Opinion No. 70-76

September 9, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Elmer L. Kaemper Executive Director Construction Industries Commission 1302 Osage Avenue Santa Fe, New Mexico 87501

QUESTIONS

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(1) Does the Construction Industries Commission have the duty to seek compliance with the Construction Industries Licensing Act and the construction codes of this state in cases where Indian pueblos or tribes lease land to private companies for the purpose of constructing buildings or other structures thereon?

(2) Does this make the private company subject to compliance with the Construction Industries Licensing Act and also give the State Inspectors the right of entry on Indian lands so leased to private companies for inspection purposes under the Construction Industries Licensing Act?

CONCLUSIONS

(1) Yes.

(2) Yes.

OPINION

*{*129}* **ANALYSIS**

The above questions arise out of the proposed development by Great Western Cities on the Cochiti Pueblo Indian lands in Sandoval County, New Mexico. Cochiti Pueblo has leased certain of its lands to Great Western Cities under a 99 year lease. Great Western Cities proposes to subdivide this land and to sublease tracts to individuals who will build either homes or businesses as provided in their particular sublease agreement.

As we understand the facts, Great Western Cities has a master plan of development which has been approved by Cochiti Pueblo as well as by the Secretary of Interior. Sublessees must follow the approved architectural design and specifications when building. In certain situations, Great Western Cities will act as a general contractor in building businesses and homes. Sublessees may either hire a New Mexico contractor to build a home complying with the architectural design and specifications approved by Great Western, Cochiti Pueblo and the Secretary of Interior or they may have Great

Western Cities build their home or business establishment meeting these already approved architectural design and specifications.

The question presented by the above facts is whether the state has jurisdiction over the construction of houses or other buildings on these Indian lands leased for 99 years to non-Cochiti Pueblo Indian lessees.

At this point, a short discussion on the status of New Mexico Indian pueblos may be helpful for understanding certain terms used in this opinion. When speaking of an Indian pueblo in New Mexico the term "public corporation" is perhaps the more appropriate characterization of their legal status. See Cohen, **Federal Indian Law,** p. 400. Unlike the case of reservation Indians holding their lands by virtue of a treaty with the United States, pueblo lands are held by virtue of title dating back to land grants from the Government of Spain. The pueblo Indians hold their lands by a right superior to the United States in that they have fee simple title to their lands. See **United States v. Sandoval,** 231 U.S. 28(1913). Although there may be some distinguishing characteristics between pueblos and and other Indian tribes, this opinion is not limited to pueblos, but rather includes all Indian country including Indian reservations.

Although some state jurisdiction on Indian lands was almost nonexistent at one time, the law has changed in later years. When confronted with various specific problems the courts have generally refused to find Indian sovereignty when basic facets of tribal life, customs and self-government were not at issue. In these instances the courts have held state law applicable. **Langford v. Monteith,** 102 U.S. 145 (1880); **United States v. McBratney,** 104 U.S. 621 (1881).

In a landmark Alaska case, **Organized Village of Kake v. Egan,** 396 U.S. 60, 7 L. Ed. 2d 573, 82 S. Ct. 562 (1962), the United States Supreme Court held that state laws may be applied on reservations or other tribal lands unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law. In **Organized Village of Kake v. Egan, supra,** the court noted that in its latest decision, **Williams v. Lee,** 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959) it had said that:

"The applicability of the state law . . . depends upon 'whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.' 358 U.S. at 221."

The court went on to point out that:

"Another recent statement of the governing principle was made in a decision reaffirming the authority of a State to punish crimes committed by *{*130}* non-Indians against non-Indians on reservations: '(I)n in the absence of limiting treaty obligation or Congressional enactment each state has a right to exercise jurisdiction over Indian reservations within its boundaries,' New York ex rel. Ray v. Martin, 326 U.S. 496 (1946)."

The Supreme Court in **Organized Village of Kake v. Egan, supra,** concluded that:

"These decisions indicate that even on a reservation state laws may be applied unless such application would interfere with reservation self-government or impair a right granted or reserved by federal law."

To determine whether the State of New Mexico has jurisdiction under its Construction Industries Act, we must therefore inquire whether the application of this law would interfere with tribal self-government or impair a right granted or reserved by federal law.

It is clear that state jurisdiction over the construction of buildings or other structures described in the facts above cannot in any way interfere with tribal self-government or infringe on the right of the Indians to govern themselves. This is essentially a non-Indian development in that the buildings constructed on the leased lands will be occupied by non-Indians. The New Mexico Construction Industries Act, and building codes issued thereunder, is designed:

to promote the general welfare of the people of New Mexico by providing for the protection of their lives, property and economic well-being against substandard or hazardous construction . . . work. Section 67-35-4, N.M.S.A., 1953 Compilation.

The public interest demands that the buildings in this state comply with established standards of construction to protect the people of this state. We must conclude that the application of the Construction Industries Act in no way interferes with reservation self-government and further that the State of New Mexico has a strong public interest in enforcing the provisions of this Act to protect the people of New Mexico.

The mere fact that the locus of an event is on an Indian reservation does not prevent the exercise of state jurisdiction, especially where the parties involved are not Indians and the subject matter of the transaction is not of federal concern. Thus, it has been held that the murder of a non-Indian by a non-Indian on a reservation, in the absence of express federal legislation to the contrary, is a matter of exclusive state jurisdiction. **U.S. v. McBratney,** 104 U.S. 621 (1881); **Draper v. U.S.,** 164 U.S. 240 (1896). Likewise, the validity of state taxation of personalty of a non-Indian within Indian country has been sustained. **Thomas v. Gay,** 169 U.S. 240 (1896).

Having concluded that state inspection of buildings constructed by New Mexico contractors on Indian lands leased to private individuals under a 99 year lease does not interfere with reservation self-government we must turn to the question of whether it impairs a right granted or reserved by federal law. In **Warren Trading Post Co. v. Arizona Tax Comm'n,** 380 U.S. 685, 85 S. Ct. 1242, 14 L. Ed. 2d 165 (1965), the Supreme Court of the United States held that states could not impose proceeds of sales tax or gross income tax on sales to reservation Indians by a licensed Indian trader. The reason for this holding was that the federal government preempted state government from imposing such a tax by regulating the prices charged Indians by Indian traders.

In the **Warren Trading Post** case, the Supreme Court pointed out that the Commissioner of Indian Affairs had "the sole power and authority to appoint traders to the Indian tribes and to specify the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." The court concluded that "Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon the traders." We find no federal law which possibly could be considered to have preempted the state from its duty to inspect buildings constructed on Indian lands and therefore must conclude the state has jurisdiction to inspect under the provisions of the Construction Industries Act.

*{*131}* There may be some argument that since these buildings will be owned by the Cochiti Pueblo Indians under the terms of the master lease, the buildings belong to the Indians and therefore state regulation is somehow proscribed. In **Agua Caliente Band of Mission Indians v. County of Riverside,** 306 F. Supp. 279 (S.D. Cal. 1969), it was held that a possessory interest in a leasehold of 99 years is tantamount to an estate in fee for assessment purposes. We believe this general principle applies equally in the present case. As pointed out above, this is essentially a non-Indian development and the public interest demands that the 99 year leased buildings comply with established standards of construction to protect the people of this state.

Article XXI, Section 2 of the New Mexico Constitution[*] is a disclaimer of a proprietary rather than a governmental interest by the state and therefore is inapplicable in this case. See Ghahate v. Bureau of Revenue, 80 N.M. 98, 101, 451 P.2d 1002 (1969) and **Organized Village of Kake v. Egan, supra** at 580.

It follows from the foregoing that pursuant to Section 67-35-50, N.M.S.A., 1953 Compilation of the Construction Industries Licensing Act, State Inspectors have the right of entry on Indian lands to carry out the necessary inspections of the type of construction set forth in this opinion request.

We have not been asked, and therefore do not at this time answer the question of jurisdiction over the construction by Indians of such structures as pueblos, hogans and kivas on Indian country for the use or occupancy by Indians. The construction of such structures may well involve basic facets of tribal life and customs, and if so, state jurisdiction in this area would interfere with tribal self-government.

By: Gary O'Dowd

Deputy Attorney General

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n* The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof, and 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; and that the lands and other property belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by this state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein shall preclude this state from taxing as other lands and 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 all such lands shall be exempt from taxation by this state so long and to such extent as the Congress of the United States has prescribed or may hereafter prescribe.