



INTERIOR BOARD OF INDIAN APPEALS

Morongo Band of Mission Indians v. Sacramento Area Director,  
Bureau of Indian Affairs

7 IBIA 299 (12/13/1979)

Also published at 86 Interior Decisions 680

Related judicial case:

*People ex rel. Dep't of Transportation v. Naegele Outdoor Advertising Co.*,  
698 P.2d 150 (Cal. Sup. Ct. 1985)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF THE MORONGO BAND OF MISSION INDIANS

v.

AREA DIRECTOR, SACRAMENTO AREA OFFICE

IBIA 79-18-A

Decided December 13, 1979

Appeal from Area Director's decision disapproving a proposed lease of trust land for outdoor advertising purposes.

Reversed.

1. Act of October 22, 1965--Bureau of Indian Affairs: Generally--  
Indian Tribes: Generally

Title I of the Highway Beautification Act, 79 Stat. 1028, which applies to all "public lands or reservations of the United States," does not apply to Indian reservations.

2. Act of August 15, 1953--Indian Tribes: Generally

Public Law 280, 67 Stat. 588-590, did not grant to states general civil regulatory powers over Indian reservations. Nor could this be accomplished by Departmental regulation, Secretarial Order or other directive.

3. Act of October 22, 1965--Bureau of Indian Affairs: Generally--  
Indian Tribes: Generally

California's Outdoor Advertising Act, implementing the Highway Beautification Act, 79 Stat. 1028, may not be applied to non-Indian lessees on the Morongo Indian Reservation.

4. Act of October 22, 1965--Bureau of Indian Affairs: Generally--  
Indian Tribes: Generally

The Department's policy established in 1965 of requiring lessees of Indian lands in California to comply with State standards regulating land use and development can be achieved without subjecting developing tribal governments to the full enforcement powers of the State, viz., through adding appropriate State standards to the provisions of any lease.

APPEARANCES: Stephen V. Quesenberry, Esq., California Indian Legal Services, for appellant; James E. Goodhue, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Riverside, California, for respondent.

#### OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

The appeal decided here involves a claim by the Morongo Band of Mission Indians (appellant) that the Area Director, Bureau of Indian Affairs, Sacramento Area Office (respondent), erred in refusing to approve a lease agreement between the Band and the Naegele Outdoor

Advertising Co., Inc., of California, for the purpose of erecting and maintaining outdoor advertising structures on the Morongo Indian Reservation.

The Area Director's decision at issue was rendered March 14, 1978. 1/ A notice of appeal was timely filed from this decision by California Indian Legal Services on behalf of appellant on April 17, 1978, pursuant to 25 CFR Part 2. By memorandum dated March 27, 1979, Acting Deputy Commissioner of Indian Affairs Martin E. Seneca, Jr., referred this appeal to the Board of Indian Appeals for resolution in accordance with the provisions of 25 CFR 2.19. 2/

In reviewing the decision appealed from and the briefs submitted by the parties, it is clear that resolution of this appeal depends primarily on the answer to the following question: To what extent, if any, does the Highway Beautification Act of 1965, 79 Stat. 1028, 23 U.S.C. § 131 (1976), apply to Indian reservations?

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1/ The Area Director's decision affirmed a determination made by the Superintendent, Southern California Agency, BIA, dated August 29, 1977.

2/ This regulation provides in relevant part:

“(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

“(1) Render a written decision on the appeal or

“(2) Refer the appeal to the Board of Indian Appeals for decision.

“(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision.”

Background

The genesis of this appeal can be traced to the struggle of the Morongo Band of Mission Indians to develop economically. This background is detailed in appellant's brief dated July 1, 1978, from which the following summary is adduced:

The Morongo Indian Reservation occupies approximately 32,300 acres of land in Riverside County, California, and is inhabited by nearly 300 members of the Morongo Band of Mission Indians. Because the reservation lies astride a narrow pass between the San Bernardino and San Jacinto Mountain Ranges, only the few relatively flat acres located in the plain are suitable for economic development. A planning study conducted for the Band in 1972 identified a total of less than 1 square mile of reservation land as suitable for economic development. All of that land lies adjacent to Interstate Highway 10, which is a major east-west artery for travel to and from the metropolitan areas of southern California.

In addition to the Interstate Highway, the reservation is crossed by a main line of the Southern Pacific Railroad, the Colorado River Aqueduct, major oil transmission pipelines, natural gas pipelines, and numerous electrical transmission lines, all of which serve the metropolitan Los Angeles area without any significant benefit to the reservation or its residents.

Despite the reservation's seemingly advantageous location for economic development, its economy is depressed and its population poor. The unemployment rate on the reservation is approximately 50 percent.

For many years a major source of income for the Morongo Band has been derived from outdoor advertising activities on tribal lands adjacent to Interstate Highway 10. <sup>3/</sup> Because the foregoing lands consist of property held in trust by the United States for the benefit of the Morongo Band, any tribal lease of the property for business purposes requires approval by the Secretary of the Interior pursuant to the provisions of 25 U.S.C. § 415 (1976), and regulations found in 25 CFR Part 131. The Bureau has refused to approve the Morongo Band's advertising lease with the Naegele company on grounds that the outdoor advertising proposed in the lease violates requirements of the Highway Beautification Act and California State law promulgated thereunder. <sup>4/</sup>

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<sup>3/</sup> In an appraisal report dated October 13, 1977, the Southern California Appraisal Office, BIA, identified outdoor advertising as "the highest and best use of reservation land along interstate 10."

<sup>4/</sup> The Area Director's decision does not recite specific findings of fact or conclusions of law. In lieu thereof, the Area Director states:

"In view of the Riverside Field Solicitor's Opinion; Secretarial Order of July 9, 1965, 30 F.R. 8722; Solicitor's Opinion dated April 7, 1967, and circumstances surrounding the lease proposal of Naegele Outdoor Advertising Company, I hereby affirm the Superintendent's decision of August 29, 1977."

Discussion, Findings and Conclusions

Certain preliminary questions are answered before we address the main issue. First, the Field Solicitor (who represents the Area Director on appeal) asserts that it is inappropriate for the Board to entertain this appeal because the issues involved are the subject of litigation in State of California v. Naegele Outdoor Advertising Company of California, Inc., No. 126069, Superior Court of the State of California, County of Riverside. This is an action brought by the State of California, through its Department of Transportation, against the Naegele company for violations of California's Outdoor Advertising Act, Bus. & Prof. Code §§ 5200-5486, allegedly committed by the company in advertising activities on the Morongo Reservation.

There are indeed questions of law at issue in the foregoing case which also arise in this administrative proceeding, such as whether the Congress intended the Highway Beautification Act to apply to Indian reservations. The precise issue in the State Court proceeding, however, does not involve the lease dispute now before the Board. In this regard, neither the Morongo Band nor the Department of the Interior is a party to the action. In the absence of any Federal court injunction or Secretarial directive precluding the Board from deciding the subject appeal, there is no legal reason why the Board cannot do so. Further, considerations of policy do not favor the continuation of disputes which are ripe for decision. Here, appellant has been pursuing a final administrative determination from the Department for

over 1-1/2 years. For the above reasons, the Board rejects respondent's contention that consideration of this appeal should be deferred or denied. <sup>5/</sup>

Subsequent to the Area Director's disapproval of the lease at issue, the Morongo Band entered into an "agency agreement" with the Naegele company in March 1978. The background and nature of this agency agreement is explained by appellant in its brief dated July 1, 1978, as follows:

During the pendency of these various appeals, the Business Committee of the Morongo Band, pursuant to the authority vested in it through the Band's enactment of Proposition 4 at its General Election of December 14, 1963, continued to consider the possibility of establishing an outdoor advertising industry on the Morongo Indian Reservation because of its potential for creating employment for Band members and for creating an income for the Morongo Band. After lengthy deliberations, it was decided that the most advantageous and expeditious way for the Band to do so would be for the Band to establish its own outdoor advertising enterprise immediately. Because the Band lacked the necessary technical expertise to do so immediately, the Band engaged an agent to commence and to operate certain aspects of this enterprise for the Band during a period when the Band would acquire its own expertise in the business. The Band has entered into an Agency Agreement with its agent [Naegele Outdoor Advertising Company of California, Inc.] for this purpose \* \* \*.

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<sup>5/</sup> The Field Solicitor refers to another California suit, State of California v. Hadley Fruit Co., Civ. No. 106415, Superior Court of California, County of Riverside, as one with a direct bearing on the issues before the Board. Appellant disagrees. The Board is informed that the above case has been settled.

The Field Solicitor submits that appellant is "attempting to convert the appeal from the refusal to approve the lease into an Interior Board of Indian Appeals' ratification of an agency agreement [summarized above] and the Band's operation of an outdoor advertising sign business." Answer Brief filed June 4, 1979, at 2. Appellant denies this charge and maintains that Departmental ratification of the Band's agency agreement with the company is not required. Appellant's Reply Brief filed June 22, 1979, at 1-2.

It is neither necessary nor appropriate for the Board to render an opinion regarding the March 1978 "agency agreement." The Board's jurisdiction in administrative appeals is limited to a review of specific action taken by BIA officials in the performance of their duties under Chapter I of Title 25 of the Code of Federal Regulations. 43 CFR 4.350-4.353. To our knowledge, no BIA action has been taken regarding the agency agreement. 6/ If some BIA action has occurred regarding the agreement, it is not reviewable by this forum in the absence of a proper appeal therefrom.

Thus, the sole question to be decided here is whether it was error for the Area Director to disapprove the proposed lease of trust land on the Morongo Indian Reservation to the Naegele company. 7/

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6/ According to the Field Selector, "at no time was the so-called agency agreement ever presented to the Superintendent, Southern California Agency, or the Area Director, for approval." Answer Brief at 2.

7/ The terms of the proposed lease are set forth in a letter to the Morongo Band Tribal Council from the Naegele company, dated August 10, 1977, which reads as follows:

The statutory authority which permits the leasing of Indian trust land for such business purposes as outdoor advertising is the Act of August 9, 1955, 69 Stat. 539, as amended, 25 U.S.C. § 415

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fn. 7 (continued)

“Gentlemen:

“Confirming our meeting and proposal to the Morongo Tribal Council on August 8, 1977, we would like to propose the following for your approval.

“1. We would like to lease the North side of sections 10 and 12 and the South side of section 8 located on Freeway Interstate 10. We will only lease enough ground space to erect single pole signs. Each advertising structure will only have one pole with the ground base approximately thirty six inches in diameter.

“2. At this time, our plans call for fifteen different single pole structures, spaced approximately 1000 ft. apart. As we understand, your sections are one mile long on the freeway side. This will allow us to build five on each of the proposed sections.

“3. In order for Naegele to lease the above mentioned property, the Morongo Indians will have to own the poles for each advertising structure. Naegele will furnish and erect each pole and sell them to the Morongos for one dollar each. We can then lease the top of the pole for a total of \$6,500 per year plus the annual increase as outlined on the attached page. At the end of our lease agreement we will buy back the poles for one dollar each or enter into a new lease at the agreement of both parties.

“4. The annual payment of \$6,500 plus, will be made in annual installments in advance beginning January 1, 1978. The payment schedule above will be established by the fact that we will have approval to start construction on the locations by October 1, 1977.

“5. In the event of future development of Morongo property, we will move our structure, including the pole fifty or one hundred feet or wherever it will not interfere with the development. This will be done at no cost to the Morongo Indians.

“6. The Hadley outdoor advertising signs can remain as far as we are concerned. But all other advertising signs will be removed by us as their leases expire with you. The reason for this is, we do not want to create outdoor advertising clutter. We would like to have an exclusive right to lease any and all property that you want to lease for advertising on any road or freeway. This will also allow you to expect and get prompt payment from one advertising company, the 3rd largest outdoor advertising company in the United States.

(1976). The Act provides that restricted Indian lands, whether tribally or individually owned, may be leased only with the approval of the Secretary of the Interior. In addition to prescribing the term of years for leases consummated under the Act, the statute provides:

Prior to approval of any lease \* \* \* the Secretary of the Interior shall first 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 to which the leased lands will be subject. [Act of June 2, 1970, § 2, 84 Stat. 303.]

The Department's regulations governing the leasing of Indian land are set forth in 25 CFR Part 131. These regulations are primarily aimed at insuring proper economic return to Indian lessors. See 25 CFR 131.5.

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fn. 7 (continued)

“7. In the event the state finds a way or passes a law to prevent Naegele from leasing the top of each of your single poles through condemnation or whatever, we will pay you the lease money owed through the day we are forced to take down our signs and poles.

“8. Naegele will maintain all advertising structures, including the poles at no cost to the Morongos. We will also assume all cost for illumination and service for the signs. Naegele will also carry all insurance for liability. We will at all times protect the interest of the Morongo Indians.

“9. We will only build standardized outdoor structures, 14' x 48' with space for extensions, please see photo, or we will not exceed 1,200 sq. ft., which will meet state approval.

“10. We will also need the right of ingress and egress of the premises to erect, place and maintain all advertising signs and structures and any equipment therefore and post, paint or illuminate and maintain advertisements or such structures.

“Very Truly Yours

“Leon E. Howell

“President”

Based on the authorities incorporated by reference in the Area Director's decision (see n.4), it appears that the Area Director disapproved the proposed lease on grounds that California and Federal laws controlling outdoor advertising along Interstate highways were not satisfied by the provisions of the lease.

On appeal the Morongo Band has presented a comprehensive attack on the validity of the Area Director's action. Among other things, Band alleges the following:

1. The Highway Beautification Act does not apply to Indian reservation lands.
  
2. Neither the Highway Beautification Act, Public Law 280, or any other proper legal authority confers on California power to implement its Outdoor Advertising Act on Indian reservations.
  
3. The Highway Beautification Act and the California Outdoor Advertising Act do not apply to non-Indian lessees of Indian trust lands.
  
4. The policy of the Secretary of the Interior to apply state land use standards to leases of Indian trust lands can be accomplished without subjecting the Band to state jurisdiction and enforcement measures.

Does the Highway Beautification Act  
Apply to Indian Reservation Lands?

The Highway Beautification Act of 1965, as amended, was enacted by Congress to provide for scenic development and road beautification of the Federal-Aid highway systems. Title I of the Act (23 U.S.C. § 131 (1976)) contains requirements for the control of outdoor advertising. At 23 U.S.C. § 131(h), the Act provides:

(h) All public lands or reservations of the United States which are adjacent to any portion of the Interstate System and the primary system shall be controlled in accordance with the provisions of this section and the national standards promulgated by the Secretary [in 1965, the Secretary of Commerce; now, the Secretary of Transportation].

[1] In a memorandum opinion to the Commissioner of Indian Affairs dated April 7, 1967, the Associate Solicitor for Indian Affairs concluded that "reservations of the United States" as used in subsection (h) of 23 U.S.C. § 131 includes Indian reservations. <sup>8/</sup> Upon careful review, we conclude that the Associate Solicitor's opinion does not reflect the state of the law on this subject.

The 1967 opinion relies primarily on the Department's disposition of three cases rendered over 65 years ago concerning rights-of-way

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<sup>8/</sup> In his concluding paragraph, the Associate Solicitor states that outdoor advertising on Indian reservation lands is subject "to regulations under the act." The opinion does not address whether outdoor advertising on Indian reservations is subject to both Federal and state regulation.

across "reservations" for canal and ditch purposes. <sup>9/</sup> At issue was whether the term "reservations" as used in the Act of March 3, 1891, § 18, 26 Stat. 1101, 43 U.S.C. § 946 (1976), includes Indian reservations. The Department ruled in the affirmative and this position was followed by a Federal court in 1914. United States v. Portneuf-Marsh Valley Irr. Co., 205 F. 416 (E.D. Ida. 1913), aff'd, 213 F. 601 (9th Cir. 1914).

As appellant argues on appeal, the Act of March 3, 1891, vests power in the Secretary of the Interior to disapprove a right-of-way grant whenever he determines that approval thereof would be injurious to an Indian reservation. <sup>10/</sup> On the other hand, the Highway Beautification Act of 1965, which relies on state action to enforce its standards, see 23 U.S.C. § 131(b)-(k) (1976), contains no special protection for Indian interests.

One indication that the Department has not considered the Highway Beautification Act applicable to Indian lands is its own regulatory

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<sup>9/</sup> 27 L.D. 421 (1898), overruling 14 L.D. 265 (1892); 33 L.D. 563 (1905); and 42 L.D. 595 (1913).

<sup>10/</sup> The statutory proviso reads in pertinent part: "Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation \* \* \*." 43 U.S.C. § 946 (1976). With respect thereto, see 27 L.D. 421, 423-424, 33 L.D. 563, 565 and 42 L.D. 595, 600, supra. In U.S. v. Portneuf-Marsh Valley Irr. Co., supra, the Federal district court stated:

"It is pointed out that there is no apparent reason why an Indian reservation should not be subject to the grant of a right of way the same as any other reservation, especially in view of the fact that the Executive Department having jurisdiction thereof may determine whether a right of way can be granted without injury to the general purpose of the reservation, and extend or withhold approval accordingly."  
205 F. 416, 419.

response to the statute. In December 1970, the Secretary issued regulations invoking and expanding the outdoor advertising standards of the Highway Beautification Act with respect to public lands managed by the Bureau of Land Management. 43 CFR 2921.0-6. No such regulations have been issued by the Secretary with respect to Indian lands.

That the Highway Beautification Act was not intended to apply to Indian reservations is apparent from the enforcement provisions of the law. Under the Act, states are subject to a 10 percent reduction in Federal highway funds if they fail to regulate outdoor advertising in accordance with national standards. 23 U.S.C. § 131(b). States are authorized to employ their zoning or condemnation powers to achieve compliance with the Act. Section 131(d)-131(g); 23 CFR 750.301-308. States may even impose stricter limitations than are found in the Act in controlling outdoor advertising. Section 131(k); 23 CFR 750.110, 750.155.

For the above measures to be taken by states on Indian reservations two well-established legal principles are necessarily forsaken: first, that tribally owned Indian reservation land is not subject to state powers of eminent domain, Minnesota v. United States, 305 U.S. 382 (1939); United States v. 10.69 Acres of Land, 425 F.2d 317 (9th Cir. 1970), 11/ and second, that states are not authorized to enforce their land use regulations on Indian reservations. Santa Rosa Band of

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11/ Allotted lands are subject to state condemnation. Act of March 3, 1901, 31 Stat. 1084, 25 U.S.C. § 357 (1976).

Indians v. Kings County, 532 F.2d 655 (9th Cir 1975), cert. denied, 429 U.S. 1038 (1977).

Unquestionably, the Congress, which has plenary authority over Indian affairs, United States v. Kagama, 118 U.S. 375 (1886), has the power to subject Indian reservations to the type of state regulation generally authorized in the Highway Beautification Act. However, based on principles enunciated by the Supreme Court in Williams v. Lee, 358 U.S. 217 (1959), regarding the limits of state power over Indian affairs, it is the Board's position that absent clear Congressional license to the states to control outdoor advertising on Indian reservations, such an intrusion by the states into "the right of reservation Indians to make their own laws and be ruled by them" is without sanction.

The term "reservations" is one broadly used "to describe any body of land, large or small, which Congress has reserved from sale for any purpose." United States v. Celestine, 215 U.S. 278 (1909). It may include military reservations, national forests, national parks, or any other Federally protected reserve. <sup>12/</sup> Indian reservations are unique, however, since vital rights are vested in the Indians and

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<sup>12/</sup> In concluding that the phrase "public lands and reservations of the United States" as found in the Act of March 3, 1891, included Indian reservations, the Appeals Court noted in United States v. Portneuf-Marsh Valley Irr. Co., supra, that "[a]t the date of that act the Indian reservations were the only considerable reservations of the United States." 213 F. 601, 603.

tribes located thereon. Appellant refers to the Buck Act 13/ as a clear example of Congressional recognition that Indian reservations are distinguishable from all other Federal reservations. As originally proposed, this Act would have allowed a state to impose its sales tax, use tax, or income tax within "Federal areas," alternatively described as Federal "reservations" in the title of the bill. A series of inquiries from the Department of the Interior eventually led to a clarifying provision in the bill excepting reservation Indians from the coverage of the Buck Act. 14/

In the case before us, absence of statutory language expressly including or excluding Indian reservations as territory subject to the Highway Beautification Act renders the term "reservations" as used in section 131(h), ambiguous. This ambiguity has been recognized by the Department of Transportation, the Federal agency primarily responsible for national enforcement of the Act. By memorandum dated December 19, 1977, an assistant chief counsel of the Federal Highway Administration furnished the Department of the Interior with a draft proposed amendment to 23 U.S.C. § 131(h) aimed at bringing Indian reservation areas within certain coverages of the Highway Beautification Act. 15/

To our knowledge, the legislative history of 25 U.S.C. § 131 (1976) reveals no reference to Indian reservations whatsoever.

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13/ Act of July 30, 1947, 61 Stat. 641, 4 U.S.C. §§ 104-110 (1976).

14/ 4 U.S.C. § 109 (1976). See Appellant's opening brief filed July 5, 1978, at 4-7.

15/ See pp. 41-46, Appellant's Attachments to Brief on Appeal, filed July 5, 1978. Among other things, the draft amendment called for a voluntary removal program on Indian reservation lands of nonconforming outdoor advertising signs.

However, implicit in statements of the House Public Works Committee regarding the legislation is the recurring theme that enforcement of the Act could effectively be achieved through the zoning and condemnation powers enjoyed by states. House Report No. 1084, 89th Congress, 1st Sess., found in 1965 U.S. Code Cong. & Adm. News, pp. 3710-3736. <sup>16/</sup> As previously stated, however, we believe these powers may be exercised by states on Indian reservations only when Congress expressly so authorizes. Under the circumstances, we find that the legislative history of the Highway Beautification Act supports the conclusion that Congress did not intend to include Indian reservations within the class of reservations affected thereby.

In ascertaining this intent of Congress, it is instructive that Indian lands are specifically identified in other Acts relating to the Federal-aid highway systems as appropriate. See 23 U.S.C. §§ 101(a), 103(b)(1), 120(a), 120(f), 120(g), 125(c), 203, 208, and 217(c). Congress obviously knew when and how to include language relating to Indian reservations in its Federal highway plan.

Appellant submits that in accordance with recognized canons of construction, doubtful statutory language must be interpreted in favor of the Indians. This is undoubtedly true with respect to Federal statutes dealing with Indians. Worcester v. Georgia, 31 U.S.

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<sup>16/</sup> The regulations of the Federal Highway Administration concerning condemnation under the Act specify that they "should not be construed to authorize any additional rights in eminent domain not already existing under State law or under 23 U.S.C. 131(g)." 23 CFR 750.301.

(6 Peters) 214, 261 (1832); Santa Rosa Band of Indians v. Kings County, *supra*; State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 58 L.Ed.2d 740, 758 (1979). Where the Federal statute involved is one of general applicability, such as the Highway Beautification Act, some courts are prone to apply normal rules of construction instead of rules which favor Indians. See United States v. Allard, 397 F. Supp. 429 (D. Mont. 1975); *cf.* United States v. White, 508 F.2d 453 (8th Cir. 1974).

In this case, it cannot be said that Indians are similarly affected as the general public if section 131(h) is deemed applicable to Indian reservations. Such a ruling would significantly alter the tribal sovereignty possessed by Indian nations. Since states have the authority under the Act to impose standards stricter than in the Act itself, such a ruling could mean economic termination of a tribe such as the Morongo Band whose primary source of income is derived from outdoor advertising. Because of the unique tribal interests at stake here, it is not inappropriate to apply the rules of construction urged by appellant, notwithstanding the general nature of the Act in question. So doing, we are all the more satisfied that Congress did not intend the Highway Beautification Act to apply to Indian reservations.

#### Public Law 280 and Departmental Standards

[2] The Field Solicitor submits that the California Outdoor Advertising Act may be enforced on Indian reservations by virtue of

a Secretarial Order of July 2, 1965, published at 30 FR 8722. This directive (signed by Under Secretary John A. Carver) provides in part:

Pursuant to § 1.4(b), Title 25, Code of Federal Regulations (30 F.R. 7520), the Secretary of the Interior does hereby adopt and make applicable, subject to the conditions hereinafter provided, all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States and located within the State of California.

The Field Solicitor points out that the above Secretarial directive has been construed by a California court as vesting the State with authority to apply its laws to lessees of Indian lands. County of San Bernardino v. LaMar, 76 Cal. Rptr. 547 (1969).

In a March 1970 opinion, former Secretary of the Interior Walter J. Hickel clarified the Department's position with respect to the 1965 Secretarial directive and expressly stated that the Department had no intention of following the ruling in County of San Bernardino, *supra*, noting that the United States was not a party to the litigation and had no notice of its pendency. 17/

Secretary

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17/ Mr. Hickel's opinion appears as appendix A to Appellants' Supplemental Statement in Support of Appeal, filed May 3, 1979. It is an unpublished opinion directed to interested parties in the zoning of lands of the Agua Caliente Indian Reservation in Palm Springs.

Hickel stated that, at most, California laws were noticed by the Department as standards for the agency to follow in approving leases of Indian land.

The Secretarial directive of 1965 and 25 CFR 1.4(b) are apparent attempts of the Department to apply or interpret the aims of Congress in its enactment of the Act of August 15, 1953, 67 Stat. 588-590, as amended, commonly known as Public Law 280. 18/ In 1976, the Supreme Court rendered the definitive decision that Public Law 280 did not grant to states general civil regulatory powers over Indian reservations. Bryan v. Itasca County, 426 U.S. 373, 390 (1976). The Court's decision in Bryan is consistent with Mr. Hickel's 1970 opinion that the Secretarial directive of 1965 was not a general jurisdictional grant to California to apply its regulatory laws in Indian country. Clearly, only Congress may accomplish such a result.

The Field Solicitor further contends that the California Outdoor Advertising Act is a prohibitory statute and thus comes within the purview of the criminal jurisdiction provisions of Public Law 280. It is the case that California has made any violation of its Act a misdemeanor. Bus. and Prof. Code, § 5464.

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18/ The 1965 order contains the following proviso: "Nothing contained in this notice shall be construed in any way to alter or limit the provisions of sections 2(b) and 4(b) and (c) of the Act of August 15, 1953 (67 Stat. 588)." Several commentators have questioned the validity of 25 CFR 1.4 (see, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. L. Rev. 535, 586 (1975), by Goldberg, Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands, 26 Stan. L. Rev. 1061, 1091 (1974), by Chambers. In Norvell v. Sangre de Cristo Dev. Co., 372 F. Supp. 348 (D.N.M. 1974), 25 CFR 1.4 was declared unconstitutional for lack of congressional authorization.

Appellant submits that under the above theory virtually any state licensing or regulatory law could be converted to a "criminal" law by merely providing that violation thereof constitutes a criminal offense. We agree with appellant that Indian reservations would obviously be subject to wholesale regulation by state legislatures under the above interpretation. Dictum in the Ninth Circuit's decision in United States v. Marcyes, 557 F.2d 1361, 1364 (9th Cir. 1977) indicates that such a procedure cannot be countenanced. We so hold here on the basis that the California Outdoor Advertising Act is clearly a regulatory law and does not fall within the criminal jurisdiction provisions of Public Law 280.

#### Regulation of Non-Indian Lessees

[3] The most difficult question in this appeal is whether the proposed lease with the Naegele company would be subject to state regulation if approved by the Department because of the non-Indian character of the enterprise. If so, the Bureau of Indian Affairs should possibly not be faulted for disapproving the lease if it fails to satisfy certain requirements of California's Outdoor Advertising Act.

In Fort Mojave Tribe v. County of San Bernardino, 543 F.2d 1253 (9th Cir. 1976), the Appeals Court reaffirmed its earlier holding in Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972), that a state

possessory interest tax could be imposed on non-Indian lessees of Indian trust land. The Board has carefully evaluated the foregoing decisions and related cases. In our opinion, appellant has correctly distinguished the case at hand from those where courts have permitted state regulation of non-Indian lessees on Indian reservations:

However, Fort Mojave and Agua Caliente are distinguishable from the situation of the Morongo Band on at least two basic points. First, different state statutes are involved which, if enforced against the non-Indian lessee, will have varying degrees of impact on tribal self-government. Assessment of a possessory interest tax on the leasehold interest of a non-Indian lessee is qualitatively different from enforcement of a land use statute (California Outdoor Advertising Act) against the same lessee. Second, a corollary of the first point, is the fact that assessment of a possessory interest tax is not an attempt by the State to exercise "general civil regulatory powers" [Bryan, supra, 426 U.S. at 390] over reservation lands.

State laws regulating outdoor advertising, like other state zoning and land use laws, fall within Bryan's prohibition against the exercise of general state civil regulatory authority on Indian reservations, absent an express grant of such authority from Congress. Moreover, the assessment of a possessory interest tax on the non-Indian lessee, unlike the regulation of outdoor advertising, is not a regulation of the use of the land and results in less of an intrusion into the areas of retained tribal sovereignty and tribal self-government. [Footnote omitted.]

Appellant's Reply Brief, filed June 20, 1979, at 18.

That the effect of state regulation on tribal sovereignty bears on the validity of a state's jurisdiction is explained in Williams v. Lee, supra, and Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976).

Here, we find the Morongo Band has made a persuasive showing, one which by proper accounts should have been attempted by its trustee, 19/ that its self-government would be adversely affected by application of California's Outdoor Advertising Act to its non-Indian lessee. 20/

#### Exercise of Secretary's Authority

[4] Appellant observes that the Department's policy "to require lessees of Indian lands to comply with state standards regulating land use and development" as expressed in Secretary Hickel's 1970 opinion, can be implemented without taking the drastic step of subjecting developing tribal governments to the full enforcement powers of the state." Appellant's Reply Brief at 20. The Band suggests that a reasonable approach would be to include State standards regarding placement, illumination, maintenance, etc., of outdoor advertising structures as provisions of any lease. The Board believes this to be a sound proposal. In undertaking this approach, however, the Bureau of Indian Affairs must insure that its own actions serve to protect

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19/ Under the authority of the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712, the United States issued a patent on December 14, 1908, declaring that it would hold the lands of the Morongo Indian Reservation "in trust for the sole use and benefit of the said Morongo Band or Village of Indians."

20/ "[T]ribal use and development of tribal property presently is one of the main vehicles for the economic self-development necessary to equal Indian participation in American life." Santa Rosa Band of Indians v. Kings County, supra at 664; see also, Bryan, supra, 426 U.S. 388, n.14.

tribal sovereignty. 21/ This can be partly accomplished by initially acquiring the Band's consent to the use of State standards. 22/

### Disposition

In accordance with the above discussion, findings and conclusions, the decision of the Sacramento Area Director dated March 14, 1978, disapproving the proposed lease between the Morongo Band and the Naegele company is vacated. This matter is remanded to the Acting Deputy Commissioner of Indian Affairs with instructions that the Bureau of Indian Affairs seek to effectuate a business lease for outdoor advertising between the Morongo Band and the Naegele company consistent with this opinion.

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21/ That this duty is incumbent on the Bureau of Indian Affairs in acting on proposed leases of Indian lands is addressed in Mr. Chambers' article cited in n.18.

22/ This procedure is desirable to bring the Secretarial Order of 1965 into compliance with the 1968 amendments of Public Law 280 regarding tribal consent. Act of April 11, 1968, 82 Stat. 78-80, 25 U.S.C. §§ 1321-22 (1976). Tribal consent should not be a problem in this case. The Morongo Band has suggested the use of State law as a standard for regulating outdoor advertising on its reservation, and, in addition, the Band has repeatedly expressed its commitment to the general purposes of the Highway Beautification Act. See Appellant's Brief filed May 3, 1979, at 4; Appellant's Brief filed June 24, 1979, at 18-19.

In accordance with the authority delegated the Board under 43 CFR 4.1, this decision is final for the Department.

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//original signed  
Wm. Philip Horton  
Chief Administrative Judge

We concur:

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//original signed  
Franklin Arness  
Administrative Judge

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//original signed  
Mitchell J. Sabagh  
Administrative Judge