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Indian Land-Use Zoning Jurisdiction: An Argument in Favor of Tribal Jurisdiction over Non-Member Fee Lands within Reservation Boundaries

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INDIAN LAND-USE ZONING JURISDICTION: AN ARGUMENT IN FAVOR OF TRIBAL JURISDICTION OVER NON-MEMBER FEE LANDS WITHIN RESERVATION BOUNDARIES

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I. INTRODUCTION

At the center of a large portion of the body of jurisprudence commonly referred to as Indian Law lies a question of jurisdiction.[1] Few of these issues have been clearly resolved by the courts, leaving uncertainty in many instances regarding the jurisdictional boundaries of Indian tribes.[2] The issue of Indian tribal land-use zoning jurisdiction is no exception.

It has been the pattern of the United States Supreme Court to interpret tribal land-use zoning jurisdictional cases in the same manner as other regulatory jurisdictional cases, using *Montana v. United States*[3] as its bellwether decision.[4] This has proven to be problematic, especially since the Court rarely agrees on their interpretation and application of *Montana*.[5]

It is the purpose of this paper to suggest that although the application of portions of the *Montana* decision are relevant in interpreting tribal jurisdictional boundaries regarding land-use zoning, strict adherence to both the fact pattern of *Montana* and the methodology of the *Montana* Court's analysis can lead to further complicating an already ambiguous issue. Part I of this paper will review *Montana v. United States*,[6] its fact pattern and the Court's analysis. A brief summation of subsequent Indian regulatory cases will follow. Part II will critically analyze *Montana* and the subsequent regulatory cases and examine why

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1. *See generally* Thomas. W. Clayton, *Brendale v. Yakima Nation: A Divided Supreme Court Cannot Agree Over Who May Zone Non-Member Fee Lands Within the Reservation*, 36 S.D. L. REV. 329 (1991); Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329 (1989).

2. Clayton, *supra* note 1, at 329, 340-49.

3. 450 U.S. 544 (1981).

4. Clayton, *supra* note 1, at 340-49. *See also* Veronica L. Bowen, *The Extent of Indian Regulatory Authority Over Non-Indians: South Dakota v. Bourland*, 27 CREIGHTON L. REV. 605 (1994).

5. Clayton, *supra* note 1, at 340-49.

6. 450 U.S. 544 (1981).

literal applications of these cases to a purely land-use zoning issue do little to clearly define zoning jurisdiction. Part III will delineate *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[7] a 1989 tribal zoning case, and compare it to *Montana* and the other regulatory jurisdictional cases. Part IV will critically analyze the Supreme Court's decision in *Brendale*. The discussion of the Court's two plurality opinions, as well as the dissenting opinion, will provide the basis for an argument in favor of a novel approach to this dilemma. Part V will initiate with the author's alternative proposal in determining a coherent policy regarding tribal land-use zoning, and will follow with a discussion of several lower court decisions that support a clearer vision and a unified policy regarding tribal zoning jurisdiction. The paper will conclude with a summary of alternatives that are available to Indian tribes in effectively adopting zoning policies that will survive a court challenge.

II. *MONTANA V. UNITED STATES* AND OTHER REGULATORY CASES

A. *MONTANA V. UNITED STATES*

1. *Facts*

In *Montana v. United States*,[8] the issue before the Court was whether the Crow Tribe could regulate or prohibit hunting and fishing by non-tribal members on land that was owned in fee simple by non-Indians but was located within the exterior boundaries of the Crow reservation.[9] Relying on treaties with the federal government, their presumptive ownership of the bed of the Big Horn River, and the inherent sovereignty of the Tribe to govern its own, the Crow Tribal Council adopted several resolutions prohibiting hunting and fishing within the reservation by anyone who was not a member of the tribe.[10]

The State of Montana asserted that it had authority to regulate hunting and fishing by non-Indians within the reservation, arguing inter alia that the state owned the bed of the Big Horn River and that the state stocked these waters with fish.[11] The United States, in its role as trustee of tribal lands, brought suit on behalf of the Tribe.[12]

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7. 492 U.S. 408 (1989).
8. 450 U.S. 544 (1981).
9. Montana v. United States, 450 U.S. 544, 544-50 (1981).
10. *Id.* at 544-49.
11. *Id.*
12. *Id.* at 549.

The federal district court denied relief to the Tribe.[13] The case was then appealed to the Ninth Circuit Court of Appeals, who reversed the lower court's decision and further held that the bed of the Big Horn River was held in trust by the United States for the Tribe.[14] The United States Supreme Court then granted certiorari to review that decision.[15]

2. *The United States Supreme Court's Analysis of Montana v. United States*

a. Treaty Rights

The Crow Tribe argued that two previous treaties with the federal government had granted the Tribe the power to exclude unwanted trespassers from reservation lands.[16] In 1851, the First Treaty of Fort Laramie[17] declared that in signing the treaty the Tribe did not "surrender the privilege of hunting, fishing or passing over" any of the lands subject to dispute between various tribes.[18] The Second Treaty of Fort Laramie in 1868[19] further provided the Crow Tribe the exclusive right to use and occupy the reservation and forbid non-Indians from passing over, settling upon, or residing in the reservation.[20] This land was to be held in trust for the Tribe by the federal government.[21]

In 1887, Congress passed the General Allotment Act (Dawes Act)[22] and in 1920 the Crow Allotment Act.[23] These two statutes authorized "the issuance of patents in fee to individual Indian allottees within the reservation."[24] After a twenty-five year period where the land remained in trust to the federal government, the Indian was allowed to dispose of the land in whatever manner he or she chose.[25] This policy resulted in large portions of Indian land being acquired by non-Indians, including approximately thirty percent of the Crow reservation.[26] This non-Indian land, though within the reservation boundaries, was now subject to state

13. *Id.*
14. *Id.* at 550.
15. *Id.* at 544.
16. *Id.* at 548-49.
17. Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749.
18. *Montana*, 450 U.S. at 548.
19. Treaty of Fort Laramie, Apr. 29, 1868, 15 Stat. 649.
20. *Montana*, 450 U.S. at 548.
21. *Id.*; *see also* Bowen, *supra* note 4, at 617.
22. Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).
23. Crow Allotment Act of 1920, ch. 224, 41 Stat. 751.
24. The General Allotment Act was amended by the Burke Act in May of 1906 to allow for the issuance of fee patents. 34 Stat. 182-83.
25. *Montana*, 450 U.S. at 548.
26. Bowen, *supra* note 4, at 617 (citing *Montana*, 450 U.S. at 548).

taxation making this land similarly situated to other non-Indian land located outside reservation boundaries.

In its analysis of this issue, the Court held that the Second Treaty of Fort Laramie vested in the Crow Tribe the authority to prohibit and regulate hunting and fishing by non-tribal members but only on such lands as the Tribe retained the right of "absolute and undisturbed use and occupation."[27] Originally the Tribe retained this right over the entire reservation.[28] The Court, however, held that these rights were subject to later acts of Congress concerning such lands.[29] The Court further held that the Allotment Acts had significantly reduced the quantity of land within the exterior boundaries on which the Tribe enjoyed exclusive occupation.[30] After examining the legislative history of these Acts, the Court determined that the purpose of this legislation was the assimilation of the tribes into the non-Indian culture and the dissolution of the tribes as sovereign entities.[31] Accordingly, the notion of the preservation of tribal authority of hunting and fishing over non-tribal members on fee lands was inconsistent with the purpose of these congressional acts.[32]

In conclusion, the Court determined that the Allotment Acts abrogated earlier treaty rights which afforded the Tribe the right to prohibit hunting and fishing by non-tribal members on the reservation.[33] In passing, the Court acknowledged that the Allotment Acts had been disavowed by the Indian Reorganization Act of 1934 (IRA);[34] however the Court found this to be irrelevant and chose to focus on the affects that the Allotment Acts had on previous treaties while leaving the purpose of subsequent acts of Congress unexplored.[35]

b. Inherent Sovereignty

In its analysis of the Tribe's inherent authority as a sovereign nation to prohibit and regulate hunting and fishing, the Court in *Montana* looked to *United States v. Wheeler,*[36] in which the Court delineates the transformation of Indian tribes from sovereign political entitles to

27. *Montana*, 450 U.S. at 558-59 (quoting the Fort Laramie Treaty of 1868, art. II, 15 Stat. 650).
28. Bowen, *supra* note 4, at 617.
29. *Montana*, 450 U.S. at 559-61.
30. *Id.* at 560-63 (citing Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165 (1977)).
31. *Id.* at 559-60.
32. *Id.* at 561.
33. *Id.* at 560.
34. *Id.* at 559 n.9; *see also* Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. § 461 (1983)).
35. *Montana*, 450 U.S. at 559 n.9.
36. 435 U.S. 313 (1978).

domestic entitles dependent within the territorial jurisdiction of the federal government.[37] This evolution has resulted in tribes retaining some characteristics of sovereignty while forfeiting others.[38]

The Court interpreted the Tribe's inherent sovereignty as being limited to those powers essential to the operation of tribal government and to order internal tribal relations.[39] The Court further held that authority for the Tribe to elicit jurisdiction beyond those boundaries could only be accorded by an act of Congress.[40] Lastly, citing to two criminal jurisdiction cases, the Court determined that a tribe's inherent sovereignty does not usually encompass "activities of non-members of the tribe."[41]

c. The *Montana* Exceptions

The Court further confounded the issue of tribal jurisdiction by offering two exceptions (the *Montana* exceptions) to the analysis.[42] The first exception held that Indian tribes did retain authority to tax, license, or otherwise regulate "non-members who enter [into] consensual relations with the tribe or its members through commercial dealing, contracts, leases, or other arrangements."[43] The second exception provided that an Indian tribe "may" assert civil jurisdiction over "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[44]

The fact that the first exception was not applicable to the fact pattern of the case, combined with the failure of the Court to find the requisite nexus between hunting and fishing regulations and the parameters offered in the second exception, resulted in both *Montana* exceptions being denied.[45] Accordingly, the Court ruled that the Tribe had no inherent sovereign authority to regulate hunting and fishing of non-members on fee lands within the exterior boundaries of the reservation.[46]

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37. Bowen, *supra* note 4, at 618.
38. *Id.*
39. *See Montana*, 450 U.S. at 564.
40. *Id.*
41. *Id.* at 565 (discussing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978)).
42. *Id.* at 565-66.
43. *Id.* (citing Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-54 (1980); Williams v. Lee, 358 U.S. 217, 223 (1959); Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947, 980 (8th Cir. 1905)).
44. *Id.* at 566 (citing Fisher v. District Court, 424 U.S. 382, 383, 389 (1976); Williams v. Lee, 358 U.S. 217, 220 (1959); Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-29 (1906); Thomas v. Gay, 169 U.S. 264, 273 (1898)).
45. *Id.*
46. *Id.* at 566-67.

B. NON-ZONING REGULATORY CASES SUBSEQUENT TO *MONTANA V. UNITED STATES*

In the sixteen years since *Montana*, the United States Supreme Court has had occasion to review several cases concerning tribal regulation of non-member Indians and non-Indians, but few of these have been purely land-use zoning in nature.

1. *Merrion v. Jicarilla Apache Tribe*

Merrion v. Jicarilla Apache Tribe[47] involved non-tribal members who entered into a lease with the Jicarilla Apache Tribe to develop petroleum resources on tribally owned land.[48] Subsequent to the execution of the lease, the Tribe adopted a severance tax on oil and gas extracted from tribally owned lands.[49] The lessees sought a permanent injunction in federal district court to invalidate this tax as it applied to them.[50]

The Supreme Court upheld the validity of the tax against the lessees stating that the Tribe retained inherent sovereign authority to tax non-members while implying that this tax could also extend to all lands within the exterior boundaries of the reservation.[51]

2. *New Mexico v. Mescalero Apache Tribe*

One year after *Merrion*, the Court ruled on a case with a fact pattern somewhat similar to that of *Montana*. In *New Mexico v. Mescalero Apache Tribe*,[52] the Court was asked to rule on the validity of state hunting and fishing regulations that were being enforced against non-tribal members on reservation land.[53]

The Court denied that the rule of *Montana* was applicable in this instance stating that *Montana* involved fee simple land held by non-members of the tribe, while the land in *Mescalero Apache* was tribally owned or land held in trust for the tribe by the federal government.[54] The Court held that: "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal

47. 455 U.S. 130 (1982).
48. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 135 (1982).
49. *Id.* at 135-36.
50. *Id.* at 136.
51. *Id.* at 137, 152.
52. 462 U.S. 324 (1983).
53. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330-31 (1983).
54. *Id.* at 330-31.

interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."[55]

3. *United States v. Dion*

In 1986, the Court was asked to rule on a case concerning a conflict between tribal hunting rights established by treaty and subsequent federal laws enacted for the preservation of wildlife.[56] In *United States v. Dion*,[57] the defendant, a member of the Yankton Sioux Tribe, was tried and convicted for shooting four bald eagles and one golden eagle on the Yankton Sioux Reservation.[58] These acts were determined to be in violation of the Federal Endangered Species Act[59] and the Bald Eagle Protection Act (Eagle Protection Act).[60]

On appeal, Dion argued that treaty rights granted to the Yankton Sioux Tribe by the federal government provided that the Tribe would have exclusive hunting rights on reservation lands, therefore nullifying the application of the Endangered Species Act and the Eagle Protection Act against tribal members.[61] The Government argued that these treaty rights had been abrogated by a subsequent act of Congress.[62]

The Court explained that for a subsequent act of Congress to abrogate treaty rights, the intent of Congress should be "clear and plain" but need not necessarily be express.[63] Thus an act could be found to abrogate treaty rights by implication if by examining the legislative history. the face of the document, or the surrounding circumstances it became clear that Congress intended to limit treaty rights.[64] The Court further held that: "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[65]

In its examination of the Eagle Protection Act, the Court cited to the exception allowing for tribes to take eagles under a permit granted by the Secretary of the Interior to the tribe "for the religious purposes of Indian tribes."[66] Noting that this conflict with treaty rights had been

55. *Id.* at 334.
56. United States v. Dion, 476 U.S. 734 (1986).
57. *Id.*
58. *Id.* at 735.
59. *Id.* (citing the Endangered Species Act, 87 Stat. 884 (as amended 16 U.S.C. § 668dd)).
60. *Id.* (citing the Bald Eagle Protection Act, 54 Stat. 250 (codified at 16 U.S.C. § 668 - 668d)).
61. *Id.* at 735-37.
62. *Id.* at 738.
63. *Id.*
64. *Id.* at 739.
65. *Id.* at 739-40.
66. *Id.* at 740.

intended by Congress, the Court determined that it was the implied intent of Congress to abrogate previous treaty rights, and thus denied Dion's defense.[67]

4. *South Dakota v. Bourland*

In 1993, the Court decided still another case involving the jurisdictional limits of an Indian tribe to regulate hunting and fishing on land located within the original reservation boundaries.[68] The facts of *South Dakota v. Bourland*[69] are as follows. The federal government negotiated with the Cheyenne River Sioux Tribe for the purchase of reservation land with the purpose of building the Oahe Dam and Reservoir.[70] This parcel contained 104,420 acres owned or held in trust for the Tribe and 18,000 acres of privately owned fee lands.[71] A portion of this land was eventually submerged beneath the waters of the reservoir and the remaining land abutted the reservoir.[72]

In accordance with the Cheyenne River Act of 1954,[73] tribal members retained certain rights in this "taken" land; among those being the right to hunt and fish on these lands including the lands previously held in fee by non-Indians.[74] The Cheyenne River Sioux Tribe subsequently enforced their hunting and fishing laws on this land against tribal members and non-tribal members alike.[75] The State of South Dakota concurrently enforced its hunting and fishing regulations on this portion of land, as well as other fee lands within the reservation, against non-tribal members only.[76]

Unlike previous years when the Tribe and the State were able to negotiate an agreement regarding hunting and fishing regulations, in 1988 no agreement was realized and the Tribe proclaimed that state deer hunting licenses would not be recognized by the Tribe and that those who hunted on any reservation land without a tribal license would be prosecuted criminally by the Tribe.[77] The State then sought relief in the United States District Court for the District of South Dakota seeking injunctive relief and a declaratory judgment concerning three issues:

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67. *Id.* at 740, 743-45.
68. South Dakota v. Bourland, 508 U.S. 679, 681-82 (1993).
69. 508 U.S. 679 (1993).
70. *Id.* at 683-84.
71. *Id.*
72. South Dakota v. Bourland, 949 F.2d 984, 988 (8th Cir. 1991).
73. 68 Stat. 1191.
74. *Bourland*, 949 F.2d at 988.
75. South Dakota v. Ducheneaux, No. 88-3049, slip op. at 4 (D.S.D. Aug. 21, 1990) (citing the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984).
76. *Id.* at 4.
77. *Bourland*, 949 F.2d at 988.

(1) whether the Tribe had authority to assert criminal jurisdiction over non-Indians who hunted and fished on the reservation; (2) whether the Tribe had the authority to exclude non-Indians from public lands within the reservation; and (3) whether the reservation boundaries had been diminished when the federal government gained possession of the land.[78]

The district court, citing to the tenet of *Montana*, rejected the Tribe's argument as to its ability to regulate hunting and fishing against non-members on any of the taken land or fee land.[79] On appeal to the United States Court of Appeals for the Eighth Circuit, the appellate court held that the tribe retained civil jurisdiction over non-members on the former trust lands that had been taken.[80] The issue of jurisdiction over non-members on the former fee lands was not appealed.[81]

After granting certiorari, a majority of the United States Supreme Court rejected the findings of the Eighth Circuit and embraced the rule of *Montana*. The Court held that regardless of the purpose, Congress had broadly opened up the land to non-Indians, thus dissolving pre-existing tribal rights to regulatory control.[82]

III. CRITICAL ANALYSIS OF *MONTANA V. UNITED STATES* AND SUBSEQUENT NON-ZONING REGULATORY CASES

This section will address the distinct quandary of jurisdictional uncertainty remaining in the wake of *Montana*. Part IV follows with a critical analysis of *Brendale* and an accompanying discussion regarding why a land-use zoning jurisdictional issue, as found in *Brendale*, should not necessarily be addressed in terms of the *Montana* decision.

A. THE CONTINUING IMPACT OF *MONTANA V. UNITED STATES*

There are certain issues in the Court's landmark decision of *Montana v. United States* that have become the source of much dispute and debate.[83] In its analysis of treaty-based rights available to the tribe, the Court in *Montana* was confronted with three major issues: (1) whether the Tribe had power to exclude; (2) whether the treaty-based right was central to the tribe's cultural existence; and (3) whether the treaty-based right had been modified or abrogated by a subsequent act of Congress.[84]

78. *Bourland*, 949 F.2d at 988; *Ducheneaux*, slip op. at 1-3.
79. *Ducheneaux*, slip op. at 12-21.
80. *Bourland*, 949 F.2d at 994.
81. *Id.* at 989 n.11.
82. South Dakota v. Bourland, 508 U.S. 679, 693 (1993).
83. Montana v. United States, 450 U.S. 544, 556-59 (1981).
84. *Id.* at 556-59.

The Court held that in light of congressional intent in its adoption of the General Allotment Act, the land had been opened to non-Indian settlement, thus abrogating the earlier Second Treaty of Fort Laramie, reducing the area of exclusion originally granted to the Tribe, and rendering the right of exclusion no longer central to the Tribe's existence.[85]

In its interpretation of these issues, the majority chose to disregard several well established doctrines in Indian jurisprudence. Since the early twentieth century it has been the custom of the United States Supreme Court to interpret treaties that were assumed to be the consequence of unfair bargaining by: (1) resolving ambiguous language in the treaty in favor of the tribe; (2) interpreting treaties as Indians would have when they entered into them; and (3) construing treaties liberally in favor of Indians.[86] Perhaps the Court could claim that the aforementioned treaties and subsequent statutes were unambiguous and clear on their face. However, a strong argument could be made that by the time *Montana* appeared before this Court, it was accepted that few tribes would have voluntarily entered into treaties that would have the consequences of reducing their land base and their inherent sovereignty with little in return unless there was uncertainty as to the text of the document.

Another suspect issue in *Montana* is the Court's reliance on the legislative intent of the General Allotment Act of 1887,[87] while failing to consider the same rationale with regard to the Indian Reorganization Act of 1934 (IRA).[88] The adoption of the IRA refuted the purpose of the Allotment Act, yet instead of relying on the legislative intent of the IRA, the Court chose to adopt the position that the IRA had not reinstated the right to exclude.[89] This opinion is in direct opposition to what has been federal government policy since the early 1970s, the support of tribal self-determination.[90]

In its analysis as to whether the Tribe retained its power to zone as a segment of its inherent sovereignty, the Court looked to *United States v. Wheeler*, a case involving a question of criminal jurisdiction.[91] The

85. *Id.* at 556-63.

86. *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows or Grass Grows Upon the Earth—How Long a Time is That?,"* 63 CALIF. L. REV. 601, 617 (1975); *see also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Winters v. United States, 207 U.S. 654, 577 (1908).

87. *Montana*, 450 U.S. at 559-63.

88. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984.

89. *Montana*, 450 U.S. at 559-60 n.9.

90. President's Message to Congress on Indian Affairs, 213 PUB. PAPERS 564 (July 8, 1970).

91. *Montana*, 450 U.S. at 563-66 (quoting United States v. Wheeler, 435 U.S. 313, 322-23, 326 (1978)).

Court cited to *Wheeler* in holding that the Tribe's inherent sovereignty is limited to those powers necessary to defend tribal self-government and to order internal tribal relations.[92] The Court further held that the exercise of tribal authority beyond what is necessary for self-government and ordering internal affairs can only emanate from an explicit act of Congress.[93]

The position that the majority took in *Montana* may in fact be applicable to criminal cases,[94] but regulatory enforcement is more often pursued through civil litigation than criminal litigation.[95] It is well established that tribes retain much broader jurisdiction over civil matters than criminal matters on reservation land.[96] In conclusion, the Court also found the two exceptions to be inapplicable to the *Montana* fact pattern.[97]

B. SUBSEQUENT NON-ZONING REGULATORY CASES

In *Merrion*, the Court upheld the severance tax adopted by the Tribe.[98] The Court held that the validity of the tax was supported by the fact that taxation of non-members on tribal land was retained as a source of its inherent sovereignty.[99] The Court in Merrion did not cite to *Montana* in its opinion.[100] In *New Mexico v. Mescalero Apache Tribe*, the Court delineated the rule applied in *Montana* from its own findings by stating that *Montana* concerned fee lands and Mescalero Apache concerned tribal lands, therefore nullifying a strict adherence to *Montana*.[101]

In *United States v. Dion*, the Court applied the subsequent abrogation theory used in *Montana*.[102] The Court was able to substitute the Eagle Protection Act for the General Allotment Act used in *Montana*.[103] What differentiates *Dion* from *Montana* regarding the abrogation theory

92. *Id.* at 564.
93. *Id.* at 564-65.
94. United States v. Wheeler, 435 U.S. 313, 326 (1978).
95. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987) (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) ("Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, their civil jurisdiction is not similarly restricted")); *see also* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 253-54 (1982) ("The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction").
96. *See Iowa Mut.*, 480 U.S. at 14-5; National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 854-55 (1985).
97. *Montana*, 450 U.S. at 566-67.
98. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982).
99. *Id.*
100. Bowen, *supra* note 4, at 621.
101. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330-31 (1983).
102. United States v. Dion, 476 U.S. 734, 743 (1986).
103. *Id.* at 738-46.

however, is that there was no further act of Congress subsequent to the Eagle Protection Act as there had been with the IRA in *Montana*.[104] Therefore the Court did not have to consider the relevance of a subsequent act.

In *South Dakota v. Bourland*, the Court once again rendered a strict application of *Montana* in enforcing the subsequent abrogation of treaty theory.[105] The Court then magnified the scope of that theory to include not only the Allotment Act, but any land transfer that was the result of a congressional act.[106]

It is the opinion of some that the *Bourland* Court's embrace of *Montana* and its application to the *Bourland* fact pattern will settle the uncertainty regarding regulatory authority between Indian tribes and non-Indians.[107] That may be true with regard to hunting and fishing regulations; however Part IV of this paper will suggest that not only is that theory highly suspect with regard to land-use zoning jurisdictional issues, but that the application of much of the *Montana* case to current land-use zoning issues is irrelevant and misleading.

IV. *BRENDALE V. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION*

All the aforementioned cases in Part I share the distinction of being regulatory in nature. The cases subsequent to *Montana* were all analyzed using *Montana* as a precedent. *Brendale v. Confederated Tribes and Bands of the Yakima Nation*[108] is treated separately owing to the fact that *Brendale* is a purely land-use zoning case. The analysis in Part IV will suggest that purely land-use zoning issues should be scrutinized distinctly and separately from other regulatory cases.

A. FACTS

The Yakima Indian Reservation was created by treaty with the United States Government in 1855.[109] As a consequence of the General Allotment Act of 1887, approximately twenty percent of the land within the exterior boundaries of the reservation was claimed in fee by non-Indians.[110] The reservation was subsequently divided informally into an "open area," where eighty percent of the population and fifty percent

104. *Id.*
105. South Dakota v. Bourland, 508 U.S. 679, 687-94 (1993).
106. *Id.* at 691-93.
107. *See* Bowen, *supra* note 4, at 658-59.
108. 492 U.S. 408 (1989).
109. Treaty Between the United States and the Yakima Nation of Indians, June 9, 1855, 12 Stat. 951, 952.
110. Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989).

of the land were non-Indian, and a "closed area," which is inhabited exclusively by Indians who own ninety percent of the land.[111]

In 1970, the Yakima Nation adopted its first zoning ordinance which was applicable to all lands within the exterior boundaries of the reservation.[112] Yakima County established its own comprehensive zoning ordinance in 1972.[113] This ordinance was applicable to all land within Yakima County except for Indian land held in trust.[114]

In April 1983, Brendale, a part-Indian non-tribal member, filed an application to the Yakima County Planning Board to subdivide a twenty acre plot in the "closed area" into ten two-acre sights.[115] During the public comment period, the Yakima Nation responded that the County was without jurisdiction to zone the Brendale property.[116] The County Board of Commissioners held that the County did in fact have jurisdiction.[117]

Yakima Nation filed suit in district court seeking a declaratory judgment as to their exclusive jurisdiction to zone this property and sought injunctive relief to enjoin any land-use activity in violation of their zoning ordinance.[118] The district court held in favor of the Tribe regarding its claim of jurisdiction to zone the Brendale property.[119] On appeal, the United States Court of Appeals for the Ninth Circuit upheld the Tribe's authority to zone the Brendale property.[120]

In September of 1983, shortly after the Brendale application, Wilkinson, a non-Indian, applied to the County to subdivide his three acres in the "open area" of the reservation into twenty lots of varying size.[121] Again the Yakima Nation protested this proposal claiming tribal jurisdiction to zone Wilkinson's land and once again the County Board of Commissioners reasoned that they in fact had jurisdiction and approved Wilkinson's proposal.[122]

The Yakima Nation again filed suit in district court praying for the same injunctive and declaratory relief as with the Brendale parcel.[123]

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111. *Id.* at 436-37.
112. *Id.* at 414.
113. *Id.*
114. *Id.*
115. *Id.* at 417-18.
116. *Id.*
117. *Id.*
118. *Id.* at 419-20 (citing Yakima Indian Nation v. Whiteside, 617 F. Supp. 735 (E.D. Wa. 1985) (Whiteside I) (also referred to as the *Brendale* case)).
119. *Id.*
120. *Id.* at 419-23.
121. *Id.* at 418-21.
122. *Id.*
123. *Id.* (citing Yakima Nation v. Whiteside, 617 F. Supp. 750 (E.D. Wa. 1985) (Whiteside II) (also referred to as the *Wilkinson* case)).

However, unlike the Brendale parcel, the district court held that the Wilkinson parcel was subject to County zoning authority.[124] On appeal to the Court of Appeals for the Ninth Circuit, the Court reversed the ruling of the district court and remanded the case.[125] The Appeals Court found the Yakima Nation to have presumptive authority to zone all lands within the borders of the reservation, unless there was a significant County interest in regulating the parcels that outweighed the Tribe's interest in administering long term land-use laws.[126] These cases, consolidated by the Court of Appeals, were then granted certiorari by the United States Supreme Court.[127]

B. THE UNITED STATES SUPREME COURT'S ANALYSIS

Once again the Court looked at *Montana* for guidance in its approach to the *Brendale* issue.[128] The Court in *Brendale*, as it had in *Montana*, looked for both treaty-based and sovereign-based authority in its determination of tribal jurisdictional rights.[129]

After analyzing the Treaty of 1855, which had created the Yakima Reservation, the Court was unable to determine whether the Tribe had been granted land-use zoning jurisdiction over non-member fee lands.[130] The Court then applied the more subjective test of whether the Tribe's power to zone arose from its inherent sovereignty, and if so, whether Congress had within its plenary power over the tribes divested them of that power either through treaty, statute, or implication.[131]

Underscoring the express purpose of this paper, the *Brendale* Court fractionated into three distinct groups, making an already ambiguous issue less coherent.[132] One plurality opinion gave Yakima County jurisdiction over a parcel in the "open area" of the reservation, identified by a primarily non-tribal population with significant non-Indian fee ownership and prevailing county services.[133] The other plurality gave

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124. *Id.* at 420-23.

125. *Id.*

126. *Id.*

127. The consolidated case at the appeals level was known as Confederated Tribes and Bands of Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987). Yakima County did not appeal the decision of *Whiteside I* (the *Brendale* case). *Id.* at 420-23. Before the district court could re-hear the *Wilkinson* case; Brendale, Wilkinson, and Yakima County petitioned to the United States Supreme Court for writ of certiorari, which was granted. Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987), *cert. granted*, 487 U.S. 1204 (1988).

128. *See* Clayton, *supra* note 1, at 334.

129. Clayton, *supra* note 1, at 344.

130. Clayton, *supra* note 1, at 336.

131. Clayton, *supra* note 1, at 337 (citing Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); United States v. Wheeler, 435 U.S. 313, 324 (1978); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 851 (1985)).

132. Clayton, *supra* note 1, at 329.

133. Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408, 414-33

the Yakima Nation jurisdiction over a parcel in the "closed area" where no significant non-tribal cultural and religious interests were paramount.[134] Justice Blackmun wrote a strong dissenting opinion rejecting the result of the first plurality and the methodology of the second.[135]

V. A CRITICAL ANALYSIS OF *BRENDALE*

The Court's disjointed opinion in *Brendale* exemplifies not only how a strict application of *Montana*, both factually and procedurally, to a land-use zoning jurisdiction issue is inadequate, but also how such an application is totally beyond the realm of effecting a workable solution. The Court initially looked to treaty-based authority in allowing tribes to enforce land-use zoning ordinances against non-Indian fee land owners.[136] Considering the fact that comprehensive land-use ordinances of any kind were not adopted in the United States until well after the treaty period[137] it is not difficult to understand why the Court was unable to find such a reference in the treaties.[138]

Secondly, the Court looked to the issue of tribal authority to enforce zoning via its inherent sovereignty.[139] It has been broadly stated that Congress, in its plenary power over the tribes, has the power to divest the tribes of their sovereignty as it sees fit.[140] However it is also widely accepted that until Congress acts, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty, statute, or by implication as a necessary result of their dependent status."[141]

(1989).

134. *Id.* at 433-48.

135. *Id.* at 448-68.

136. Clayton, *supra* note 1, at 334-35.

137. The seventeenth century land-use regulations were based on nuisance concepts. A. RATHKOPT, THE LAW OF ZONING AND PLANNING § 1.01 (4th ed. 1983). These common law principles were applied during this time on a case-by-case basis to enjoin unreasonable uses of land. R. ANDERSON, AMERICAN LAW OF ZONING § 3.04 (2d ed. 1976). Further regulation was eventually accomplished via restrictive covenants prohibiting specific land uses. *Id.*

By the early twentieth century comprehensive land-use systems were beginning to appear. A. RATHKOPT, THE LAW OF ZONING AND PLANNING § 1.01[2] (4th ed. 1983). In 1916, the Board of Estimate and Apportionment of the City of New York promulgated what is considered the first comprehensive zoning regulation. The purpose of this resolution was to protect central Manhattan from further overcrowding due to anticipated improvements in transportation facilities. The resolution was upheld as a valid exercise of the police power by the New York Court of Appeals in 1920. Lincoln Trust Co. v. Williams Building Corp., 128 N.E. 209, 211 (N.Y. 1920).

138. The constitutionality of a comprehensive municipal zoning ordinance was not established until 1926. *See, e.g.*, Euclid v. Ambler Realty Company, 272 U.S. 365, 379-97 (1926). *Euclid* was followed by a number of cases that established the validity of zoning plans which divided municipalities into districts, each of which limited land usage. N. WILLIAMS, AMERICAN PLANNING LAW—LAND USE AND THE POLICE POWER §§ 5.03-5.04 (1974). A detailed history of the early zoning decisions can be found in treatises. *See, e.g.*, E. BASSETT, ZONING—THE FIRST TWENTY YEARS (1936); E. YOKLEY, ZONING LAW AND PRACTICE §§ 1-1 to 3-27 (4th ed. 1978).

139. Clayton, *supra* note 1, at 336-37.

140. United States v. Wheeler, 435 U.S. 313, 323 (1978); *see also* National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845, 851 (1985); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

141. *Wheeler*, 435 U.S. at 324.

Regardless of this precedent, Justice White, writing for one plurality in *Brendale* held inter alia that the power to zone did not flow from the power to govern itself or from the power to control internal affairs.[142] He further stated that there had been no specific grant of zoning authority from Congress, therefore it did not exist.[143] Justice Stevens, writing for the other plurality, ruled inter alia that the "change of neighborhood" rule of equitable servitudes denied the tribe the ability to enforce zoning laws against non-Indians on areas of the reservation that were predominantly occupied by non-Indians because it did not further the tribe's interests.[144]

The disparity in the Court's various opinions reflects a basic misunderstanding of the issue at hand. To adjudge a solution for this relatively new phenomenon of comprehensive zoning using a criteria originally adopted to address hunting and fishing issues is fruitless.[145] Instead of delving through the past in search of treaty references to modern concepts and pursuing an inference from Congress in an area in which Congress has yet to effectively speak, the Court may have been wise to consider Justice Blackmun's dissenting opinion in *Brendale* which espouses a review of current federal government policy.[146]

Justice Blackmun based his dissenting opinion on tribal sovereignty and on the federal government's policy of self-determination.[147] Blackmun proposed that tribes retain exclusive zoning jurisdiction where the tribe had enacted a comprehensive zoning code.[148] He further stated that the County should have jurisdiction to zone Indian country only where the tribe had not exercised its authority.[149] Blackmun further attacked the plurality opinions by stating that they enhanced the state of "checkerboard" jurisdiction, which under the rule of *Montana* and supported in part by the plurality opinions in *Brendale*, allowed for land to be jurisdictionally fractionated, rendering any comprehensive zoning code ineffective and unenforceable.[150]

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142. Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408, 412-32 (1989).

143. *Id.*

144. *Id.* at 441-44. "Under the 'change of neighborhood' doctrine, an equitable servitude lapses when the restriction, as applied to 'the general vicinity and not merely a few parcels,' has 'become outmoded,' has 'lost its usefulness,' or has become 'inequitable' to enforce." *Id.* at 447 (quoting R. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 8.20 (1984)).

145. *See infra* notes 131-32 and accompanying text.

146. *Brendale*, 492 U.S. at 447-67.

147. *Id.*

148. *Id.* at 467-68.

149. *Id.*

150. *Id.* at 3025-26.

VI. AUTHOR'S PROPOSAL AND LOWER COURT DECISIONS

Of the myriad of problems that currently plague Indian Country, land fractionation and the lack of effective land-use policies are among the most influential.[151] Jurisdictional uncertainty prohibits many tribes from effectively enforcing environmental codes thereby leaving tribal natural resources at risk.[152] This is also detrimental to the design of a tribal economic development plan that could enhance the tribes self-sufficiency and alleviate tribal dependency on the federal government.[153]

The United States Supreme Court's strict application of *Montana* to the *Brendale* case only enhanced the premise that a novel approach is necessary in addressing tribal land-use zoning issues. A new approach needs to address the issues specific to comprehensive zoning and apart from other regulatory jurisdictional problems.

One criteria that has evolved in a series of lower court decisions embraces the second *Montana* exception which allows for tribes to assert civil jurisdiction over "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[154] This exception is harmonious with the express purpose of comprehensive zoning and is consistent with the federal government's policy of promoting tribal self-determination. This tenet is also consistent with the numerous Supreme Court cases which have held the original boundaries of Indian reservations to still be intact in spite of the eventual transfer of some reservation lands to non-Indians.[155]

Several lower court decisions have upheld the enforcement of tribal zoning codes against non-Indians on fee lands. In *Knight v. Shoshone and Arapahoe Indian Tribes,*[156] the defendants, James and Karen Knight, were non-Indian owners of fee lands on the Wind River Indian

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151. *Id.*; *see also* Carl G. Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. REV. 231 (1997).

152. In October of 1996, a zeolite mine was proposed for fee lands located near Manderson on Pine Ridge Reservation. Although Manderson is located in the center of Pine Ridge Reservation, this land was technically under state regulatory jurisdiction. Pine Ridge currently has no comprehensive land-use bylaw and was in pursuit of other legal recourse to enjoin this operation. It was eventually determined that although a non-Indian owned the surface rights to the land, the mineral rights had been retained by the previous Indian land owner. Jean Roach, *Proposed Zeolite Mine is Undermined,* INDIAN COUNTRY TODAY, Nov. 4-11, 1996, at B2.

153. Clayton, *supra* note 1, at 349.

154. *See* Knight v. Shoshone & Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982); Superior Oil Co. v. United States, 605 F. Supp. 674 (D. Utah 1985); Cardin v. DeLaCruz, 671 F.2d 363, 366 (9th Cir. 1982) (citing *Montana*, 450 U.S. at 565-66).

155. Mattz v. Arnett, 412 U.S. 481 (1973); United States v. Washington, 496 F.2d 620, 621 (9th Cir. 1974), *cert. denied*, 419 U.S. 1032 (1974).

156. 670 F.2d 900 (10th Cir. 1982).

Reservation in Wyoming who were attempting to divide their property to create a thirty-two lot subdivision.[157] After this proposal, but before its submission for approval, the Shoshone and Arapahoe Business Councils enacted Tribal Ordinance Number 38,[158] a tribal zoning code which applied to:

> [A]ll lands within the exterior boundaries of Wind River Reservation, whether held in trust by the United States for the benefit of individual Indians, or for the Shoshone and Arapahoe tribes, or held in fee by Indians or non-Indians.[159]

Subsequently, the Knight's filed their subdivision plan with the Freemont County Planning Commission and the Tribes brought an action in federal district court to enjoin the subdivision proposal until it had been approved by the Tribes.[160]

The district court upheld the Tribe's claim of jurisdiction over the lands involved in the proposed subdivision and the defendants appealed the decision.[161] The United States Court of Appeals for the Tenth Circuit upheld the lower court's decision ruling that the Tribes retained jurisdiction to zone the fee lands.[162] In its decision, the Court cited to the second *Montana* exception stating:

> "Indian tribes retain inherent sovereignty power to exercise some forms of jurisdiction over non-Indians on their reservations, even on non-Indian fee lands."[163] One proper form of the exercise of that power may be in response to "conduct [which] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[164]

Cardin v. DeLaCruz[165] involved a non-Indian owner of a thirty-two acre lot of land within the exterior boundaries of the Quinault Indian Reservation in Washington on which he operated a grocery and general store.[166] The Quinault Tribe requested and obtained an injunction from the Tribal Court to close the store for violations of tribal building, health,

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157. Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900, 901 (1982).
158. *Id.* at 901.
159. *Id.* (citing Tribal Ordinance No. 38, a tribal zoning code for Arapahoe and Shoshone Tribes).
160. *Id.* at 901-02.
161. *Id.* at 902.
162. *Id.*
163. *Id.* (citing *Montana*, 450 U.S. at 566).
164. *Id.*
165. 671 F.2d 363 (9th Cir. 1982).
166. Cardin v. DeLaCruz, 671 F.2d 363, 364 (9th Cir. 1982).

and safety codes.[167] The store owner then filed an action in federal district court seeking to enjoin tribal officers from regulating the operation of his business.[168]

The district court ruled in favor of the store owner, holding that the Tribe lacked jurisdiction to enforce its building, health, and safety regulation against him.[169] The district court based its decision largely on the United States Supreme Court decision of *Oliphant v. Suquamish Indian Tribe*,[170] a criminal case, in holding "that the tribe's power of self-government to regulate the internal and social relations of its members did not extend to non-Indian plaintiffs."[171] This decision was further appealed by the appellants.[172]

The United States Court of Appeals for the Ninth Circuit reversed the lower court's decision stating that *Oliphant* concerned itself with tribal criminal jurisdiction and made no mention of civil or regulatory jurisdiction.[173] The Court further cited to the second *Montana* exception in holding that health regulations were a valid purpose for tribal regulatory jurisdiction over non-Indian fee land owners, thus upholding the tribal code against the non-Indian land owner.[174]

In 1982, the Ninth Circuit once again ruled on an Indian zoning case. In *Confederated Salish and Kootenai Tribes v. Namen*,[175] the Tribes brought an action against non-Indian owners of fee land fronting on the south half of Flathead Lake in an attempt to regulate the landowners' riparian rights on the lake.[176] The United States District Court for Montana ruled that the Tribes had no authority to regulate the riparian rights of non-Indian landowners.[177] The Ninth Circuit, reversed the lower court, once again citing to the second *Montana* exception in holding that the conduct the Tribe was attempting to regulate had the potential for significantly affecting the economy, health and welfare of the Tribes.[178]

In *Superior Oil Company v. United States*,[179] the oil companies brought an action against the United States, the Navajo Tribe, and the officers of the Tribe, arising from the Tribe's failure to act on the

167. *Id.* at 365.
168. *Id.*
169. *Id.* at 364.
170. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
171. *Cardin*, 671 F.2d at 365.
172. *Id.*
173. *Id.* at 365-67.
174. *Id.* at 366 (citing *Montana*, 450 U.S. at 565-66).
175. 665 F.2d 951 (9th Cir. 1982).
176. Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 953 (9th Cir. 1982).
177. *Id.* at 951.
178. *Id.* at 964.
179. 605 F. Supp. 674 (D. Utah 1985).

companies requests for approval of assignment of oil and gas leases and seismic testing permits.[180]

The United States District Court for Utah dismissed this complaint holding inter alia that the Court had no authority to order the Tribe to approve permits because such an order would impose on the Tribe's sovereignty partially derived from the second *Montana* exception authorizing the Tribe's regulatory jurisdiction in matters of tribal economic security, health, and welfare.[181]

Each of the decisions above provide for a broad recognition of tribal authority to regulate non-Indian fee land owners through zoning or other health related codes that are at once in harmony with the basic premise of a comprehensive land-use plan and the Federal Government's policy of self-determination for Indian tribes. These cases also reveal a willingness of the lower courts to delineate between purely land-use zoning jurisdiction fact patterns and other forms of regulatory jurisdiction involving non-Indian fee lands within reservation boundaries.

VII. CONCLUSION

The United States Supreme Court decision of *Brendale v. Confederated Tribes and Bands of Yakima Nation* suggests that a strict application of *Montana v. United States* to each Indian regulatory jurisdiction scenario is inadequate.[182] A novel approach that integrates current federal government policy concerning tribal self-determination with the modern precepts of comprehensive land-use zoning is essential.

In the absence of a clear congressional directive concerning comprehensive land-use zoning for Indian tribes, the Court should refrain from embracing the entire rule of *Montana* and consider the application of the second *Montana* exception. The consistent application of this exception by lower courts has offered an approach which is both well-defined and uniform.

In consideration of these lower court decisions, as well as the modern approach to comprehensive land-use zoning, it would serve tribes well to not only enact a comprehensive land-use zoning policy; but to insure that the ordinance is explicit in its purpose to protect the political integrity, economic security, as well as the health and welfare of the tribe.

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180. Superior Oil Co. v. United States, 605 F. Supp. 674, 677 (D. Utah 1985).
181. *Id.* at 683-84.
182. *See* Brendale v. Confederated Tribes and Bands of the Yakima Nation, 492 U.S. 408 (1989).