

A brief commentary on these developments in the law governing the Pueblos is in order.

(1) The increase of federal services administered for the benefit of the Pueblos through the Department of the Interior is evident upon a reading of the appropriation acts for the Bureau of Indian Affairs and, beginning with the Act of May 24, 1922,<sup>72</sup> for the Department of the Interior. The most important of the federal appropriations for the Pueblos, since 1910, are for irrigation,<sup>73</sup> drainage of pueblo lands,<sup>74</sup> increased educational facilities for the Pueblo Indians,<sup>75</sup> construction of bridges and roads,<sup>76</sup> and the establishment of a sanatorium for the Pueblo Indians.<sup>77</sup>

A number of difficult questions have arisen in connection with the reclamation of pueblo lands through the Middle Rio Grande Conservancy District. This is a political subdivision of the State of New Mexico. Within the area of its operations lie the lands of several Pueblos. The Act of February 14, 1927,<sup>78</sup> authorized an appropriation of federal funds for reconnaissance work on the lands of Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta Pueblos. Upon the completion of the survey thus authorized<sup>79</sup> there was enacted the Act of March 13, 1923,<sup>80</sup> which authorized the Secretary of the Interior to enter into a contract with the Middle Rio Grande Conservancy District for conservation, irrigation, drainage, and flood-control work covering pueblo lands. The statute fixed a maximum construction cost of \$1,593,311, payable in not less than five annual installments. Such payments were to be made by the United States, subject to reimbursement "under such rules and regulations as may be prescribed by the Secretary of the Interior." To ensure such payments, the statute imposed a lien upon newly reclaimed pueblo lands and declared that reimbursement should be made out of rentals of newly reclaimed lands, or, if such lands were ever sold, out of the proceeds of the sale. No lien for construction costs was imposed on those lands already irrigated by the Pueblo Indians, and it was provided that "such irrigated area of approximately 8,346 acres shall not be subject by the district or otherwise to any pro rata share of the cost of future operation and maintenance or betterment work performed by the district." Further protection of Indian rights is contained in provisions assuring the priority of Indian water rights, preference to Indian lessees in the leasing of newly reclaimed lands, and free leasing of 4,000 acres of such lands to Indians cultivating the same.

Under the foregoing statute a contract was executed between the Secretary of the Interior and the Middle Rio Grande Conservancy District on December 14, 1928.

As construed by the Solicitor of the Interior Department, the statute and the contract permitted the district to charge operation and maintenance costs on pueblo lands outside of the 8,346

acres already irrigated but did not authorize the payment of such charges either by the United States or by the Pueblos.<sup>81</sup> This omission was remedied by the Act of August 27, 1935,<sup>82</sup> which authorized the Secretary of the Interior to contract for the payment of operation and maintenance costs on the newly reclaimed lands for 5 years<sup>83</sup> on a reimbursable basis.

Appropriations have been made from time to time by Congress to meet the obligations to the Middle Rio Grande Conservancy District assumed under the 1928 and 1935 acts.<sup>84</sup>

(2) A number of the appropriations above discussed are, by the express language of the appropriation acts, reimbursable in accordance with rules and regulations which the Secretary of the Interior shall prescribe.<sup>85</sup>

(3) While section 17 of the Pueblo Lands Act, as we have noted, bars transfers of pueblo land not approved in advance by the Secretary of the Interior, section 4 of the Act of June 18, 1934,<sup>86</sup> goes further and bars all transfers of tribal land except such as are made in exchange for lands of equal value.<sup>87</sup>

The Act of June 18, 1934, applies to all the Pueblos of New Mexico except the Pueblo of Jemez, as a result of referendum elections held in each Pueblo pursuant to section 18 of the act. The present situation, therefore, is that the Pueblo of Jemez, with the approval of the Secretary of the Interior, may alienate pueblo lands or interests therein, but that the other Pueblos can alienate lands or interests in land only where two conditions are met: Land of equal value must be received in exchange; and the approval of the Secretary of the Interior must be obtained in advance.

(4) The admission of New Mexico to statehood was promptly followed by a series of legislative measures designed to prevent the farther expansion of Indian lands within the state. The Appropriation Act of June 30, 1913,<sup>88</sup> attached the following proviso to the regular appropriation for the survey and allotment of lands in severalty:

Provided, That no part of said sum shall be used for survey, resurvey, classification, appraisalment, or allotment of any land in severalty upon the public domain to any Indian, whether of the Navajo or other tribes, within the State of New Mexico and the State of Arizona. (P. 78.)

<sup>72</sup> Op. Sol. I. D., M.27512, February 20, 1935.

<sup>73</sup> c. 745. 49 Stat. 887.

<sup>74</sup> This authorization was extended to 1945 by sec. 5 of the Act of June 20, 1938. 52 Stat. 778, 779. This act also authorized outright (nonreimbursable) federal appropriations for construction costs and past and future operation and maintenance charges on lands of the Albuquerque School, authorized Payment, on a reimbursable basis, for extra construction work not contemplated in the original plan, and authorized reimbursable payments on lands newly acquired. Cf. Op. Sol. I. D., M.28108. March 18, 1936, holding that the Secretary may contract for payment of construction costs on newly acquired lands.

<sup>75</sup> Act of May 29, 1928, 45 Stat. 883, 900; Act of March 4, 1929, 45 Stat. 1623, 1640; Act of March 26, 1930, 46 Stat. 90, 104; Act of May 14, 1930, 46 Stat. 279, 292; Act of February 14, 1931, 46 Stat. 1115, 1128; Act of March 4, 1931, 46 Stat. 1552, 1567; Act of April 22, 1932, 47 Stat. 91, 102; Act of February 17, 1933, 47 Stat. 820, 831; Act of March 2, 1934, 48 Stat. 362, 371; Act of June 19, 1931, 48 Stat. 1021, 1033; Act of May 9, 1935, 49 Stat. 176, 188 ("final payment"); Act of June 22, 1936, 49 Stat. 1757, 1770; Act of August 9, 1937, 50 Stat. 564, 579; Act of August 25, 1937, 50 Stat. 755, 764; Act of May 9, 1938, 52 Stat. 291, 306 ("final payment").

<sup>76</sup> See, for example, Act of February 14, 1920, 41 Stat. 408, 423, and acts cited in preceding footnote. And see Chapter 12, sec. 7.

<sup>77</sup> 48 Stat. 984, 25 U. S. C. 464. See Chapter 15, sec. 18C.

<sup>78</sup> On the effect of the restraints on alienation contained in sec. 17 of the Act of June 18, 1934, 25 U. S. C. 477, in the event that any of the Pueblos should be chartered thereunder, see Chapter 15, sec. 18.

<sup>79</sup> 38 Stat. 77.

<sup>72</sup> 42 Stat. 552.

<sup>73</sup> Practically all regular appropriation acts from statehood to date.

<sup>74</sup> Act of February 14, 1920, 41 Stat. 408, 423; Act of March 3, 1921, 41 Stat. 1225, 1239; Act of May 24, 1922, 42 Stat. 552; Act of January 24, 1923, 42 Stat. 1174, 1193; Act of June 5, 1924, 43 Stat. 390, 403.

<sup>75</sup> See Act of May 10, 1926, 44 Stat. 453, 468. See Act of January 12, 1927, 44 Stat. 934, 948.

<sup>76</sup> Legislation governing appropriations for a road through the Santa Clara Pueblo establishes a special control over the admission to the Puye Cliff Ruins for the benefit of the Pueblo. Act of March 4, 1929, 45 Stat. 1562, 1586-1587.

<sup>77</sup> Act of March 26, 1930, 46 Stat. 90, 104.

<sup>78</sup> 44 Stat. 1098.

<sup>79</sup> The report in question, transmitted by the Secretary of the Interior on January 12, 1928 (House Doc. No. 141, 70th Cong., 1st sess.), estimated that the project would benefit approximately 132,000 acres, of which approximately 23,000 acres were Pueblo Indian lands. Of the latter, approximately 8,346 were found to be under cultivation.

<sup>80</sup> 45 Stat. 312. For regulations adopted pursuant to this law, see 25 C. F. R. 129.1.

This proviso is repeated in every regular Indian Bureau and Interior Department appropriation act up to and including the appropriation act of February 17, 1933.<sup>92</sup>

In the Appropriation Act of May 25, 1918,<sup>93</sup> the following item of permanent substantive law appears:

That hereafter no Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress. (P. 570.)

The Appropriation Act of June 22, 1936,<sup>94</sup> contained a third limitation on the expansion of Indian lands in New Mexico, in the form of a proviso attached to the appropriation for land purchases pursuant to section 5 of the Act of June 18, 1934. This proviso, which has been substantially reenacted in each succeeding appropriation act,<sup>95</sup> declared:

Provided, That within the States of Arizona, New Mexico, and Wyoming no part of said sum shall be used for the acquisition of land outside of the boundaries of existing Indian reservations. (P. 1765.)

While these legislative barriers were being erected against acquisition of non-Indian lands for Indian use, the acquisition of Indian lands for non-Indian use was facilitated by the Act of May 10, 1926,<sup>96</sup> entitled "An Act To provide for the condemnation of the lands of Pueblo Indians in New Mexico for public purposes, and making the laws of the State of New Mexico applicable to such proceedings." Under this act pueblo lands "may be condemned for any public purpose and for any purpose for which lands may be condemned under the laws of the State of New Mexico." Condemnation proceedings under this act must be brought in the federal courts, and notice of suit must be "served upon the superintendent or other officer in charge of the particular pueblo where the land is situated."

This act is substantially similar to the general statute governing condemnation of allotted lands, but there is no parallel statute governing tribal lands generally, so that the Pueblos are subjected to a type of action from which other tribes are immune.

<sup>92</sup> Act of August 1, 1914, 38 Stat. 582; Act of May 18 1916, 38 Stat. 123; Act of March 2, 1917, 39 Stat. 969; Act of May 25, 1918, 40 Stat. 561; Act of June 30, 1919, 41 Stat. 3; Act of February 14, 1920, 41 Stat. 408; Act of March 3, 1921, 41 Stat. 1225; Act of May 24, 1922, 42 Stat. 552; Act of June 5, 1924, 43 Stat. 390; Act of March 3, 1925, 43 Stat. 1141; Act of May 10, 1926, 44 Stat. 453; Act of January 12, 1927, 44 Stat. 934; Act of March 7, 1928, 45 Stat. 200; Act of March 4, 1929, 45 Stat. 1562; Act of May 14, 1930, 46 Stat. 279; Act of February 14, 1931, 46 Stat. 1115; Act of April 22, 1932, 47 Stat. 91; Act of Feb. 17, 1933, 47 Stat. 820.

<sup>93</sup> 40 Stat. 561. A year later a general prohibition against the creation of Indian reservations except by act of Congress, was included in the Appropriation Act of June 30, 1919, sec. 27, 41 Stat. 3, 34, which was later supplemented by the Act of March 3, 1927, sec. 4, 44 Stat. 1347, prohibiting the alteration of reservation boundaries except by act of Congress. See Chapter 15, sec. 7.

<sup>94</sup> 49 Stat. 1757.

<sup>95</sup> Act of August 9, 1937, 50 Stat. 564; Pub. No. 68, 76th Cong., 1st sess. (May 10, 1939).

<sup>96</sup> C. 282, 44 stat. 498.

By the Act of April 21, 1928,<sup>97</sup> general laws governing the acquisition of rights-of-way through Indian lands<sup>98</sup> were made applicable to the Pueblos of New Mexico.

The extension of Indian liquor laws to the Pueblos, effected by the Enabling Act of 1910,<sup>99</sup> called forth a special reference to the Pueblos in a provision of the Appropriation Act of August 24, 1912,<sup>100</sup> exempting sacramental wine from such laws.

A further piece of special legislation for the Pueblo Indians is found in the Appropriation Act of March 2, 1917,<sup>101</sup> which contains a proviso to the effect that no part of the sum appropriated for pay of judges of Indian courts "shall be used to pay any judge for the Pueblo Indians of New Mexico, and that no such judge shall be appointed for such Indians by any United States official or employee."

This account of legislation peculiarly affecting the Pueblo Indians, during the period of statehood, would not be complete without a reference to the course of legislation affecting the expenditure of tribal funds. At first, the funds awarded to the Pueblos under the Pueblo Lands Act were expendable by the Secretary of the Interior for the purchase of land and water rights for such Indians.<sup>102</sup> The purposes for which such funds might be expended were broadened in subsequent appropriation acts to cover fencing, irrigation, improvement, and the repayment of federal loans to Pueblos for "industry and self-support,"<sup>103</sup> and purchase of agricultural machinery.<sup>104</sup> Until the Act of May 31, 1933, however, discretion in the expenditure of pueblo funds was vested in the Secretary of the Interior. The act of that date made the consent of the governing authorities of the Pueblo concerned a condition precedent to the expenditure of pueblo funds. The principle thus established was generalized a year later in section 16 of the Act of June 18, 1934.<sup>105</sup>

For eight decades the Pueblos had faced the choice of being treated like other Indian tribes and subjected to federal control of their internal affairs or being treated like non-Indians and finding themselves cut loose from federal services and their lands cut loose from federal protection. Recent legislation and administration have overcome this dilemma by recognizing the right of self-government to be an inherent right of the Pueblos and of other tribes, and by revising the scope of federal supervision in the field of Indian affairs so that the Pueblos, like other tribes, may enjoy federal services and federal protection without surrendering control over their internal municipal life.

<sup>97</sup> C. 400, 45 Stat. 442. The reasons for this enactment are set forth in H. Rept. No. 816, 70th Cong., 1st sess.

<sup>98</sup> 25 U. S. C. 311, 312, 313, 314, 315, 317, 318, 319, 321, 43 U. S. C. 934-935.

<sup>99</sup> Act of June 20, 1910, 36 Stat. 557. See p. 389, *supra*.

<sup>100</sup> 37 Stat. 518.

<sup>101</sup> See Chapter 17, sec. 4.

<sup>102</sup> 39 Stat. 969 *over*.

<sup>103</sup> See Act of December 22, 1927, 45 stat. 2, at pp. 17-18.

<sup>104</sup> Acts of March 4, 1929, 45 Stat. 1562; May 14, 1930, 46 Stat. 279.

<sup>105</sup> Acts of February 14, 1931, 46 Stat. 1115; July 1, 1932, 47 Stat. 525; February 17, 1933, 47 Stat. 820.

<sup>106</sup> 48 Stat. 984, 986; 25 U. S. C. 476. See Chapter 5, sec. 10.

## SECTION 5. PUEBLO SELF-GOVERNMENT 104

At least since the *Sandoval* decision, in 1913, there has been no room for doubt that the Pueblos of New Mexico are Indian

<sup>104</sup> Although in matters of self-government each pueblo is autonomous, mention should be made of the all-Pueblo Council, which has functioned as a consultative body in matters of common concern to the New Mexico Pueblos since 1922. On the operation of this body, see *American Indian Life*, Bulletin No. 10 (October-November 1927), pp. 7-13.

tribes entitled, to the same rights of self-government, under the Constitution and laws of the United States, as other Indian tribes. The scope of these rights of self-government has been

continued in Chapter 7 of this volume and need not be discussed further at this point. The actual exercise of these rights, however, by the Pueblos has given rise to at least three legal problems which deserve special mention, namely: (1) The legal au-

thority of pueblo officers; (2) the status of religious liberties of pueblo members, in view of the intimate connection between religious and political affairs in the pueblo system of government; and (3) the right of the Pueblo to control occupancy rights of individual members in pueblo lands.

(1) The question of the authority of pueblo officers has generally arisen in connection with the validity of agreements purportedly executed on behalf of a Pueblo. The case of *Pueblo of Santa Rosa v. Fall*,<sup>105</sup> turned on the issue of whether the "captain" of an alleged Pueblo in the State of Arizona had authority to act for the Pueblo in executing a contract affecting tribal claims to land. The Supreme Court held that according to the custom of the Pueblo the "captain" would have no authority to act on behalf of the Pueblo in a matter of this importance, declaring:

That Luis was without power to execute the papers in question, for lack of authority from the Indian council, in our opinion is well established. (Pp. 319-320.)

The suit based upon the alleged agreement with the pueblo "captain," was ordered, dismissed "without prejudice to the bringing of any other suit hereafter by and with the authority of the alleged Pueblo of Santa Rosa." (P. 321.)

The rule announced in the case of the Pueblo of Santa Rosa has been applied to the Pueblos of New Mexico. The Solicitor of the Department of the Interior held, in a memorandum of March 11, 1935, that a grant of a right-of-way executed by the Governor of Pojoaque Pueblo was invalid for the reason that "According to the custom of the pueblo, a grant of lands cannot be made by the governor, but only by the governor and council, or by an assembly of the entire pueblo."

In matters of lesser importance than the disposition of pueblo lands and claims, pueblo authority will generally be exercised by the civil officers or the civil council of the Pueblo. Among the Rio Grande Pueblos, the roster of officers generally includes a governor, the chief executive of the Pueblo, a lieutenant governor, and one or more war captains (who in addition to their religious duties generally act as police officers), fiscales (who are charged with care of graveyards and church property), and sheriffs (messengers of the Governor and council). All elected for 1-year terms. The civil council will generally include the officers and a number of "principales." The status of "principales" is a more or less permanent status generally conferred upon those who have held the post of governor and sometimes upon those who have held other elective offices in the Pueblo.

Within this general framework of pueblo government there are, of course, many variations of structure and except in the Pueblos of Laguna and Santa Clara, which operate under written constitutions,<sup>106</sup> questions of governmental structure and authority would require specific inquiry into the custom of the particular Pueblo.

(2) Questions involving religious aspects of pueblo social life are fraught with such difficulty and complexity that it would be rash to attempt to formulate the law governing this field of pueblo life except in terms of very specific fact situations. It may be worth while, however, to note several caveats against hasty and tempting conclusions in this field.

In the first place, it must be recognized that while the Spaniards insisted upon a separation of religious and lay authority within each Pueblo, and the regular civil officers and civil

council were set up in response to this insistence, this separation has probably nowhere been completely carried through, except at the Pueblo of Laguna. Thus one may find that nominations to civil office are made by the caciques, the native religious leaders of the Pueblo, and in some Pueblos, always, elected unanimously thereafter by the pueblo assembly.

In the second place, it should be noted that the distinction between religious and civil services required of pueblo members is a distinction on which two experts will seldom agree.

Finally, it should be remembered that the doctrine of separation of church and state, although fundamental in the government of the United States, has never been imposed by Congress as a formula to which the Pueblos must adhere.

In view of these difficulties, efforts to apply to the Pueblos canons of religious liberty which would apply to federal or state governments must be viewed with extreme reserve.

The memorandum submitted to Assistant Attorney General Blair by Special Assistant to the Attorney General G. A. Iverson, on October 3, 1936, dealing with suppression of the use of peyote in the Pueblo of Taos, illustrates the difficulties of the subject and provides a useful guide for further inquiries of this nature. In this case certain Indians using peyote in violation of a tribal custom or ordinance had been tried by the pueblo council and punished by having their land assignments taken away from them. The Iverson memorandum deals with the question of whether the Federal Government might intervene to correct an apparent injustice done to the peyote users of the Pueblo.

The memorandum reaches the conclusion that the Pueblo Indians are entitled to the protection of the First Amendment guaranteeing religious liberty, but that this amendment is inapplicable to the action of the Pueblo authorities themselves as distinguished from the action of federal authorities;<sup>107</sup> that the authority of the tribal court of the Pueblo was clear; that the executive officers of the United States would have no authority to interfere with the administration of Justice by the pueblo court in matters affecting relations between members of the Pueblo;<sup>108</sup> that the revocation of an assignment by the Pueblo council, which had been imposed as a penalty, was in violation of the Act of June 7, 1924,<sup>109</sup> so that the Secretary of the Interior would be justified in taking the position "that the attempted coercion is invalid and without force and effect";<sup>110</sup> and finally, that the Federal Government would not be able by any judicial proceeding to interfere with the action of the tribal council in these cases.<sup>111</sup>

The Iverson opinion apparently assumed that the occupancy interest of the Indians concerned was an interest in land. Within the meaning of the Act of June 7, 1924, which governs the transfer of interests in land of the Pueblo Indians. The factual correctness of this assumption with respect to the land of the Pueblo Indians of Taos is perhaps open to question.<sup>112</sup> This does not affect the validity of the argument presented in the Iverson memorandum that the officials of a Pueblo would not be authorized to transfer interests in land from one individual to another. If, however, no such action is attempted, that is to say, if what the individual pueblo member has is not an interest in land but a privilege of use terminable at the will of the Pueblo itself, it would appear that the limitation referred to in the Iverson memorandum is of no practical importance in the situation dealt with. If in point of fact the individual member has only a privilege of occupancy terminable at the will of the Pueblo, then the Pueblo

<sup>105</sup> 273 U. S. 315 (1927).

<sup>106</sup> That of Laguna was adopted by the Laguna Indians on January 1, 1908, without any specific congressional authorization or departmental supervision. That of Santa Clara Pueblo was adopted by the Indians on December 14, 1935, and approved by the Secretary of the Interior on December 20, 1935, pursuant to the Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. 461 et seq.

<sup>107</sup> 8 Memoranda, Lands Division D. J. [1936], 220, 221-223.

<sup>108</sup> Ibid., pp. 231-236.

<sup>109</sup> 43 Stat. 636.

<sup>110</sup> 8 Memoranda, Lands Division D. J. [1936], p. 230.

<sup>111</sup> Ibid., p. 240.

<sup>112</sup> See pp. 395-396, *infra*.

would clearly be justified in terminating that occupancy without the approval of the Secretary of the Interior.

The Iverson opinion contains an illuminating analysis of the judicial authority of the Pueblo council:

Ten Indian officials who assumed to dispose of the con-

trovery in the instant case obtained their authority, whatever it was, from the Indian tribe under this governmental policy of self-development or self-determination. They constituted a determining body, as a part of a local government which in its principal aspects contained the elements of representative government as that term is understood in our system. It appears to have been created upon deliberate action on the part of the tribe, and while its exercise of authority was necessarily limited by various and sundry acts of Congress, it rested upon what appears to have been a custom of long duration. True, it is not a court with such dignity as that, for example, of the Seneca Indians of New York who had adopted a constitutional Charter relating to various domestic subjects connected with domestic relations and even property rights (*Rice v. Maybee*, 2 Fed. Supp. 669), but patently the absence of formality or regularity of procedure is not a requirement going to or affecting the validity or binding force and effect of conclusions reached or judgments announced within the scope of the limited authority of such an institution.

In what has been said above it is assumed that worship by the Indians and the practice of religious ceremonies are internal affairs of the Indians. \* \* \* Accordingly, if the Use of peyote was outlawed as pernicious to the welfare of the Indians, the right of the Indian Council to regulate its use or prevent it altogether cannot be questioned because forsooth it was used as a part of a religious ceremony. It seems to me that the question in either event presents a tribal matter and must under the authorities be left to tribal determination. True, the present Council may be wrong. It may be actuated by bias or prejudice against the members of the Native American Church. It may be that their actions were influenced by ulterior motives and that a wrong should be corrected, but as before stated, the Indians themselves created the tribunal and custom and usage support the validity of its judgments. Next year another election will probably be held and a different tribunal inducted into office. The government of the Indians in this case being in a measure at least representative, they should be left in matters of this character to their own devices. There being no appeal from the judgment of the court, the right of appeal being purely statutory, the judgment cannot be reviewed, but this fact does not affect either the jurisdiction or the power.<sup>113</sup>

(3) The right of the Pueblo to control occupancy rights of individual members in pueblo lands is essentially similar to the right of other tribes with respect to tribal lands, discussed in Chapter 9 of this volume. Although, as noted, the Iverson memorandum held that the council of the Pueblo could not, without the approval of the Secretary of the Interior, revoke or transfer an interest in land possessed by a member of the Pueblo, the assumption that individual Taos Indians held such interests in land is not supported by any facts set forth in the Iverson memorandum. A recent memorandum of the Solicitor of the Interior Department on this point<sup>114</sup> declares, after setting forth the language of section 17 of the Act of June 7, 1924:<sup>115</sup>

Under the foregoing language, it must be held that if an assignment in the Santa Clara Pueblo amounts to a transfer of right, title, or interest in real property, any purported assignment, whether to an Indian or to a non-Indian, made by the pueblo without the prior approval of the Secretary of the Interior is without validity in law or equity. On the other hand, if an assignment does not convey an interest in the land itself, it does not fall within

the scope of the statute cited. It becomes important, therefore, to distinguish between those transactions which convey an interest in real property and those transactions which, while relating to the use of real property, do not create an interest therein.

This distinction has been considered by the courts in a great variety of cases which seek to distinguish an interest in land from a mere license. A recent decision in the Circuit Court of Appeals for the Eighth Circuit holds:

"A mere permission to use land, dominion over it remaining in the owner and no interest or exclusive possession of it being given, is but a license. (Citing authorities.)" (*Tips v. United States*, 70 F. (2d) 525, 526.) [C. C. A. 5, 1934.]

The essential characteristic of a license to use real property, as distinguished from an interest in real property, is that in the former case the licensee has no vested right as against the licensor or third parties. He has only a privilege, which the licensor may terminate.

As Justice Holmes pointed out, in *Marrone v. Washington Jockey Club*, 227 U. S. 633, "A contract binds the person of the maker but does not create an interest in the property that it may concern, unless it also operates as a conveyance. \* \* \* But if it did not create such an interest, that is to say, a right in rem valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach." (At p. 636.)

Put in its simplest terms, the rule is that a landowner does not transfer an interest in his land by allowing another to use the land. Thus, for instance, a member of the landowner's family, inasmuch as he is "a bare licensee, of the owner; who has no legal interest in the land," cannot derive from his legal privilege to use the land a right against the landowner or against third parties. *Elliott v. Town of Mason*, 81 Atl. 701 (N. H. 1911). See also *Keystone Lumber Co. v. Kolman*, 69 N. W. 165 (Wis. 1896). The distinction established by the cases between a license and an interest in land is entirely consistent with the purpose of the Pueblo Land Act of June 7, 1924.

A reading of the legislative history of that act shows that it was designed, to stop the loss of pueblo lands by stopping transactions from which a claim against the pueblo might ultimately be derived. Thus if a pueblo, under the guise of making assignments, should in effect grant a life estate or even a leasehold interest to an individual member of the pueblo, there would be a transaction, upon which a claim adverse to the pueblo might be founded either by the individual or by a third party, to whom he might convey his rights. On the other hand, the action or inaction of the pueblo, authorities in permitting a pueblo member to use a designated area of pueblo land, would not of itself create any interest in land adverse to the title of the pueblo itself, any more than the decision of a family council to allot certain rooms or buildings to certain members of the family would constitute a transfer of an interest in land.

In between these two extremes difficult "twilight zone" cases may appear. In these cases the courts have looked to the intention of the parties to determine whether the transaction was intended to create a right against the landowner and against third parties. If it was so intended, the transaction must be regarded as a conveyance of an interest in real property. If not, a mere license relationship is established.

Even the language of leasing will not suffice to create a lease relationship if the transaction leaves complete power over the land in the hands of the landowner. Thus, in the case of *Tips v. United States*, 70 F. (2d) 525 [C. C. A. 5, 1934], the court found that an instrument which used the terms "landlord," "tenant," "lease," etc., was nevertheless a mere license, because the so-called lessor, the War Department, had no power to lease the property or to grant more than a revocable permit to use the property.

It would be entirely improper for me to attempt to apply the general principles, above set forth, to an imaginary assignment that may be made to an imaginary Indian under an imaginary ordinance that has not yet been passed. When an actual assignment is made or pro-

<sup>113</sup> 8 Memoranda, Lands Division D. J. [1936], 220, 226, 227-228.

<sup>114</sup> Memo. Acting Sol. I. D., April 14, 1939.

<sup>115</sup> 43 Stat. 636; discussed at p. 390, *supra*.

posed and the bylaws, ordinances, unwritten customs or expressed intentions of the parties which bear upon the issues above presented, are laid before me. I shall be glad to render an opinion on the question of whether such assignment involves a conveyance of an interest in land and is therefore invalid without prior Secretarial approval.

The foregoing discussion however should make clear

the right of the pueblo to grant a mere license for the use of lands to the members of the pueblo. It should be equally clear, under the principles above set forth, that the pueblo lacks power to grant more than a mere license and that any oral transaction or written instrument purporting to grant an interest in land valid against the pueblo itself or against third parties would be void at law and in equity.

## SECTION 6. PUEBLO LAND TITLES

Without further reference to the history of pueblo land titles dealt with in the earlier sections of this chapter, we may attempt a statement of the incidents of pueblo land ownership today. At the present time the land ownership of the Pueblos is of two types. There is, in the first place, land to which the Pueblos hold fee title, under grants of the Spanish, the Mexican, or the United States Governments, or by reason of purchases made by the Pueblo. In the second place, there is land to which legal title is held by the United States, the equitable ownership of which is vested in the Pueblo. Such lands include statutory reservations<sup>126</sup> and Executive order reservations of lands formerly part of the public domain.<sup>127</sup> Likewise, lands purchased by the United States for the benefit of the Pueblo, whether through the use of pueblo funds or through the use of gratuity appropriations, may fall under this category. In its relations to third parties, however, the rights of the Pueblo are not substantially affected by the distinction between the two forms of title.<sup>128</sup> As a legal owner or as an equitable owner the Pueblo has all the ordinary rights of a landowner with respect to third parties except the right of alienation. The Pueblo has the right to exclude third parties from its land,<sup>129</sup> and it has the right to

qualify this exclusion by specific conditions under which third parties will be permitted to enter upon pueblo lands. As a landowner the Pueblo may insist that its licensees pay a sum of money for the privilege of entering the pueblo lands, and that while they are within the pueblo boundaries they refrain from certain types of conduct which the pueblo authorities classify as offensive. As a landowner the Pueblo may grant revocable rights of occupancy, grazing permits, or other Licenses to nonmembers, provided that no property interest is thereby alienated, and subject to the approval of the Interior Department where such approval is required by existing law. Likewise, the Pueblo may lease pueblo lands to members or to outsiders subject to the approval of the Secretary of the Interior. The necessity of obtaining the consent of the United States to any transaction involving alienation of a property interest, whether by sale, mortgage, exchange, gift, or lease is a matter to which we have already given consideration at pages 390 and 395.

The legal authority of the Pueblo to exercise the rights of a landowner does not depend upon the peculiar facts with respect to the legal title of pueblo grant lands. Its rights are cognate with the rights of other tribes, which have been analyzed in Chapter 15 of this volume.

The limitations upon those rights, while generally similar to the limitations placed upon land ownership by other tribes, are made specific by the terms of the Pueblo Lands Act of June 7, 1924, which has been discussed on page 390. Briefly summarized, it may be said that in its relations with the states, the Federal Government, the members of the Pueblo, and third parties generally, the Pueblo is the owner of lands granted or reserved to it, except that it does not have the right to dispose of the land or any interest therein without the approval of the United States.

<sup>126</sup> Act of April 12, 1924, c. 90, 43 Stat. 92 (Zia Pueblo); Act of May 23, 1928, 45 Stat. 717 (Acoma); Act of February 11, 1929, 45 Stat. 1161 (San Ildefonso).

<sup>127</sup> See Chapter 15, sec. 7.

<sup>128</sup> The conclusion of the process of assimilating pueblo grant lands to the status of other tribal lands is found in *United States v. Chavez*, 290 U. S. 357 (1933), holding that pueblo lands are "Indian country" for purposes of federal criminal jurisdiction. The opinion of Mr. Justice Van Devanter contains a brief but informative resumé of the legal history of the New Mexico Pueblos.

<sup>129</sup> *Pueblo de San Juan v. United States*, 47 F. 2d 446 (C. C. A. 10, 1931). See Chapter 15, sec. 20.

## SECTION 7. THE RELATION OF THE PUEBLOS TO THE FEDERAL GOVERNMENT

That the Pueblos are wards of the United States in the sense in which that phrase was first used, i. e., that Congress possesses plenary power to govern the Pueblos, is a proposition that has not been cast in doubt since the *Sandoval* case.<sup>130</sup> There remains the question how far Congress has exercised this power and, in particular, how far Congress has conferred upon the Executive branch of the Federal Government authority over the Pueblos. The question of the scope of Executive power with respect to the Pueblos is dealt with in a recent opinion of the Solicitor of the Interior Department<sup>131</sup> from which the following passage is quoted:

One of the points on which administrative control is clearly established relates to the disposition of real property. Here the cases hold that the Pueblos have no power to dispose of real property except with the consent of the United States. Such consent may be given expressly by the Secretary of the Interior, or implicitly through a legal action involving pueblo lands. In the latter case the United States must be a party to the action, or else the

Pueblos must be represented by an attorney appointed by the United States, if the decree against the Pueblos is to have validity.

The chief authority cited for this statement is the case of *United States v. Candelaria*,<sup>132</sup> in which the following question was certified to the Supreme Court:

1. Are Pueblo Indians in New Mexico in such status of tutelage as to their lands in that State that the United States, as such guardian, is not barred either by a judgment in a suit involving title to such lands begun in the territorial court and passing to judgment after statehood or by a judgment in a similar action in the United States District Court for the District of New Mexico, where, in each of said actions, the United States was not a party nor was the attorney representing such Indians therein authorized so to do by the United States? (P. 438.)

This question the Supreme Court answered in the following terms, *per* Van Devanter, J.:

Many provisions have been enacted by Congress—some general and other special—to prevent the Government's

<sup>130</sup> 231 U. S. 28 (1913), discussed at pp. 389–390, *supra*.

<sup>131</sup> OP. Sol. I. D., M. 29568, August 9, 1939.

<sup>132</sup> 271 U. S. 432 (1926).



Indian wards from improvidently disposing of their lands and becoming homeless public charges. One of these provisions, now embodied in section 2116 of the Revised Statutes, declares: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." This provision was originally adopted in 1834, c. 161, sec. 12; 4 Stat. 720, and, with others "regulating trade and intercourse with the Indian tribes," was extended over "the Indian tribes" of New Mexico in 1851, c. 14, sec. 7, 9 Stat. 587.

While there is no express reference in the provision to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, "any tribe of Indians." Although sedentary, industrious and disposed to peace, they are Indians in race, customs and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races. It therefore is difficult to believe that Congress in 1851 was not intending to protect them, but only the nomadic and savage Indians then living in New Mexico. A more reasonable view is that the term "Indian tribe" was used in the acts of 1834 and 1851 in the sense of "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory." *Montoya v. United States*, 180 U. S. 261, 266. In that sense the term easily includes Pueblo Indians.

Under the Spanish law Pueblo Indians, although having full title to their lands, were regarded as in a state of tutelage and could alienate their lands only under governmental supervision. See *Chouteau v. Molony*, 16 How. 203, 237. Text writers have differed about the situation under the Mexican law; but in *United States v. Pico*, 5 Wall. 536, 540, this Court, speaking through Mr. Justice Field, who was specially informed on the subject, expressly recognized that under the laws of Mexico government "extended a special guardianship" over Indian pueblos and that a conveyance of pueblo lands to be effective must be "under the supervision and with the approval" of designated authorities. And this was the ruling in *Sunol v. Hepburn*, 1 Cal. 254, 273, *et seq.* Thus it appears that Congress in imposing a restriction on the alienation of these lands, as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such Indians.

With this explanation of the status of the Pueblo Indians and their lands, and of the relation of the United States to both, we come to answer the questions propounded in the certificate.

To the first question, we answer that the United States is not barred. Our reasons will be stated. The Indians of the pueblo are wards of the United States and hold their lands subject to the restriction that the same cannot be alienated in any-wise without its consent. A judgment or decree which operates directly or indirectly to transfer the lands from the Indians, where the United States has not authorized or appeared in the suit, infringes that restriction. The United States has an interest in maintaining and enforcing the restriction which cannot be affected by such a judgment or decree. This Court has said in dealing with a like situation: "It necessarily follows that, as a transfer of the allotted lands contrary to the inhibition of Congress would be a violation of the governmental rights of the United States arising from its obligation to a dependent people, no stipulations, contracts, or judgments rendered in suits to which the Government is a stranger, can affect its interest. The authority of the United States, to enforce the restraint lawfully created cannot be impaired by any action without its consent." *Bowling and Miami Improvement Co. v. United States*, 233 U. S. 528, 534. And that ruling has been recognized and given effect in other cases. *Privett v. United States*, 256 U. S. 201, 204; *Sunderland v. United States*, 266 U. S. 226, 232.

But, as it appears that for many years the United States has employed and paid a special attorney to rep-

resent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effectually concluded as if it were a party to the suit. *Souffront v. Compagnie des Sucreries*, 217 U. S. 475, 486; *Lovejoy v. Murray*, 3 Wall. 1, 13; *Olafin v. Fletcher*, 7 Fed. 851, 852; *Maloy v. Duden*, 86 Fed. 402, 404; *James v. Germania Iron Co.*, 107 Fed. 597, 612. (Pp. 441 to 444.)

The decision reached in the *Candelaria* case has been followed in a number of cases arising on appeals from decrees of the Pueblo Lands Board.<sup>122</sup>

The opinion of the Solicitor of the Interior Department quoted above goes on to analyze the scope of Federal executive power over the Pueblos in the following terms:

The power of the Executive extends to the bringing of suits on behalf of a pueblo in matters affecting pueblo lands and controlling the conduct of such litigation. The basis of such power is set forth in the passage above quoted from *United States v. Candelaria*, in which Mr. Justice Van Devanter said: "The suit was brought on the theory that these Indians are wards of the United States and that it therefore has authority and is under a duty to protect them in the ownership and enjoyment of their lands." (271 U. S., at 437.) Under section 1 of the Pueblo Lands Act which provides that "the United States of America, in its sovereign capacity as guardian of said pueblo Indians" shall institute certain actions to quiet title of pueblo lands, a number of suits have been brought on behalf of Indian pueblos.

See for example *United States v. Board of National Missions of Presbyterian Church*, *supra*; *Garcia v. United States*, *supra*; *Pueblo of Piouris v. Abeyta*, *supra*.

In the last cited case the question was raised whether the pueblo itself was precluded from appealing an adverse decision sustained in an action instituted by the United States on behalf of the pueblo. The court declared:

"It thus appears that at any time prior to the filing of the field notes and plats by the Secretary of the Interior in the office of the Surveyor General of New Mexico (Pueblo Lands Act, sec. 13, 43 Stat. 640 [25 U. S. C. A. sec. 331 note]) either the United States or the pueblo may maintain an action involving the title and right to lands of the pueblo; but a decree rendered in a suit brought by the pueblo does not bind the United States, while a decree rendered in a suit brought by the United States does bind the pueblo.

"The statutory power of the United States to initiate actions for the Pueblo Indians necessarily involves the power to control such litigation. If the private attorneys of the pueblo could dictate the averments of the bill, or could prevail in questions of judgment in the introduction of evidence, there would be no substance to the guardianship of the United States over the Indians. There cannot be a divided authority in the conduct of litigation; divided authority results in hopeless confusion. If the United States has power to dismiss with prejudice prior to trial, as has been held, it certainly has power to decline to appeal after trial, if it believes the decision of the trial court is without error." (At pp. 13 to 14.)

In view of the foregoing authorities it is clear that the United States is empowered by virtue of its relation to the pueblo and pursuant to special legislation based on that relationship to conduct and control litigation on behalf of the pueblos concerned for the protection of pueblo lands.

No attempt will be made in this opinion to analyze exhaustively the realm in which the Executive arm of the

<sup>122</sup> *United States v. Board of National Missions of the Presbyterian Church*, 37 F. 2d 272 (C. C. A. 10, 1929); *Garcia v. United States*, 43 F. 2d 873 (C. C. A. 10, 1930); *Pueblo of Piouris v. Abeyta*, 50 F. 2d 12 (C. C. A. 10, 1931).

Federal Government is empowered to supervise acts of the pueblo government. It is enough for the present to point on the one hand to the foregoing cases upholding such supervision in matters affecting the disposition of pueblo lands and litigation with reference to such lands and to note, on the other hand that pueblo rights of self-government in matters internal to the pueblo have been constantly recognized in all the decided cases. In the Constitution of the Santa Clara Pueblo, approved by the Secretary of the Interior on December 20, 1935, an attempt was made to distinguish between matters over which the pueblo has sovereign power, under existing Federal law, and matters over which the Interior Department has final control. This attempt is embodied in the fifth numbered paragraph of Article IV, section 1 of the Pueblo Constitution. This paragraph, dealing with powers which are not specifically enumerated in section 16 of the act of June 18, 1934, but which are comprehended under the general phrase "all powers vested in any Indian tribe or tribal council by existing law," reads as follows:

"5. To enact ordinances, not inconsistent with the constitution and bylaws of the pueblo, for the maintenance of law and order within the pueblo and for the punishment of members, and the exclusion of nonmembers violating any such ordinances, for the raising of revenue and the appropriation of available funds for pueblo purposes, for the regulation of trade, inheritance, landholding, and private dealings in land within the pueblo, for the guidance of the officers of the pueblo in all their duties, and generally for the protection of the welfare of the pueblo and for the execution of all other powers vested in the pueblo by existing law: *Provided*, That any ordinance which affects persons who are not members of the pueblo shall not take effect until it has been approved by the Secretary of the Interior or some officer designated by him."

A third point in the relation of the pueblo to the Federal Government is raised by the question whether the pueblos may resort to legal proceedings against the United States or its officers. While this question is essentially a question of legal procedure, the substantive rights of the pueblos must depend in a very large degree upon the answer given to this question. The question is distinctly and unmistakably answered in the opinion of the Supreme Court read by Mr. Justice Van Devanter in *Lone Wolf v. Pueblo of Santa Rosa* (249 U. S. 110 (1919) 1, *supra*). In that case the pueblo of Santa Rosa was recognized as entitled to bring suit against the Secretary of the Interior to enjoin that official from offering, listing, or disposing of, as public lands of the United States, certain lands claimed by the Indian pueblo.

Again, in the case of *Pueblo de San Juan v. United States* (47 F. 2d 446 (C. C. A. 10, 1931) 1, *supra*), the right of a pueblo to bring suit against the United States, under the Pueblo Lands Act (43 Stat. 637), was upheld.

In accordance with the familiar rule a suit against the

United States must be based upon legislation through which the United States permits itself to be sued. Suits against officers of the United States based on alleged illegal acts require no such statutory authority.

A final question which the relation of the pueblo to the Federal Government has raised is the question whether the pueblos are entitled to the protection of the Federal Constitution with respect to acts done under Federal authority.

The opinion of the Supreme Court in the above-cited case of *Lone Wolf v. Pueblo of Santa Rosa* answers this question in the following terms:

"The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering. Certainly it would not justify the defendants in treating the lands of these Indians to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. Besides, the Indians are not here seeking to establish any power or capacity in themselves to dispose of the lands, but only to prevent a threatened disposal by administrative officers in disregard of their full ownership. Of their capacity to maintain such a suit we entertain no doubt. The existing wardship is not an obstacle, as is shown by repeated decisions of this court, of which *Lone Wolf v. Hitchcock*, 187 U. S. 553, is an illustration." (At pp. 113 to 114.)

Again, it was held in the case of *Garcia v. United States*, *supra*, that Congress could not constitutionally deprive a pueblo of the right to plead a New Mexico statute of limitations. The court declared:

"We conclude that such Indian pueblos were entitled to the benefits of the New Mexico statutes of limitation and that the United States, as their guardian, may plead such statutes in their behalf.

"If this be true, then the Pueblo of Taos, having acquired fee simple title to the Tenorio tract under section 3364, *supra*, prior to the adoption of the Pueblo Lands Act, could not be deprived of that title by legislative fiat." (At p. 878.)

In accordance with the foregoing decisions it is plain that while the Indian pueblos have been considered for certain purposes as wards of the Federal Government they are entitled not only to bring suit against that Government and its officers but to claim as against such Government and officers the protections guaranteed by the Federal Constitution.

## SECTION 8. THE RELATION OF THE PUEBLOS TO THE STATE

We have already noted that the terms upon which New Mexico was admitted to statehood left no room for a claim by the state to governmental power over the Pueblos. The general rule that the Pueblos are not subject to state control must, however, be qualified in several respects.

In the first place, as noted in Chapter 6 of this volume, pueblo lands, like other Indian reservations, are part of the state in which they are situated for purposes of state jurisdiction over non-Indians.

In the second place, Congress has made various state laws, such as laws respecting health and education,<sup>126</sup> applicable on Indian reservations, and these laws are as applicable to the Pueblos as to other Indian tribes.<sup>125</sup>

In the third place, the judgments and decrees of the Pueblo in

matters properly within its jurisdiction would appear to merit the same faith and credit that is owing to other recognized agencies of tribal government under the decisions discussed elsewhere in this volume.<sup>126</sup>

A significant problem of the relation of the Pueblos to the State of New Mexico is raised by the possibility of suit by a Pueblo in a state court.<sup>127</sup> On this question an opinion of the Solicitor of the Interior Department<sup>128</sup> declares:

It has occasionally been assumed that where a State has no jurisdiction over the land of an Indian pueblo, the

<sup>126</sup> See chapter 14, sec. 3.

<sup>127</sup> Examples of such suits to state or territorial courts are: *Pueblo of Laguna v. Pueblo of Acoma*, 1 N. M. 220 (1857), dispute over possession of sacred picture; *Victor de la O v. The Pueblo of Acoma*, 1 N. M. 226 (1857), dispute over possession of document of title; *Pueblo of Isleta v. Tondre and Picard*, 18 N. M. 388, 137 Pac. 86 (1913), condemnation of right-of-way.

<sup>128</sup> Op. Sol. I. D., M.29566, August 9, 1939.

<sup>125</sup> 25 U. S. C. 231.

<sup>126</sup> See Chapter 6, sec. 2.

pueblo has no standing in the courts of the State. This assumption is entirely erroneous. Despite the lack of State jurisdiction over pueblo lands, the pueblo may, nevertheless, bring suit in State courts, so far as State law permits, and demand, in other respects, recognition as a public corporation. The judgments and ordinances of a pueblo are entitled to the same sort of recognition that State courts give to the acts of another State or nation. The pueblo as a sovereign body is not subject to suit in State courts except with its own consent. The pueblo is not for that reason a pariah. It is entitled, at the very least to all the rights which a foreigner may assert in the courts of a State.

The foregoing views are based upon the judgment of the Supreme Court in *United States v. Candelaria*.<sup>129</sup> In this case the United States, as guardian of the Pueblo of Laguna, brought a suit to quiet title. The objection was made that prior decisions in the state courts barred the action. The Court commented on the validity of the earlier decrees, in the following terms:

In their answer the defendants denied the wardship of the United States and also set up in bar two decrees rendered in prior suits brought against them by the pueblo to quiet the title to the same lands. One suit was described as begun in 1910 in the territorial court and transferred when New Mexico became a State to the succeeding state court, where on final hearing a decree was given for the defendants on the merits. \* \* \* In the replication the United States alleged that it was not a party to either of the prior suits: that it neither authorized the bringing of them nor was represented by the attorney who appeared for the pueblo; and therefore that it was not bound by the decrees.

On the case thus presented the court held that the

<sup>129</sup> 271 U. S. 432 (1926). That portion of the opinion in this case which relates to the first question certified is set forth and discussed above at pp. 396-397.

decrees operated to bar the prosecution of the present suit by the United States, and on that ground the bill was dismissed. An appeal was taken to the Circuit Court of Appeals, which after outlining the case as just stated, has certified to this Court the following questions:

2. Did the state court of New Mexico have jurisdiction to enter a judgment which would be *res judicata* as to the United States, in an action between Pueblo Indians and opposed claimants concerning title to land, where the result of that judgment would be to disregard a survey made by the United States of a Spanish or Mexican grant pursuant to an act of Congress confirming such grant to said Pueblo Indians? (Pp. 438 to 439.)

Coming to the second question, we eliminate so much of it as refers to a possible disregard of a survey made by the United States, for that would have no bearing on the court's jurisdiction or the binding effect of the judgment or decree, but would present only a question of whether error was committed in the course of exercising jurisdiction. With that eliminated, our answer to the question is that the state court had jurisdiction to entertain the suit and proceed to judgment or decree. (P. 444.)

The case of *Trujillo v. Prince*,<sup>130</sup> establishing the proposition that an Indian, outside of his Pueblo, is within the scope of the state wrongful death statute, so that his administrator may be entitled to recover damages in a state court against a non-Indian; demonstrates that where state law does not interfere with congressional or tribal power it may be invoked in certain cases between Indians and non-Indians. This case does not involve any peculiarities of pueblo law, and the general issues which it raises are dealt with elsewhere in this volume.<sup>131</sup>

<sup>130</sup> 42 N. M. 337, 78 P. 2d 145 (1938).

<sup>131</sup> See Chapter 8, sec. 6; Chapter 19, sec. 5.

## SECTION 9. THE PUEBLO AS A CORPORATE ENTITY

We have already noted that the Pueblos of New Mexico were given the status of corporations by one of the first acts of the New Mexican Territorial Government.<sup>132</sup> This legislative chartering may be viewed as a translation into Anglo-Saxon terms of the corporate recognition which the Pueblos had long enjoyed under Spanish and Mexican law. Co the case of *Lane v. Pueblo of Santa Rosa*,<sup>133</sup> the Supreme Court declared, *per Van Devanter, J.*:

During the Spanish, as also the Mexican, dominion it enjoyed a large measure of local self-government and was recognized as having capacity to acquire and hold lands and other property. With much reason this might be regarded as enabling and entitling it to become a suitor for the purpose of enforcing or defending its property interests. See *School District v. Wood*, 13 Massachusetts, 193, 198; *Cooley's Const. Lim.*, 7th ed., p. 276; 1 *Dillon Munic. Corp.*, 5th ed., secs. 50, 64, 65. But our decision need not be put on that ground, for there is another which arises out of our own laws and is in itself sufficient. After the Gadsden Treaty Congress made that region part of the Territory of New Mexico and subjected it to "all the laws" of that Territory. Act August 4, 1854, c. 245, 10 Stat. 575. One of those laws provided that the inhabitants of any Indian pueblo having a grant or concession of lands from Spain or Mexico, such as is here claimed, should be a body corporate and as such capable of suing or defending in respect of such lands. Laws New Mex. 1851-2, pp. 176 and 418. If the plaintiff was not a legal entity and juristic person before, it became such under that law; and it retained that status after Congress included it in the Territory of Arizona, for the act by which this was done extended to that Territory all legislative enactments of

the Territory of New Mexico. Act February 24, 1863, c. 56, 12 Stat. 664. The fact that Arizona has since become a State does not affect the plaintiff's corporate status or its power to sue. See *Kansas Pacific R. R. Co. v. Atchison, Topeka & Santa Fe R. R. Co.*, 112 U. S. 414. (P. 112.)

The corporate status of the Pueblos has been recognized in many cases.<sup>134</sup>

In *United States v. Candelaria*, the Supreme Court, *per Van Devanter, J.*, commented on the *Lane* case in these terms:

It was settled in *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, that under territorial laws enacted with congressional sanction each pueblo in New Mexico—meaning the Indians comprising the community—became a juristic person and enabled to sue and defend in respect of its lands. \* \* \* That was a suit brought by the Pueblo of Santa Rosa to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from carrying out what was alleged to be an unauthorized purpose and attempt to dispose of the Pueblo's lands as public lands of the United States. Arizona was formed from part of New Mexico and when in that way the pueblo came to be in the new territory it retained its juristic status. \* \* \* (Pp. 442-443.)

The incidents of corporate status<sup>135</sup> attaching to the Pueblos are analyzed in a recent opinion of the Solicitor of the Interior Department<sup>136</sup> in the following passage:

It is clear that the decided cases leave no room for doubt on the proposition that the pueblos of New Mexico

<sup>134</sup> *United States v. Candelaria*, 271 U. S. 432. 442-443 (1926); *Pueblo of Zia v. United States*, 168 U. S. 198 (1897); *Garcia v. United States*, 43 F. 2d 873, 878 (C. C. A. 10, 1930); *Pueblo de San Juan v. United States*, 47 F. 2d 446 (C. C. A. 10, 1931), cert. den. 284 U. S. 626.

<sup>135</sup> The right of the Pueblos, as corporations, to receive grazing permit under the Taylor Grazing Act (Act of June 28, 1934, 48 Stat.

<sup>132</sup> Laws, New Mexico, 1851-1852, p. 418. See sec. 2, *supra*.

<sup>133</sup> 249 U. S. 110 (1919).



are corporations, with power to bring suits against third parties, and liability to suits brought by third parties.<sup>127</sup> It is not so clear what manner of corporation the pueblos are. The most explicit characterization found in any of the Federal cases heretofore decided is found in the case of *Garcia v. United States*, *supra*, where the Pueblo of Taos is classified under the category of "municipal or public corporations."

By the Act of December, 1847, Rev. St. N. M. 1855, p. 420, section 69-101, N. M. Stat. Ann. Comp. 1928, the Indian Pueblos were given the status of bodies, politic and corporate, and, as such, empowered to sue in respect of their lands. *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110, 39 S. Ct. 185, 63 L. Ed. 504. A statute of limitation, in the absence of provision therein to the contrary, runs not only for, but against municipal or public corporations. *Metropolitan E. Co. v. Dist. of Columbia*, 132 U. S. 1, 11-12,

1269, as amended by the Act of June 26, 1936, 49 Stat. 1976) is affirmed in two of the opinions of the Solicitor of the Interior Department which contain an exhaustive analysis of Pueblo corporate status. Op. Sol. I. D. M. 28869, February 18, 1937; Op. Sol. I. D. M. 29797, May 14, 1938. On the general problem of the corporate status of Indian tribes, see Chapter 14, sec. 4.

<sup>127</sup> Op. Sol. I. D. M. 29566, August 9, 1939.

<sup>128</sup> Insofar as the quoted statement indicates that a Pueblo has legal capacity to defend an action, the statement is amply supported by the language of the Supreme Court in the *Lane* and *Candelaria* cases, above quoted, and by certain decisions of the Territorial court. (See fn. 127 *supra*.) The inference, however, at a Pueblo may be sued without its consent would find no support in these opinions of the Supreme Court, and would run contrary to the rule that a sovereign body is immune from suits to which it has not consented. The application of this rule in Five Civilized Tribe cases has been upheld. *Turner v. United States*, 248 U. S. 394 (1919); *Adams v. Murphy*, 165 Fed. 304 (C. C. A. 8, 1908); *Thebo v. Choctaw Tribe of Indians*, 68 Fed. 372 (C. C. A. 8, 1895); and see *United States v. United States Fidelity Co.*, 106 F. 2d 804, 809 (C. C. A. 10, 1939). That a similar holding would be reached in the case of the New Mexican Pueblos is indicated by *United States v. Sandoval*, 231 U. S. 28, 48 (1913).

10 S. Ct. 19, 33 L. Ed. 231; *Little v. Emmett Irr. Dist.*, 45 Idaho 485, 263 P. 40, 56 A. L. R. 822; *Rosedale S. D. No. 5 v. Towner County*, 58 N. D. 41, 216 N. W. 212, 215. We conclude that such Indian Pueblos were entitled to the benefits of the New Mexico statutes of limitation and that the United States, as their guardian, may plead such statutes in their behalf." (P. 878.)

While the Pueblos of New Mexico fall within certain definitions of "municipal corporations,"<sup>128</sup> it is not intended to suggest that they are municipal corporations of the State of New Mexico within the meaning of state statutes on the rights and powers of such corporations. Such an inference would run counter to the basic doctrines of tribal self-government and congressional sovereignty in Indian affairs. The term "public corporation" is therefore perhaps more appropriate as a characterization of the legal status of the Pueblos. The content of any term of characterization, however, must depend largely upon judicial decisions which have not yet been rendered.

<sup>128</sup> "A municipal corporation, in its strict and proper sense, is the body politic and corporate constituted by the incorporation of the inhabitants of a city or town for the purposes of local government thereof. . . . We may, therefore, define a municipal corporation in its historical and strict sense to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them in their corporate capacity to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. This power of local government is the distinctive purpose and the distinguishing feature of a municipal corporation proper." 1 Dillon on Municipal Corporations (5th ed. 1911) secs. 31-32. The essential feature of local self-government has been discussed under an earlier heading. The fact that the Pueblo is a membership corporation rather than a stock corporation is too obvious to call for discussion. The relation of the corporation to a particular area of land and the inhabitants thereof is made dear in the territorial statute establishing the corporate status of the Pueblos which has been quoted above.