NOTE

Undermining Tribal Land Use Regulatory Authority: *Brendale v. Confederated Tribes*

I. INTRODUCTION

The Allotment Act of 1887 diminished tribal regulatory authority over Indian reservation land use.[1] While the Act provided for alienation of reservation land to non-Indians, it did not terminate the reservation status of alienated land.[2] Hence, a question which repeatedly arises is whether Indians can control land use on non-Indian owned reservation land.

In a recent case, the United States Supreme Court held that Indians maintain their power to control non-Indian owned reservation land use only to the extent that Indians exercise their power to exclude non-Indians from reservations.[3] In so holding, the Court precluded Indians from controlling land use on non-Indian owned reservation land.

The Court's decision has a major effect on tribal authority because the power to control land use, including the power to zone land for different uses, is an essential power of local government.[4] Like state and local governments, tribal governments have enacted comprehensive zoning laws to control development and to ensure consistency in reservation land use. By depriving Indians of their sovereign authority to zone *all*

1. General Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-358 (1988)); Indian Reorganization Act of 1934 (Wheeler-Howard Act), Pub. L. No. 73-383, 48 Stat. 984 (current version at 25 U.S.C. §§ 461-479 (1988)).

2. Mattz v. Arnett, 412 U.S. 481, 505-06 (1973) (in legislation enacted subsequent to the Allotment Act, Congress has stated that Indian Country includes allotted lands).

3. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994 (1989).

4. Village of Euclid, Ohio v. Ambler Realty, 272 U.S. 365, 392-95 (1926) (the Court upheld local government zoning law finding that by segregating residential zones from business and industrial zones, the important government interests of peaceful residential environments, increased pedestrian safety, and noise reduction were served). *See generally* N. WILLIAMS, JR., AMERICAN LAND PLANNING LAW §§ 1.01-.08, 7.07, 8.01-.03 (1988).

reservation land, the Supreme Court severely hampered tribal efforts to implement comprehensive land use regulation.

This Note traces the historical basis of Indian regulatory authority over non-Indians, examines the Supreme Court's latest decision in *Brendale*, and then exposes the weaknesses of that decision.

II. TRIBAL REGULATORY AUTHORITY ON RESERVATIONS BEFORE *BRENDALE*

A. Land Use Control Generally

All discussions of land use in the United States must begin with the Supreme Court's landmark *Euclid* decision.[5] In 1922, the village council of Euclid, Ohio adopted a comprehensive zoning ordinance segregating land use into roughly three categories: residential, commercial, and industrial. Under the ordinance, industries could only develop land zoned for industrial use; commercial businesses could only locate on land zoned for commercial use; and residences could only be built on land zoned for residential use.[6] By restricting different land uses to separate districts, the village council's objective was to control development "within definitely fixed lines."[7] While controlled and ordered development seemed laudable, not everyone in Euclid agreed with the way the council drew the lines.

In a lawsuit which eventually reached the United States Supreme Court, a realty company in Euclid challenged the constitutionality of an ordinance restricting it from developing its residentially zoned land for industrial use. The Ambler Realty Company asserted that the ordinance was unconstitutional because it deprived the company of liberty and property without due process—a direct violation of the fourteenth amendment.[8] The Court upheld the constitutionality of the ordinance because it was not capricious or arbitrary; rather, it was a proper exercise of the police power to protect public health, safety, morals, and general welfare.[9] The ordinance was not an arbitrary restriction on an individual landowner's property rights because it *comprehensively* regulated village land use for the general welfare of all village members.

5. *Euclid*, 272 U.S. 365, marked the first Supreme Court approval of zoning.
6. *Id.* at 379-82.
7. *Id.* at 388.
8. *Id.* at 384.
9. *Id.* at 395.

Euclid therefore established that land use restrictions imposed by local governments will be upheld if they comprehensively regulate the land for the health, safety, morals, and general welfare of its residents. Simply put, land use controls must be developed pursuant to some comprehensive plan for the public welfare.[10] Permitting individual landowners to develop and use their land however they wish opens the door to conflicting neighboring land uses, chaos, and confusion.[11] It is this random and uncontrolled development that threatens the public welfare.[12]

Pursuant to state zoning enabling legislation, local governments enact zoning laws to control development. As *Euclid* demonstrates, zoning is the *primary* means by which local authorities restrict various uses to certain districts to achieve comprehensive land use control.[13] Comprehensive zoning provides at least four specific benefits: (1) it permits local government to assess how different land uses interrelate; (2) it provides a single authority to consider a locality's need for public facilities; (3) it allows local government to make sound land use decisions in light of dwindling natural resources; and (4) it permits local government to assess the needs of all landowners concerned.[14]

B. Land Use Control on the Reservation

Tribal governments have enacted zoning laws to control reservation land use.[15] As described below, the tribal regulatory authority over reservation land use has been grounded on Indian sovereignty.

In 1763, King George of Great Britain proclaimed that the King held title to all North American Indian land "discovered" by British subjects, but that Indians retained the right to

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10. N. WILLIAMS, JR., *supra* note 4, at § 7.07.

11. *Euclid*, 272 U.S. at 392-95.

12. *Id.*

13. Local governments also control land use through taxation, eminent domain proceedings, and restrictive covenants.

14. N. WILLIAMS, JR., *supra* note 4, at § 1.08.

15. *See, e.g.*, YAKIMA NATION ZONING CODE, *cited in* Yakima Nation's Consolidated Brief Answering as Plaintiff-Appellee and Opening as Plaintiff-Appellant at 47, Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987), *aff'd in part and rev'd in part sub nom.* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994 (1989) (No. 85-4433, 85-4383) [hereinafter Nation's Brief].

occupy and use such land.[16] Partly on the basis of this proclamation, the United States Supreme Court's position in 1832 was that "Indian nations [are] distinct political communities, having territorial boundaries, within which their authority is exclusive."[17] The Court, in effect, acknowledged the sovereignty of Indians over tribal land.

Sovereignty is "the unrestricted right of groups of people to organize themselves in political, social and cultural patterns that meet their needs."[18] Moreover, sovereignty includes the right of people to determine how land is to be used for the common good.[19] Sovereignty gives rise to the "power" or "authority" to establish a government and to exercise powers of self-government, including the power to regulate land use.[20] Given their sovereignty, Indians should possess regulatory authority over reservation land use.

Brendale, however, dramatically changed the relationship between states and sovereign tribes. States are no longer preempted from asserting their authority over tribal relations with non-Indians. The traditional view concerning the application of state law to reservation activities was established in *Worcester v. Georgia* in which the United States Supreme Court held that Georgia State law was inapplicable to Cherokee Indian Nation trust lands.[21] The basis for the Court's decision was the early federal view that Indians were sovereign as to the states, but dependent upon the federal government.[22] One year before *Worcester*, Chief Justice John Marshall stated that an Indian nation's "relation to the United States resembles that of a ward to his guardian."[23] Over a century later, in *Williams v. Lee*, the Supreme Court affirmed its earlier view.[24]

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16. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-44, 548 (1832).

17. *See id.* at 557.

18. K. KICKINGBIRD, INDIAN SOVEREIGNTY 2 (1977) (quoting Mike Meyers a Seneca Indian consultant to the Institute for the Development of Indian Law).

19. *Id.* (quoting Mike Meyers).

20. *Id.* at 6. Sovereign people may also possess the power to make and enforce laws, to tax, to regulate trade within their land's borders, to determine membership, and to regulate domestic relations. *Id.* at 5.

21. *Worcester*, 31 U.S. at 561. The Court held that a Georgia State law requiring non-Indian resident missionaries of the Cherokee Nation to obtain permits was inapplicable to the missionaries because the Cherokee Nation was a distinct entity upon which Georgia State law had no force. *Id.*

22. *Id.* at 554-59.

23. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

24. 358 U.S. 217 (1958). Lee, a non-Indian who operated a trading post on the Navajo Indian Reservation, sued Williams, a Navajo Indian, in Arizona Superior Court

Citing *Worcester*, the Court held that, absent a congressional act conferring state power over Indian affairs, state courts lacked jurisdiction over such affairs.[25]

Acting substantially like local governments, tribes have exercised their fundamental right to zone reservations. For example, the Yakima Indian Nation has enacted a zoning code for the Yakima Indian Reservation.[26] Because reservation landowners include non-Indian, nonmember Indian,[27] and Indian landowners, reservations have a "checkerboard" appearance with both non-Indians and Indians dispersed throughout. The checkerboard appearance of reservations resulted from two federal acts: the General Allotment Act of 1887 (Dawes Act)[28] and the Indian Reorganization Act of 1934 (Wheeler-Howard Act).[29]

The Dawes Act attempted to achieve Indian assimilation by parceling out reservation lands to Indian families. Lawmakers believed that it would be beneficial to Indians to eventually disintegrate the reservations and assimilate the tribes into the United States "melting pot."[30] Yet, once alloted lands became freely transferable, Indians sold reservation lands to non-Indians resulting in the loss of nearly ninety mil-

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to collect for goods sold on credit to Williams. The question before the Court concerned state power over affairs between Indians and non-Indians.

25. *Id.* at 219-20. Addressing the question of tribal authority over the non-Indian, Lee, Chief Justice Black stated:

> It is immaterial that respondent [Lee] is not an Indian. He was on the Reservation and the transaction with an Indian took place there. . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations . . . . If this power is to be taken away from them, it is for Congress to do it.

Id. at 223 (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 564-66 (1903)).

26. YAKIMA COUNTY, WASH. ZONING CODE (1972). As the Ninth Circuit noted, "By enacting zoning ordinances, a tribe attempts to protect against the damage caused by uncontrolled development, which can affect all the residents and land of the reservation." Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534 (9th Cir. 1987) (footnote omitted), *aff'd in part and rev'd in part*, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994 (1989).

27. A nonmember Indian is an Indian who is not a member of the particular tribe regulating the reservation. Though caselaw sometimes distinguishes between nonmember Indians and non-Indians, the issues are essentially the same for both types of landowners. Consequently, for simplicity, any references in this article to non-Indians shall include nonmember Indians.

28. Ch. 119, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331-358 (1988)).

29. Pub. L. No. 73-383, 48 Stat. 984 (current version at 25 U.S.C. §§ 461-479 (1988)).

30. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 131 n.39 (1982).

lion acres previously held by Indians in 1887.[31] In 1934, the Wheeler-Howard Act abolished allotment to preserve what was left of the diminished reservations. Thus, federal policy toward Indians completely reversed. However, while the Wheeler-Howard Act prohibited future allotment of Indian land, it provided no solution for the damage that had already occurred.

When the Dawes Act made Indian land transferable, much of it was sold to non-Indians. It is this concurrent ownership of reservation land by Indians and non-Indians that is at the heart of many conflicts between Indian law and state law. The conflict between Indian and state zoning laws is the issue that the Supreme Court dealt with in *Brendale*.[32] Conflicts arise from checkerboard zoning, where both state and tribal zoning laws control reservation land use. For example, a state and a tribe may impose different zoning laws upon the same parcel of non-Indian reservation fee land. This concurrent exercise of zoning laws not only precipitates conflict between incompatible state and tribal zoning laws, but it also precludes either the county or the tribe from obtaining the benefits of comprehensive reservation land use regulation. Unless tribes and states enact compatible zoning laws, or devise cooperative zoning schemes, land use on reservations will not follow any predictable, logical pattern. As a result of neighboring incompatible land uses, the uncertainty and chaos will lead to litigation and the general welfare of all reservation inhabitants will be at stake.[33]

C. *Supreme Court Decisions Leading Up to* Brendale

As the Dawes Act gave rise to checkerboard reservations, questions arose regarding tribal authority over non-Indian reservation landowners. Recent Supreme Court decisions indicate the Court's reluctance to find that tribes retain their sovereign

31. For an excellent discussion of the Dawes Act and the resulting loss of Indian-owned lands, see F. COHEN, *supra* note 30, at 130-40.

32. 109 S. Ct. 2994 (1989).

33. *See, e.g.*, Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982) (non-Indian reservation landowners sought to subdivide their fee lands contrary to the Shoshone/Arapahoe tribal zoning code); Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 617 F. Supp. 735 (E.D. Wash. 1985) (nonmember reservation fee landowner sought to develop land where tribe barred development); Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 617 F. Supp. 750 (E.D. Wash. 1985) (non-Indian reservation fee landowner sued to subdivide land Yakima Nation had zoned for agricultural use).

authority to regulate non-Indian reservation landowners.[34] Consequently, state power over matters involving non-Indians and Indians has increased.

In *United States v. Mazurie*, the Court held that tribal regulatory authority over non-Indians was limited to the authority the federal government delegated to Indians.[35] The Court reasoned that delegation to Indians was proper "where the [tribal] entity exercising the delegated authority itself possesses independent authority over the subject matter."[36] Indians were found to possess such independent authority over non-Indian use of reservation land. The *Mazurie* Court found this authority to be rooted in Indian sovereignty.[37] However, three years after *Mazurie*, the Supreme Court dealt a severe blow to tribal regulatory authority.[38]

In *Oliphant v. Suquamish Indian Tribe*, the Court held that the Suquamish lacked criminal jurisdiction over non-Indians because "[b]y submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."[39] While *Oliphant* only concerned Indian *criminal jurisdiction*, the Supreme Court has applied the ruling much more broadly.[40]

In *United States v. Wheeler*, the Court cited *Oliphant* for the proposition that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."[41] In stating that Indian sovereignty had diminished because of the tribe's "dependent status," the Court extended the *Oliphant*

34. *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981). One reason why the Supreme Court has not allowed tribes to assert their authority over non-Indians is because often non-Indians are not represented on tribal councils. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994, 3011 (1989). *See also infra* notes 145-48 and accompanying text.

35. United States v. Mazurie, 419 U.S. 544, 557 (1975) (Court approved federal delegation of regulatory authority to tribes in area of liquor control).

36. *Id.* at 556-57 (citing United States v. Curtiss-Wright Export Co., 299 U.S. 304, 319-22 (1936)).

37. *Id.* Justice Rehnquist pointed out that "it is an important aspect of this case [*United States v. Mazurie*] that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." *Id.* at 557 (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)).

38. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

39. *Id.* at 210.

40. *See* United States v. Wheeler, 435 U.S. 313, 323 (1978).

41. *Id.* at 323 (citing *Oliphant*, 435 U.S. at 191).

divestiture rule to civil as well as criminal matters. The *Oliphant* decision did not address the issue of tribal jurisdiction over *civil* matters; the Court merely held that tribal *jurisdiction* over *criminal* matters had eroded because of the tribe's dependent status as to the United States.[42] Therefore, the Court's extension of the *Oliphant* rule in *Wheeler* was questionable.

Two years after *Wheeler*, the Court whittled *Oliphant* back down to near its original breadth in *Washington v. Confederated Tribes of the Colville Indian Reservation*.[43] The *Colville* Court declared that "[t]ribal powers are not implicitly divested by virtue of the tribes' dependent status. *This Court has found such divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government.*"[44] Because divestiture only results when tribal authority is inconsistent with federal interests, the *Colville* test is less restrictive of tribal regulatory authority than the *Wheeler* interpretation of the *Oliphant* test.[45]

The Supreme Court's approach changed yet again in *United States v. Montana*[46] when *Oliphant* was again applied broadly.[47] In ruling that the Crow tribe could regulate non-

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42. *Id.* at 326.

43. 447 U.S. 134 (1980) (Court upheld the exercise of Indian regulatory power over business transactions involving non-Indians).

44. *Id.* at 153 (emphasis added). As tribal taxation did not frustrate any overriding federal interest, the Court upheld the exercise of tribal authority and reminded its audience that "*tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.*" *Id.* at 154 (emphasis added).

45. R. Johnson, Zoning for Environmental Protection on Indian Reservations 168 (Sept. 15-16, 1988) (CLE presentation for Indian Law symposium at University of Washington School of Law).

46. 450 U.S. 544 (1981). In *Montana*, the Crow Indians asserted their sovereign authority to regulate hunting and fishing on reservation fee lands owned by nonmembers. However, the State of Montana argued that it had superior authority to regulate nonmember hunting and fishing on the reservation. *Id.* at 549.

47. While the Supreme Court applied *Oliphant* more broadly in *Montana*, the Court subsequently ruled that *Oliphant* was not applicable to cases involving civil subject matter jurisdiction:

> [A]lthough Congress' decision to extend the criminal jurisdiction of the federal courts to offenses committed by non-Indians against Indians within Indian country supported the holding in *Oliphant*, there is no comparable legislation granting the federal courts jurisdiction over civil disputes between Indians and non-Indians that arise on an Indian reservation.

National Farmers Union Ins. v. Crow Tribe of Indians, 471 U.S. 845, 854 (1985).

Two years later, the Supreme Court upheld its ruling in *National Farmers Union* when it concluded: "Although the criminal jurisdiction of the tribal courts is subject

member hunting and fishing only on tribe-owned fee lands, the *Montana* Court found that Indians retained their inherent sovereignty when internal tribal relations were threatened.[48] However, with respect to external relations (those involving non-Indians) the Court held that the tribe had been implicitly divested of its sovereignty because of its dependent status.[49] In extending *Oliphant* beyond its original scope the Court reasoned: "Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[50] The Court found that the tribe had been divested of its regulatory authority over hunting and fishing on non-Indian owned fee lands because the State of Montana had applied its regulatory laws to non-Indian hunting and fishing on the reservation.[51]

In restricting the domain of tribal authority, the *Montana* Court presumed against any exercise of tribal authority over non-Indians. However, there is an exception to *Montana*'s general rule. In addition to the power to regulate nonmembers who enter into consensual relations with Indians, a tribe may regulate non-Indians when their "conduct threatens or has

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to substantial federal limitation, see Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), their civil jurisdiction is not similarly restricted." Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1986) (citing *National Farmers Union*, 471 U.S. at 854-55 nn.16 & 17).

Most recently, in *Brendale*, when the Yakima Nation cited *National Farmers Union* and *Iowa Mutual* as the basis for tribal civil jurisdiction over non-Indian land use on fee lands, the Supreme Court offered a surprising and new interpretation of these two decisions:

> In neither of those cases did the Court decide whether the Indian tribe had authority over the nonmembers involved. Instead, the Court established an exhaustion rule, allowing the tribal courts initially to determine whether they have jurisdiction, and left open the possibility that the exercise of jurisdiction could be later challenged in federal court.

Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994, 3006 n.10 (1989) (citing *National Farmers Union*, 471 U.S. at 856-57; *Iowa Mutual*, 480 U.S. at 16, 19).

48. *Montana*, 450 U.S. at 563-65.

49. *Id.*

50. *Id.* at 565. The soundness of this proposition is questionable. *See supra* note 41 and accompanying text. Indeed, in a subsequent opinion, Cardin v. De La Cruz, 671 F.2d 363, 365-66 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982), the Ninth Circuit Court of Appeals challenged the soundness of this notion. *See infra* note 64.

51. *Montana*, 450 U.S. at 549. The Court reasoned that since the Crow Tribe and the State of Montana "had accommodated themselves to the state regulation," the tribe, arguably, had not exhibited any unique tribal interest in regulating non-Indian hunting and fishing. *Id.* at 565 n.13.

some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[52]

While the *Colville* rule presumes the existence of inherent tribal regulatory authority, *Montana* represents a Supreme Court shift back in favor of state regulatory authority over non-Indians. However, the *Montana* exception undermines the general rule, and lower federal courts after *Montana* applied this exception to find in favor of tribal regulatory authority over non-Indians.[53]

In *Knight v. Shoshone & Arapahoe Indian Tribes*, a case strikingly similar to *Brendale*, non-Indian landowners within the perimeter of the Wind River Reservation sought to subdivide their fee lands contrary to the tribal zoning code.[54] The tribes sued to enjoin the development. The non-Indians contended that, absent congressionally delegated authority, the tribes could not regulate land use upon non-Indian owned reservation lands.[55] The district court found in favor of the tribes and granted the injunction.[56]

On appeal, the Tenth Circuit upheld the injunction and held that Indians have "attributes of sovereignty" over their territory.[57] As sovereigns, tribes retain a "broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest."[58] Specifically, the court indicated that civil jurisdiction

52. *Id.* at 565. The *Montana* test is noteworthy because while the general rule is that Indians lack any inherent right to exercise tribal authority over non-Indians, the exception virtually swallows the rule. R. Johnson, *supra* note 45, at 168. Indeed, beyond internal tribal relations, whenever a tribe's political integrity, economic security, or health or welfare is threatened by non-Indian conduct upon non-Indian-owned reservation fee lands, the tribe has the authority to regulate the non-Indian conduct.

53. Note, *Zoning: Controlling Land Use on the Checkerboard: The Zoning Powers of Indian Tribes After Montana v. United States*, 10 AM. INDIAN L. REV. 187, 207 (1982) [hereinafter *Controlling Land Use*]. Interestingly, the Supreme Court may have been sensitive to lower federal court reactions to *Montana* because less than one year after its *Montana* decision, the Supreme Court relied heavily on *Colville* to support its finding that the Jicarilla Apache Tribe had inherent authority to impose a severance tax on non-Indian lessees who removed oil and gas from tribal lands. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982). One author suggests that in swinging back to its *Colville* approach, the Supreme Court attempted to soften the harshness of the *Montana* rule. *Controlling Land Use*, *supra*, at 206.

54. 670 F.2d 900, 901 (10th Cir. 1982).

55. *Id.* at 902.

56. *Id.*

57. *Id.* (citing *Merrion*, 455 U.S. at 140).

58. *Id.* (citing Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-53 (1980)).

over non-Indians was proper where the non-Indians' conduct threatened tribal interests.[59] In so holding, the *Knight* court applied the *Montana* exception.

Under the *Montana* exception, the tribes had a substantial interest in regulating the non-Indians. Because of tribal activities adjacent to or nearby the subject lands, the tribes were concerned about the impact that the subdivision would have upon neighboring tribal land uses. First, the tribes owned trust land adjacent to the subject land.[60] Second, the tribes held annual tribal ceremonies within five miles of the proposed subdivision.[61] Finally, two Indian schools, two Indian cemeteries, and an Indian activity hall were also within five miles of the subject lands.[62] Given the tribal interests at stake, the Tenth Circuit properly held that tribal zoning controlled.[63]

The court found that the tribes faced the risks of incompatible neighboring land uses, probable litigation, uncertainty, and conflicting land use. Rather than yield to checkerboard zoning, the court recognized the tribes' sovereign authority to regulate the reservation under a comprehensive zoning scheme.[64]

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59. *Id.* (citing Montana v. United States, 450 U.S. 544 (1981)).

60. *Id.* at 903.

61. *Id.*

62. *Id.*

63. *See id.* In affirming the district court's decision, the Tenth Circuit based its decision partly on the evidence of the tribes' significant and substantial interest in the subject lands. It also based it on the fact that there did not appear to be any state attempt to concurrently regulate land use upon the reservation. However, even if the state had attempted to apply its zoning law to non-Indian owned reservation fee lands, the court of appeals might still have affirmed the decision. The *Knight* court, like the *Colville* court, was concerned with federal, not state preemption of tribal law: "no treaty provision is of any pertinence and *Congress* has not acted to delegate or deny the right to control use of non-Indian owned land located within the reservation." *Id.* at 902 (emphasis added).

64. See Village of Euclid, Ohio v. Ambler Realty, 272 U.S. 365, 392-395 (1926); *see also* Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 961, 963 (9th Cir.), *cert. denied*, City of Polson, Montana v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 459 U.S. 977 (1982). *Namen* involved an attempt by the tribes to prohibit non-Indian, lake-front landowners from building and maintaining a storage shed, docks and a breakwater upon reservation fee lands. *Id.* at 951. The court of appeals found no overriding federal interests sufficient to divest the tribes of their authority to regulate non-Indian fee landowners. *Id.* at 963. The court held that, even under *Montana*, the tribe possessed the authority to regulate non-Indians where the latter's conduct potentially affected tribal interests. *Id.* at 964.

Specifically, if the non-Indians' conduct went unregulated by tribal zoning, it "could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources." *Id.* The *Namen* court correctly recognized that the tribe's interest in

As *Knight* and other post-*Montana* cases demonstrate, lower federal courts have refused to adopt *Montana*'s questionable divestiture rule.[65] They have instead held that tribes may regulate non-Indian conduct which threatens tribal interests, particularly the tribal interest in implementing comprehensive reservation land use regulation. Having discussed the background of tribal regulatory authority over non-Indian reservation landowners, this Note will next address the tribal regulatory issues in *Brendale*.

III. THE LOWER COURT *BRENDALE* DECISIONS: *WHITESIDE* I AND *WHITESIDE* II

Brendale is the consolidation of two lower federal court

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protecting reservation resources was superior to the non-Indian landowners' interest in developing their land more aggressively than permitted under tribal law. Another Ninth Circuit case that upheld the exercise of tribal regulatory authority over non-Indians was Cardin v. De La Cruz, 671 F.2d 363 (9th Cir.), *cert. denied*, 459 U.S. 967 (1982). John Cardin was a non-Indian who owned land on the Quinault Indian Reservation upon which he operated a grocery and general store. *Id.* at 364. The dispute arose when Cardin's store failed to meet tribal building, health and safety regulations. *Id.* Cardin sued to enjoin the tribe from applying its regulatory laws to non-Indian owned land, and the district court granted the injunction, relying largely on the *Oliphant* divestiture rule. *Id.* at 364-65. On appeal, the Ninth Circuit reversed and allowed the exercise of tribal regulatory authority thereby affirming "the Supreme Court's repeated assertions that Indian tribes retain attributes of sovereignty over their territory, not just their members." *Id.* at 366.

The *Cardin* court refused to adopt *Montana*, finding that tribal authority to regulate land use takes precedence when non-Indian conduct threatens tribal interests. *Cardin* is also important because it dismissed the *Montana* Court's proposition that *Oliphant* was applicable to civil cases. Writing for a unanimous tribunal, Judge Pregerson stated that nothing in the *Oliphant* Court's analysis "suggests that Indian *civil* or *regulatory* jurisdiction over non-Indians is inconsistent with Indians' dependent status." *Id.* at 365-66. In so holding, the court found *Montana*'s general divestiture rule unsound.

One additional Ninth Circuit case that applied the *Montana* exception concerned tribal authority to regulate two non-Indian, off-reservation automobile dealers. *See* Babbitt Ford, Inc. v. Navajo Tribe, 710 F.2d 587 (9th Cir. 1983). Under Navajo Tribal law, before the dealers could repossess Indian vehicles, they had to obtain the purchaser's written consent. *Id.* at 590. The dealers sued in federal district court alleging that the tribe had been divested of its authority to regulate the on-reservation repossession of Indian vehicles. *Id.* at 590. The court of appeals found no divestiture of Indian authority and held instead that the exercise of tribal authority over the non-Indians was appropriate where the regulation protected tribal health and safety. Specifically, the tribe was concerned about repossession without consent which might result in conflict. *Id.* at 593.

In applying the *Montana* exception rather than the rule, the *Babbitt Ford* court followed the post-*Montana* lower federal court pattern. Lower federal courts have not given much attention to *Montana*'s general divestiture rule. Controlling Land Use, *supra* note 53, at 208.

65. *See supra* notes 54-64 and accompanying text.

decisions both entitled *Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside*.[66] For clarity and comparison, they shall be referred to as *Whiteside* I and *Whiteside* II.

Whiteside I, or the Closed Area case, concerned tribal regulation of non-Indian land in a portion of the reservation that the Yakima Nation had closed to the public to protect the area's grazing, forest, and wildlife resources.[67] Conversely, *Whiteside* II, or the Open Area case, concerned non-Indian land located within a portion of the reservation generally open to the public. A description of the Yakima Reservation more clearly illustrates how the cases differ.

The Yakima Reservation is located in southeastern Washington. The United States holds eighty percent of the 1.3 million acres of reservation land "in trust" for the benefit of tribal members. The remaining twenty percent is held in fee by Indians and non-Indians, or in trust for nonmembers.

Most of the trust land is in the Closed Area, which is predominantly forested and relatively undeveloped. There are few permanent residences.[68] The Yakima Nation limits access to the Closed Area to members of the Yakima Tribe, employees, and permittees.[69] On the other hand, most of the fee land is located in the Open Area, which is composed mostly of land used for grazing, agriculture, commercial, and residential purposes.[70] Unlike the Closed Area, there is no restriction upon public access; the area is open to anyone.[71] Although non-Indians are essentially excluded from the Closed Area, non-Indians and Indians are not segregated in the Open Area. Consequently, the Yakima Reservation has a "checkerboard" appearance arising from the co-existence of Indian and non-Indian owned lands.

Philip Brendale was a permittee and fee owner of 160 acres in the middle of the forested portion of the Closed Area. Although he was an Indian, he was not a Yakima Tribe mem-

66. 617 F. Supp. 735 (E.D. Wash. 1985) (*Whiteside* I) and 617 F. Supp. 750 (E.D. Wash. 1985) (*Whiteside* II), *consolidated, aff'd in part, and rev'd in part*, 828 F.2d 529 (9th Cir. 1987), *aff'd in part and rev'd in part sub nom.* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994 (1989).

67. *Whiteside* I, 617 F. Supp. at 738 (citing Tribal Resolution of the Yakima Indian Nation (Aug. 11, 1954)).

68. *Id.* at 19-22.

69. *Id.* at 20.

70. *Id.* at 22-23.

71. *Id.* at 22.

ber. In April 1983, Brendale filed an application with Yakima County to subdivide one of his twenty-acre parcels into ten two-acre lots. Brendale planned to sell the lots, each with independent sewage and water facilities, as sites for summer cabins and recreational vehicles. Brendale submitted an environmental checklist and the Yakima County Planning Department declared that Brendale did not have to prepare an Environmental Impact Statement (EIS).[72]

The Yakima Nation appealed the Department's conclusion to the Yakima County Board of Commissioners. The Yakima Nation asserted that Yakima County lacked the authority to zone Brendale's property, and that an EIS was warranted given the threat the proposed development posed to the Closed Area.[73] Although the Department subsequently decided to require an EIS, the Yakima Nation sued in federal district court to enjoin the proposed development altogether.[74] The central issue in the dispute was whether Indian or county zoning law was applicable to Brendale's land. Simply put, county zoning law permitted the proposed development, while Indian zoning law did not.[75]

Whiteside II, the Open Area case, also involved a conflict between county zoning law, which would have permitted more aggressive development, and tribal zoning law, which would have barred it. In *Whiteside* II, Stanley Wilkinson, a non-Indian fee landowner of an undeveloped forty-acre tract, applied to the county to subdivide thirty-two acres into twenty single family residential lots. Like Brendale, Wilkinson submitted an environmental checklist to the Yakima County Planning Department. After reviewing the checklist, the Department declared that an EIS was unnecessary. The Yakima Nation appealed the Department's decision on two grounds. It argued that Yakima County lacked the authority to regulate Wilkinson's property, and that since the proposed subdivision would significantly affect the reservation environment an EIS was required. The Board of County Commissioners heard the appeal and affirmed the Department's decision.

72. *Id.* at 29-33. The Yakima County Board of Commissioners subsequently concluded that an EIS was warranted; however, the Yakima Nation's appeal was already underway. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994, 3001 & n.3 (1989).

73. Nation's Brief, *supra* note 15, at 32.

74. *Whiteside* I, 617 F. Supp. 735 (E.D. Wash. 1985).

75. Nation's Brief, *supra* note 15, at 25-28.

Thereafter, the Yakima Nation sued in federal district court to enjoin the county from applying its zoning law to the Wilkinson property.[76]

As in *Whiteside* I, Yakima Nation zoning prohibited the proposed development while Yakima County zoning did not. Thus, in both *Whiteside* I and *Whiteside* II, the ultimate question was whether the county or the tribe possessed the authority to zone non-Indian reservation land.[77] To resolve the zoning question, the federal district court applied the *Montana* exception and held in favor of the tribe in *Whiteside* I, but against the tribe in *Whiteside* II.[78]

In *Whiteside* I, the court held that, because Brendale's proposed development threatened tribal interests, Yakima Nation zoning controlled.[79] Aside from the threat the development posed to tribal timber production, the court's "paramount concern . . . [was] the threat to the Closed Area's cultural and spiritual values."[80] It was these significant tribal interests that led the court to conclude that the Yakima Nation had a superior interest in applying its zoning law to protect reservation inhabitants.[81] In addition, the court noted that the county's interest in applying its zoning law to Brendale's property was minimal by comparison.[82]

In *Whiteside* II, on the other hand, the court found that Wilkinson's proposed development in the Open Area did not threaten the tribe's political integrity, economic security, or health and welfare. Specifically, Yakima County's zoning adequately regulated land use on Open Area fee lands and did not threaten Yakima Nation trust lands.[83] The Yakima Nation failed to convince the court that the potential impact sufficiently threatened tribal interests. Brendale appealed the deci-

76. *Whiteside* II, 617 F. Supp. 750 (E.D. Wash. 1985).

77. Under tribal zoning, Wilkinson's property was located in an "agricultural" use zone where the construction of subdivision housing was prohibited. Nation's Brief, *supra* note 15, at 26. Moreover, while Wilkinson sought to subdivide thirty-two acres into twenty 1.6 acre lots, the minimum lot size in the agricultural zone was five acres. *Id.* By contrast, the county's designation for Wilkinson's property was "general rural," which allowed a broader range of uses and only required half-acre minimum lot sizes. *Id.* at 28-29. Thus, if the Yakima Nation's zoning law controlled, it would bar Wilkinson's proposed development.

78. *Whiteside* I, 617 F. Supp. at 742-43; *Whiteside* II, 617 F. Supp. at 758.

79. *Whiteside* I, 617 F. Supp. at 742-43 (citing *Montana*, 450 U.S. at 566).

80. *Whiteside* I, 617 F. Supp. at 744.

81. *Id.*

82. *Id.* at 743.

83. *Whiteside* II, 617 F. Supp. at 758.

sion in *Whiteside* I and the Yakima Nation appealed the decision in *Whiteside* II. The Ninth Circuit Court of Appeals consolidated the cases, affirmed *Whiteside* I, and reversed and remanded *Whiteside* II.[84]

With respect to the Closed Area development, the appellate court agreed with the district court's finding that the Yakima Nation's zoning law controlled because of the threat Brendale's project posed to tribal interests.[85] As to Wilkinson's proposed subdivision in the Open Area, the Ninth Circuit pointed to Yakima County's failure to establish "any off-reservation interest in imposing its zoning code on fee land within the reservation."[86] In particular, the court noted that "[t]he exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity."[87] Although the appellate court ruled in *Whiteside* II that the Yakima Nation had the authority to zone Wilkinson's land, it remanded the case on the question of whether tribal or county zoning was applicable.[88]

Brendale, Wilkinson, and Yakima County each appealed the Ninth Circuit's decision. The Supreme Court granted certiorari and consolidated the cases.[89]

IV. THE SUPREME COURT'S DECISION IN *BRENDALE*

On June 29, 1989, the Supreme Court announced its decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*. The decision is complex because the Justices issued three separate opinions resulting in two pluralities.

Justice Stevens prepared the Court's opinion in *Whiteside*

84. Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987).

85. *Id.* at 535.

86. *Id.* at 536.

87. *Id.*

88. *Id.* at 535-36. To clarify: in both the Open Area and Closed Area cases, the Ninth Circuit declared that the tribe had the authority to regulate non-Indian fee landowners. *Id.* Moreover, with respect to the Closed Area case, the court held that a balancing test indicated tribal interests were superior to county interests. *Id.* at 535. Accordingly, Yakima Nation tribal zoning controlled in the Closed Area. The court remanded because the district court had failed to balance the federal, tribal, and county interests. *Id.* at 536.

89. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 108 S. Ct. 2843 (1988).

I, announcing the Court's affirmance of the Ninth Circuit's decision in the Closed Area case.[90] According to Justice Stevens's *Whiteside* I opinion, the Yakima Nation's power to exclude[91] non-Indians has been diminished by the alienation of tribal lands to nonmembers under the Allotment Act: "[I]t is . . . improbable that Congress envisioned that the Tribe would retain its interest in regulating the use of vast ranges of land sold in fee to nonmembers who lack any voice in setting tribal policy."[92] In *Whiteside* I, Justice Stevens reasoned that tribal power to shape the character of the land through land use regulation derives from the power to exclude.[93] By maintaining the power to exclude, the Yakima Nation preserved its power to regulate nonmember owned lands. Thus, in the Closed Area, because more land was still reserved for the tribe's exclusive use, the tribe retained its power to shape the character of that land.

However, in the Open Area, because the tribe could no longer exclude nonmembers from a large portion of this area, the tribe's power to exclude had been diminished. In *Whiteside* I, Stevens reasoned that, as the power to exclude diminishes, the power to shape the character of that land also diminishes.[94] Justice Stevens, concurring with Justice White's opinion in *Whiteside* II, felt that tribal zoning controlled the proposed development of Brendale's property, while county zoning controlled the proposed development of Wilkinson's property.[95]

Justice White prepared the Court's opinion in *Whiteside* II, the Open Area case, which reversed the Ninth Circuit's ruling.[96] Under the resulting plurality opinion, the Yakima Nation's treaty with the United States did not establish that the Yakima Nation had exclusive authority to regulate non-

90. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994, 3009 (1989). Justice O'Connor joined Stevens, while Justices Marshall, Blackmun, and Brennan concurred in the result. Justices Scalia, White, and Kennedy, and Chief Justice Rehnquist dissented.

91. Justice Stevens stated that the Yakima Nation's power to exclude is derived from the 1855 treaty between the United States and the Yakima Indian Nation, June 9, 1855, 12 Stat. 951-52. *Brendale*, 109 S. Ct. at 3012.

92. *Id.* at 3011.

93. *Id.* at 3015.

94. *Id.* at 3016-17.

95. *Id.*

96. *Id.* at 3009. Chief Justice Rehnquist and Justices Scalia and Kennedy joined in Justice White's opinion. *Id.* at 2996. Justices Stevens and O'Connor concurred, *id.* at 3009, while Justices Blackmun, Brennan, and Marshall dissented, *id.* at 3017.

Indian owned reservation lands. Rather, in accordance with *Montana*, "treaty rights with respect to Reservation lands must be read in light of the subsequent alienation of those lands."[97] Specifically, in *Whiteside* II, Justice White reasoned that because reservation land had been alienated to non-Indians, tribal treaty rights had diminished.[98]

As in *Montana*, non-Indians had acquired Yakima Reservation lands, and the Court reasoned that Congress did not intend to permit tribes to regulate non-Indians. While the Wheeler-Howard Act[99] may have ended future alienation of reservation lands, Justice White reasoned that it did not give Indians the right to exclusive use of alienated lands.[100] Any treaty-derived power to exclude had been diminished by the alienation of Yakima Reservation lands.

The *Whiteside* II plurality also concluded that the Yakima Nation's sovereign authority to regulate non-Indian activity had been divested. It reasoned that, to the extent that the exercise of tribal authority involved the tribe's external relations with non-Indians, the Yakima Nation had been divested of such authority. Because *Brendale* involved fee lands, the plurality distinguished it from *Colville*[101] which dealt with tribal regulation of trust lands.[102] In *Whiteside* II, Justice White also distinguished *Brendale* from those cases in which Congress expressly delegated regulatory authority over non-Indians.

Justice White reasoned that since Congress had not expressly delegated the authority to zone non-Indian fee lands to the Yakima Nation, the Yakima Nation lacked any inherent authority to zone such lands. He acknowledged that tribes may possess the authority to regulate non-Indian activity (1) where the tribe has entered into consensual relations with non-Indians through commercial dealing, contracts, or other arrangements, or (2) where non-Indian conduct threatens tribal interests.[103]

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97. *Id.* at 3004 (citing Montana v. United States, 450 U.S. 544, 561 (1981)).

98. *Id.*

99. Pub. L. No. 73-383, 48 Stat. 984 (current version at 25 U.S.C. §§ 461-479 (1988)).

100. *Brendale*, 109 S. Ct. at 3004.

101. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); *supra* text accompanying note 44.

102. *Brendale*, 109 S. Ct. at 3006.

103. *Id.* at 3006-07. Specifically, the *Whiteside* II plurality directed its readers to compare the situation in these consolidated cases to other instances in which Congress has expressly delegated to tribes federal authority over non-Indian landowners. *Id.*

However, in Justice White's discussion of *Montana*'s relation to *Brendale*, he asserted that the *Montana* exception did not create tribal authority to zone reservation lands.[104] Tribes must first demonstrate that protectable interests are imperiled.[105] Justice White found that the Yakima Nation lacked the authority to zone Wilkinson's land because it was unable to demonstrate that protectable interests would be threatened by Wilkinson's development in the Open Area.[106]

Justice Blackmun concurred with the plurality in *Whiteside* I, but dissented as to the plurality judgment in *Whiteside* II.[107] Regarding *Whiteside* II, Justice Blackmun warned that tribal attempts to zone comprehensively would be frustrated if the *Montana* exception was not used as the basis for tribal authority to zone non-Indian land. Blackmun urged that *Montana* be read to give tribes inherent authority to zone *all* fee lands, including those owned by non-Indians.[108]

According to Blackmun, several Supreme Court cases clearly establish that Indians retain sovereign authority over non-Indians unless tribal authority is inconsistent with *federal interests*.[109] He noted that civil jurisdiction cases subsequent to *Montana* reaffirm the view that tribes retain civil jurisdiction over non-Indians. Additionally, Blackmun asserted that despite their incorporation into dominant society, tribes are not divested of civil jurisdiction over non-Indian reservation landowners.[110]

Justice Blackmun argued that zoning is a fundamental function of local government. The power to zone is especially important to tribal governments because Indians "enjoy a

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Congress has made such expressed delegations in the Indian Country Crimes Act, 18 U.S.C. §§ 1151, 1161 (1988), and in the Clean Water Act, 33 U.S.C. § 1377 (e) and (h)(1) (1988).

104. *Brendale*, 109 S. Ct. at 3007.

105. *Id.*

106. *Id.* (citing *Montana*, 450 U.S. at 566).

107. *Id.* at 3017 (Blackmun, J., dissenting). Justices Brennan and Marshall joined in Justice Blackmun's dissent.

108. *Id.* at 3021-22 (Blackmun, J., dissenting).

109. *Id.* at 3020-21 (Blackmun, J., dissenting) (citing Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (Court upheld tribe's internal authority to impose a severance tax upon non-Indian reservation mining); Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987) (civil jurisdiction over non-Indians is a recognized part of inherent tribal sovereignty and exists "unless affirmatively limited by a specific treaty provision or a federal statute."); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 153 (1980) (tribes retain substantial civil jurisdiction over non-Indians); *see supra* notes 43-45, 47, 53 and accompanying text.

110. *Brendale*, 109 S. Ct. at 3020 (Blackmun, J., dissenting).

unique historical and cultural connection to the land."[111] According to Blackmun, the *Montana* exception allows tribes to retain authority over non-Indians whenever the latter's conduct threatens tribal interests.[112] With respect to *Whiteside* I and *Whiteside* II, Justice Blackmun concluded that the threat to the Yakima Nation was the loss of the authority to zone the reservation comprehensively.[113] Given this threat, he urged that the Yakima Nation be permitted to regulate all of its lands, even those owned by non-Indians.[114]

V. A CRITIQUE OF *BRENDALE*

Brendale established that, to the extent a tribe tries to exclude non-Indians from the reservation, the tribe preserves its power to regulate non-Indian reservation landowners. This holding can be attacked on two principal grounds. First, under the *Montana* exception, Yakima Nation zoning should have controlled in the Open Area. If the Supreme Court had remanded *Whiteside* II for a balance of tribal, state, and federal interests, the Yakima Nation would very likely have prevailed. Second, from a land use policy perspective, tribal zoning should control, even if it affects non-Indian reservation landowners.

A. Yakima Nation Zoning Should Have Controlled Under the Montana *Exception*

When the appellate court remanded *Whiteside* II for a balancing of interests analysis, it recognized that several compelling arguments existed in favor of tribal zoning.[115] First, Wilkinson's development threatened the Yakima Nation's interest in preservation of agricultural lands. While both county and tribal zoning laws had as their general purpose the preservation of agricultural land, each body implemented its zoning differently. The Yakima Nation did not zone reservation land according to whether the landowner was Indian or non-Indian.[116] However, under county zoning, the applicable

111. *Id.* at 3022 (Blackmun, J. dissenting) (citing FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960)).

112. *Brendale*, 109 S. Ct. at 3023 (Blackmun, J., dissenting).

113. *Id.*

114. *Id.* at 3023-24.

115. Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 536 n.5 (9th Cir. 1987).

116. Nation's Brief, *supra* note 15, at 44.

zoning classification did depend on whether the land was owned by an Indian or a non-Indian. While all Indian owned land near the *Whiteside* II proposed development was designated exclusively for agricultural use, upon Wilkinson's request the property was zoned General Rural.[117] This county zoning classification did not restrict the non-Indian from pursuing non-agricultural uses.[118]

When the county agreed to change the zoning classification for a particular parcel of reservation land because a non-Indian landowner wanted to use the land differently, the county undermined the Tribe's comprehensive plan and the consistency it was intended to achieve. Whatever the county's policy may have been,[119] its effect only aggravated the checkerboard zoning problem, and circumvented the goal shared by the tribe and the county of preserving reservation land for agricultural use. The county's General Rural classification required half-acre minimum lots, while tribal zoning required five-acre minimum lots.[120] Consequently, whenever the county permitted non-Indian landowners to develop and sell half-acre lots, it thwarted the Yakima Nation's agricultural land preservation policy and defeated its goal of achieving consistency in reservation land use through comprehensive regulation.

A second compelling argument for tribal zoning acknowledged by the court of appeals is that the Yakima Nation recognized the threat that intense development posed to the area.[121] The land contained soil which was particularly susceptible to severe erosion and runoff.[122] This soil was unsuitable for development as it posed severe hazards for septic tanks, buildings, and streets.[123] Additionally, the court indicated that there was a sacred Yakima Nation burial ground within one and a half miles of Wilkinson's property.[124] Finally, the court of appeals found that Yakima County had failed to establish any off-reservation interest in applying its zoning law to the

117. *Id.* at 45.

118. *Id.*

119. The Yakima County Code does not state what the county's policy may have been. *See* YAKIMA COUNTY, WASH., ZONING CODE (1972).

120. Nation's Brief, *supra* note 15, at 45.

121. *Id.* at 50.

122. *Id.*

123. *Id.*

124. Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d, 529, 536 (9th Cir. 1987).

property.[125]

In failing to remand *Whiteside* II to weigh the various federal, state, and tribal interests at stake, the Supreme Court never acknowledged the existence of possible tribal interests in applying tribal zoning law. As indicated above, however, the Yakima Nation had a stronger interest in applying its zoning law. First, the Yakima Nation's uniform application of zoning law was more apt to preserve reservation lands for agricultural use.[126] Second, the county failed to establish any off-reservation interest in applying its zoning law.[127] Finally, the Yakima Nation identified particular environmental, ecological, and cultural risks that the development would impose upon the land.[128] Under the *Montana* exception, considering these threats that Wilkinson's development posed to tribal interests, the Supreme Court should have ruled that tribal zoning law controlled.

In sum, *Brendale* conflicts with the lower federal court trend of applying the *Montana* exception.[129] The lower court trend acknowledges the importance of comprehensive land use planning. Since *Euclid*, the Supreme Court has also supported land use regulation that is comprehensive. However, by failing to endorse the lower federal court view, the Supreme Court destroyed the Indians' capacity to achieve comprehensive land use.[130]

B. Land Use Policy Supports Tribal Control

Even without the *Montana* exception, Yakima Nation zoning should have controlled as a matter of general land use policy. As the appellate court acknowledged, to endorse tribal zoning in one instance and then county zoning in another prevents the effective implementation of comprehensive land use

125. *Id.* When a state alleges that it has an off-reservation interest, it must point to off-reservation effects that necessitate state intervention. *Id.*; *see, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (Court held that interest in raising revenues did not justify imposition of state tax on transactions between Indians and non-Indians).

126. Nation's Brief, *supra* note 15, at 45.

127. *Id.*

128. *Id.* at 50.

129. *See supra* notes 52-63 and accompanying text.

130. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994, 3022-23 (1989).

regulation.[131] When courts preempt tribal regulatory authority over non-Indian land, they frustrate tribal efforts to regulate the reservation comprehensively and open the door to a host of consequent problems.

Under a checkerboard zoning scheme, there is no logic to reservation land use. For example, in *Brendale*, the Supreme Court upheld a non-Indian landowner's ability to develop land that the Yakima Nation intended to preserve for agricultural use. Whenever more than one zoning authority is asserted, conflicts will arise and neither authority will ever achieve comprehensive land use regulation. As discussed below, a checkerboard zoning scheme results in unconstitutional regulation, conflicts, confusion, and uncertainty.[132]

First, checkerboard zoning defeats tribal attempts to implement comprehensive land use regulation. The notion that land use regulation should be comprehensive is not only a practical choice; it is a constitutional requirement. In *Euclid*[133] the Supreme Court held that the constitutionality of zoning depended upon whether it was applied in light of some greater plan to benefit the general community.[134] Thus, a zoning ordinance is unconstitutional whenever it is unrelated to a general scheme promoting the public health, safety, morals, or general welfare.[135] A zoning ordinance that does not comprehensively regulate all concerned land for the benefit of the general welfare "passes the bounds of reason and assumes the character of a merely arbitrary fiat."[136] Arbitrary zoning laws are unconstitutional because they unduly burden individual property rights without benefitting the general welfare.[137]

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131. Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 534-35 (9th Cir. 1987).

132. *See infra* notes 133-45 and accompanying text.

133. Village of Euclid, Ohio v. Ambler Realty, 272 U.S. 365 (1926); *see supra* notes 4-14 and accompanying text.

134. *Euclid*, 272 U.S. at 388.

> Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use . . . is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.

Id. (citing Sturgis v. Bridgeman, L.R. 11 Ch. 852, 865).

While *Euclid* did not contemplate the use of a "comprehensive plan" as termed by current land use planners, *Euclid* recognized the importance of zoning with a rational relation to a legitimate public purpose. *Id.*

135. *Id.* at 395.

136. Purity Extract Co. v. Lynch, 226 U.S. 192, 204 (1912).

137. *See Euclid*, 272 U.S. 365.

The language in the purpose statement of the Yakima Nation's zoning code clearly indicates that the Yakima Nation intended to implement traditional "Euclidean" comprehensive planning. The purpose statement specifies that the ordinance exists to "assure the orderly development" of the reservation "and to otherwise promote the public health, safety, morals and general welfare in accordance with the rights reserved by the Yakima Indian Nation."[138] Yet, the Yakima Nation could not achieve orderly development if the county asserted its authority to zone the reservation differently. Thus, the concurrent exercise of county and tribal zoning law completely frustrated the constitutional requirement that zoning serve the general welfare.

A second policy supporting exclusive application of tribal zoning on reservations is that, as in *Brendale*, checkerboard zoning leads to animosity between non-Indians and Indians.[139] With respect to the problem of overlapping land use regulations, the Supreme Court's *Whiteside* I opinion conceded that "the potential for conflict between a county's rules and a tribe's rules is certainly substantial," but it asserted that such conflict "is neither inevitable nor incapable of resolution."[140] Yet, because this potential for conflict always exists, allowing the concurrent exercise of more than one zoning authority unnecessarily invites conflict.[141]

Land use policy also disfavors checkerboard zoning because it is confusing and thus leads to needless litigation. Without a uniform regulatory scheme motivated by one comprehensive plan, development of reservation land will be more expensive and time consuming as landowners will necessarily turn to the courts to resolve conflicts.[142]

Finally, in addition to the preceding land use policy problems, checkerboard zoning hinders environmental protection on the reservation. As with zoning, when more than one environmental regulatory scheme is in effect, the potential for

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138. Nation's Brief, *supra* note 15, at 47.

139. Comment, *The Developing Test for State Regulatory Jurisdiction in Indian Country: Application in the Context of Environmental Law*, 61 OR. L. REV. 561, 586 (1982).

140. Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 109 S. Ct. 2994, 3013 n.3 (1989).

141. *See supra* notes 4-14 and accompanying text.

142. Comment, *supra* note 139, at 586 (Comment examines the history of state regulatory jurisdiction over Indians and suggests ways that tribes can avoid future state intervention).

conflict is great. Given Native Americans' historical and cultural ties to the land[143] and their notions of tribal land tenure and the Indian's relation to nature and ecology, Indians have a special interest in protecting reservation resources by developing tribal environmental protection programs.[144] Of course, non-Indian reservation landowners may also have environmental concerns, so Indians may not have a superior interest in environmental protection. Nevertheless, unless cooperative environmental regulatory schemes are developed, it is unlikely that Indians or non-Indians will be able to achieve adequate environmental protection.

In summary, given the problems that result from checkerboard zoning, the Supreme Court erred when it provided for the continuance of the concurrent exercise of two different reservation zoning schemes. The Court merely perpetuated the problems created by checkerboard zoning.

VII. CONCLUSION

Given the checkerboard composition of Indian reservations today, questions arise as to whether federal, state, or tribal authority governs reservation land use. *Brendale* establishes that Indians maintain their power to control reservation land use over non-Indian landowners only to the extent that tribes have excluded non-Indians from reservations. Consequently, on those portions of a reservation where non-Indians are predominantly present, state, not tribal, zoning law controls.

In so holding, the Court thwarted tribal efforts to comprehensively regulate reservation land use. More specifically, in permitting the concurrent exercise of two, often incompatible, zoning schemes, the Court left Indian reservations vulnerable to the evils of checkerboard zoning: uncertainty and conflict under an incomprehensive and, arguably, unconstitutional zoning scheme.

One obvious solution would have been to allow only one governing entity to regulate reservation land use. The assertion of state law on Indian land is antithetical to tribal sover-

143. *See generally* Ackerman, *A Conflict Over Land*, 8 AM. INDIAN L. REV. 259 (1980) (a thorough analysis of how land, water, and other natural resources are linked to Indian cultural, spiritual, historical, and religious development).

144. Will, *Indian Lands Environment—Who Should Protect It*, 18 NAT. RESOURCES J. 465, 499 (1978).

eignty and duplicative of tribal authority.[145] It is for these reasons that tribal, not state, police power has traditionally controlled on reservation land.[146] Moreover, when state or federal governments intervene in tribal government affairs, tribal governments are less apt to develop and flourish independently.[147] Because the Yakima Nation established a viable government recognized by the United States and protected by its treaty with the United States, the Yakima Nation should have had controlling authority.[148]

Opponents of the position that tribal zoning preempts state zoning argue that the assertion of tribal authority over non-Indians is inappropriate because non-Indians do not have a voice in tribal government.[149] Under the "Euclidean" zoning scheme, residents have a voice in local government and thus zoning regulation; however, on reservations, non-Indians generally do not have a voice in tribal government.[150]

The inability of non-Indians to participate in tribal government constituted a serious defect in the Yakima Nation's zoning scheme. When a municipality attempts to regulate disenfranchised landowners, the constitutionality of such zoning legislation is highly questionable.[151] Moreover, *Oliphant* and *Wheeler* indicate that the Supreme Court will intervene to aid non-Indians whenever there is a risk of discriminatory tribal regulation of Indian and non-Indian relations.[152]

Notwithstanding this concern about the Yakima Nation's particular zoning scheme, tribal zoning should control development on Indian as well as non-Indian reservation land.[153] In denying the Yakima Nation the right to universally apply its

145. F. COHEN, *supra* note 30, at 270.

146. *Id.* In particular, "the presence of tribal governments makes the states' responsibilities more modest in Indian country, where there are operating tribal legislatures, courts, police, natural resource agencies, social service bureaus, and often schools." Wilkinson, *Cross-Jurisdictional Conflicts: An Analysis of Legitimate State Interests on Federal and Indian Lands*, 2 J. ENVTL. L. 145, 161 (1982).

147. *See* Wilkinson, supra note 146, at 162. Indian independence is a congressional goal. *See* Indian Self-Determination Act, 25 U.S.C. § 450 (1988).

148. Nation's Brief, *supra* note 15, at 52.

149. *See* Reply Brief of Petitioner Stanley Wilkinson at 17-19, Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 109 S. Ct. 2994 (1989).

150. Comment, *Jurisdiction to Zone Indian Reservations*, 53 WASH. L. REV. 677, 680 (1978).

151. Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 72 n.8 (1978).

152. Comment, *supra* note 150, at 697-98; *see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978).

153. While the issue of the unrepresented non-Indian landowner is a serious concern, it is beyond the scope of this Note.

zoning laws, the *Brendale* Court prevented the tribe from successfully implementing comprehensive reservation land use regulation and aggravated the checkerboard zoning problem to the detriment of all reservation landowners.

In the aftermath of *Brendale*, tribes may achieve greater land use control by providing for the protection of non-Indian reservation landowners. For example, tribes may wish to give non-Indians a voice in tribal government.[154] They may also lobby Congress for a legislative cure to checkerboard zoning,[155] or they may use whatever federally delegated environmental regulatory authority already exists.[156] As *Brendale* did nothing to remedy the evils of checkerboard zoning, Indians must continue to strive for more consistency in reservation land use through comprehensive regulation in order to protect the health, safety, morals, and general welfare of all reservation inhabitants.

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154. While the Suquamish Tribe has allowed non-Indians to join its planning council, the tribe has retained ultimate authority. Comment, *supra* note 150 at 699 & n.21. Despite the tribe's effort to give non-Indians a voice, for this solution to be viable, non-Indians must be given a real vote on the council.

155. Indians might propose new federal legislation that addresses the problems created by checkerboard zoning and provides means by which landowners can achieve more comprehensive reservation land use. For example, tribes may request that Congress give Indians delegated federal authority to exclusively zone reservations. Congress may be amenable to this proposition where the legislation gives non-Indian landowners a true voice in land use planning.

156. See recent amendments to the Safe Drinking Water Act, 42 U.S.C. § 300(f)-(j) (Supp. V 1987), and the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601-15. A tribe's ability to comprehensively regulate reservation resources does not cure all of the evils of incomprehensive reservation land use. Unless tribal resources are at stake, a tribe may be unable to control or influence a question involving checkerboard zoning. Thus, environmental laws may protect tribal resources, but they will not preserve tribal burial grounds from the threat of surrounding development.