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October 11, 1974

Mr. Brad Patterson
White House
Washington, D.C.

RE: Mescalero Apache Tribe

Dear Brad:

I am enclosing a draft of the brief I am presently working on for the Mescalero Apache Tribe. I thought you would be interested in it in light of our recent telephone conversation.

Please excuse the condition of this brief. It is still in "production".

Perhaps we will have more material for you later.

Very truly yours,

George

George E. Fetting

GEF:maw
Enc.



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DAVID L. NORVELL, ATTORNEY
GENERAL, STATE OF NEW
MEXICO,

Plaintiff,

vs

CIVIL NO. 9106

SANGRE DE CRISTO DEVELOPMENT
COMPANY, INC. AND ROGERS
C. B. MORTON, ET AL,

Defendants,

MESCALERO APACHE TRIBE,

Defendant-Intervenor.)

DEFENDANT, MESCALERO APACHE TRIBE'S TRIAL BRIEF

STATEMENT OF ISSUES

A. Whether the laws of the State of New Mexico apply to and govern the activities of a non-Indian real estate developer in its development of Indian land.

B. Whether the application of those laws would infringe upon the right of the Pueblo of Tesuque to govern its own affairs.

C. Whether the application of those laws have been pre-empted by the operation of Federal control.

D. Whether 25 C.F.R. 1.4 is a valid regulation of the Department of the Interior.

STATEMENT OF THE CASE



Director

This case is one for declaratory relief as to the applicability of certain state laws to the activities of a non-Indian lessor of Pueblo Indian land and the validity of 25 CFR 1.4. The Attorney General of the State of New Mexico filed suit against Sangre de Cristo Development Company, Inc. and subsequently joined the Secretary of the Interior, the Commissioner of Indian Affairs and the Area Supervisor of the Bureau of Indian Affairs. The case was tried without a jury in the United States District Court for the District of New Mexico following intervention by the Board of Commissioners of Santa Fe County as plaintiff and the Mescalero Apache Tribe as defendant. The Court held for the Plaintiffs that various state laws relating to construction licensing, land subdivision, water quality, alcoholic beverages, ad valorem taxes and gross receipts taxes are applicable to the activities of Sangre de Cristo Development Company, Inc. on Indian land under lease and that 25 CFR 1.4 is an invalid regulation of the Secretary of the Interior.

The Appellant, Sangre de Cristo Development Company, Inc., hereinafter referred to as "The Company", has leased from the Pueblo of Tesuque, hereinafter referred to as "The Pueblo", an Indian Tribe recognized by the Department of the Interior, hereinafter referred to as "Interior", certain Pueblo lands by a lease approved by Interior pursuant to 25 U.S.C. 415.

The Company pursuant to this lease, has subdivided portions of the leased premises and had that subdivision plan approved by the Secretary of the Interior. The leased premises are entirely on Pueblo land and the Pueblo lands are within the territorial boundaries of the State of New Mexico, hereinafter referred to as "The State", and the Board of



Commissioners of Santa Fe County, ^{are} hereinafter referred to as "The County".

The State and County have attempted to enforce various State laws upon the activities of the Company in its activities as a subdiv-
ider of Pueblo land.

The Pueblo has enacted various ordinances governing building codes and subdivisions.

ARGUMENT

Preliminarily, the Appellant Mescalero Apache Tribe hereinafter referred to as "Mescalero", wishes to clarify the issues of law involved in this case by emphasizing what the issues are not. First, it is obvious to everyone that the Company is not an Indian Pueblo and therefore, if the activities of the Company had taken place anywhere but on Indian land the disputes involved would not have arisen. Second, the Company has not stepped into the shoes of its Lessor, the Pueblo of Tesuque, assumed the Pueblo's immunity from the operation of state law.

The main issue boils down simply to considering the effect on the Pueblo of Tesuque of the application of state laws on a Lessee of Pueblo land.

POINT 1

APPLICATION OF THE LAWS OF THE STATE OF NEW MEXICO TO THE COMPANY ACTIVITIES ON INDIAN LAND WILL SERIOUSLY AND UNDULY INFRINGE UPON THE RIGHT OF THE PUEBLO TO GOVERN ITS OWN AFFAIRS, AND THEREFORE SUCH APPLICATION IS PROHIBITED.

The basic underlying premise of Indian law is derived from the case of Worcester v



Georgia, 31 U.S. (6 Pet.) 515 (1832). It was there held that Indian tribes were entitled to exercise self-government, to the exclusion of state law, subject only to superior federal control. The doctrine prohibiting states from interfering with tribal self-government has been consistently reaffirmed by the Federal Courts. See e.g., Williams v Lee, 358 U.S. 217 (1958); Talton v Mayes, 163 U.S. 376 (1896); Native American Church v Navajo Tribal Council, 272 F.2d 131 (10th Cir 1959). See generally "Tribal Self-Government and the Indian Reorganization Act of 1934", 70 Mich. L. Rev 955 (April, 1972). While the Congress of the United States has at times permitted states to exercise some jurisdiction in "Indian Country" by specific acts, the Courts have maintained and upheld the premises principle. Indeed, when Congress has acted, it has done so recognizing that unless it acted, the various Indian tribes remained free to exercise self-government. As Justice Black observed in Williams v Lee, *supra*, at p. 220:

"Congress has ...acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation".

Iron Crow v. Oglala Sioux Tribe, 231 F.2d 89 (8th Cir. 1956) its authority for the assertion of tribal sovereignty over all activities on the reservation. Iron Crow was dealing not only with the jurisdiction of the Tribal Courts over the crime of adultery committed by two members of the Tribe, but also with the power of the Tribal Council by resolution to impose a tax on a non-tribal member leasing grazing lands on the reservation which lands had been allotted to a tribal member. The Court in Iron Crow stated:



Inasmuch as it has never been taken from it, the Defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty. the Tribe has seen fit to give orderly implementation to that power through the adoption of a Constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. Section 476.

We conclude that the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any Federal Statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, *supra*, that such power still exists. Iron Crow, *supra*, at page 99.

The Court in Iron Crow cited Buster v. Wright, 135 F. 947, (8th Cir 1905), appeal dismissed 203 U.S. 599, 27 S. Ct. 777, 51 L.Ed 334. Buster dealt with the authority of the Creek Nation to prescribe the terms upon which non-citizens could transact business within the borders of the Creek Reservation. The Court in Buster stated that the power to prescribe the terms upon which non-citizens could transact business was one of the inherent and essential attributes of its original sovereignty. Iron Crow was cited as authority by the United States Supreme Court in Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L.Ed. 2d 251 at Page 253 (1959).

There are many instances in the history of Indian law showing Congressional recognition



of this principle. For example, the original Major Crimes Act, Act of March 3, 1885, ch.341, Sec 9, 23 Stat. 385, as amended 18 U.S.C. Sections 1153, 3242, giving jurisdiction to the Federal Courts over certain crimes, was enacted as a response to the U.S. Supreme Court decision in Ex parte Crow Dog, 109 U.S. 556 (1883) where it was held that the murder of one Sioux by another on the reservation was not within the criminal jurisdiction of either the State or Federal Courts. Further, the Congressional enactments which put into effect the concept of termination in the 1950's evidenced Congressional recognition that the states had no authority to act in Indian matters unless Congress so authorized. See Public Law 280, Act of August 15, 1953, 67 Stat. 588, as amended, 18 U.S.C. Sec 1162, 28 U.S.C. Sec 1360.

It is clear that the basic point of departure in analyzing the parameters of State jurisdiction in "Indian Country" is the premise that the states have no power over Indian matters unless Congress specifically authorizes it or unless the matter is of no concern to the Indian Tribe. In Williams v Lee, supra, the Supreme Court rephrased this principle and stated the legal test to be one revolving around the concept of self-government. Recognizing that the states may not interfere with self-government of Indian tribes, the Court held that the Arizona State Courts had no jurisdiction over actions involving Reservation Indians where the exercise of such jurisdiction "would undermine the authority of the tribal courts ... and hence would infringe on the right of the Indians to govern themselves". 358 U.S. at 223. That is, such action would conflict with the Indians' right to be free from state interference.

This test, centering around the concept of self-government, has not been changed by the decision



in Organized Village of Kake v Egan, 369 U.S. 60 (1962). After an involved historical analysis, the Court states at page 75, that "State Laws may be applied to Indians unless (it) would interfere with ... self-government ..." (emphasis supplied). Thus, the basic legal test carried down since Worcester remains.

The entire decision in Kake must be considered in light of the legislative history which led up to the Alaskan Statehood Act, and the intent of Congress in formulating the curious distinction between a disclaimer of proprietary rights and governmental rights by the State of Alaska. This was done in order to solve the question of what was going to happen to Federal land in the vast territory of Alaska. Justice Frankfurter in Kake, supra, stated at p. 69:

"The disclaimer of right and title by the State (Alaska) was a disclaimer of proprietary rather than Governmental interest. It was determined, after some debate, to be the best way of insuring that Statehood would neither extinguish nor establish claims by Indians against the United States. If lands subject to the claim of Indian rights were transferred to the State, the Indians were not thereby to lose the right to make claims against the United States for damages". Emphasis and italics supplied.

The State contends that Kake clarifies some doubtful issues left by William v Lee. To the contrary, it appears that Kake has muddled the waters and given hope to states that they can now exercise jurisdiction over Indian land unless they are specifically prohibited by Congress from exercising jurisdiction in a particular area. Must Congress act each time The State attempts to exercise one of its laws on Indian land to specifically exclude



that exercise of state jurisdiction?

The entire background of Indian law shows that just the opposite is true: States may act only if Congress authorizes them to do so, not unless Congress denies them the authority to do so. The use of the concept of self-government as a test in Kake is merely an alternative way of stating this basic test.

Will the application of the laws of the State to the Company interfere with the right of the Pueblo to govern its own affairs? The Mescaleros contend that the District Court takes too narrow a view of the concept of "self-government".

The State would argue that the Pueblo has only the right to govern the exclusively Indian affairs within their reservation. Thus, the Pueblo would have no jurisdiction or control over non-Indian activities on that reservation. However, when the full legal status of "Indians" or "Indian Tribes" was conferred upon the Pueblo and its lands by the Enabling Act for the state (Act of June 20, 1910, 36 Stat. 557), the state disclaimed "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 or from 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; ... but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians



under any act of congress, but such ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe."

The decision of the District Court is contradictory to the constitution of the United States, the constitution of the State of New Mexico and established court decisions. The Pueblo not only has jurisdiction over and the power to control its members, but also jurisdiction over and the power to control its property. The Supreme Court in Williams v. Lee, supra, stated at page 219:

"Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in Worcester the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained."

The Court in Williams has also reiterated the background of Federal Control over Indians at page 220:

"Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes it enacted comprehensive statutes in 1834 retulating trade with Indians and organizing a Department of Indian Affairs. 4 Stat 729, 735. Not satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized. See, e.g., the Wheeler-Howard Act, Sections 16, 17,



48 Stat 987, 988, 25 USC Secs 476, 477. Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. The policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them ... (reference omitted) ... Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied."

The concept of self-government must of necessity also include the ability to control the activities which take place within the Pueblo. Indeed, various court decisions have established that the right of self-government vests in Indian tribes the power to do such things as regulate domestic relations among tribal members, U.S. v. Quiver, 241 U.S. 602 (1916), levy taxes, Buster v. Wright, supra, app. dismiss. 203 U.S. 599 (1906), regulate property, Sizemore v. Brady, 235 U.S. 441 (1914), and administer justice. See generally Sol. Op., "Power of Indian Tribes", 55 I.D. 14 (1934). When Congress has wanted state laws to apply to "Indian Country", it has done so by express consent, for example, the Act of May 10, 1926, 44 Stat. 498 (power to condemn pueblo lands), Act of April 21, 1928, 45 Stat. 442; Act of Feb. 15, 1929, 45 Stat. 1105, 25 U.S.C. 231 (power to enforce state sanitation and quarantine laws on pueblo lands subject to rules and regulations of the Secretary of the Interior), Act of August 9, 1946, 60 Stat. 962, 25 U.S.C. 231 (power to enforce state compulsory school attendance laws on pueblo lands).

With all of this background, it is clear that the power to control the terms of a lease of tribal lands and the activities of the Lessee

under



are within the concept of self-government. Certainly the use made of Pueblo lands is of major concern to the Pueblo itself as a governmental entity, just as, for example, leases of U. S. Forest Lands are of concern to the United States as a governmental body. As previously stated, the rule is that a state may not act or apply its laws where to do so would interfere with self-government of a tribe. It can easily be recognized therefore, that to allow the application of the laws of the State to Company's activities on the pueblo land in this case would seriously interfere with the right of the Pueblo to govern its lands.

Aside from being an interference with self-government, the application of state law here would restrict the freedom of the Pueblo to negotiate and enter into contracts. The Pueblo, because it is an Indian body, is already restricted in its ability to freely bargain by Federal Laws and Regulations. Other persons and entities, of course, are not subject in this manner to Federal control. Thus, if the State is also allowed to apply its laws and regulations so as to further affect the Pueblo in its ability to negotiate a lease, the result is a double burden on the Pueblo.

It has previously been mentioned that the Pueblo, like other self-governing Indian tribes, does not have the power to enact its own ordinances and regulations governing use of Pueblo lands. The Court of Appeals for the 8th Circuit in Buster v. Wright, supra stated at page 951:

"The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people,



indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. Neither the authority nor the power of the United States to license its citizens to trade in the Creek Nation, with or without the consent of that tribe, is in issue in this case, because the complainants have no such licenses. The plenary power and lawful authority of the government of the United States by license, by treaty, or by act of Congress to take from the Creek Nation every vestige of its original or acquired governmental authority and power may be admitted, and for the purposes of this decision are here conceded. The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek tribe itself.

"Originally an independent tribe, the superior power of the republic early reduced this Indian people to 'domestic, dependent nation' (Cherokee Nation v. State of Georgia, 5 Pet. 1-20, 8 L.Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a Constitution modeled after that of the United States, exercised legislative, executive, and judicial functions within its territorial jurisdiction for more than half a century ... (T)he governmental authority of the Creek Nation, subject always to the superior power of the republic, remained practically unimpaired until the year 1889.

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Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe of all its judicial power and curtailed its remaining authority until its powers of government have become the mere shadows of their former selves. Nevertheless its authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries guarantied by the treaties of 1832, 1856, and 1866, and sustained by repeated decisions of the courts and opinions of the Attorneys General of the United States, remained undisturbed."

Because of this, it seems obvious that the Pueblo itself should be free to determine, subject to Federal authority, whether it wishes such controls to be enacted. If Congress does not impose such controls, the ultimate choice is, by Congressional silence, left with the Pueblo. The Pueblo should be free to not enact such controls. This freedom would be clearly lost if the state could apply its controls.

While Kake has mentioned some distinction between proprietary and governmental interest in the disclaimer clauses of the Alaskan Statehood Act, it is clear that the Court in Kake was clearly referring to the particular circumstances of Alaska and the legislative history of the Alaskan Statehood Act.

To permit a state government to claim that they have only disclaimed a proprietary interest and not governmental interest in Indian land is to open the door for the state government to claim jurisdiction over everything in relation to Indian land except ownership.

The State would argue that all of the laws and regulations which it is now seeking to impose



upon the Company are governmental exercises of its legitimate police power and are not proprietary in nature. If this be the case, every governmental interest or concern which the state is seeking to impose upon Indian land must be interfering with the Pueblo's governmental interest or concern with its own land, since what is "governmental" to the state must also be "governmental" to the Pueblo.

The State has argued that the Pueblo in its contractual role could completely control the leased premises subject only to state laws and regulations. The State likewise leases lands to private entities but it does not purport to exercise its governmental control through the terms of the lease. The state is still able to exercise self government over the leased premises as well as be a contracting party. The Pueblo may not be as sophisticated a government as the state, but the basic concept of sovereignty exists nevertheless.

The Pueblo has the right to enact its own legislation concerning building standards, subject to interests of Lessees and sublessees taxation, land subdivision, advertising, water supply, sewage and water disposal, or the Pueblo has the right to not enact legislation governing these areas.

It cannot be denied that one of the primary characteristics of self-government is the right to not govern in a particular area as well as the right to govern in a particular area. Under the State theory of this case, this right of the Pueblo will have been completely abrogated by the State of New Mexico, without Congressional authority to do so

Self-government as a legal doctrine is quite clearly the controlling of one's affairs and actions based on legislative decisions. The self-government of the Pueblo is subject



only to the Congress' control, and Congress has clearly stated what must be done by the Pueblo or any other Indian tribe to exercise their right of self-government. See generally 70 Mich. L. Rev. 955, supra.

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By Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360, Congress embarked on a program of termination of Federal Trust statutes over Indians and Indian lands. Under this Act hereinafter referred to as Public Law 20, New Mexico could have assumed both civil and criminal jurisdiction over both the Indians and Indian lands by Amending its constitution. This assumption of jurisdiction initially required only unilateral action on the part of the State, however, in 1968, Congress amended Public Law 20 to provide that the assumption could only with the consent of a majority of the adult enrolled members of each tribe. Act of April 11, 1968, 82 Stat 79. New Mexico has done neither.

Should Congress declare that the State's right to self-government extended only to its capacity to impose conditions upon persons in a contractual relationship, I'm sure that the State would be up-in-arms and would likewise be contending that such an arrangement is no self-government at all. It might be useful to imagine that if the State had no laws governing water quality, liquor dispensing, land subdivision, construction licensing, ad valorem taxes and a gross receipts and compensation use tax act and the Pueblo were attempting to enforce similar laws on the Company's activities on Indian land, would the Company then be able to argue that the Pueblo did not have the power nor jurisdiction to enforce such laws because the jurisdiction was actually in the State of New Mexico. In short, is the jurisdiction over non-Indian activities on Indian land exclusively in the Pueblo or the State. If the jurisdiction is dual, then it follows that the exercise of



jurisdiction by one government must surely interfere with the exercise of the other.

That is exactly what the State would impose upon the Pueblo. This clearly is not the intent of Congress nor the United States Supreme Court in Kake. The Supreme Court of the United States in Williams v Lee, supra, clearly stated Arizona's position which is the same position and attitude held by the State of New Mexico. The Court stated at page 218:

"The Supreme Court of Arizona affirmed, holding that since no Act of Congress expressly forbids their doing so, Arizona Courts are free to exercise jurisdiction over Civil Suits by non-Indians against Indians of the action that arises on an Indian Reservation. 83 Ariz. 214, 319 p. 2d 998".

This is the position which the United States Supreme Court in Williams v Lee specifically reversed and is exactly the position that the State is maintaining in this case. The Court further stated at page 222:

"No Federal Act has given State Courts jurisdiction over such controversies. In a general statute Congress did express its willingness to have any state assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility. To date, Arizona has not accepted jurisdiction possibly because the people of the state anticipate that the burdens according such power might be considerable".

Likewise, New Mexico has not accepted this jurisdiction and should not be allowed to exercise it short of the Congressional mandate as to the proper procedure in acquiring such jurisdiction.



POINT II

THE ENFORCEMENT OF NEW MEXICO'S LAWS AND REGULATIONS UPON THE DEFENDANT SANGRE DE CRISTO IN ITS ACTIVITIES ON PUEBLO LAND HAS BEEN COMPLETELY PRE-EMPTED BY FEDERAL CONTROL.

The laws which the State is presently trying to enforce upon the Company cover the same areas which the Federal Government has enforced in controlling the development of Pueblo land. The lease has been approved through the Department of the Interior pursuant to Federal laws and regulations together with the specific sub-division portions of the lease.

The United States Supreme Court in Warren Trading Post Company v Arizona Tax Commission, et al, 380 U.S. 685, (1965) has clearly stated the pre-emption doctrine in relation to Indians. There, Arizona was attempting to tax the gross income of an Indian trader on the Navajo Reservation. The Supreme Court, at page 690, stated:

"It was under these comprehensive statutes and regulations that the Commissioner of Indian Affairs licensed appellant to trade with the Indians on the Navajo Reservation. These apparently all-inclusive regulations and statutes authorizing them would seem in themselves, sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for State law imposing additional burdens upon traders."

The Court, through Justice Black, further states at pages 690 and 691:

"Congress has, since the creation of the Navajo Reservation nearly a century ago, let the Indians on it largely free to run



their reservations and its affairs without state control, a policy which has automatically relieved Arizona from all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations, the Federal Government has provided for roads, education and other services needed by the Indians. We think the assessment and collection of this tax would, to a substantial extent, frustrate the evident Congressional purpose of ensuring that no burden be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts".

The same Congressional intent is expressed in the case at bar in that the entire lease arrangement has been subject to Federal supervision and control every step of the way. 25 C.F.R. pt. 131. In order to provide complementary leasing of Indian land with adjacent state land, the Secretary of the Interior may under 25 C.F.R. 1.4 adopt particular state statutes, codes, resolutions, rules or other regulations for applicability on that particular Indian land. The lease in question was made pursuant to 25 U.S.C. 415 wherein Congress has specifically provided that leases of Indian country may be made with the approval of the Secretary of the Interior for various purposes and that all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior to provide regulations regarding the leasing and use of Indian land. The New Mexico Supreme Court has considered this very question in Sangre de Cristo Development Company, Inc. v City of Santa Fe and Board of County Commissioners of Santa Fe County, New Mexico. 84 N.M. 343, 503 p. 2d 323 (1972). The Court therein stated at Page 351:

"It is obvious to us that Congress intended



to and has accomplished, by its inactments and extensive and all-inclusive regulations promulgated pursuant thereto, a pre-emption by or a reservation in the United States of all control over the leasing of Indian lands and this includes the sub-division, planning and plating of these lands for the uses to be made thereof within the term of the leasehold. Under these circumstances, there is no room for the state or its political sub-divisions to impose additional or conflicting controls relating to the subdivision, planning or plating of the lands. Warren Trading Post Company v Tax Commission, et al, supra. It is for Congress to decide when and to what extent the States and the political sub-divisions may exercise subdivision, planning and plating control over Indian lands leased pursuant to 25 U.S.C. 415, supra, and the regulations of the Secretary of Interior promulgated under the authority granted him by Congress. See Lone Wolf v Hitchcock, 187 U.S. 553, 223 Supreme Court 216, 47 L. Ed. 209 (1903)".

Thus, it certainly appears that there is no room left for the State to exercise any jurisdiction over the Company in its leasing of Indian land. The control of that development has been completely pre-empted by the United States.

POINT III

IS 25 C.F.R. 1.4 A VALID, DULY PROMULGATED AND ENFORCEABLE REGULATION OF THE SECRETARY OF THE INTERIOR.

The Mescaleros have only a few brief comments concerning 25 C.F.R 1.4 and would adopt the Federal Appellant's brief as to this point. 25 C.F.R. 1.4 was promulgated by the



Secretary of the Interior in 1965, under 25 U.S.C. 415 directing the Secretary of the Interior to approve leases by Indians under terms and regulations as the Secretary of the Interior might proscribe.

The language and intent of 25 C.F. R. 1.4 was subsequently ratified by Congress in the enactment of P.L. 91-275 84 Stat. 303 on June 2, 1970.

The Congress in that 1970 amendment to 25 U.S.C. 415 specifically instructed the Secretary of the Interior that:

"... Prior to approval of any lease or extension of any existing lease pursuant to this section, the Secretary of the Interior shall further satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the heighth, quality and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses of which the leased lands will be subject".

An examination of the legislative history of the 1970 amendment to 25 U.S.C. 415 reveals that Congress was concerned because of the peculiar immunity from state and local laws enjoyed by Indian reservations which created a problem in the usual controlling authority with respect to building, health and safety code enforcement. While the Congress did not intend to unduly burden development plans for Indian lands, Congress felt that the amendment to 25



U.S.C. 415 was necessary so that the Secretary of the Interior could satisfy himself that adequate consideration was given to local laws and regulations, 1970 U.S. Code Cong. and Adm. News 3243.

The amendment to 25 U.S.C. 415 by P.L. 91-275 is a clear indication of the presumption by Congress that such state laws did not apply to Indian land and more specifically to lessees of Indian land. Otherwise, Congress would not have felt the need existed to amend 25 U.S.C. 415 and insure that consideration was given to state and local laws in this area. It should also be pointed out that the section was amended in light of P.L. 280.

Thus, in light of 25 U.S.C. 415 as amended, and its legislative history, the regulation promulgated by the Secretary of the Interior as 25 C.F.R. 1.4 is certainly within the mandate of Congress to the Secretary of the Interior to regulate the leasing of Indian land in light of local rules, laws, regulations and ordinances.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED WITH A MANDATE TO ENTER JUDGMENT THAT THE FOLLOWING STATUTES ARE INAPPLICABLE TO SANGRE DE CRISTO DEVELOPMENT COMPANY, INC. IN ITS OPERATION AND ACTIVITIES AT THE COLONIAS DE SANTA FE SUBDIVISION UNDER LEASE DATED MAY 24, 1970:

- (1) Sections 46-5-1 and 46-5-2, N.M.S.A. 1953 Comp as amended
- (2) Sec 67-35-1 et seq, N.M.S.A 1953 comp as amended
- (3) Sec 72-1-1, NMSA 1953 Comp as amended
- (4) Secs 70-3-1 et seq, NMSA 1953 Comp as amended



- (5) Sec 75-39-1 and Sec 12-1-4(8) NMSA
1953 Comp as amended
- (6) Secs 72-16A-1 et seq NMSA, 1953
comp as amended

and that 25 C.F.R. Sec 1.4 is a valid and enforceable regulation of the Secretary of the Interior.

Respectfully Submitted,

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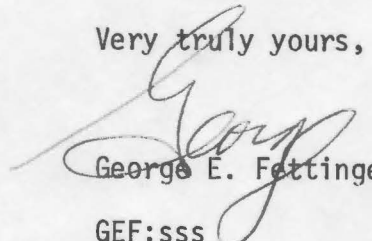
November 26, 1974

Brad Patterson
White House
Washington, DC 20000

Dear Brad:

I thought you might be interested in this.

Very truly yours,


George E. Fetting

GEF:sss



THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOS. 74-1365, 74-1366, 74-1367

DAVID L. NORVELL, ATTORNEY
GENERAL, STATE OF NEW MEXICO,

Appellees,

vs

SANGRE DE CRISTO DEVELOPMENT
COMPANY, INC. AND ROGERS
C. B. MORTON, ET AL,

Appellants,

MESCALERO APACHE TRIBE,

Appellant-Intervenor.

APPELLANT-INTERVENOR'S
BRIEF IN CHIEF

George E. Fettingner
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Alamogordo, New Mexico 88310
Attorney for Appellants.



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APPELLANT-INTERVENOR'S
BRIEF IN CHIEF.

ISSUES PRESENTED FOR REVIEW

A. Whether the laws of the State of New Mexico apply to and govern the activities of a non-Indian real estate developer in its development of Indian land.

B. Whether the application of those laws would infringe upon the right of the Pueblo of Teseque to govern its own affairs.

C. Whether the application of those laws have been pre-empted by the operation of Federal control.



D. Whether 25 C.F.R. 1.4 is a valid regulation of the Department of the Interior.

STATEMENT OF THE CASE

This case is one for declaratory relief as to the applicability of certain state laws to the activities of a non-Indian lessor of Pueblo Indian land and the validity of 25 CFR 1.4. The Attorney General of the State of New Mexico filed suit against Sangre de Cristo Development Company, Inc. and subsequently joined the Secretary of the Interior, the Commissioner of Indian Affairs and the Area Director of the Bureau of Indian Affairs. The case was tried without a jury in the United States District Court for the District of New Mexico following intervention by the Board of Commissioners of Santa Fe County as plaintiff and the Mescalero Apache Tribe as defendant. The Court held for the Plaintiffs that various state laws relating to construction licensing, land subdivision, water quality, alcoholic beverages, ad valorem taxes and gross receipts taxes are applicable to the activities of Sangre de Cristo Development Company, Inc. on Indian land under lease and that 25 CFR 1.4 is an invalid regulation of the Secretary of the Interior.

FACTS OF THIS CASE

The Appellant, Sangre de Cristo Development Company, Inc., hereinafter referred to as "The Company", has leased from the Pueblo of Tesuque, hereinafter referred to as "The Pueblo", an Indian Tribe recognized by the Department of the Interior, hereinafter referred to as "Interior", certain Pueblo lands by a lease approved by Interior pursuant to 25



U.S.C. 415.

The Company pursuant to this lease, has subdivided portions of the leased premises and had that subdivision plan approved by the Secretary of the Interior. The leased premises are entirely on Pueblo land and the Pueblo lands are within the territorial boundaries of the State of New Mexico, hereinafter referred to as "The State". The Board of Commissioners of Santa Fe County is hereinafter referred to as "The County".

The State and County have attempted to enforce various State laws upon the activities of the Company in its activities as a subdivider of Pueblo land.

The Pueblo has enacted various ordinances governing building codes and subdivisions.

ARGUMENT

Preliminarily, the Appellant Mescalero Apache Tribe hereinafter referred to as "Mescalero", wishes to clarify the issues of law involved in this case by emphasizing what the issues are not. First, it is obvious to everyone that the Company is not an Indian Pueblo and therefore, if the activities of the Company had taken place anywhere but on Indian land the disputes involved would not have arisen. Second, the Company has not stepped into the shoes of its Lessor, the Pueblo of Tesuque, and assumed the Pueblo's immunity from the operation of state law.



The main issue boils down simply to considering the effect on the Pueblo of Tesuque of the application of state laws on a Lessee of Pueblo land.

POINT I

APPLICATION OF THE LAWS OF THE STATE OF NEW MEXICO TO THE COMPANY ACTIVITIES ON INDIAN LAND WILL SERIOUSLY AND UNDULY INFRINGE UPON THE RIGHT OF THE PUEBLO TO GOVERN ITS OWN AFFAIRS, AND THEREFORE SUCH APPLICATION IS PROHIBITED.

The basic underlying premise of Indian law is derived from the case of Worcester v Georgia, 31 U.S. (6 Pet.) 515 (1832). It was there held that Indian tribes were entitled to exercise self-government, to the exclusion of state law, subject only to superior federal control. The doctrine prohibiting states from interfering with tribal self-government has been consistently reaffirmed by the Federal Courts. See e.g., Williams v Lee, 358 U.S. 217 (1958); Talton v Mayes, 163 U.S. 376 (1896); Native American Church v Navajo Tribal Council, 272 F 2d 131 (10th Cir 1959). See generally "Tribal Self-Government and the Indian Reorganization Act of 1934", 70 Mich. L. Rev 955 (April, 1972). While the Congress of the United States has at times permitted states to exercise some jurisdiction in "Indian Country" by specific acts, the Courts have maintained and upheld this principle. Indeed, when Congress has acted, it has done so recognizing that unless it acted, the various Indian tribes remained free to exercise self-government. As Justice Black observed in Williams v Lee, supra, at p. 220:



"Congress has ... acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation".

Iron Crow v Oglala Sioux Tribe, 231 F2d 89 (8th Cir. 1956), is authority for the assertion of tribal sovereignty over all activities on the reservation. Iron Crow was dealing not only with the jurisdiction of the Tribal Courts over the crime of adultery committed by two members of the Tribe, but also with the power of the Tribal Council by resolution to impose a tax on a non-tribal member leasing grazing lands on the reservation which lands had been allotted to a tribal member. The Court in Iron Crow stated:

Inasmuch as it has never been taken from it, the Defendant Oglala Sioux Tribe possesses the power of taxation which is an inherent incident of its sovereignty. The Tribe has seen fit to give orderly implementation to that power through the adoption of a Constitution which, among other things, has specifically provided for the levy of taxes. Such action was taken in accordance with the provisions of the Indian Reorganization Act, 1934, 48 Stat. 987, 25 U.S.C.A. Section 476.

We conclude that the original precept of tribal sovereignty and the fact that the power of the Oglala Sioux Tribe to impose the tax or license in question has not been pretermitted by any Federal Statute or agency ruling thereunder, but, to the contrary, has been implemented by the Indian Reorganization Act, *supra*, that such power still exists. Iron Crow, *supra*, at page 99.

The Court in Iron Crow cited Buster v. Wright, 135 F. 947, (8th Cir 1905), appeal dismissed 203 U.S. 599, 27 S. Ct. 777, 51 L. Ed 334. Buster dealt with the authority of the Creek Nation to prescribe the terms upon which non-citizens could transact business within the borders of the Creek Reservation. The Court in Buster stated that the power to prescribe the terms upon which non-citizens could transact business was one of the in-



herent and essential attributes of its original sovereignty. Iron Crow was cited as authority by the United States Supreme Court in Williams v. Lee, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 at Page 253 (1959).

There are many instances in the history of Indian law showing Congressional recognition of this principle. For example, the original Major Crimes Act, of March 3, 1885, ch. 231, Sec 9, 23 Stat. 385, as amended 18 U.S.C.

Sections 1153, 3242, giving jurisdiction to the Federal Courts over certain crimes, was enacted as a response to the U.S. Supreme Court decision in Ex parte Crow Dog, 109 U.S. 556 (1883) where it was held that the murder

of one Sioux by another on the reservation was not within the criminal jurisdiction of either the State or Federal Courts. Further, the Congressional enactments which put into effect the concept of termination in the 1950's evidenced Congressional recognition that the states had no authority to act in Indian matters unless Congress so authorized. See Public Law 280, Act of August 15, 1953, 67 Stat. 588, as amended, 18 U.S.C. Sec 1162, 28 U.S.C. Sec 1360.

It is clear that the basic point of departure in analyzing the parameters of State jurisdiction in "Indian Country" is the premise that the states have no power over Indian matters unless Congress specifically authorizes it or unless the matter is of no concern to the Indian Tribe. In Williams v. Lee, supra, the Supreme Court rephrased this principle and stated the legal test to be one revolving around the concept of self-government. Recognizing that the states may not interfere with self-government



of the Indian Tribes, the Court held that the Arizona State Courts had no jurisdiction over actions involving Reservation Indians where the exercise of such jurisdiction "would undermine the authority of the tribal courts ... and hence would infringe on the right of the Indians to govern themselves". 358 U.S. at 223. That is, such action would conflict with the Indians' right to be free from state interference.

This test, centering around the concept of self-government, has not been changed by the decision in Organized Village of Kake v Egan, 369 U.S. 60 (1962). After an involved historical analysis, the Court states at page 75, that "State Laws may be applied to Indians unless (it) would interfere with ... self-government ..." (emphasis supplied). Thus, the basic legal test carried down since Worcester remains.

The entire decision in Kake must be considered in light of the legislative history which led up to the Alaskan Statehood Act, and the intent of Congress in formulating the curious distinction between a disclaimer of proprietary rights and governmental rights by the State of Alaska. This was done in order to solve the question of what was going to happen to Federal land in the vast territory of Alaska. Justice Frankfurter in Kake, supra, stated at p. 69:

"The disclaimer of right and title by the State (Alaska) was a disclaimer of proprietary rather than Governmental interest. It was determined, after some debate, to be the best way of insuring that Statehood would neither extinguish nor establish claims by Indians against the United States. If lands subject to the claim of Indian rights were transferred to the State, the Indians were not thereby to lose the right to make claims against the United States for damages". Emphasis and italics supplied.



The State contends that Kake clarifies some doubtful issues left by Williams v Lee. To the contrary, it appears that Kake has muddled the waters and given hope to states that they can now exercise jurisdiction over Indian land unless they are specifically prohibited by Congress from exercising jurisdiction in a particular area. Must Congress act each time the State attempts to exercise one of its laws on Indian land to specifically exclude that exercise of state jurisdiction?

The entire background of Indian law shows that just the opposite is true: States may act only if Congress authorizes them to do so, not unless Congress denies them the authority to do so. The use of the concept of self-government as a test in Kake is merely an alternative way of stating this basic test.

Will the application of the laws of the State to the Company interfere with the right of the Pueblo to govern its own affairs? The Mes-caleros contend that the District Court takes too narrow a view of the concept of "self-government".

The State would argue that the Pueblo has only the right to govern the exclusively Indian affairs within their reservation. Thus, the Pueblo would have no jurisdiction or control over non-Indian activities on that reservation. However, when the full legal status of "Indians" or "Indian Tribes" was conferred upon the Pueblo and its lands by the Enabling Act for the state (Act of June 20, 1910, 36 Stat. 557), the state disclaimed "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 or from 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;..but nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but such ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe."

The decision of the District Court is contradictory to the constitution of the United States, the constitution of the State of New Mexico and established court decisions. The Pueblo not only has jurisdiction over and the power to control its members, but also jurisdiction over and the power to control its property. The Supreme Court in Williams v. Lee, supra, stated at page 219:

"Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in Worcester the broad principles of that decision came to be accepted as law. Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained."



The Court in Williams has also reiterated the background of Federal Control over Indians at page 220:

"Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs. 4 Stat 729, 735. Not satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized. See, e.g., the Wheeler-Howard Act, Sections 16, 17, 48 Stat 987, 988, 25 USC Secs 476, 477. Congress has followed a policy calculated eventually to make all Indians full-fledged participants in American society. The policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without disadvantage to them...(reference omitted)...Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which Worcester v. Georgia has denied."

With all of this background, it is clear that the power to control the terms of a lease of tribal lands and the activities of the Lessee are within the concept of self-government. Certainly the use made of Pueblo lands is of major concern to the Pueblo itself as a governmental entity, just as, for example, leases of U. S. Forest Lands are of concern to the United States as a governmental body. As previously stated, the rule is that a state may not act or apply its laws where to do so would interfere with the right of the Pueblo to govern its lands.

Aside from being an interference with self-government, the application of state law here would restrict the freedom of the Pueblo to negotiate and enter into contracts. The Pueblo, because it is an Indian body, is already restricted in its ability to freely bargain by Federal Laws and



Regulations. Other persons and entities, of course, are not subject in this manner to Federal control. Thus, if the State is also allowed to apply its laws and regulations so as to further affect the Pueblo in its ability to negotiate a lease, the result is a double burden on the Pueblo.

It has previously been mentioned that the Pueblo, like other self-governing Indian tribes, has the power to enact its own ordinances and regulations governing use of Pueblo lands. The Court of Appeals for the 8th Circuit in Buster v. Wright, supra stated at page 951:

"The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in act of Congress, treaty, or agreement of the United States. It was one of the inherent and essential attributes of its original sovereignty. It was a natural right of that people, indispensable to its autonomy as a distinct tribe or nation, and it must remain an attribute of its government until by the agreement of the nation itself or by the superior power of the republic it is taken from it. Neither the authority nor the power of the United States to license its citizens to trade in the Creek Nation, with or without the consent of that tribe, is in issue in this case, because the complainants have no such licenses. The plenary power and lawful authority of the government of the United States by license, by treaty, or by act of Congress to take from the Creek Nation every vestige of its original or acquired governmental authority and power may be admitted, and for the purposes of this decision are here conceded. The fact remains nevertheless that every original attribute of the government of the Creek Nation still exists intact which has not been destroyed or limited by Act of Congress or by the contracts of the Creek tribe itself.

"Originally an independent tribe, the superior power of the republic early reduced this Indian people to 'domestic, dependent nation' (Cherokee Nation v. State of Georgia, 5 Pet. 1-20- 8, L. Ed. 25), yet left it a distinct political entity, clothed with ample authority to govern its inhabitants and to manage its domestic affairs through officers of its own selection, who under a Constitution modeled after that of the United States, exercised legislative, executive, and judicial functions within its territorial jurisdiction for more than half a century... (T)he governmental authority of the Creek



Nation, subject always to the superior power of the republic, remained practically unimpaired until the year 1889. Between the years 1888 and 1901 the United States by various acts of Congress deprived this tribe of all its judicial power and curtailed its remaining authority until its powers of government have become the mere shadows of their former selves. Nevertheless its authority to fix the terms upon which noncitizens might conduct business within its territorial boundaries guaranteed by the treaties of 1832, 1856, and 1866, and sustained by repeated decisions of the courts and opinions of the Attorneys General of the United States, remained undisturbed."

Because of this, it seems obvious that the Pueblo itself should be free to determine, subject to Federal authority, whether it wishes such controls to be enacted. If Congress does not impose such controls, the ultimate choice is, by Congressional silence, left with the Pueblo. The Pueblo should be free to not enact such controls. This freedom would be clearly lost if the state could apply its controls.

While Kake has mentioned some distinction between proprietary and governmental interest in the disclaimer clauses of the Alaskan Statehood Act, it is clear that the Court in Kake was clearly referring to the particular circumstances of Alaska and the legislative history of the Alaskan Statehood Act.

To permit a state government to claim that they have only disclaimed a proprietary interest and not governmental interest in Indian land is to open the door for the state government to claim jurisdiction over everything in relation to Indian land except ownership.

The State would argue that all of the laws and regulations which it is now seeking to impose upon the Company are governmental exercises of its legitimate police power and are not proprietary in nature. If this



be the case, every governmental interest or concern which the state is seeking to impose upon Indian land must be interfering with the Pueblo's governmental interest or concern with its own land, since what is "governmental" to the state must also be "governmental" to the Pueblo.

The State has argued that the Pueblo in its contractual role could completely control the leased premises subject only to state laws and regulations. The State likewise leases lands to private entities but it does not purport to exercise its governmental control through the terms of the lease. The state is still able to exercise self-government over the leased premises as well as be a contracting party. The Pueblo may not be as sophisticated a government as the state, but the basic concept of sovereignty exists nevertheless.

The Pueblo has the right to enact its own legislation concerning building standards, subject to interest of Lessees and sublessees taxation, land subdivision, advertising, water supply, sewage and water disposal, or the Pueblo has the right to not enact legislation governing these areas.

It cannot be denied that one of the primary characteristics of self-government is the right to not govern in a particular area as well as the right to govern in a particular area. Under the state theory of this case, this right of the Pueblo will have been completely abrogated by the State of New Mexico, without Congressional authority to do so.

Self-government as a legal doctrine is quite clearly the controlling



of one's affairs and actions based on legislative decisions. The self-government of the Pueblo is subject only to the Congress' control, and Congress has clearly stated what must be done by the Pueblo or any other Indian tribe to exercise their right of self-government. See generally 70 Mich. L. Rev. 955, supra.

By Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162, 28 U.S.C. 1360, Congress embarked on a program of termination of Federal Trust statutes over Indians and Indian lands. Under this Act hereinafter referred to as Public Law 280, New Mexico could have assumed both civil and criminal jurisdiction over both the Indians and Indian lands by Amending its constitution. This assumption of jurisdiction initially required only unilateral action on the part of the State, however, in 1968, Congress amended Public Law 280 to provide that the assumption of jurisdiction would only occur with the consent of a majority of the adult enrolled members of each tribe. Act of April 11, 1968, 82 Stat 79. New Mexico has done neither.

Should Congress declare that the State's right to self-government extended only to its capacity to impose conditions upon persons in a contractual relationship, I'm sure that the State would be up-in-arms and would likewise be contending that such an arrangement is no self-government at all. It might be useful to imagine that if the State had no laws governing water quality, liquor dispensing, land subdivision, construction licensing, ad valorem taxes and a gross receipts and compensation use tax



act and the Pueblo were attempting to enforce similar laws on the Company's activities on Indian land, would the Company then be able to argue that the Pueblo did not have the power nor jurisdiction to enforce such laws because the jurisdiction was actually in the State of New Mexico; in short, is the jurisdiction over non-Indian activities on Indian land exclusively in the Pueblo or the State. If the jurisdiction is dual, then it follows that the exercise of jurisdiction by one government must surely interfere with the exercise of the other.

That is exactly what the State would impose upon the Pueblo. This clearly is not the intent of Congress nor the United States Supreme Court in Kake. The Supreme Court of the United States in Williams v Lee, supra, clearly stated Arizona's position which is the same position and attitude held by the State of New Mexico. The Court stated at page 218:

"The Supreme Court of Arizona affirmed, holding that since no Act of Congress expressly forbids their doing so, Arizona Courts are free to exercise jurisdiction over Civil Suits by non-Indians against Indians of the action that arises on an Indian Reservation. 83 Ariz. 214, 319 p. 2d 998".

This is the position which the United States Supreme Court in Williams v Lee specifically reversed and is exactly the position that the State is maintaining in this case. The Court further stated at page 222:

"No Federal Act has given State Courts jurisdiction over such controversies. In a general statute Congress did express its willingness to have any state assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility. To date, Arizona has not accepted jurisdiction possibly because the people of the state anticipate that the burdens according such power might be considerable".



Likewise, New Mexico has not accepted this jurisdiction and should not be allowed to exercise it short of the Congressional mandate as to the proper procedure in acquiring such jurisdiction.

POINT II

THE ENFORCEMENT OF NEW MEXICO'S LAWS AND REGULATIONS UPON THE DEFENDANT SANGRE DE CRISTO IN ITS ACTIVITIES ON PUEBLO LAND HAS BEEN COMPLETELY PRE-EMPTED BY FEDERAL CONTROL.

The laws which the State is presently trying to enforce upon the Company cover the same areas which the Federal Government has enforced in controlling the development of Pueblo land. The lease has been approved through the Department of the Interior pursuant to Federal laws and regulations together with the specific sub-division portions of the lease.

The United States Supreme Court in Warren Trading Post Company v Arizona Tax Commission, et al, 380 U.S. 685, (1965) has clearly stated the pre-emption doctrine in relation to Indians. There, Arizona was attempting to tax the gross income of an Indian trader on the Navajo Reservation. The Supreme Court, at page 690, stated:

"It was under these comprehensive statutes and regulations that the Commissioner of Indian Affairs licensed appellant to trade with the Indians on the Navajo Reservation. These apparently all-inclusive regulations and statutes authorizing them would seem in themselves, sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for State law imposing additional burdens upon traders."

The Court, through Justice Black, further states at pages 690 and 691:



"Congress has, since the creation of the Navajo Reservation nearly a century ago, let the Indians on it largely free to run their reservations and its affairs without state control, a policy which has automatically relieved Arizona from all burdens for carrying on those same responsibilities. And in compliance with its treaty obligations, the Federal Government has provided for roads, education and other services needed by the Indians. We think the assessment and collection of this tax would, to a substantial extent, frustrate the evident Congressional purpose of ensuring that no burden be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those acts".

The same Congressional intent is expressed in the case at bar in that the entire lease arrangement has been subject to Federal supervision and control every step of the way. 25 C.F.R. pt. 131. In order to provide complementary leasing of Indian land with adjacent state land, the Secretary of the Interior may under 25 C.F.R. 1.4 adopt particular state statutes, codes, resolutions, rules or other regulations for applicability on that particular Indian land. The lease in question was made pursuant to 25 U.S.C. 415 wherein Congress has specifically provided that leases of Indian country may be made with the approval of the Secretary of the Interior for various purposes and that all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior to provide regulations regarding the leasing and use of Indian land. The New Mexico Supreme Court has considered this very question in Sangre de Cristo Development Company, Inc. v City of Santa Fe and Board of County Commissioners of Santa Fe County, New Mexico. 84 N.M. 343, 503 P. 2 d 323 (1972). The Court therein stated



at Page 351:

"It is obvious to us that Congress intended to and has accomplished, by its enactments and extensive and all-inclusive regulations promulgated pursuant thereto, a pre-emption by or a reservation in the United States of all control over the leasing of Indian lands and this includes the sub-division, planning and plating of these lands for the uses to be made thereof within the term of the leasehold. Under these circumstances, there is no room for the state or its political sub-divisions to impose additional or conflicting controls relating to the subdivision, planning or plating of the lands. Warren Trading Post Company v Tax Commission, et al, supra. It is for Congress to decide when and to what extent the States and the political sub-divisions may exercise subdivision, planning and plating control over Indian lands leased pursuant to 25 U.S.C. 415, supra, and the regulations of the Secretary of Interior promulgated under the authority granted him by Congress. See Lone Wolf v Hitchcock, 187 U.S. 553, 223 Supreme Court 216, 47 L. Ed. 209 (1903)".

Thus, it certainly appears that there is no room left for the State to exercise any jurisdiction over the Company in its leasing of Indian land. The control of that development has been completely pre-empted by the United States.

POINT III

IS 25 C.F.R. 1.4 A VALID, DULY PROMULGATED AND ENFORCEABLE REGULATION OF THE SECRETARY OF THE INTERIOR.

The Mescaleros have only a few brief comments concerning 25 C.F.R. 1.4 and would adopt the Federal Appellant's brief as to this point. 25 C.F.R. 1.4 was promulgated by the Secretary of the Interior in 1965, under 25 U.S.C. 415 directing the Secretary of the Interior to approve leases by Indians under terms and regulations as the Secretary of the Interior might prescribe.



The language and intent of 25 C.F.R. 1.4 was subsequently ratified by Congress in the enactment of P.L. 91-275 84 Stat. 303 on June 2, 1970.

The Congress in that 1970 amendment to 25 U.S.C. 415 specifically instructed the Secretary of the Interior that:

"...Prior to approval of any lease or extension of any existing lease pursuant to this section, the Secretary of the Interior shall further satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses of which the leased lands will be subject".

An examination of the legislative history of the 1970 amendment to 25 U.S.C. 415 reveals that Congress was concerned because of the peculiar immunity from state and local laws enjoyed by Indian reservations which created a problem in the usual controlling authority with respect to building, health and safety code enforcement. While the Congress did not intend to unduly burden development plans for Indian lands, Congress felt that the amendment to 25 U.S.C. 415 was necessary so that the Secretary of the Interior could satisfy himself that adequate consideration was given to local laws and regulations, 1970 U.S. Code Cong. and Adm. News 3243.

The amendment to 25 U.S.C. 415 by P.L. 91-275 is a clear indication of the presumption by Congress that such state laws did not apply to



Indian land and more specifically to lessees of Indian land. Otherwise, Congress would not have felt the need existed to amend 25 U.S.C. 415 and insure that consideration was given to state and local laws in this area. It should also be pointed out that the section was amended in light of P.L. 280.

Thus, in light of 25 U.S.C. 415 as amended, and its legislative history, the regulation promulgated by the Secretary of the Interior as 25 C.F.R. 1.4 is certainly within the mandate of Congress to the Secretary of the Interior to regulate the leasing of Indian land in light of local rules, laws, regulations and ordinances.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED WITH A MANDATE TO ENTER JUDGMENT THAT THE FOLLOWING STATUTES ARE INAPPLICABLE TO SANGRE DE CRISTO DEVELOPMENT COMPANY, INC. IN ITS OPERATIONS AND ACTIVITIES AT THE COLONIAS DE SANTA FE SUBDIVISION UNDER LEASE DATED MAY 24, 1970:

- (1) Sections 46-5-1 and 46-5-2, N.M.S.A. 1953 Comp as amended
- (2) Sec 67-35-1 et seq, N.M.S.A. 1953 comp as amended
- (3) Sec 72-1-1, NMSA 1953 Comp as amended
- (4) Secs 70-3-1 et seq, NMSA 1953 Comp as amended
- (5) Sec 75-39-1 and Sec 12-1-4 (8) NMSA 1953 Comp as amended
- (6) Secs 72-16A-1 et seq NMSA, 1953 comp as amended

and that 25 C.F.R. Sec 1.4 is a valid and enforceable regulation of the



...and were specifically to possess of Indian land. Otherwise, ... would not have felt the need existed to amend 25 U.S.C. 415 and ... that consideration was given to state and local laws in this area. ... also be pointed out that the section was amended in light of ...

...in light of 25 U.S.C. 415 as amended, and its legislative ... the regulation promulgated by the Secretary of the Interior ... 25 U.S.C. 415 is certainly within the mandate of Congress to the ... of the Interior to regulate the leasing of Indian land in ... of local rules, laws, regulations and ordinances.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED WITH A WRIT OF HABEAS CORPUS GRANTED THAT THE FOLLOWING STATUTES ARE INAPPLICABLE TO SARGENT ... DEVELOPMENT COMPANY, INC. IN ITS OPERATIONS AND ACTIVITIES AT ... SUBDIVISION UNDER LEASE DATED MAY 24, 1970:

- (1) Sections 46-5-1 and 46-5-2, N.M.S.A. 1953 Comp as amended
- (2) Sec 67-35-1 et seq., N.M.S.A. 1953 Comp as amended
- (3) Sec 75-1-1, 1953 Comp as amended
- (4) Secs 76-3-1 et seq., 1953 Comp as amended
- (5) Sec 76-39-1 and Sec 76-1-4 (B) 1953 Comp as amended
- (6) Secs 77-18A-1 et seq., 1953 Comp as amended

and that 25 C.F.R. Sec 1-4 is a valid and enforceable regulation of the



Secretary of the Interior.

Respectfully submitted,

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