Mexico. This stipulation purported to recognize the State's jurisdiction over all construction undertaken under the lease, its civil and criminal jurisdiction over all activities by Great Western and its non-Indian employees, and its power to tax any interest held by Great Western in pueblo lands. The Town of Cochiti Lake agreed not to exercise any criminal jurisdiction over non-Indians without State consent. Water consumption was limited to rights purchased by the developers from sources other than the Pueblo. Neither the Pueblo de Cochiti nor the Department of Interior was a party to the stipulation.

The strength of this stipulation will be analyzed from two standpoints: whether under Federal and State law, particularly the New Mexico Constitution, the State may legally assume such jurisdiction, and, if it may, whether jurisdiction has been validly conferred by the stipulation.

LEGAL RESTRICTIONS ON THE EXERCISE OF STATE JURISDICTION

With respect to jurisdiction over Indians and Indian lands the states fall into two basic classes: those which have assumed civil and criminal jurisdiction under Public Law 280 or its successor, Title IV of the Indian Civil Rights Act, and those which have not.[2] New Mexico has not, but even for states assuming such jurisdiction, authorization to alienate, encumber, or tax Indian trust properties, or to adjudicate ownership or right to possession of them has been expressly withheld, indicating that these are areas of pre-eminent Federal concern.[3]

As in the case of some of the other states,[4] there was a provision in New Mexico's Enabling Act requiring a disclaimer of all proprietary rights to Indian lands located within its borders, the right or title to which had been acquired through the United States or prior sovereign.[5] This provision was subsequently incorporated in Article XXI of the State Constitution which reads in part:

2. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, 18 U.S.C. § 1162 (1970) and 28 U.S.C. § 1360 (1964). Public Law 280 was substantially incorporated into Title IV of the Indian Civil Rights Act, 25 U.S.C. §§ 1321-26 (1970), but the requirement of Indian consent was added in order for a state to assume jurisdiction. Thus no states have obtained jurisdiction under Title IV and the only states exercising jurisdiction are those which are included by Public Law 280.

3. 18 U.S.C. § 1162 (1970), 28 U.S.C. § 1360 (1964), 25 U.S.C. §§ 1321(b), 1322(b) (1970).

4. Arizona, Montana, North Dakota, Oklahoma, South Dakota, Utah, and Washington. *See* Ransom & Gilstrap, *Indians–Civil Jurisdiction in New Mexico–State, Federal, and Tribal Courts,* 1 N.M. L. Rev. 196 at 199 (1971).

5. Enabling Act for New Mexico, ch. 310, § 2, 36 Stat. 557 (June 20, 1910).

> [A]nd that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States . . . but all such lands shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe.[6]

Congressional permission has since been given to amend this disclaimer, but the State may not assume Title IV jurisdiction until the amendment has been effected.[7]

Conceding that New Mexico lacks whatever additional jurisdiction Title IV confers, the question of the limits of its present power remains. The Supreme Courts of both the United States and New Mexico have agreed that disclaimers such as Article XXI affect only proprietary rights and that states operating under them retain certain governmental authority over Indian affairs.[8] That defining this authority is an elusive task can be proven by examining two lines of judicial precedent.

Both lines diverge from the case of *Williams v. Lee* in which Lee, the owner of a general store on the Navajo Reservation, brought suit to collect on a debt owed by Williams and his wife, Navajo Indians living on the reservation.[9] Denying defendants' motion to dismiss, the Arizona state courts entertained jurisdiction and entered judgment for Lee. The United States Supreme Court reversed, holding that the exercise of state jurisdiction would impinge on tribal sovereignty and that the case was therefore within the exclusive domain of the Navajo Tribal Court. The Arizona Supreme Court apparently acted on the theory that since no act of Congress expressly forbade their doing so, the State was free to assume jurisdiction.[10] Justice Black found this a "doubtful determination of the important question of state power over Indian affairs," and proposed as the proper test:

> Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.[11]

Justice Frankfurter apparently added a judicial twist to the *Wil-*

6. N.M. Const. art. XXI, § 2.
7. 25 U.S.C. § 1324 (1970). This provision is substantially the same as the Act of Aug. 15, 1953, ch. 505, § 6, 67 Stat. 588.
8. Organized Village of Kake v. Egan, 369 U.S. 60 (1962); Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).
9. Williams v. Lee, 358 U.S. 217 (1959).
10. Williams v. Lee, 83 Ariz. 241, 319 P.2d 998 (1958).
11. Williams v. Lee, 358 U.S. 217 (1959).

liams test in the case of *Organized Village of Kake v. Egan,* which represents the first line of divergence from *Williams.*[12] In this case the State of Alaska was attempting to regulate the use of fish traps by the Thlinget Indians. Although the Thlingets have no reservation, fishing rights are recognized as Indian property and protected by a provision in the Alaska Statehood Act similar to Article XXI of the New Mexico Constitution.[13] In upholding the power of the State to regulate the traps the court said, " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction."[14] Thus in reformulating the test of state authority it concluded:

> These decisions indicate that even on reservations state laws may be applied to Indians *unless* such applications would interfere with reservation self-government or impair a right granted or reserved by federal law.[15] (Emphasis added.)

If this is the correct test the state can apparently act unless expressly forbidden to do so by Congress or unless interfering with tribal self-government. This would indicate a reservoir of un-pre-empted authority rather than the more limited arsenal of expressly conferred powers.

The effect of the *Kake* decision on the New Mexico Supreme Court was marked. Barely one year before its announcement the court had written:

> To our minds, the terms upon which New Mexico was admitted as one of the States of the Union and Article XXI, Sec. 2 of our Constitution, left no room for a claim by the state to governmental power over the Indians or Indian lands, except where such jurisdiction has been specifically granted by Act of Congress, or sanctioned by decisions of the Supreme Court of the United States.[16]

Yet only weeks after Justice Frankfurter had delivered the *Kake* opinion, the New Mexico Supreme Court seized upon his distinction between disclaiming proprietary and governmental interests.[17] Seven years later the New Mexico Court of Appeals used this residual powers test to uphold the imposition of state income tax on the earnings of a Zuni Indian working and living on the reservation.[18]

12. Organized Village of Kake, 369 U.S. 60 (1962).
13. Alaska Statehood Act, Pub. L. No. 85-508 § 4, 72 Stat. 339 (July 7, 1958).
14. Organized Village of Kake, 369 U.S. 60, 68 (1962).
15. *Id.* at 75.
16. Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 330, 361 P.2d 950, 953 (1961), *cert. denied,* 368 U.S. 915 (1961).
17. Montoya v. Bolack, 70 N.M. 196, 205, 372 P.2d 387, 394 (1962).
18. Gahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (Ct. App. 1969). Note that the parties had stipulated that imposition of the tax would not affect Tribal self-government.

Nevertheless, upon closer scrutiny there are several aspects of *Kake* which may impair its wholesale application to New Mexico. First it must be noted that the Indian right asserted in *Kake* was based on occupancy rather than on title, and no entry onto reserved lands was involved. More important is the peculiar situation of Alaska which was only emerging into statehood when the controversy arose. To be sure the Alaska Statehood Act and subsequently the Alaska Constitution contained disclaimers substantially similar to Article XXI of the New Mexico Constitution.[19] Congress, however, in 1958 had allowed the Territory of Alaska to assume civil and criminal jurisdiction under Public Law 280.[20] Thus Alaska, unlike New Mexico, had acceded to a broader jurisdiction over Indians and Indian affairs. In this light the decision of the Supreme Court to uphold the application of a general statewide law to Indians who were fishing off the reservation does not seem unreasonable. Furthermore, as indicated before, the New Mexico disclaimer itself precludes the assumption of Title IV jurisdiction.[21] This suggests that the disclaimer now has a more restrictive effect on New Mexico's authority than it did on Alaska's and increases the disparity between the states.[22]

If, indeed, Alaska enjoys a unique situation in its apparent ability to operate under a disclaimer but still assert its jurisdiction over Indians, it would be enlightening to examine the other path of *Williams* as it has been applied in the Ninth Circuit to states more closely approximating the situation in New Mexico.

In *Littell v. Nakai* the general counsel for the Navajo Tribe sought an injunction in Federal District Court against Navajo Tribal Chairman Raymond Nakai, alleging that Nakai was interfering with the performance of the counsel's duties.[23] The action was dismissed by the Ninth Circuit on the ground that it was a matter for exclusive tribal jurisdiction. Although Littell was authorized by the Depart-

19. Alaska Statehood Act, Pub. L. No. 85-508 § 4, 72 Stat. 339 (July 7, 1958); Alas. Const. art. XII, § 12. Note that the Constitution altered the phrasing "absolute jurisdiction and control" contained in the Statehood Act to "absolute disposition." *See also* Organized Village of Kake v. Egan, 369 U.S. 60, 68-71 (1962).

20. By the Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545, the Territory of Alaska was included among the Public Law 280 states.

21. *See* 25 U.S.C. § 1324 (1970).

22. In its latest pronouncement on the question of assuming jurisdiction the United States Supreme Court cited the need for "affirmative legislative action" by the state in order to have assumed jurisdiction under Public Law 280. Furthermore, legislative action by the Tribal Council alone was insufficient to confer the consent necessary to assume jurisdiction under Title IV. Thus unilateral action by the Tribal Council was insufficient to vest a Montana State District Court with jurisdiction over a civil matter arising on the reservation. *See* Kennerly v. District Court of Montana, 400 U.S. 423 (1971).

23. 344 F.2d 486 (9th Cir. 1965), *cert. denied,* 382 U.S. 986 (1966).

ment of Interior to act as general counsel, the basis of the action was the contract and its interpretation, not the authority under which it was established. In discussing tribal jurisdiction the court said:

> The Navajo Tribe as such need not have a proprietary or other legally recognized interest in the particular litigation or its outcome in order for the controversy to be one concerning internal affairs. . . . No doubt the Tribe in *Williams,* as in the case before us, was neither an indispensable, a necessary, or even a proper party to the action, but that was not the test. Rather, the test was a broader one hinging on whether the matter was one demanding the exercise of the Tribe's responsibility for self government.[24]

The second case, *Hot Oil Service, Inc. v. Hall,* dealt with a complex situation involving a tribal lease on the Navajo Reservation.[25] The Tribe had leased to one of its members who conveyed her interest to a New Mexico corporation and then took a sublease. The corporation attempted to bring an action for unpaid rent invoking federal diversity jurisdiction, but the suit was dismissed on the ground that if an Arizona State court would be without subject-matter jurisdiction, there could be no federal diversity jurisdiction. In speaking to the issue of state court subject-matter jurisdiction the court determined:

> The land involved was tribal Indian land which was leased by the tribe to one of its members who, acting alone, conveyed a leasehold interest to the non-Indian lessor. Involving Indian land, the suit *necessarily involved Reservation affairs.* . . . As we understand the teaching of *Williams,* the Arizona State courts would have been without subject-matter jurisdiction.[26] (Emphasis added.)

This concept of exclusive tribal jurisdiction over matters arising from tribal leases was applied in a memorandum opinion by the Federal District Court for Montana.[27] There the court denied jurisdiction to issue a writ of prohibition sought by a land developer holding a reservation lease to restrain the Blackfeet Tribal Court from expelling him from the reservation. The court held:

> The same rationale as that found in *Littell* and *Williams* would seem equally applicable in the instant case and compels the conclusion that the matters arising out of the lease are internal affairs of the tribe and can be determined solely in the tribal court.[28]

These precedents raise the issue of whether New Mexico, in agree-

24. *Id.* at 490.
25. 366 F.2d 295 (9th Cir. 1966).
26. *Id.* at 297.
27. United States v. Blackfeet Tribal Court, 244 F. Supp. 474 (D.Mont. 1965).
28. *Id.* at 478.

ing to the stipulation and to the consequent assumption of jurisdiction and authority, acted ultra vires or unconstitutionally. In attempting to enforce building code regulations through the Construction Industries Commission and to assert civil and criminal jurisdiction over non-Indian employees of the lessee, the state must inevitably encroach upon the interests and powers of the Indian lessor. When such interests do collide it is difficult to foresee how the matter could fail to be characterized as "arising out of the lease" and as "pre-empting" tribal authority. An interesting corollary to this question developed in Washington, a state claiming civil and criminal jurisdiction over Indians under Public Law 280.[29] There the Washington Supreme Court proscribed enforcement of a county zoning ordinance with respect to a non-Indian lessee operating a refuse dump on Indian lands, holding that enforcement would constitute an unlawful "encumbrance" upon the land and a restriction upon the use to which the lessor might put it.[30] In any event, burdened by Article XXI of its constitution and lacking Title IV jurisdiction, it is far from certain that New Mexico is legally empowered to administer state law over the lessee, particularly when that law must limit the use of reserved lands or interfere in some degree with tribal administration of the lease.

THE VALIDITY AND NECESSITY OF THE STIPULATION AS AN INSTRUMENT ESTABLISHING JURISDICTION

Making the questionable assumption that New Mexico is competent to assume the jurisdiction purportedly established in the stipulation, the question remains whether the stipulation itself is a valid instrument, performing any function in resolving jurisdictional disputes. The overriding factor here is the lack of participation in the stipulation by either the Pueblo de Cochiti or the Department of Interior. If it were ultimately resolved that New Mexico has the jurisdiction asserted in the stipulation without the consent of either the Pueblo or the lessee, then the stipulation itself would be immaterial for it conveys nothing which the State would not already have. Thus the more precise question is whether New Mexico may properly assert jurisdiction based on the stipulation.

Although principles of international law are obviously not con-

29. Although Washington is not included among the states listed in the statute, the State Supreme Court was of the opinion that it had nevertheless assumed jurisdiction by fulfilling the requirements of Public Law 280 § 6 through action by its state legislature. Snohomish County v. Seattle Disposal Co., 70 Wash. 668, 425 P.2d 22, 25 (1967), *cert. denied,* 389 U.S. 1016 (1967).

30. Snohomish County v. Seattle Disposal Co., 70 Wash. 668, 425 P.2d 22 (1967), *cert. denied,* 389 U.S. 1016 (1967).

trolling as to the validity of an agreement between a state and a lessee of pueblo lands, an analogy to some basic concepts may nevertheless prove enlightening. Recognizing first that Great Western Cities by its acquiescence would bind neither the Pueblo de Cochiti nor the United States who were not signatories,[31] the focus must be on the State's powers to compel compliance directly from Great Western and the Town of Cochiti Lake absent the assistance of the Pueblo government. The *Restatement* recognizes two types of jurisdiction, jurisdiction to prescribe and jurisdiction to enforce.[32] Jurisdiction to prescribe may exist separately, but in no case can a nation enforce a rule it has prescribed unless it first had jurisdiction to prescribe the rule.[33] In general there are two bases for asserting jurisdiction, territorial and national.[34] A nation may prescribe a rule affecting conduct outside its territory when such conduct has substantial effect within its territory or involves one of its nationals.[35] Absent a specific agreement a nation does not have enforcement jurisdiction outside its territory.[36]

Borrowing international legal terminology it might be suggested that New Mexico has jurisdiction under the stipulation to prescribe rules of conduct for Great Western Cities. At least Great Western and the Town of Cochiti Lake appear contractually bound to adhere to such rules. The question is whether the rules can be enforced when contrary to the dictates of the Pueblo, or, restated, whether State regulation to the extent authorized under the stipulation could be upheld where it impairs the lessee's performance under the lease. Since the stipulation itself lacks the assent of the Pueblo and is therefore not binding upon it, the State has acquired no jurisdiction over the Pueblo or the lease beyond that which it already had. As discussed above, however, there are substantial grounds for concluding that matters arising from the lease are for the exclusive jurisdiction of the Pueblo. What the State has gained from the stipulation appears to be at best a contractual commitment from the lessee to comply with certain State regulations where it can do so consistently

31. This was clearly the position of the Department of Interior at the time the case was dismissed. In a memorandum dated June 23, 1971, from the Acting Associate Solicitor, Indian Affairs, to the Commissioner of Indian Affairs (on file at the office of Attorney Thomas O. Olson, Albuquerque) it was stated:

> The only thing the United States has stipulated to is the dismissal of the action with prejudice. The provisions of the stipulation signed by Great Western Cities, Inc., the Town of Cochiti Lake and the State of New Mexico are not binding on the United States or the Pueblo of Cochiti.

32. Restatement (Second) of Foreign Relations Law of the United States § 6 (1965).
33. *Id.* § 7.
34. *Id.* § 10.
35. *Id.* §§ 18, 30.
36. *Id.* §§ 20, 24, 25.

with compliance with provisions of the lease. Barring the prior existence of State jurisdiction over the lease itself or State power to regulate the use of Pueblo lands (either case would make the stipulation immaterial), where the stipulation would require the lessee to violate his lease or the mandates of the Indian lessor, it would be an illegal contract, and the regulations consequently unenforceable.[37]

CONCLUSION

As a means of resolving the jurisdictional issues raised by real estate developments on Indian reservations, there is little to recommend the stipulation. The very real possibility that New Mexico has exceeded the legal limits of its own authority in agreeing to assume the prescribed jurisdiction reduces the strength and significance of the document. Furthermore, even if the State could assume such powers it is doubtful that they could be conveyed, much less enforced, without the acquiescence of the Pueblo and the United States Government. One can only conclude that New Mexico has accomplished nothing by the stipulation, that its powers of enforcement remain as before suit was filed, and that the inevitable confrontation between Pueblo and State interests has only been postponed. Yet even with its weaknesses the stipulation has managed to deal with only the most elementary problems raised by such developments. The tax question which it scarcely touches holds devastating implications for the future marketability of Indian lands.[38] Myriad other problems of government and services are certain to appear as the proposed city grows.

Numerous attempts have been made to characterize Indian tribes since Chief Justice Marshall portrayed them as "domestic dependent nations."[39] But when these characterizations are assembled they become a collage of contrasting pieces depicting, if anything, only the confusion of a century and a half of fluctuating Indian policy, and challenging the most artful intellect to find a consistent whole. Tribal economic development is now entering a new era. That the responsibility should fall on the courts to apply this conceptual melange of law, regulation, and precedent to the solution of the issues it will raise seems inconceivable. What is indicated, rather, is the need for re-evaluation and the ultimate determination of an

37. Restatement of Contracts § § 236, 512, 592, 598 (1932).

38. The tax question is currently being litigated. In Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), the Ninth Circuit upheld the imposition of a possessory interest tax on the lessee of Indian lands where there was no legislation evidencing a Congressional intent to forbid it. The case is currently before the Supreme Court on petition for certiorari, docket number 71-183, filed Aug. 6, 1971.

39. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

enduring Indian policy. For two hundred years the exigencies of a growing nation have dictated the piecemeal sacrifice of Indian rights. This generation may well have the privilege of making the final sacrifice, unless, as the Indian moves into the economic maelstrom, his rights, obligations, and status are clearly defined and protected.[40]

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40. A related article offering possible solutions to jurisdictional conflicts appears in this issue. *Note*, 2 N.M. L. Rev. 71 (1972).