Opinion No. 53-5632

January 8, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. C. O. Erwin Chief Highway Engineer State Highway Department Santa Fe, New Mexico

*{*11}* You have requested the opinion of this office as to whether Chapter 123, New Mexico Session Laws of 1929 is applicable to Indian lands. This law, commonly known as the "Bill Board Law", (Secs. 58-708 to 58-713 N.M.S.A., 1941) prohibits the erection of any sign board on the right-of-way of any public highway, or upon adjacent land so as to obstruct the view or within 100 feet of any state highway without a permit from the State Highway Commission. From the latter provision is excepted signs advertising a business carried on on the premises where the sign is located. The law does not provide for fine or imprisonment for its violation, but states:

"58-712. Unlawful Signs Designated as Public Nuisances -- Removal by highway commission. -- All such advertising signs, signboards and devices which are *{*12}* placed, erected or maintained in violation of the provisions of this act (Secs. 58-708 -- 58-713) at a time more than sixty (60) days from and after the date when this act (Secs. 58-708 -- 58-713) becomes effective shall be deemed and considered to be public nuisances and may be summarily removed by any member or employee of the state highway commission. (Laws 1929, ch. 123, Sec. 5. P. 279; C.S. 1929, Sec. 64-2005)"

Since both matters of acquiring right-of-way over Indian lands (25 USCA 322) and criminal jurisdiction (U. S. v. Chavez, 78 L. ed. 360) are applied similarly to pueblos and reservations as well as Indian lands under allotment, (Title 18, USCA 1151), for the purpose of this opinion we will deem all such Indian land, unless full and complete title including full power of alienation, free of government control or interest has passed to the Indian.

By Article 21, Sec. 2 of its Constitution, the State of New Mexico disclaimed any right to Indian lands and declared "the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States". (See also Enabling Act 36 Stat. 557).

The general rule as to the jurisdiction over Indians or Indian land is that plenary authority over Indian affairs rests in the federal government to the exclusion of the state governments. There are two exceptions to this general rule. According to Cohen, Handbook of Federal Indian Law, Page 119, these are:

"First, where Congress has expressly declared that certain powers over Indian affairs shall be exercised by the states, and second, where the matter involves non-Indian questions sufficient to ground state jurisdiction."

In the case of Trujillo vs. Prince, 42 NM 337, Judge Bickley summarized as follows:

"* * * (c) the silence of Congress in respect to a matter of national concern is generally interpreted by the court as evidence of its will that the matter shall **not** be regulated by the states; (d) but Congress may break this silence and permit state police laws to operate even where they involve matters of national concern; (e) in matters of local concern the power of Congress is not exclusive; and (f) as to such matters the silence of the Congress discloses no objection to the operation of state laws. To this summary might be appended another principle, namely (g) when Congress acts affirmatively in any situation involving a matter of national concern, a state statute will be inoperative which (1) conflicts with some positive regulation of the federal legislation, or (2) is regarded by the court as intruding into the field which Congress meant to occupy by its

We must, therefore determine whether Congress has authorized the enforcement of this law by state officials where the sign is located on Indian land, or whether it conflicts with the will of Congress.

Rights-of-way for highways over Indian lands in New Mexico have been acquired by two methods: First, by condemnation under Sec. 375, Title 25 USCA, (this action must be brought in the Federal Court, Minnesota vs. U. S. 83 L. ed 235); or second, secured by permission of *{*13}* the Secretary of Interior under Sec. 311, 322, 323, Title 25 USCA. For most of the rights-of-way in New Mexico the latter method is used.

Sec. 311, Title 25 USCA reads as follows:

"Section 311. Opening highways. The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation. (Mar. 3, 1901, c. 832, Sec. 4, 31 Stat. 1084.)"

25 USCA 322 makes this section applicable to Pueblos in New Mexico.

The Secretary of Interior has submitted a form application for rights-of-way to be used by the Highway Department which provides that the application is made pursuant to 25 USCA Sec. 311, and has prepared regulations for the use of the State Highway Department and for the use of the Indian Service employees in securing these rights-of-way. The endorsement on the plat submitted by the Area Director of the Bureau of Indian Affairs of his approval pursuant to this law and these regulations is deemed the conveyance of the right-of-way. Very often separate stipulations between the Highway Commission and the governing body of the Indian tribe or pueblo involved are referred to and made a part of this grant by endorsement.

Unless there is something in those stipulations to the contrary, we find nothing in the laws and regulations pursuant to which the applications are made and the rights-of-way granted inconsistent with the thought that the Bill Board Law is to be applied on Indian lands. The statute authorizes the Secretary of the Interior to grant permission for the opening and establishing of public highways "in accordance with the laws of the state or territory in which the lands are situated". 25 USCA 311. Regulation No. 49 (25 Code Reg. Part 256) provides that except that lands situated in Nebraska and Montana where a different law is in effect, the Secretary is authorized to grant permission to local authorities or state authorities, "to open public highways in accordance with the laws of the state in which the Indian lands are situated" and this is applied to lands of public Indians by Regulation 91 The Superintendent or officer in charge of the Indian lands is required to certify under Form 15-5-1044, "Report on Application for Public Highway" that the damages assessed represent fair and adequate compensation to the Indians, not only for the land taken and damages done to improvements and growing crops, but also to "adjoining lands".

It would seem, therefore, that Congress has delegated to the Secretary of the Interior the right to permit the state to have not only reasonable control over its right-of-way opened pursuant to state laws and regulations, but also over adjoining lands, where necessary for the opening and establishing of highways safe for public travel. It is difficult to believe that regulatory rights stop at the right-of-way line where Congress has not spoken to the contrary and that although the Highway Department may remove sign boards within the right-of-way, it cannot prevent the *{*14}* erection of, or remove sign boards placed just outside the right-of-way line, particularly on dangerous curves and angles which would be as detrimental and unsafe for the travelling public as the erection of signs within the right-of-way itself.

The general proposition that state laws have no force within Indian lands on matters affecting Indians which Cohen, in his handbook of Federal Indian Law, states (Page 116) has not been successfully challenged in the Supreme Court of the United States, no longer holds, in our opinion. Cohen's work was published in 1942 and on February 15, 1943, the Court in U. S. v. Oklahoma Gas and Electric Company, 87 L. ed. 716 held that a grant of right-of-way under Sec. 311, USCA Title 25 over Indian land in the absence of any contrary indication of intention was in accordance with the law of the state where the land lies. There the government had contended that the grant of right-of-way did not authorize utilities to the use thereof even when state permission had been obtained and the Court held:

"We see no reason to believe that Congress intended to grant to local authorities a power so limited in a matter so commonly subject to complete local control. * * * Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this, it would have made its meaning clear."

We do not hold that Congress has given the state courts criminal jurisdiction over these rights-of-way or adjoining lands. Such a controversy was involved in the cases arising in

Wisconsin with State vs. Trucker 296 N. W., 645 decided in 1941, which held that the requirements of a motor vehicle license law could be enforced against an Indian in the state courts. Yet in, In re Fredenberg, 65 Fed. Sup. 4 decided in 1946, the U. S. District Court of the Eastern District of Wisconsin held just **to the contrary and the Seventh Circuit Court of Appeals in 131 Fed. 2d 737** in holding that the state courts had no jurisdiction over the crime of manslaughter committed by an Indian on a highway through Indian land stated:

"Whether there is an implied grant of jurisdiction to Wisconsin so as to permit adequate protection of its highway by state **statute, we need not determine.** No such case is before us."

This same Court (CCA 7) in the case of U. S. vs. Sosseur 181 F. 2nd 873, held that the Wisconsin statute making slot machines unlawful could be enforced in the Federal Court under the Assimilative Claims Act, (18 USCA 13) and in its reasoning the Court said:

"* * * * As the District Court observed, the offense obviously was not by one Indian against another -- it was stipulated that the slot machines were used by both Indians and non-Indians and that they were publicly available for anyone who chose to use them. Thus defendant furnished the means by which non-Indians were enabled and induced to violate the Wisconsin law. And while the actual acts here alleged to constitute a violation of the law were committed by an Indian on a reservation and hence *{*15}* were not in the jurisdiction of the State (See Cohen, op. cit. p. 146), the impact of those acts was on non-Indians as well as Indians, and they tended to undermine the enforcement by the State of its own law."

We do not feel that Chapter 123,

Laws of 1929, The Bill Board law, is such a penal law as would come within the Assimilative Claims Act since there are no penal provisions nor provisions for its enforcement by any court. The well-recognized fact that the proprietary interest of most sign boards on Indian lands is largely non-Indians can only lead us to the same reasoning of the Court in the Sosseur case, that it is not an offense of one Indian against another, but furnishes a means by which non-Indians are enabled to violate the New Mexico law. Certainly permitting sign boards to remain on adjoining Indian lands while removing them from all other lands adjacent to the highway in the state where they are no more dangerous or detrimental to public welfare, would tend to undermine the enforcement by the state of its own law.

The recognition of the Bill Board Law by the Secretary of the Interior in his granting of rights-of-way, unlike the Wisconsin motor vehicle license law, does not require that he recognize any criminal jurisdiction of the state courts or law enforcement agencies over Indian lands. The civil courts of New Mexico are open to Indians as are the federal courts should they feel that injunctive relief is necessary against members or employees

of the State Highway Commission for violation of their property rights, Martinez vs. Martinez 49 NM 83, Tenorio vs. Tenorio 44 NM 89, Trujillo vs. Prince 42 NM 337.

We feel, therefore, that the Bill Board law is so closely related to the right-of-way and so essential to the opening and establishing of a right-of-way, safe for the travelling public, Indian as well as non-Indian, that by its very nature it must be one of the state laws in accordance with which the highway was opened. That Congress through the secretary of Interior has permitted the operation of this law. That the individual Indians, the pueblo, or the tribe, as the case may be, have received compensation for any loss of right to this adjoining land, and that unless an agreement to the contrary exists, the intent of all was that this reasonable state regulation would apply on Indian lands adjoining rights-of-way obtained pursuant to Sec. 311, USCA Title 25.

As to Indian lands adjoining rights-of-way obtained by condemnation pursuant to 25 USCA 357 -- where no permission has been obtained from the Secretary of the Interior, and no consent given by the Indian allottees, we can find none of the above evidence of permission, consent or payment for taking or surrender of any rights outside of the right-of-way. In these cases Congress has remained silent, and although the reason for enforcement of the law is just as great, it cannot be brought into effect without federal authority. Lacking this, and if necessary for the safety of the travelling public, we can only suggest that a right-of-way of sufficient width be obtained in the condemnation proceeding.

By ___

Spe. Asst. Attorney Gen.