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Indian Law: The Pre-Emption Doctrine and Colonias De Santa Fe

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COMMENT

INDIAN LAW: THE PRE-EMPTION DOCTRINE AND COLONIAS DE SANTA FE

Some 5,400 acres of land belonging to the Tesuque Pueblo sit on the edge of Santa Fe, awaiting the bulldozers, the building crews and the residents of a modern housing tract. If the machines and people come, the state of New Mexico must only stand by and watch the action, a spectator within its own territorial boundaries. This is the consequence of the decision of the New Mexico Supreme Court in *Sangre de Cristo Development v. City of Santa Fe and Board of County Commissioners of Santa Fe, New Mexico.*[1] The decision: the city and county of Santa Fe may not exercise platting, planning or subdivision control over the development of Colonias de Santa Fe because the federal government has pre-empted such regulation.[2]

In brief, the holding is based on allegedly extensive and all-inclusive federal regulation of subdivisions on Indian lands and federal statutes relating to leasing of Indian lands. Taken together, the Court reasoned, these statutes and regulations evidenced a congressional intent to preclude the city and county from exercising platting, planning or subdivision control over such developments as Colonias de Santa Fe.[3] The legal tag applied to this preclusion is the pre-emption doctrine, established in respect to federal jurisidiction over Indians, in *Warren Trading Post v. Arizona Tax Commissioner.*[4]

This Comment challenges the *Sangre de Cristo* decision on three grounds: first, the Secretary of Interior simply has not enacted regulations for the development of subdivisions on Indian lands; secondly, the intent of Congress is really the *ultra vires* law-making of the Secretary of Interior; and thirdly, the pre-emption doctrine was incorrectly applied to the Sangre de Cristo situation. The result of the decision was to provide little protection for the future purchasers of such land and their neighbors, and to leave the ultimate issues unresolved and undiscussed. Carried to its logical conclusion, the opinion, in applying the pre-emption doctrine as it did, could have staggering consequences.

It is not difficult to understand the desire of Indians to make the

1. 11 N.M. State Bar Bulletin and Advance Opinions 382, ____ N.M. ____ (1972). Cert. denied, ____ U.S. ____ (1973). [hereinafter cited as 11 Advance Opinions ____].

2. *Id.*

3. *Id.*

4. 380 U.S. 685 (1965).

best economic use of their lands.[5] Neither is it difficult to understand their desire to remain free of state jurisdiction.[6] But as Indian land is turned to commercial uses, conflict with the state and local non-Indian citizenry almost inevitably follows. Consider, for example, the fact that Indian lands comprise ten per cent of the total acreage in New Mexico.[7] Consider that Congress has expressly authorized 99-year leases for "public, religious, educational, recreational, residential, or business purposes . . ."[8] on the Navajo Reservation and three other New Mexico pueblos—Cochiti, Pojoaque and Zuni.[9] Consider, also, that such long-term leases of Indian lands have been authorized by Congress in seven other states.[10] The Four Corners Plant is located on land leased from the Navajo Indians. The Sandia Pueblo purposes to build and lease a pari-mutuel dog and horse racing facility, despite the fact that dog racing is illegal under New Mexico law. Can Four Corners violate state air pollution laws with impunity? Can the Sandia Pueblo violate state law? The answers are unknown. The decision in *Sangre de Cristo,* however, provides a disturbing precedent.

That decision need not be the final word on the subject. Currently pending before the United States District Court for the District of New Mexico is a suit brought by the State of New Mexico against Sangre de Cristo seeking a declaratory judgment that the state may exercise jurisdiction over several facets of the Colonias de Santa Fe development, including state subdivision controls.[11] The decision of

5. There is some question whether the economic effect of state action is even a valid consideration in determining the question of pre-emption. *See, Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), in which the Ninth Circuit, while recognizing that California's possessory interest tax could have an adverse economic effect upon Indian lessors, nevertheless upheld the tax and *Organized Village of Kake v. Egan, Governor of Alaska,* 369 U.S. 60 (1962), where, despite the fact the communities of Kake and Angoon were totally dependent upon salmon fishing, the U.S. Supreme Court refused to enjoin threatened enforcement against them of a state statute prohibiting the use of salmon traps.

6. Since Indian land generally is inalienable, freedom from state jurisdiction may be used to offset the fact that land purchased on Indian land cannot be in fee simple absolute, but must be merely a leasehold estate.

As to the validity of a state tax on such a leasehold interest *see Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971), and Muir, *Ad Valorem Tax Status of a Private Lessee's Interest in Publicly Owned Property: Taxability of Possessory Interests in Industrial Projects Under the New Mexico Industrial Revenue Bond Act,* 3 N.M. L. Rev. 136 (1973).

7. 1971-72 New Mexico Blue Book 106. Of a total of 77,866,400 square miles in the state, Indians own 7,313,600 square miles.

8. 25 U.S.C. §415.

9. *Id.*

10. *Id.* The other states in which such leases have been authorized are Florida, Arizona, Utah, California, Colorado, Nevada and Washington.

11. David L. Norvell, Attorney General v. Sangre de Cristo Development Co., Inc. Civil No. 9106 (filed 1971). Specifically the state seeks a declaratory judgment that Sangre de Cristo is liable under the state gross receipts tax for tax on its receipts from sales of soft drinks made on

the New Mexico Supreme Court bluntly makes the question one of federal law.[12] The United States District Court could well find that pre-emption has not occurred.

The Colonias de Santa Fe controversy began in 1970 when Sangre de Cristo Development Company, Inc., and the Tesuque Pueblo on April 17, entered into a lease approved by the Albuquerque area director of the Bureau of Indian Affairs of the United States Department of Interior on May 24, 1970.[13] Under the terms of the agreement, the corporation was granted a 99-year lease on a maximum of 5,400 acres of Tesuque land.[14] The land is located within Santa Fe County and a substantial portion is within five miles of the city limits of Santa Fe.[15] Subsequently, the corporation in an action against both the city and county of Santa Fe sought to enjoin the defendants from exercising platting, planning and subdivision control over its development, Colonias de Santa Fe. The defendants each counter-claimed to enjoin the corporation from further violations of state platting, planning and subdivision control laws.[16] The Supreme Court held that sovereign immunity barred plaintiff's action.[17] Thus,

the leased land; that the company must obtain a dispenser's license issued by the state before operating a bar selling alcoholic beverages on the leased land; that the construction on the leased lands is subject to the provisions of the Construction Industries Licensing Act; that the value of the leasehold interest and improvements thereon is subject to state ad valorem property taxes; that the Land Subdivision Act is applicable to the development; and that state regulations governing water quality and supply, sewage disposal and water pollution control are applicable to the company.

The state property appraisal department estimated the value of the leasehold as of Jan. 1, 1971 at $1,855,500. At the 1970-71 tax rate, assessed valuation would be an estimated $618,900.

12. Conceivably the state supreme court's decision may have been made in light of the pending federal action and the decision can be interpreted as, in effect, dumping the question of state jurisdiction into the lap of the federal court. The denial of certiorari by the United States Supreme Court from the New Mexico decision makes the United States District Court action even more significant. Of course, the United States Supreme Court might grant certiorari on the federal court decision and ultimately settle the controversy.

13. 11 Advance Opinions at 384.

14. Lease between Sangre de Cristo Development Company, Inc., and the Pueblo of Tesuque, No. 331,405, recorded in the County of Santa Fe in Book 279 at 585-645. The lease provides for 1,300 acres initially, graduated to a maximum size of 5,400 acres.

15. 11 Advance Opinions at 384.

16. 11 Advance Opinions at 382. Specifically, the City of Santa Fe claimed violation of N.M. Stat. Ann. §§14-18-1 to -12, §§14-19-1 to 14.1, §§14-20-1 to -24 (Repl. 1968) relating to municipal platting, planning and subdivision authority, and the County of Santa Fe alleged violation of N.M. Stat. Ann. §§ 70-3-1 to -9 (Supp. 1971), relating to county platting, planning and subdivision control.

17. The court found that sovereign immunity barred plaintiff's suit against the city and county because neither the state nor the city or county had "given permission or consent for this suit against them. . . ."

> Since there is no statute authorizing the plaintiff to sue defendants in the case now before us, and since the functions which defendants claim they have the authority to exercise over the land are governmental rather than corporate, it appears clear from the New Mexico law, . . . that the trial court erred in rejecting the defense of sovereign immunity asserted by each of the defendants.

no injunction could issue against the city and county.[18] The Court then declared that neither could an injunction issue against the corporation because of the pre-emption doctrine.

The law governing state jurisdiction over Indians and Indian lands has changed dramatically from the early decisions considering the question.[19] Gradually, two tests have evolved to measure the validity of state action in reference to Indians and Indian lands. The first was established in *Williams v. Lee.*[20] Under the *Williams* test, the relevant inquiry is whether or not the power sought to be exercised will interfere with the self-government of the Indian tribe.[21] The other test, established in *Warren Trading Post,* is whether the suggested exercise of authority will "impair a right, granted, reserved or

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Although the New Mexico Supreme Court found sovereign immunity dispositive of the case, it felt constrained to decide the question of city and county jurisdiction over Colonias de Santa Fe

> because of its great public importance; because this issue was fully briefed and argued by both sides on this appeal; and because defendants have expressly urged. . . that we resolve this issue. (at 383).

The way the court applied the doctrine of sovereign immunity is, itself, open to challenge. In general, the New Mexico decisions distinguish between sovereign immunity in terms of state action and sovereign immunity involving actions by city and county governments. In the latter situation, the Court, as late as two years ago, re-emphasized that a private person may move "to enforce a public duty not due to the state." Womack v. Regents of the University of New Mexico, 82 N.M. 460, 483 P.2d 934 (1971). Two of the judges on the bench in the Sangre de Cristo action concurred in the Womack opinion. *See* also, Muir, *supra* note 6.

18. 11 Advance Opinions at 384. Two opinions in the case were handed down by the Court. The first—No. 9441 (Sept. 22, 1972)—was written by Justice LaFel E. Oman. The second was per curiam opinion. In both opinions, the court found that the disclaimer of right and title to Indian lands in Art. XXI, 2 of the New Mexico Constitution did not preclude the applicability of state laws to the current action since the disclaimer was of proprietary interest and not of government control.

19. *See,* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), in which Chief Justice Marshall declared the Cherokee Nation:

> a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with acts of Congress. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States.

This altered status of Indians and Indian lands was discussed at length in both Sangre de Cristo opinions. Particularly, the Court noted the widespread involvement of Indians in the activities of the state.

20. Williams v. Lee, 358 U.S. 217 (1959). Williams involved a suit to collect a debt, brought by a non-Indian operator of a general store on the Navajo Reservation in Arizona, against a Navajo and his wife who lived on the reservation. The Court held that jurisdiction of the dispute was in the tribal court and that the suit could not be brought in the state court.

21. This question was considered in the Sangre de Cristo case, 11 Advance Opinions at 385:

> Since defendants seek to impose their claimed authority only over lands leased by the Pueblo for 99 years to plaintiff, and only for the purpose of controlling the platting, planning and subdivision activities of plaintiff, we are unable to see how the exercise by defendants of this authority would interfere with the self-government of the Tesuque Pueblo.

pre-empted by Congress."[22] It is this concept—pre-emption[23]—that the New Mexico Supreme Court found determinative of the *Sangre de Cristo* case. In short, the exercise of the city and county's subdivision, planning and platting authority over the Colonias de Santa Fe development on Tesuque lands "would conflict with the subdivision, planning and platting authority which the United States has pre-empted or reserved unto itself."[24]

The court found evidence of pre-emption in regulations 1.4 and 131[25] of the Secretary of Interior and in the 1968 and 1970 amendments to 25 U.S.C. 415, the statute granting the secretary general leasing authority. Reading the statutes and regulations together, the court felt that:

> it is obvious . . . Congress intended to and has accomplished, by its enactments and the 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 subdivision, planning and platting of these lands for the uses to be made thereof during the term of the leasehold.[26]

Ironically, probably the strongest ground for pre-emption—Regulation 1.4 of the Secretary of Interior[27]—was least emphasized by the court.[28] The section reads:

> (a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe. . . .
>
> (b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws,

22. 11 Advance Opinions at 385.

23. For other examinations of the question of state jurisdiction relative to Indians *see* Comment, *State Power and the Indian Treaty Right to Fish*, 59 Calif. L. Rev. 485 (1971); Note, *State Taxation on Indian Reservations*, 1966 Utah L. Rev. 132 (1966); and Comment, *Indians—State Jurisdiction over Real Estate Developments on Tribal Lands*, 2 N.M. L. Rev. 81 (1972).

24. 11 Advance Opinions at 385.

25. 25 C.F.R. §§1.4 and 131 et seq. (1972).

26. 11 Advance Opinions at 386.

27. 25 C.F.R. §1.4. Regulation 1.4 was not even mentioned in the first opinion the Court rendered in Sangre de Cristo.

28. 11 Advance Opinions at 386.

> ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. . . .[29]

The Court simply mentioned this section as one of the Secretary of Interior's comprehensive rules and regulations governing leases of Indian lands.[30]

The section seems almost impregnable until the authority for the regulation is examined. It then becomes obvious that regulation 1.4[31] is not evidence of Congressional intent, but of law making by the Secretary of Interior. The authority for the regulation comes from 25 U.S.C. 2:

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

The statute appears broad. In practice, though, it has never been used to justify federal pre-emption of all Indian affairs. For example, in *Agua Caliente Band of Mission Indians v. County of Riverside,*[32] the Ninth Circuit Court of Appeals upheld the validity of a California possessory interest tax imposed on lessees of Indian land in the Palm Springs, California area. That court held the tax was "properly imposed unless it can be said that the legislation dealing with Indians and Indian lands demonstrates a congressional purpose to forbid the imposition of it."[33] The Court did not even consider whether such congressional purpose of exclusion could be found in 25 U.S.C.S. 415, under which the lease was made.

Even less substance is given the pre-emption argument under regulations 131 et. seq.[34] of the Secretary of Interior. These regulations are indeed extensive and all-inclusive, governing numerous conditions precedent to approval of leases by the Secretary of Interior, accounting of monies and provisions relating to specific Indian lands. However, not once is subdivision, platting or planning control mentioned.[35]

29. 25 C.F.R. §1.4 (1972).
30. 11 Advance Opinions at 386.
31. 25 C.F.R. §1.4 (1972).
32. 442 F.2d 1184 (9th Cir. 1971).
33. *Id.* at 1186.
34. 25 C.F.R. §131 et seq. (1972).
35. The headings of some of the subsections are indicative of the nature of the entire subchapter: §131.3, "Grants of leases by owners or their representatives"; §131.4, "Use of land of minors"; §131.6, "Negotiation of leases." Even subsections which, by heading, sound applicable to subdivision control are related to other topics, *e.g.*, §131.11, "Conservation and land use requirement." This subsection reads:

In comparison to the Secretary of Interior's regulations, the New Mexico Land Subdivision Act[36] requires, *inter alia*, written disclosure covering roads, public utilities, water sources, price and financial terms and the existence of blanket encumbrances.[37] Advertising standards[38] are imposed; legal access to "an existing public way"[39] is required before land may be sold or leased.[40]

The planning and platting authority of the City of Santa Fe and the zoning authority of counties and municipalities contemplate further regulations. The rules may cover such subjects as street co-ordination; open space; population and traffic distribution; street widths; lot depth, width and natural drainage; grading and improvement of streets; installation of water, sewer and other utility facilities;[41] the height and size of structures; "location and use of buildings, structures and land for trade, industry, residence or other purposes"; and "the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. . . ."[42]

No where in the Secretary of Interior's regulations are these subjects mentioned. The comparison speaks for itself: zoning, platting, planning and subdivision control are the subjects of state regulation; conditions precedent for the approval of leases are the substance of the Secretary of Interior's regulations. It is difficult to find conflict between the state law and the federal regulations. State law admittedly may conflict with provisions of the lease between Sangre de Cristo and the Tesuque Pueblo.[43] Such conflict was not used by the court to justify pre-emption, nor should it be. Even assuming congressional intent to pre-empt in this field, the Secretary of Interior has not issued regulations for subdivision development on Indian lands. Terms of the lease are not a substitute for properly-adopted administrative regulations. The lease is not readily available to the

Farming and grazing operations conducted under leases granted or approved under this part shall be conducted in accordance with recognized principles of good practice and prudent management. Land use stipulations or conservation plans necessary to define such use shall be incorporated in and made a part of the lease.

36. N.M. Stat. Ann. §§70-3-1 to -9 (Supp. 1971).

37. *Id.* at §70-3-4.

38. *Id.* at §70-3-5.

39. *Id.* at §70-3-3.

40. The definition of "subdivided land" used in the Land Subdivision Act, *id.* at §70-3-2, specifically excludes "subdivisions approved by an agency of the United States. . . ." Such language almost seems to indicate that the state has pre-empted itself. However, the language of this section was not used by the Court in reaching its decision and if the issue had been discussed, it is, at least, arguable that the legislative intent in including such language was to exclude the applicability of the Land Subdivision Act whenever adequate provision was made by the Secretary of Interior for subjects covered by the state law.

41. N.M. Stat. Ann. §14-18-6 (Repl. 1968).

42. N.M. Stat. Ann. §14-20-1 (Repl. 1968).

potential sublessee of Indian lands; the consumer has little way of knowing if the Secretary of Interior has protected his interests. In addition, the lease in this case does not provide the detailed regulation provided by New Mexico law.[44] Much is simply left to the discretion of the Secretary of Interior and the Tesuque Pueblo;[45] many details are unmentioned.[46] An interesting question arises: if the lease terms pre-empt, do they pre-empt only those subjects covered by the lease or any subject relating to subdivision development? Is the state, the city or the county attempting to regulate a subdivision such as Colonias de Santa Fe required to litigate every loophole in the lease terms to determine if pre-emption has occurred.

Warren Trading Post[47] clearly illustrates that the legal basis for pre-emption is federal regulations or federal statutes. *Warren* involved the validity of an Arizona tax on the income of the operator of a retail trading post on the Navajo Indian Reservation. The trading post was operated under a license granted by the Commissioner of Indian Affairs pursuant to 25 U.S.C. 261. In holding the tax invalid, the U.S. Supreme Court asserted that the tax would

> to a substantial extent frustrate the evident congressional purpose

43. Lease agreement, *supra* note 14. Paragraph 2 requires that the premises be "developed, used and operated pursuant to a general plan of development."

Paragraph 8(A) provides that within six months after the effective date of the lease, Sangre de Cristo must submit a master plan and architect's design for the complete development of Tract 1 to the Secretary of Interior and the Tesuque Pueblo for their approval. Master plans and architect's designs also are required within six months after the corporation exercises its option to lease any of the additional tracts.

Paragraph 8(C) requires the lessee to submit to the Secretary of the Pueblo, before beginning the construction of any improvements worth more than $5,000, comprehensive plans and specifications for such improvements. The plans shall be approved if they conform to the master plan and architect's design, but

> the Lessor and the Secretary shall not thereby assume any responsibility for construction or any violation of any applicable laws, ordinances, or governmental regulations.

Similarly, Paragraph 8(D) requires the corporation to create "a new municipality" which

> must, of necessity, provide any and all municipal services normally and usually provided by municipal corporations. These services shall include, but shall not necessarily be limited to water service, streets, utilities, schools, parks, police and fire protection, and any and all other normal and usual municipal services . . . it being understood that neither the Lessor nor the Secretary shall be in any way responsible for or obligated to furnish municipal services to the residents of the leased premises.

The paragraph adds that the corporation shall submit a "complete and detailed plan" for these municipal services for the approval of the Secretary of the Pueblo.

44. *Compare,* Lease Agreement provisions cited note 43 *supra, with* discussion of New Mexico Statutes p. 541 *supra.*

45. *See* Lease Agreement provisions note 43 *supra,* particularly the provisions for municipal services and construction at Colonias de Santa Fe.

46. *See* Lease Agreement provisions note 43 *supra.* Just as an example of an omission in the lease, there is no provision for advertising standards and disclosure to prospective subleases.

47. 380 U.S. 685 (1965).

> 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 . . . This state tax . . . could . . . disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.[48]

The other source for pre-emption the New Mexico Supreme Court found—the amendments to 25 U.S.C. 415—read, like the regulations of the Secretary of Interior, as requirements for approval of a lease. Language requiring or granting authority to the Secretary of Interior to govern non-Indian communities created subsequent to the leases simply is non-existent. The 1970 amendment[49] provides that the Secretary of Interior, before approving leases of Indian land

> . . . shall first satisfy 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 lease lands; and the effect on the environment of the uses to which the leased lands will be subject.[50]

The 1968 amendment to 25 U.S.C. 415 allows the Tesuque Pueblo to lease its land for 99 years subject to the approval of the Secretary of Interior and "under such terms and regulations as may be prescribed by the Secretary of the Interior."[51]

The holding in the Sangre de Cristo case is limited to pre-emption of city and county platting, planning or subdivision control over housing developments on Indian lands, though the language refers to state jurisdiction. In relying on Section 415, however, the question must be asked if state courts have been pre-empted, for example, from opening their doors to a suit arising from a dispute between two non-Indian sublessees at Colonias de Santa Fe since by the 1970 amendments to 25 U.S.C. 415 the secretary must "satisfy that adequate consideration has been given . . . [to] the availability of

48. 380 U.S. at 691. It is interesting to note that even in an area well-regulated and pre-empted by the federal government—trading posts—a suit was brought by the Navajos to require the Secretary of Interior "to adopt and enforce certain rules and regulations governing traders doing business on the reservation." *Rockbridge v. Lincoln*, 449 F.2d 567 (1971).

49. The 1970 amendment was added to 25 U.S.C. §415 on June 2, 1970, after the lease was approved by the Albuquerque area director of the Bureau of Indian Affairs in May. Thus, its applicability to this lease is questionable.

50. 25 U.S.C. §415 (1971).

51. *Id.*

judicial forums." The court does not indicate where the line is to be drawn.

The 1968 amendment also relates to conditions precedent to approval of leases. This might easily be construed to mean that the "such terms and regulations" language of the amendment applies to the conditions established between the lessor—the Indians—and the lessee—often a corporation—and not to terms between the corporation and the state. The consequence of the opposite reading is that a non-Indian corporation taking a leasehold for nearly a century can have the terms of its relationship to the state in which it is located and the people to whom it subleases dictated by the Secretary of Interior.[52] Who protects the interests of the sublessees? The Secretary of Interior has a fiduciary relationship with the Indians. His task is to protect their interests. The corporation is presumably most concerned with its own profit-making. According to the terms of the lease in this case,neither the Secretary of Interior nor the Tesuque Indians can be held liable for breach of the contract conditions.[53] The sublessee must turn to the corporation for relief if there is a breach, an empty remedy if the corporation has in the meantime dissolved or gone bankrupt. In short, the "such terms and regulations" language of the 1968 amendment, if read as an unlimited grant of authority to the Secretary of Interior, marks a return to the days of a harsh caveat emptor doctrine. In an age of expanded consumer rights, it is difficult to believe that Congress intended to leave such sublessees powerless against the lessee-developer. Rather, a more reasonable explanation is that the language is simply a grant of authority to the Secretary of Interior to adequately protect the Indian tribe or pueblo in its relationship to the corporation in such areas as adequate compensation, job opportunities, etc., and not to protect the non-Indian corporation from the force of relevant State law.[54]

On the same day that the developers of Colonias de Santa Fe were successfully arguing that the federal government had pre-empted the control of subdivision on Indian lands, the federal government was

52. The Secretary does take this atttitude. *See*, Lease Agreement, *supra* note 43.

53. *Id.*

54. One federal statute can be read as evidencing a Congressional intent to preclude state authority over leased Indian land. 25 U.S.C. §416h provides that:

> The Papago Council and the Salt River Pima-Maricopa Community Council, with the consent of the Secretary of Interior, are hereby authorized, for their respective reservations, to enact zoning, building, and sanitary regulations covering the lands on their reservations for which leasing authority is granted . . . in the absence of State civil and criminal jurisdiction over such particular lands, and said councils may contract with local municipalities for assistance in preparing such regulations.

This section also can be interpreted to mean that in the absence of specific Congressional intent such as that embodied in this provision, state law is deemed to be applicable.

unsuccessful in persuading the Tenth Circuit Court of Appeals that the Colonias action was not federal action within the meaning of the requirements of the National Environmental Policy Act (NEPA).[55] The Tenth Circuit directed the U.S. District Court in Albuquerque to issue a temporary and permanent injunction preventing the United States government from enjoining future work at Colonias de Santa Fe until the NEPA requirement were met.[56] NEPA requires that all federal agencies make environmental impact statements on "major Federal actions significantly affecting the quality of the human environment. . . ."[57]

Thus today, the future of Colonias de Santa Fe remains uncertain. The land of the Tesuque still sits on the edge of Santa Fe awaiting its new residents. The problem it has posed awaits, too, for a realistic solution from the courts or from Congress.

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55. Davis v. Morton, 469 F.2d 593 (1972). Appellants in the suit were two landowners living near Tesuque and two non-profit corporations concerned with environmental protection. They alleged violation of 42 U.S.C. §4332(2)(C) by failure to make an environmental impact statement and of 25 U.S.C. §415(a) by approving the lease "without first being assured that certain statutory mandates had been met."

56. *Id.*

57. 42 U.S.C. 4332(2)(C). The Court of Appeals first decided that NEPA applies to all agencies under the authority of Congress and then held that granting leases on Indian lands constitutes major federal action.

On the National Environmental Policy Act *see generally* Hanks & Hanks, *Environmental bill of rights: The Citizen Suit and the National Environmental Policy Act of 1969,* 24 Rutgers L. Rev. 230 (1970); Note, *Panoramic View of the National Environmental Policy Act,* 16 How. L.J. 116 (1970); Fraser, *Environmental Protection Act 1970,* 45 L. Institute J. 393 (1971).