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Constitutional Revision - Indians in the New Mexico Constitution

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CONSTITUTIONAL REVISION— INDIANS IN THE NEW MEXICO CONSTITUTION

There are three express references to Indians in the present New Mexico constitution. These references are in Article VII, Section 1, concerning qualification of voters, Article XIX, Section 2, concerning control of Indian lands, and Article XIX, Section 8, concerning the introduction of liquor into Indian country. The Constitutional Revision Commission has proposed the deletion of the reference to Indians in Article VII, Section 1 and the retention of both provisions in Article XIX. In addition, the commission has recommended insertion of new material concerning state assumption of jurisdiction over Indian lands. The three existing provisions and the recommended addition are analyzed below. Insertion of the new material is questioned, but otherwise the recommendations of the commission are supported.

Article VII, Section 1 of the existing constitution denies the franchise to "Indians not taxed."[1] The revision commission has suggested the deletion of that phrase from the new constitution.[2] As the commission has noted, the New Mexico supreme court has recently upheld the Indians' right to vote despite the constitutional limitation.[3] Furthermore, the restriction is in apparent conflict with Article XXI, Section 5, which provides that "This state shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude."[4] Finally, since Indians are subject to federal[5] and, increasingly, state taxation,[6] the provision would have slight significance if retained. Thus the commission's suggestion should be followed.

At the time New Mexico entered the Union, the United States

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1. N.M. Const. art. VII, § 1 reads in part: "Every male citizen . . . except idiots, insane persons, persons convicted of a felonious or infamous crime . . . and Indians not taxed, shall be qualified to vote at all elections for public officers. . . ."

2. Report of New Mexico Constitutional Revision Commission 205-06 (1967) [hereinafter cited as Commission Report].

3. *Id.* at 206. The case so holding is Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962).

4. The commission has noted this inconsistency, which apparently stems from the fact that Indians are the only people disenfranchised because "not taxed." Commission Report 205.

5. W. Brophy & S. Aberle, The Indian: America's Unfinished Business, Report of the Commission on the Rights, Liberties, and Responsibilities of the American Indian 16 (1966).

6. Ghahate v. Bureau of Revenue,—N.M.—, 451 P.2d 1002 (Ct. App. 1969), has extended the taxing power of the state over reservation Indians to include state income tax.

required that it incorporate certain provisions into its constitution.[7] These provisions required by the Enabling Act became the compact provisions of Article XXI, Sections 1-9. Before deleting or amending any of the compact provisions, the state must first be given permission by Congress.[8] Once permission is granted, the proposed change must be approved by the legislature and the electorate.[9] Since the legislature will not vote on the constitution submitted by the convention,[10] and since, with one possible exception,[11] Congress has not given its permission to change any of the existing compact provisions, the revision commission has recommended the retention of all of these sections intact.[12] The commission has suggested, however, that congressional consent "be obtained for deleting some of the provisions now embodied in the present Compact with the United States."[13] While the commission does not refer to any specific sections, it is likely that one provision which should ultimately be excised is Article XXI, Section 8.[14]

Article XXI, Section 8 is one of two provisions concerning the introduction of liquor into Indian land which appeared in the original constitution. In 1953, New Mexico repealed a constitutional prohibition of the "sale, barter, or gift of intoxicating liquors to Indians or the introduction of such liquors into Indian country."[15] The remaining provision requires that Indian lands, including Pueblos, remain subject to all laws of the United States concerning the introduction of liquor into Indian country for a period of twenty-

7. Enabling Act for New Mexico, 1910, ch. 310, § 2, 36 Stat. 557. This Act requires the insertion of several provisions in the New Mexico constitution as a condition to becoming a state. These provisions constitute a compact between New Mexico and the United States.

8. *Id.* This requirement is reproduced at N.M. Const. art. XXI, § 10.

9. N.M. Const. art. XIX, § 4:

> When the United States shall consent thereto, the legislature, by a majority vote of the members in each house, may submit to the people the question of amending any provision of Article XXI of this Constitution on Compact with the United States to the extent allowed by the Act of Congress permitting the same, and if a majority of the qualified electors who vote upon any such amendment shall vote in favor thereof, the said article shall be thereby amended accordingly.

10. Supplemental Report of New Mexico Constitutional Revision Commission 12-13 (1969). This procedure is officially outlined at N.M. Const. art. XIX, § 2.

11. This exception is N.M. Const. art. XXI, § 2, discussed *infra.*

12. Commission Report 208.

13. *Id.*

14. In the new constitution proposed by the commission, this provision would appear as Article XIV, Section 16.

15. The repealed provision was originally a part of N.M. Const. art. XXI, § 1. Congressional permission for the repeal was granted at 18 U.S.C. § 1161 (1953). State legislative approval was granted at N.M. Laws 1953, ch. 623. Repeal was consummated at a special state election on September 15, 1953.

five years following the allotment, sale, reservation, or disposal of such lands. Curiously, this remaining provision is more outmoded than the one repealed. It seems to be a relic of the Dawes Act. Enacted in 1887, the Dawes Act provided for allotments of tribal land to individual Indians, allegedly for the purpose of assimilating the Indian to the ways of private ownership. Allotments under the Act were to be held in trust by the United States for twenty-five years or longer before a fee patent would be issued. This Act represented the federal approach to Indians at the time New Mexico became a state, and the twenty-five year period in the liquor provision at N.M. Const. art. XXI, § 8 was apparently designed to correspond to the grace period of trust under the Dawes Act. Aside from its role as a memorial to our past failures in the area of Indian Affairs, the Dawes Act is of no import today.[16]

When New Mexico was given permission to amend Article XXI, Section 1, thereby removing one of the two liquor provisions, Arizona, which had the same two provisions in its constitution, was allowed to remove them both.[17] There is no need whatsoever for the remaining New Mexico provision today, since federal prohibitions on liquor in Indian country have been removed so long as state and tribal laws are followed.[18] Thus there is no federal law to be applied to such lands; liquor control in Indian country is now in the hands of the states and the tribes. Since the convention could not legally delete the provision, it should be retained as suggested and then properly repealed after the new constitution is adopted.[19]

Article XXI, Section 2 is the most problematic compact provision in the existing constitution because it contains, among other things, an apparent disclaimer of state jurisdiction over Indian lands.[20] The general question of jurisdiction over Indians and Indian lands is beyond the scope of this Comment,[21] which is restricted to the practi-

16. Brophy & Aberle, *supra* note 5, at 18-20.

17. 18 U.S.C. § 1161 (1953).

18. *Id.*

19. *See* note 9 and accompanying text *supra.*

20. The provision reads in part:

"Sec. 2. [Control of unappropriated or Indian lands—Taxation of federal government, nonresident, and Indian property.] The people inhabiting this state do agree and declare that they forever disclaim all right and title to . . . all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through the United States, or any prior sovereignty; and 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. . . ."

21. This question is among the liveliest in the area of Indian law. In addition to innumerable law review articles on the subject, an especially helpful presentation is M.

cal question of what to do with existing Article XXI[22] and the material proposed by the commission as the new Article XIV, Section 8. Article XXI, Section 2 can only be changed in the manner noted above in the discussion of Article XXI, Section 8. However, Article XXI, Section 2 is unique among the Compact provisions in that congress has apparently given permission to change it. In Public Law 280, Congress provided that the states could assume jurisdiction over Indians and that states having constitutional impediments to such assumption could remove them.[23] While certain provisions of that Act were repealed or modified by the 1968 Civil Rights Act,[24] the permission to amend impeding constitutions was not retracted. Clearly Congress intended that its permission concerned compact provisions in state constitutions, since such permission would otherwise be unnecessary.

The revision commission has suggested that all of the compact sections in the present constitution be retained; that legally no changes could be made at this time.[25] Such legal impediment is not, however, lack of congressional opinion; it is Article XIX, Section 4 of the present constitution. If New Mexico required only the consent of Congress and the state electorate to change Article XXI, Section 2, it could be changed by the convention. However, since Article XIX, Section 4 requires that such changes be approved by the state legislature and then submitted to the people, the convention is legally powerless to accept the invitation from Congress to amend Article XIX, Section 2.

In lieu of an alteration of Article XIX, Section 2, the commission has suggested the insertion of the following new material at Article XIV, Section 8: "The legislature of the state is empowered to assume and assert state governmental jurisdiction to the extent permitted by law over Indian lands and pueblos situate within the state, whenever in the discretion of the legislature such action is desirable."[26] This would be an inadvisable provision. If the new material

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Price, American Indian Legal Problems, Cases and Materials, chs. I & IA (1968) (unpublished materials for classroom use).

22. In the proposed constitution, this provision would be Article XIV, Section 10.

23. 28 U.S.C. § 1360 (1953):

> "Notwithstanding the provisions of any Enabling Act for the admission of a state, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act. . . ."

24. Civil Rights Act, 25 U.S.C.A. §§ 1321-24 (1968). The most significant modification of former law by the Civil Rights Act is the requirement that tribal consent precede any assumption of jurisdiction by the state.

25. Commission Report 208.

26. *Id.* at 202.

is included without changing existing Article XXI, Section 2, there will be an inconsistency in the constitution. In some admittedly unclear sense[27] Article XXI, Section 2 is a disclaimer of state jurisdiction, which would conflict with the proposed assumption section. Subsequent modification of the compact provision could remove the inconsistency, but the better approach is to avoid inconsistency altogether, while at the same time furthering the general purpose of avoiding unnecessary grants of powers to the legislature.

If the new material were included at Article XIV, Section 8, there would still be an impediment to jurisdiction in the compact provision. If the new material were not included, the only impediments would be the compact provision, and, since the 1968 Civil Rights Act, tribal consent. This is so because of the nature of state government. As noted in the introduction to the 1967 report,[28] state constitutions, unlike the federal constitution, are not grants of power; thus the state may generally exercise any powers not specifically withheld by state or federal constitutions or statutes. The state need not give itself the power to assume jurisdiction over Indian lands; it need only remove any existing limitations on such power. When the existing constitutional impediment to the assumption of jurisdiction is removed, the legislature is free to enact such an assumption. No grant of power to do so is required. Furthermore, if the new material were included, it would simply be unnecessary clutter in the constitution once the legislature acts to assume jurisdiction.

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27. Your Food Stores, Inc. v. Village of Espanola, 68 N.M. 327, 361 P.2d 950 (1961), interpreted the provision as a very broad disclaimer of state jurisdiction over Indians. Recent cases have analogized from the Supreme Court's interpretation of a similar provision in the Alaska constitution as merely a disclaimer of proprietary jurisdiction. Organized Village of Kake v. Egan, 369 U.S. 60 (1962). *See* Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966); Batchelor v. Charley, 74 N.M. 717, 398 P.2d 49 (1965); State v. Warner, 71 N.M. 418, 379 P.2d 66 (1963); and Montoya v. Bolack, 70 N.M. 196, 372 P.2d 387 (1962). However, despite the many cases in which the disclaimer is discussed and restricted, its meaning remains unclear, since congressional permission to remove it would make no sense at all if it were applicable only to jurisdiction over real property as suggested by the more recent cases. This is so because both former law and the 1968 Civil Rights Act specifically exempt Indian realty from any possible state assumption of jurisdiction.

28. Commission Report 5.