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A Rebuttal to the Pre Emption Doctrine and Colonias De Santa Fe

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A REBUTTAL TO "THE PRE-EMPTION DOCTRINE AND COLONIAS DE SANTA FE"

This paper challenges the Comment, "The Pre-emption Doctrine and Colonias de Santa Fe,"[1] on the ground that it misses the point of pre-emption by treating the concept as if a state may assume jurisdiction over Indian matters *unless* the federal government has pre-empted a field—in this case, regulation of long-term leases on tribal lands. This notion will not stand in the light of two interrelated principles of Indian law, both of which derive from *Worcester v. Georgia.*[2] The first is that until Congress chooses to exercise its plenary power over Indian affairs by statutorily pre-empting a field,[3] the tribes retain control of that area by virtue of their internal sovereignty. In *Worcester,* the Court held that Indian tribes "have always been considered as distinct, independent, political communities, having territorial boundaries, within which their authority is exclusive," subject only to superior federal power.[4] The doctrine of internal sovereignty of the tribes has been consistently reaffirmed by the federal judiciary which looks to congressional statutes as limitations upon, rather than direct sources of, original tribal sovereignty.[5] The case of *Ex parte Crow Dog*[6] illustrates an early application of the doctrine of tribal self-government: the Supreme Court held that the murder of one Indian by another on the Sioux Reservation was within the exclusive jurisdiction of the tribe and, absent express congressional legislation, not within the jurisdiction of the federal courts. Two years after the decision, Congress enacted the Major Crimes Act[7] which gave to the federal courts jurisdiction over certain crimes committed by Indians on their reservations. When Congress has acted to reserve an area of Indian law, as it did with the Major Crimes Act, it has done so out of the recognition that unless it acts

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1. Comment, 13 Natural Resources J. 535 (1973).
2. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832).
3. The federal government derives its authority over Indian affairs from the commerce clause of the United States Constitution (Art. I, § 8, cl. 3) which gives Congress power to regulate commerce with the tribes, and from the treaty clause (Art. II, § 2, cl. 2) which empowers the President to make treaties with the "advice and consent of the Senate."
4. 31 U.S. at 559.
5. F. Cohen, Handbook of Federal Indian Law 122 (1942).
6. Ex parte Crow Dog, 109 U.S. 556 (1883).
7. Major Crimes Act, 23 Stat. 362, 18 U.S.C. § 548 (1885). The act, currently codified in 18 U.S.C. § 1153 (Supp. III, 1968), has been expanded over the years to bring thirteen major crimes committed by Indians on their reservations within the jurisdiction of the federal courts.

the tribes remain free to exercise the powers of self-government in that area.[8]

Another established principle of Indian law is that the states have no power over Indian matters *unless* Congress has specifically authorized such jurisdiction, a principle which also found judicial expression in *Worcester.* The Court held that the laws of a state can have no force on tribal lands within its borders except with the assent of the tribe involved or in conformity with treaties or acts of Congress.[9] From time to time the Congress has conferred upon the states jurisdiction over limited portions of Indian affairs, e.g., compulsory school attendance laws[10] and sanitation and quarantine regulations.[11] Perhaps the most controversial legislation granting the states power over Indian affairs was the 1953 Public Law 280,[12] which provided for unilateral assumption by the states of civil[13] and criminal[14] jurisdiction over Indians and Indian country without tribal consent. Six states[15] were given outright grants of jurisdiction over Indian lands within their borders except for specifically exempted reservations. The act also provided for assumption of jurisdiction over Indian affairs by those states which had not been given specific grants of jurisdiction.[16] This provision was amended by Title IV of the Indian Civil Rights Act of 1968[17] which requires consent to such jurisdiction by the tribes to be affected. Since *Worcester,* the doctrine that state laws have no force on Indian lands without specific congressional grant has been consistently upheld by the United States Supreme Court.

The Comment writer failed to take into account these fundamental tenets of Indian law in challenging the holding in *Sangre de Cristo Development Corporation, Inc. v. City of Santa Fe and Board of County Commissioners of Santa Fe County, New Mexico.*[18] That

8. In a Department of Interior document enumerating tribal powers, the Solicitor's office stated:

> ... full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government [unless qualified by treaty or acts of Congress].

United States Department of Interior, Powers of Indian Tribes 8 (1934).

9. 31 U.S. at 561.

10. Act of Aug. 9, 1946, 25 U.S.C. § 231 (1964).

11. Act of Feb. 15, 1929, 25 U.S.C. § 231 (1964).

12. Act of Aug. 15, 1953, 18 U.S.C. § 1162 (1964), 28 U.S.C. § 1360 (1964).

13. 28 U.S.C. § 1360 (1964).

14. 18 U.S.C. § 1162 (1964).

15. California, Minnesota, Nebraska, Oregon and Wisconsin. Alaska acceded to statehood as a Pub. L. No. 280 state by the Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545, which granted such jurisdiction to the Territory of Alaska.

16. Section 7, 28 U.S.C. § 1360 (1964).

17. Indian Civil Rights Act, 25 U.S.C. § § 1321-1326 (1968).

18. Sangre de Cristo Development Corporation, Inc. v. City of Santa Fe and Board of

case dealt with the issue of whether a governmental unit of the state of New Mexico may exercise planning and platting authority and sub-division control over Tesuque Pueblo lands which have been leased to a non-Indian development corporation. The Comment author appears to regard the pueblo as if it were part of the state of New Mexico rather than what it is—federally-protected tribal land within the state's boundaries. The Tesuque, like certain of the other pueblos, holds its lands in fee title under grants dating back to the Spanish and reaffirmed by the Mexican and United States Governments.[19] Half a century before New Mexico was admitted to statehood in 1910, land titles for seventeen pueblos, including Tesuque, were confirmed by Congress and patented by President Lincoln.[20]

In common with certain other states,[21] New Mexico's Enabling Act[22] and Constitution[23] contain provisions by which the state disclaims jurisdiction over Indian lands within its borders. The pertinent constitutional provision states in part:

> ... 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. ...[24]

The question whether such disclaimer is one of governmental or proprietary interest has been the subject of considerable confusion since *Organized Village of Kake v. Egan*[25] which dealt with attempts by Alaska to regulate the use of fish traps by Tlingit Indians in public waters. Tlingit fishing rights are protected by a provision in the Alaska Statehood Act[26] similar to the disclaimer clause in the New Mexico Constitution. The Court in *Kake* interpreted the provision as a disclaimer of proprietary interest and not of governmental control,

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County Commissioners of Santa Fe County, New Mexico, 84 N.M. 343, 503 P.2d 323 (1972), *cert. denied,* 411 U.S. 938 (1973).

19. Cohen, *supra* note 4, at 396.

20. The Tesuque, along with seven other pueblos, did not have original grant papers at the time of accession of the Territory of New Mexico. In 1854 Congress provided for appointment of a surveyor who was mandated to report on the location and size of the pueblos, as well as ascertain the nature of their titles to land. Based upon his testimony and that of pueblo officers, Tesuque title grant was confirmed by Congress in 1858 and patented in 1864. Pueblo land titles are restricted fee patents since the pueblo tribes enjoy all the rights of a land-owner except the right of alienation which requires approval of the Secretary of Interior, in common with those tribes which have only equitable title to their lands.

21. Arizona, Montana, Oklahoma, Utah, Washington, North Dakota and South Dakota.

22. Enabling Act of New Mexico, § 2, 36 Stat. 557 (1910).

23. N.M. Constitution, § 2.

24. *Id.*

25. Organized Village of Kake v. Egan, 369 U.S. 60, 82 S. Ct. 562, 7 L.Ed.2d 573 (1962).

26. Alaska Statehood Act, P.L. 85-508, § 4, 72 Stat. 339 (1958).

and held that the "absolute jurisdiction and control" retained by the federal government is not strictly synonymous with exclusive jurisdiction.[27] Having made these distinctions, Justice Frankfurter attempted to redefine the scope of state authority over Indian lands; after examining cases dealing with state jurisdiction absent an express grant from Congress, he wrote:

> These decisions indicate that even on reservations state law may be applied to Indians unless such applications would interfere with reservation self-government or impair a right granted or reserved by federal law.[28]

New Mexico, along with other states, has attempted to use this dictum as authority for extension of its powers over tribes located within the state.[29] Unlike Alaska, which acceded to statehood with P.L. 280 jurisdiction,[30] New Mexico has not acquired P.L. 280 authority since it has neither acted to obtain consent of the tribes to be affected nor to amend its Constitution, both of which procedures are required by Title IV of the Indian Civil Rights Act.[31]

The Comment writer states that two tests have evolved by which state action in Indian affairs may be measured. One test concerns impairment of federal pre-emption of Indian affairs. The leading case on this question is *Warren Trading Post v. Arizona Tax Commission,*[32] in which the United States Supreme Court held invalid an attempt by Arizona to tax the gross income of licensed traders on the Navajo Reservation, claiming that federal regulation of Indian traders pre-empts the field. Thus, the Court held, no room exists for the state to impose additional burdens on the traders. Another test of state action concerns interference with tribal self-government. In *Williams v. Lee,*[33] a case arising from the attempts of a non-Indian trader on the Navajo Reservation to collect for goods sold to tribal members, the Supreme Court noted that "No Federal Act has given

27. 369 U.S. at 64-71.

28. 369 U.S. at 75.

29. Montoya v. Bolack, 70 N.M. 196, P.2d 387 (1962); State v. Warner, 71 N.M. 418, 379 P.2d. 66 (1963); Gahate v. Bureau of Revenue, 80 N.M. 98, 451 P.2d 1002 (Ct. App. 1969).

30. *See* note 15, *supra.*

31. Civil Rights Act, *supra* note 17: Sections 1321(a) and 1322(a) require consent, respectively, for criminal and civil jurisdiction by the tribe to be affected; Section 1324 requires amendment of state constitutions to remove legal impediments to assumption of jurisdiction over Indian affairs. Kennerly v. District Court of Montana, 400 U.S. 423 (1970), held that Title IV is the only means by which a state may assume such jurisdiction.

32. Warren Trading Post v. Arizona Tax Commission, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d. 165 (1965).

33. Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959).

State Courts jurisdiction over such controversies."[34] This position was a reversal of the judgment of the Arizona Supreme Court which had decided in favor of the trader and held that the case would be allowed since Congress had not expressly forbidden state jurisdiction over civil suits by non-Indians against Indians, essential tribal relations were not involved, and the rights of Indians were not jeopardized. In reversing the judgment of the Arizona court, the Supreme Court stated:

> Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which Worcester v. Georgia had denied.[35]

The Court further stated:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. . . . If this power is to be taken away from them, it is for Congress to do it. . . .[36]

The issues dealt with in *Warren* and *Williams*—respectively, impairment of federal pre-emption and of tribal self-government—are not two separate tests as the Comment writer suggests. Taken together, these questions require a specific federal grant to the states to assume jurisdiction over Indian affairs. If Congress has pre-empted, the *Warren* question is applicable; if not, the Court must move on to the self-government question in *Williams.* Clearly, the two holdings are in keeping with the long line of cases which have upheld the doctrine that a state may not act to assert jurisdiction over Indian affairs unless under specific congressional grant.

This doctrine was reaffirmed in the recent case of *McClanahan v. State Tax Commission of Arizona,*[37] which held that Arizona may not tax a tribal member for income earned exclusively on the reservation; the Court's reasoning was that "the State has no more jurisdiction to reach income generated on reservation lands than to tax the land itself."[38] As authority, the Court cited a Department of Interior text on Indian law:[39]

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State

34. 358 U.S. at 222.
35. 358 U.S. at 220.
36. 358 U.S. at 223.
37. McClanahan v. State Tax Commission of Arizona, ___U.S.___, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).
38. U.S. , 93 S.Ct. 1267, 36 L.Ed.2d 142.
39. U.S. , 93 S.Ct. 1261, 36 L.Ed.2d 135.

> laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress.[40]

The *McClanahan* decision clarified the waters which had been muddied by the *Kake* holding that Alaska's disclaimer clause was a disclaimer of proprietary as distinct from governmental interests.[41] Although Arizona relied on *Kake* in an attempt to assume governmental control over individual income derived from tribal sources, the Court held that the state could not assert such jurisdiction since it had not complied with Title IV prerequisites for assuming jurisdiction. Thus, *McClanahan* makes clear that when a state has not acquired P.L. 280 jurisdiction, its constitutional disclaimer applies to governmental as well as proprietary interests in Indian lands.

In challenging the *Sangre de Cristo* decision, the Comment writer asserts that the Secretary of the Interior had not enacted regulations for subdivisions on Indian lands.[42] That the Secretary had congressional authorization to regulate leasing of Indians lands was not in issue. In 25 U.S.C. 415, Congress specifically provided that leases of Indian lands shall be made with approval of the Secretary and that all leases and renewals shall be made under such terms and regulations as may be prescribed by him. Pursuant to section 415, the Secretary promulgated regulation 1.4,[43] which delineates the scope of discretion which he may exercise in approving leases of Indian lands. Regulation 1.4 prohibits the applicability of state or local regulations which purport to control property (including water rights) leased from an Indian tribe, except where authorized by the Secretary or his representative. Under this regulation, the Secretary may adopt state regulations for applicability on specified tribal lands whenever he deems such regulations appropriate.

Arguing against the import of regulation 1.4, the Comment author states that "regulation 1.4 is not evidence of Congressional intent, but of law making by the Secretary of the Interior."[44] In the *Sangre de Cristo* case, the New Mexico Supreme Court held that the state's attempts to exercise governmental authority over subdivision, planning and platting on the Colonias development would not interfere with the self-government of the pueblo. At the same time, the Court held, the exercise of such authority would conflict with that of the federal government:

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40. United States Department of Interior, Federal Indian Law 845 (1958).
41. *See* note 27, *supra.*
42. Comment, *supra* note 1, at 535.
43. 25 C.F.R. § 1.4 (1972).
44. Comment, *supra* 1, at 540.

> . . . Congress intended to and has accomplished by its enactments, and the extensive and all-inclusive regulations promulgated pursuant thereto, a preemption by or a reservation in the United States of all control over the leasing of Indian lands, and this includes the subdivision, planning and platting of these lands for the uses to be made thereof during the term of the leasehold.[45]

While regulation 1.4, *per se,* may not be evidence of congressional intent, that regulation is certainly within the Secretary's congressional mandate as is regulation 131, *et seq.*[46] "Leasing and Permitting," which regulates leasing of Indian lands. The very fact that Congress has acted in the field of tribal leases by mandating Interior regulations shows its intent to pre-empt the field.

In regard to the zoning authority of the counties and municipalities governed by the New Mexico Land Subdivision Act,[47] the Comment writer allows that the act contemplates further regulations[48] while seeming to deny such contemplation to federal regulations pertaining to leasing of Indian lands. The congressional grant of authority to the Secretary clearly contemplates further regulations. For Congress to have set out regulations of its own or to have denied discretionary powers in the Secretary would have been equivalent to denial of the differences in Indian lands, traditions, resources and relations with federal and state governments. Given these tribal differences, the statutory leasing authority of the Secretary must necessarily be discretionary and broad in compass. Regulations which might apply to Indians in one part of the country may not be relevant to tribes in other regions; consider, for example, the different land conditions of reservations in the water-rich states of the Northwest and those in the Southwest where water is scarce. To challenge the holding in *Sangre de Cristo,* as the Comment author has done, on the ground that the Secretary has not promulgated regulations for the development of subdivisions on Indian lands, is to deny the diversity of the tribes to whom a single set of such regulations may be applied.

The Comment writer finds no conflict between the federal regulations and New Mexico's statutes controlling zoning, platting, planning and subdivision,[49] and implies that since there is no apparent conflict the *Sangre de Cristo* Court should have found that regulations under state statutes apply to the Colonias development on

45. 84 N.M. at 351.
46. 25 C.F.R. § 131 *et. seq.* (1972).
47. N.M. Stat. Ann. § § 70-3-1 to -9 (Supp. 1971).
48. Comment, *supra* note 1, at 541.
49. *Id.* at 541.

Tesuque Pueblo. Regulation 1.4[50] authorizes but does not direct the Secretary to adopt state regulations if he deems them applicable. This regulation is a clear indication of federal recognition that state laws do not apply to Indians or their lands unless under express federal grant.

The thrust of the Comment purports to analyze the relation of the pre-emption doctrine and the Colonias development. However, the Comment misses the point of pre-emption for it treats the doctrine as if a state may step in to fill a vacuum created by congressional failure to act in a certain area of Indian law. Unless Congress has statutorily reserved a field or acted to make state laws applicable, the tribes have full powers of self-government, including the power to regulate the use of tribal property.[51] Pursuant to this power, a tribe may prescribe building code regulations and assert eminent domain,[52] as well as zone and tax.[53] According to the tenets of self-government, a tribe also has the right to *not* legislate in these areas. For a tribe not to act in a certain area does not automatically transfer that area to the jurisdiction of either federal or state governments, nor does it preclude the tribe from later legislating in that area. The Interior Solicitor's office took cognizance of this tenet by quoting from an early case dealing with the question: "Power and authority rightfully conferred do not necessarily cease to exist in consequence of long non-user [*sic*]."[54] Even the existence of a long-term commercial lease affecting tribal land does not vitiate tribal sovereign rights, including regulation of tribal property.[55]

A tribe's power to regulate the use of land within its jurisdiction derives both from its rights incident to property ownership and from its powers of internal sovereignty.[56] The regulation of lands and other tribal powers are protected by the decision in *Williams v. Lee*.[57] In both that case and the more recent one of *McClanahan v.*

50. 25 C.F.R. § 1.4 (1972).

51. As noted by Cohen, *supra* note 4, at 122:
> Indian self-government, the decided cases hold, includes the power of an Indian tribe to adopt and operate under a form of government of the Indians' choosing, to define conditions of tribal membership, to regulate domestic relations of members, to prescribe rules of inheritance, to levy taxes, to regulate property within the jurisdiction of the tribe, to control the conduct of members by municipal legislation, and to administer justice.

52. Makah Indian Tribe v. McCauly, 39 F. Supp. 75 (Wash. 1941).

53. Iron Crow v. Oglala Sioux Tribe of the Pine Ridge Reservation, 129 F.Supp. 15 (S.D. 1955).

54. United States Department of Interior, *supra* note 8, at 18 (quoting from United States *ex rel.* Standing Bear v. Crook, 5 Dill 453, 460).

55. Snohomish County v. Seattle Disposal Company, 425 P.2d 22 (Wash. 1967).

56. Cohen, *supra* note 4, at 143.

57. 358 U.S. 217.

State Tax Commission of Arizona,[58] the United States Supreme Court reaffirmed the policy announced in *Worcester v. Georgia*[59] that the internal affairs of a tribe remain exclusively within the jurisdiction of its tribal government until such time as Congress acts to take away that jurisdiction.

Long-term leases of the length and character of that contracted between the Tesuques and Sangre de Cristo usually contemplate the development of a new community to include residential, recreational and commercial uses. The development must be successful if the tribe is to derive substantial economic benefits from gross receipts percentages and yearly rentals from sub-lessees, as well as from basic ground rent. Leasing in general, and long-term leasing in particular, is at the foundation of federal Indian policy to encourage the economic development of reservations. With little or no tribal capital, the long-term lease is increasing as a method of bringing some kind of economic return to the tribes from their land—the one asset they do have. The application of state laws on tribal leaseholds would restrict the freedom of a tribe to negotiate and enter into contracts, a freedom already restricted by federal regulations.

Beyond these economic considerations, a more basic argument against New Mexico's expansion of its laws over tribal lands is that such action would interfere not only with existing federal regulations but also with tribal self-government. Since New Mexico has not acquired P.L. 280 jurisdiction over tribes within its borders there is no authority whereby the state may justifiably attempt to exercise jurisdiction over the Colonias development on the Tesuque Pueblo.

CONCLUSION

In general, a state may not act to expand its laws over Indian lands within its boundaries unless it has been granted congressional jurisdiction over a specific area such as school attendance laws or unless it has acquired broad P.L. 280 authority. New Mexico has not been granted authority to regulate subdivision developments on leased tribal lands, nor has the state acquired P.L. 280 jurisdiction since it has not complied with the requirements of Title IV of the Indian Civil Rights Act of 1968. In order to circumvent Title IV, New Mexico, like Arizona and other states, has attempted to use the holding in *Organized Village of Kake v. Egan* that a state's constitutional disclaimer pertains to proprietary as distinct from governmental interests. *Kake,* however, arose in Alaska which had acquired

58. U.S. , 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973).
59. 31 U.S. 515.

statehood concurrently with P.L. 280 authority and involved tribal rights in public waters. The *Sangre de Cristo* case, on the other hand, involved tribally-held lands. The Supreme Court, in *McClanahan v. State Tax Commission of Arizona,* made clear that a state lacking P.L. 280 authority may not utilize *Kake* as a means of assuming governmental jurisdiction over Indian affairs within its borders.

The traditional pre-emption doctrine applies to questions of jurisdiction between federal and state governments. In areas where the federal government has reserved complete jurisdiction, as in international relations, the states and their governmental units are precluded from acting. In those areas where the federal government has left room for further regulation, the states may assert complementary jurisdiction. A different jurisdictional formula applies to Indian affairs, for in this sphere there is the added dimension of inherent tribal sovereignty. Since the landmark case of *Worcester v. Georgia,* the federal judiciary has consistently reaffirmed the doctrine that the tribes retain the powers of self-government to regulate their own affairs except in those matters which the federal government has reserved to itself. Where federal jurisdiction is not exclusive the tribes have concurrent jurisdiction, as in the area of tribal land leases. If the doctrine of pre-emption has relevance in the tribal-state relationship, it is that the combined plenary powers of the federal government and the powers of internal sovereignty of the tribes operate to preclude state jurisdiction in Indian affairs absent specific congressional grant of such jurisdiction. The reason the challenged Comment missed the point of pre-emption is that it overlooked a necessary factor in its jurisdictional equation—a tribe's inherent right of self-government to regulate its own affairs.

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