New Mexico Law Review

2 N.M. L. Rev. 71 (Winter 1972)

Winter 1972

Need for a Federal Policy in Indian Economic Development

Mark B. McFeeley

Recommended Citation

Mark B. McFeeley, *Need for a Federal Policy in Indian Economic Development*, 2 N.M. L. Rev. 71 (1972).
Available at: http://digitalrepository.unm.edu/nmlr/vol2/iss1/3

This Notes and Comments is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

NOTE

NEED FOR A FEDERAL POLICY IN INDIAN ECONOMIC DEVELOPMENT

INTRODUCTION

Pursuant to the policy adopted by the federal government and implemented by the Bureau of Indian Affairs, many of the Nation's Indian tribes, acting only after approval of the Secretary of the Interior, are attempting to make themselves economically independent by leasing portions of their lands for development by non-Indians.

This has lately taken the form of leasing lands for hotels, as on the Agua Caliente reservation in Southern California, and for development of residential areas, as at the Cochiti and Tesuque pueblos in New Mexico.

Leasing tribal lands has resulted in many problems, as the states attempt to both tax and acquire jurisdiction over the interests of the lessee in a multitude of situations.

There have been attempts to solve these problems by using settlement tactics, by acquiescing to the states' claims of jurisdiction, and by bringing actions in court. None of these methods seems to have taken into account the broad, far-reaching policy enunciated by Congress of helping the Indians attain economic self-sufficiency. Nor has Congress stepped in and passed laws that would further its policy and solve many of the questions now being disputed.

At least three cases have arisen over state attempts to tax and to acquire other types of jurisdiction over lessees of Indian lands: *The Agua Caliente Band of Mission Indians v. The County of Riverside,*[1] *State of New Mexico v. Russell,*[2] (concerning the development at Cochiti Pueblo) and *Norvell v. Sangre De Cristo Development Co.,*[3] (concerning the development at Tesuque Pueblo).

It is the purpose of this article to discuss some of the state jurisdictional and tax claims,[4] to analyze some recent decisions in light of the federal policy toward Indian tribes, and to suggest a method

1. Agua Caliente Band of Mission Indians v. County of Riverside, 306 F. Supp. 279 (C.D. Calif. 1969), *aff'd,* 442 F.2d 1184 (9th Cir. 1971). *Petition for cert. filed,* 40 U.S.L.W. 3079 (U.S. Aug. 6, 1971) (No. 71-183).

2. State of N.M. v. Russell, Civil No. 8745 (D. N.M., filed Dec. 4, 1970).

3. Norvell v. Sangre de Cristo Dev. Co., Civil No. 9106 (D. N.M., filed Sep. 7, 1971).

4. The limited scope of this paper does not allow for a discussion of water rights, which are of particular importance and concern in the Western and Southwestern areas of the United States.

whereby future economic development by Indian tribes can be carried on without infringement of federal or tribal powers by the states, without any loss of tribal sovereignty, and in an orderly and regulated manner.[5]

POSSESSORY USE TAXES

In the recent Ninth Circuit case of *The Agua Caliente Band of Mission Indians v. The County of Riverside,*[6] a possessory interest tax levied by the County of Riverside on Palm Springs Properties, a lessee of land on the Agua Caliente Reservation, was upheld in a 2-1 decision. The Agua Caliente Indians claimed that the imposition of the tax decreased the value of their land (Palm Springs Properties was unable to pay the agreed rental under the lease because of having to pay the tax),[7] made it very difficult, if not impossible, to lease their lands, and put them at an economic disadvantage compared to owners of land bearing no restrictions.[8]

The Circuit Court, in affirming the decision of the United States District Court for the Central District of California[9] found that there was no Congressional purpose which forbids imposition of this type of tax and that the levy was not on the land itself, ". . . but rather taxes the 'full cash value' of the lessee's interest."[10] The court also concluded that the cases of *United States v. City of Detroit*[11] and *Oklahoma Tax Commission v. Texas Company*[12] foreclosed any consideration of the economic consequences to the Indians and of the Tribe's contention that a tax on the use of a thing was a tax on the thing itself.[13] Judge Ely, in his dissenting opinion distinguished both the *City of Detroit* and *Oklahoma Tax Commission* cases,[14] stating

5. For a discussion of an attempt to resolve some of the issues with a settlement agreement between the State and the developer, *see* Comment, 2 N.M.L.R. 81 (1972).

6. Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971).

7. Brief for Appellants at 5, Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971).

8. *Id.* at 9, 10.

9. Agua Caliente Band of Mission Indians v. County of Riverside, 306 F. Supp. 279 (C.D. Calif. 1969).

10. Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184, 1186 (9th Cir. 1971).

11. United States v. City of Detroit, 355 U.S. 466 (1958).

12. Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949).

13. Brief of Appellants, *supra* note 7, at 4.

14. Judge Ely read *City of Detroit* as standing for the proposition that ". . . [t]he doctrine of intergovernmental immunity does not preclude state taxation of an entity *solely* because the burden of such taxation eventually falls on the federal government." He read *Oklahoma Tax Commission* as allowing taxation only when ". . . there is no possibility that ultimate liability for the taxes may fall upon the owner of the land" and that the case would not be properly applicable since ". . . no derivative Indian rights were asserted by the non-Indian lessees and no Indian was a party to the action." 442 F.2d at 1188.

that had the language in *Squire v. Capoeman*[15] been given more consideration by the majority, it would have compelled finding the tax invalid.[16]

In *Squire v. Capoeman,* the majority, speaking through Chief Justice Warren, was of the opinion that Capoeman, a Quinaielt Indian living on the reservation, was not liable for capital gains tax imposed on the proceeds of the sale of timber by the United States in its capacity as guardian of its Indian ward. The Court thought that presently existing or future taxes should not be applicable to the Indian allotment and that "unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others."[17]

It is interesting to note that the court, and even Judge Ely in his dissent, made no reference to *Williams v. Lee.*[18] The language in that case, coupled with the fact that the Agua Caliente Band had imposed its own tax[19] upon Palm Springs Properties, would perhaps have made it possible to construe the county tax as an interference with tribal government, and thus invalid under the rule of *Williams v. Lee.*[20]

There are problems inherent in leasing Indian lands, such as securing the approval of the Secretary of the Interior,[21] and difficulties involved in financing construction projects on Indian lands (the lands cannot be subordinated to the mortgage).[22] Due to such considerations, possible lessors might not get involved with Indian lands unless there was some offsetting advantage. Until the decision in *Agua Caliente,* exemption from taxes provided one such offsetting advantage. Thus, in effect, the imposition of the possessory use tax by the County of Riverside presents the entire Agua Caliente Band of

15. Squire v. Capoeman, 351 U.S. 1 (1956).

16. "Rather, the case stands for the proposition that the federal policy of protecting Indian wards is superior even to the need to collect revenue for the maintenance of the federal government itself." 442 F.2d at 1189.

17. Squire v. Capoeman, 351 U.S. 1, 10 (1956).

18. Williams v. Lee, 358 U.S. 217 (1959). *Williams* held invalid an attempt by the State of Arizona to assume civil jurisdiction over a case arising on the Navajo reservation on the grounds that the assumption of jurisdiction by Arizona would be an interference with Navajo tribal sovereignty.

19. Brief of Appellants, *supra* note 7, at 10-11, 33.

20. *See* note 18 *supra.*

21. General Leasing Act, 25 U.S.C. § 415(a) (Supp. 1971). Since leases of tribal land may only be made under terms and conditions that meet the approval of the Secretary of the Interior it can be argued, as it was by Appellants in the *Agua Caliente* case, that Congress has pre-empted the field and that the decision in Warren Trading Post Co. v. Arizona Tax Comm'n., 380 U.S. 685 (1965), should be controlling to rule the tax invalid.

22. Brief for Appellants, *supra* note 7, at 9.

Indians from having a chance for economic survival in competion with others.

Since both cases cited as controlling by the majority can be distinguished, imposition of a tax is an interference with tribal government, and it is Congressional policy to encourage Indian tribes to become economically self-sufficient, it is the opinion of this author that the Supreme Court should reverse the Ninth Circuit holding in *The Agua Caliente Band of Mission Indians v. The County of Riverside.*

AD VALOREM PROPERTY TAXES

The State of New Mexico is attempting to impose an ad valorem property tax upon the value of the lease and the value of the improvements made by the Sangre De Cristo Development Company on the land which they have leased from the Pueblo of Tesuque.[23]

Before 1949 and the *Oklahoma Tax Commission v. Texas Co.*[24] case, it seems clear that the state would not have had the power to levy an ad valorem property tax on the personal property of a non-Indian on Indian lands,[25] with the exception of cattle and horses being grazed on the property.[26] In a line of cases overruled by *Oklahoma Tax Commission v. Texas Co.*, the Supreme Court had held that "a tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them," and that the imposition of taxes on the value of leases on the property of non-Indians on leased Indian lands interfered with the duty of the federal government to make the best possible transactions for its Indian wards and thus was an interference with the federal government.[27]

Oklahoma Tax Commission seems to have laid down the rule that absent an express statutory grant of a tax exemption to non-Indians on Indian lands, a state should feel free to exercise its power to tax the lessees. This interpretation, by a court which previously stated "the language used in treaties with the Indians should never be construed to their prejudice,"[28] has caused hardships to the Indian tribes in their attempts to forge ahead economically and thus has interfered, in a very real sense, with the Federal government in its duty of looking out for its Indian wards. This hardship is amply

23. Counts III and IV of Complaint, Norvell v. Sangre de Cristo Development Co., Civil No. 9106 (D. N.M., filed Sep. 7, 1971).

24. Oklahoma Tax Comm'n. v. Texas Co., 336 U.S. 342 (1949).

25. Gillespie v. Oklahoma, 257 U.S. 501 (1922).

26. Thomas v. Gay, 169 U.S. 264 (1898).

27. U.S. v. County of Alleghany, 322 U.S. 174 (1944); Gillespie v. Oklahoma, 257 U.S. 501 (1922).

28. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832).

illustrated by the testimony of the concerned parties in the *Agua Caliente* case. It is time for the federal government, if it is going to honor its commitments, to take a good look at the effect of taxation, both direct and indirect, on future development by Indian tribes. It should balance these factors against such opposing considerations as the cost to federal and state governments of taking away this source of tax revenues, and give serious consideration to providing tax exemptions for this type of activity.

SUBDIVISION AND ZONING

Among other problems that have become apparent in New Mexico with the leasing of Indian lands for development of homesites and communities is the applicability of New Mexico's Land Subdivision Act.[29]

Section 70-3-2(a) of this Act exempts from coverage subdivisions approved by an agency of the United States. Since the lease and provisions for subdivision therein at both Cochiti and Tesuque Pueblos have been approved by the Secretary of the Interior, it would appear that this Section acts as a bar to state enforcement of the Act and leaves the developer free from restrictions regarding platting,[30] disclosure of restrictions on the land in the terms of the contract,[31] and standards of advertising.[32]

The state has a legitimate interest in protecting its citizens from fraud in the offering of land for sale, even land within the boundaries of an Indian reservation. It would appear that enforcement of this state interest in no way interferes with the sovereignty of a tribe whose land might be involved or with any federal interest. The author therefore urges that, before any new leases are approved by the Secretary of the Interior, the disclosure provisions of the Land Use or Land Subdivision Act of the state in which the land is situated be made applicable to the developer or lessee of the land and that it be recognized that the state should be able to enforce the provisions of its laws governing these points.

It should be noted at this point that although the author is advocating the right of a state to have its Subdivision Law made applicable to a development on an Indian reservation, neither the Supreme Court of Washington, speaking in *Snohomish County v. Seattle Disposal Company*,[33] nor the author thinks the state has any right to "zone" Indian land and regulate its use.

29. N.M. Stat. Ann. § 70-3-1 to 9 (Supp. 1971).
30. N.M. Stat. Ann. § 70-3-3 (Supp. 1971).
31. N.M. Stat. Ann. § 70-3-4 (Supp. 1971).
32. N.M. Stat. Ann. § 70-3-5 (Supp. 1971).
33. 425 P.2d 22 (Wash. 1967).

> Limitation on the use to which a lessee from the Tulalio Tribes can put Indian lands is limiting the Indian use. The county cannot indirectly accomplish federally prohibited interference with property that it could not accomplish directly.[34]

LICENSES

Another problem arising in New Mexico, caused by the leasing of Indian lands to non-Indians for development purposes, is the claim of state jurisdiction and control over the dispensing of alcoholic beverages and the state's attempt to force the developer to obtain a dispenser's license.[35]

Historically, Congress has regulated possession and sale of liquor, both to Indians and on Indian lands and it continues to do so today.[36]

In 1953, Congress enacted 18 U.S.C. § 1161,[37] which basically allows Indian tribes a "local option" as to whether or not they will allow liquor on their reservations and also requires conformity with state laws and tribal ordinance.

Complying with § 1161, The Council of the Pueblo of Tesuque adopted the requisite ordinance on December 8, 1970, which was subsequently approved by the Secretary of the Interior.[38]

---

34. *Id.* at 26. It seems that this reasoning could also be used in reversing the decision in the *Agua Caliente* case, the County not being able to accomplish indirectly (by imposing a possessory use tax) what it could not accomplish directly (restricting the Indians' right to lease tribal lands or taxing tribal lands directly).

35. Count I of Complaint, Norvell v. Sangre de Cristo Development Co., Civil No. 9106 (D. N.M., filed Sep. 7, 1971).

36. F. Cohen, Federal Indian Law 352 (1970).

37. 18 U.S.C. § 1161 provides: "The provisions of 1154, 1156, 3113, 3488, and 3618, of this title, shall not apply within any area that is not Indian country, nor to any act or transaction within any area of Indian Country provided such act or transaction is in conformity both with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian Country, certified by the Secretary of the Interior, and published in the Federal Register."

38. The ordinance states:

> Whereas, Public Law 277, 83d Congress, approved August 15, 1953, provides that sections 1154, 1156, 3113, 3488, and 3618 of title 18, United States Code, commonly referred to as the Federal Indian Liquor Laws, shall not apply to any act or transaction within any area of Indian Country provided such act or transaction is in conformity with both the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the Tribe having jurisdiction over such area of Indian Country, certified by the Secretary of the Interior, and published in the Federal Register.
>
> Whereas, the Council of the Pueblo of Tesuque requests that the introduction, sale or possession of intoxicating beverages shall be lawful within that area of Indian Country under the jurisdiction of the Pueblo of Tesuque, which lies east of the east right-of-way boundary of U.S. Highway 64-84-285: *Provided,* That such introduction, sale or possession is in conformity with the laws of

The author has been unable to find any cases construing 18 U.S.C. § 1161, and the legislative history of the Act, set out in 1953 U.S. Code Congressional and Administrative News at 2400, offers little to indicate whether it was contemplated that a dispenser operating under a tribal ordinance would be required to obtain a state license. Recent events, however, indicate that it was not so contemplated. On March 26, 1971, Rocky Boy's Reservation in Montana passed the required ordinance[39] which was similar in content to that passed by

---

the State of New Mexico, and subject to such licensing or regulation as the Council of the Pueblo of Tesuque may require.

Therefore, be it ordained by the Council of the Pueblo of Tesuque that said introduction, sale or possession of intoxicating beverages shall be lawful within that area of Indian Country, under the jurisdiction of the Pueblo of Tesuque, which lies east of east right-of-way boundary of U.S. Highway 64-84-285; *Provided,* That such introduction, sale, or possession be in conformity with the laws of the State of New Mexico and in conformity with such licensing or regulation as the Council of the Pueblo of Tesuque may, by appropriate ordinance subject to approval by the Secretary of the Interior, require.

Be it further enacted that any tribal laws, resolutions or ordinances heretofore enacted which prohibit the sale, introduction, or possession of intoxicating beverages are hereby repealed with the exception of those lands, under the jurisdiction of the Pueblo of Tesuque, lying west of the east right-of-way boundary of U.S. Highway 285-84-64, upon which the introduction, sale, or possession of intoxicating beverages shall remain illegal.

36 Fed. Reg. 7693 (Apr. 1971).

39. Whereas, Public Law 277, 83d Congress, approved August 15, 1953, provides that sections 1154, 1156, 3113, 3488 and 3618 of title 18, United States Code, commonly referred to as the Federal Indian Liquor Laws, shall not apply to any act or transaction within any area of Indian country, provided such act or transaction is in conformity with both the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the Tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register, and

Whereas, Ordinance 1-54 enacted November 23, 1953, of the Rocky Boy's Business Committee relating to the application of the Federal Indian Liquor Laws on the Rocky Boy's Reservation permitted the introduction and possession of intoxicating liquor on the Reservation but did not permit the sale of the same, and

Whereas, it is now desired that these rules and regulations be modified to permit the sale of intoxicating liquor in addition to the use, introduction and possession thereof,

Therefore, be it ordained, that the introduction, sale, or possession of intoxicating liquor, including but not being limited to beer, wine, whiskey, etc., hereinafter collectively referred to as intoxicating liquor, shall be lawful within the Indian country under the jurisdiction of the Chippewa Cree Tribe, provided such act or transaction is in conformity with both the laws of the State of Montana and this Ordinance.

Be it further ordained, that said intoxicating liquor, as hereinabove defined, may be sold on the Rocky Boy's Reservation in accordance with the following provisions and restrictions:

1. Under this Ordinance only one outlet for the sale of intoxicating liquor shall be authorized for consumption on-premises and/or off-premises.

Tesuque Pueblo in that it required licensing by the Tribe (the Tesuque ordinance requires that a license be procured from the Pueblo Council). It would thus appear that the interpretation being given to § 1161 is that the minimum standards allowable are those imposed by state law. It is possible, however, for the tribe to impose more rigid standards. While *conformity* with state law is required as a minimum standard, there is no indication that the state's licensing laws must be complied with or that a state license is required.

Said outlet shall be operated only under a license issued by the Chippewa Cree Tribe, which may be owned by the Tribe or issued to a person, organization or business entity, selected and approved by the Tribe. All of the following rules and regulations shall apply to any party dispensing such intoxicating liquor.

2. The above-described license for the sale of intoxicating liquor may be operated only within the confines of that part of the Rocky Boy's Reservation which lies in the SE¼ of sec. 21 and all of sec. 22, T. 28 N., R. 16 E. of the Montana Meridian.
3. Any person authorized under the terms of this Ordinance, whether as a Tribal licensee or employed by the Tribe, selling intoxicating liquor shall abide by and be responsible for the following:
   A. Operate so that any act or transaction carried on hereunder is in conformity both with the laws of the State of Montana, where applicable, and with this Ordinance.
   B. Never sell intoxicating liquor on credit and not engage in pawnbroking, taking items in hock, lending money, or in any other activity which is designed to permit an indigent person or any customer from buying [*sic*] such products in his establishment. All sales of intoxicating liquor must be on a cash basis.
   C. Continuously maintain order in the premises in which intoxicating liquor is sold, prohibit intoxicated persons from purchasing intoxicating liquor, assure that no sale of intoxicating liquor is made to a minor, prohibit consumption of intoxicating liquor on the premises purchased for off-premises consumption, and prohibit loud, boisterous, lascivious and profane language, prohibit begging or soliciting for drinks, prohibit fighting or threatening to fight on the premises, and prohibit any violation of the Tribal Law and Order Code by any person on the premises to the best of his ability.
   D. To be and remain solely responsible to insure that any and all persons purchasing intoxicating liquor on such premises are not minors.
4. The Tribal licensee or employee of the Tribe operating an establishment selling intoxicating liquor under this Ordinance shall post a $500 cash bond with the Tribe which shall be forfeited to the Tribe if he or any of the employees under his supervision violate any of the provisions of this Ordinance.
5. The Law and Order Sub-Committee of the Tribal Business Committee shall meet quarterly during the year, and at such other times as they deem necessary, to review the effects of intoxicating liquor sales on the Reservation, and the conduct of the persons selling the same, and to recommend action to the Business Committee to enforce or amend the laws and regulations concerning such activity.

Be it further ordained, that this Ordinance shall become effective upon certification of the Secretary of the Interior and publication in the Federal Register (4-16-71), and that any ordinances, laws or resolutions previously

If this discrepancy is litigated, the Court will be forced to make a decision knowing little, if any, of the long range Indian policy being formulated by Congress or of the congressional intent behind the statute it is construing.

CONCLUSION

These are but four of the areas of controversy developing between states, Indian tribes, and lessees of tribal lands.

Attempts have been made to solve these disputes by settlement[40] and by resort to the courts.[41] Neither solution seems to be appropriate or to allow long range economic planning by the nation's Indian tribes. For example, not all claims that New Mexico may want to make relative to taxes and other types of control over Sangre De Cristo Development Company or the future inhabitants of Colonias De Santa Fe are enumerated in the complaint in *Norvell v. Sangre De Cristo Development Co.*[42]

Rather than obtain a piecemeal, state by state, adjudication of rights that have such an important bearing on future economic development by Indian tribes, the federal government, to protect its interests and the interests of its Indian "wards," should, after consultation with appropriate agencies and with the nation's Indian tribes, promulgate regulations relative to every aspect of leasing Indian lands.[43] These should include water rights, taxes, building codes, fire and police protection, schooling, water and air pollution, health and sanitation, civil and criminal jurisdiction and service of process. To leave the formulation of rules to a case by case, state by state, determination in the court with the limited amount of expertise it can acquire over the subject from briefs and memoranda, and with the general policy of the courts to look only at the facts before it, paying little attention to cases which have decided dif-

---

enacted which differ or are not consistent with the intent of this Ordinance are hereby repealed.

Be it further ordained, that the Chairman and Secretary of the Business Committee, when authorized by the Business Committee, are empowered to execute any licenses or other instruments referred to in this Ordinance, on behalf of the Tribe.

36 Fed. Reg. 7262 (Apr. 1971).

40. Comment, 2 N.M.L.R. 81 (1972).

41. Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971); Norvell v. Sangre de Cristo Development Co., Civil No. 9106 (D. N.M., fiiled Sep. 7, 1971).

42. Civil No. 9106 (D. N.M., filed Sep. 7, 1971).

43. Whyte v. Dist. Ct. of Montezuma County, 346 P.2d 1012, 1014, (Colo. 1959) states: "Under the Constitution of the United States the jurisdiction of the federal government over all Indian affairs is plenary and subject to no diminution by the states in the absence of specific congressional grant of authority to them to act." [Citations omitted.]

ferent points in different states under different constitutions and statutes, would make for an uncertain and confused body of law and regulations. Furthermore, this would seem to be another abdication of trust by the federal government in its dealings with the Indians. The resulting confusion would hinder the Indian tribes in their efforts toward further economic development since a potential lessor-developer could not be certain in any situation what state laws and regulations would be applicable to him and would not be anxious to buy a law suit.

It is obvious that the simplest, most straightforward solution, one which could help achieve the optimum economic self-sufficiency set as a goal both by the Tribes and the federal government, would be for that government to accept its responsibility, come forth with the necessary regulations, and, as *Warren Trading Post* teaches us,

> These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business . . . on reservations so fully in hand that no room remains for state laws imposing additional burdens . . . .[44]

MARK B. MCFEELEY

44. Warren Trading Post v. Arizona State Tax Comm'n., 380 U.S. 685, 690 (1965).