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JURISDICTION TO ZONE INDIAN RESERVATIONS

During the nineteenth century, many Indian tribes granted the United States government virtually all of their tribal lands in return for the promise that their people could live without disturbance on reservations.¹ Today the extent to which Indians may live on their reservations without interference is clouded by jurisdictional conflicts.² The primary adversaries are Indian tribes and local and state governments.³

A significant aspect of this jurisdictional controversy concerns the power of tribal governments to enforce their civil regulatory laws on reservation lands, including ordinances regulating pollution, water conservation and usage, natural resource protection, and zoning. This controversy results from differing perceptions of the extent to which such self-regulation should affect non-Indians.⁴

This comment will examine one of the most critical aspects of the civil jurisdiction issue—tribal jurisdiction to exercise land use planning and zoning control. With such jurisdiction, a tribe may regulate or prohibit the development of reservation lands, and thus exercise a measure of control over the future of its reservation. Without zoning

⁴ States may delegate many of their powers, such as zoning, to counties and municipalities. See, e.g., WASH. REV. CODE ch. 36.70 (1976 & Supp. 1977) (planning act for counties).
⁵ For example, the Secretary of the Interior has announced conditional approval of a tribal zoning ordinance for the Fort Hall Reservation in Idaho which includes tribal zoning jurisdiction over non-Indians. Interior Secretary Approves Indian Tax, Zoning Laws, 4 INDIAN L. REP. (AM. INDIAN L. TRAINING PROGRAM) § 0–7 (1977). The Secretary gave limited attention to the legal basis for the approval. See Memorandum from H. Gregory Austin, Solicitor for the Department of the Interior 21–25 (Oct. 13, 1976) (regarding tribal jurisdiction over non-Indians in civil matters and approval of various tribal ordinances). It should be noted, however, that less than four percent of the reservation is owned by non-Indians. Interior Secretary Approves Indian Tax, Zoning Laws, supra § 0–8; Memorandum from H. Gregory Austin, supra at 3. Whether such approval would be extended to a reservation primarily owned by non-Indians is uncertain. See Part III-A infra.
jurisdiction, most tribes would be forced to submit to the judgments of non-Indians about the uses of reservation lands.\(^5\)

An introduction to the history and patterns of land ownership on Indian reservations is important to an understanding of the clashes between Indian and non-Indian reservation residents. Equally important is the recognition that tribes have certain inherent controls over reservation lands, resources, and activities. Following a brief development of these background issues, this comment examines federal diminutions of tribal sovereignty and their possible application to tribal zoning powers. It concludes that specific federal enactments that have been asserted as support for state zoning powers do not in fact transfer such jurisdiction to the states; that the exercise of state zoning jurisdiction may be preempted by federal enactments and tribal laws; and that state zoning would, in any event, constitute impermissible infringement on any tribal zoning schemes.

Finally, since federal law in this area is in the process of significant change, this comment concludes with an analysis of the underlying political considerations that may ultimately determine the extent to which Indians will be allowed to regulate land use on their reservations.

I. BACKGROUND

A. Ownership of Indian Lands

Indian reservation lands are not owned exclusively by Indians. Treaties with particular tribes\(^6\) and the more general Dawes Act (also known as the General Allotment Act)\(^7\) of 1887 authorized mandatory allotments of parcels of reservation lands to individual Indians under

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\(^5\) The conflict can be seen by comparing tribal planning and zoning on the Swinomish Reservation in Washington State with that undertaken by Skagit County, in which the reservation is located. About 80% of the reservation has been placed in a forest zone by the tribe in an attempt to preserve the natural character of the reservation. Swinomish Indian Tribal Community, Zoning Ordinance (July 2, 1976). The county, on the other hand, has zoned this portion of the reservation for residential and industrial uses. Skagit County, Wash., Interim Zoning Ordinance 4081 (1966).

\(^6\) E.g., Treaty with the Omahas, Mar. 16, 1854, 10 Stat. 1043 (incorporated by reference in several other treaties); Treaty with the Oneida Nation, June 1, 1798 (unpublished treaty), cited in F. Cohen, Handbook of Federal Indian Law 206 n.4 (1942) (first allotments of tribal lands to individuals). See F. Cohen, supra at 63–64, 206–07.

Reservation Zoning

conditions of trusteeship imposed by the federal government. Under the Dawes Act, for example, after a period of wardship, the Indian beneficiary was generally entitled to private ownership of the land in fee simple, free from all encumbrances. The federal policy was to change the character of reservation lands from tribal to individual ownership. Not all reservation land, however, was allotted to individual Indians under this system. On some reservations there remained "surplus" unallotted lands. The federal government sold much of this surplus land to non-Indians. Also, after achieving fee simple ownership, individual Indian allottees could freely alienate their allotments. As a result, total Indian landholdings on reservations dropped from 138 million acres to 48 million acres between 1889 and 1934.

Although the allotment policy was terminated in 1934 by the Indian Reorganization Act, one legacy of the allotment period is a tripartite classification of lands on Indian reservations. Reservation lands may now be held in trust by the federal government for the tribes or for an individual Indian; or privately owned in fee patent by Indians or non-Indians.

B. Reservation Zoning

The systematic and coordinated utilization of land throughout a given area, such as an Indian reservation, is a major goal of land use planning and its handmaiden, zoning. One prominent authority has identified several rationales for comprehensive planning, including

8. Id. § 5. (current version at 25 U.S.C. § 348 (1976)).
9. Id.
12. Id. at 16.
13. See id. at 17.
14. Id. at 17.
16. Fee patent ownership differs from fee simple ownership only in that the private ownership is derived originally from a federal government grant, or patent. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337-38 (1906).
needs for a consistent approach that can adequately deal with all facets of varied local uses of land, a centralized authority that can fairly determine the proper allocation of available resources, and a means by which the local community can participate in choosing between alternate patterns for future development. Local governments are the natural entities to exercise these controls over their own jurisdictions.

Tribal regulations controlling development within reservation boundaries are consistent with the traditional zoning powers of local governments recognized in Village of Euclid v. Ambler Realty Co. In Euclid, the Supreme Court concluded that local governmental authorities can determine the course of development within their jurisdictions, as long as the regulations are rationally connected to police power interests in the health, safety, morals, or general welfare of the public. A significant distinction between the traditional zoning situation in Euclid and tribal zoning of reservations is that in the former, residents have a right to a voice in the local government. Typically, on reservations, non-Indians do not have the right to participate fully in tribal governments.

Land use planning and zoning are particularly important on Indian reservations because they not only provide a regulatory mechanism, but can also serve to protect a relationship to the land unique to Indians. In Santa Rosa Band of Indians v. Kings County, the Court of Appeals for the Ninth Circuit struck down a state's attempt to regulate reservation lands held in trust by the Federal government for the tribe or individual Indians. However, no court has yet fully analyzed state

19. Id. § 1.08.
21. Id. at 389, 394–95.
22. The extent of non-Indian participation depends on the governing laws of each reservation. See Part III-B infra (discussion of some proposals that would allow non-Indian participation).
23. As Justice Black noted,
   It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional tribal ways of life. . . . But this is their home—their ancestral home. There, they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money . . . . Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1959) (dissenting opinion) (footnote omitted). Cf. Santa Clara Pueblo v. Martinez, 98 S. Ct. 1670, 1684 (1978) (issues arising under Indian Civil Rights Act § 202, 25 U.S.C. § 1302 (1976), “will frequently depend on questions of tribal tradition and custom”).
Reservation Zoning

power to zone reservation lands held in fee simple by Indians or non-Indians.\textsuperscript{25} Resolution of this question begins with an analysis of inherent tribal powers to govern reservations.

C. Inherent Tribal Powers

Under the generally accepted analysis, tribal sovereign powers are not derived from Acts of Congress, but are the "inherent powers of a limited sovereignty which has never been extinguished."\textsuperscript{26} Thus, Indian tribes originally possessed all of the powers of any sovereign state. Although most external powers, such as the power to make treaties with foreign nations, were surrendered to the federal government, internal tribal powers, such as self-government, can be extinguished only by specific Acts of Congress.\textsuperscript{27} Judicial interpretation\textsuperscript{28} and congressional actions\textsuperscript{29} have consistently recognized that Indian tribes possess aspects of internal sovereignty.

\textsuperscript{25} A federal district court has held that a tribe does not have the power to regulate uses of land owned by a nonmember corporation. Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, No. C77-882M (W.D. Wash. July 27, 1978) (reversing prior decision following motion for reconsideration based on Oliphant v. Suquamish Indian Tribe, 98 S. Ct. 1011 (1978)). See generally Part III-B-2 infra.


\textsuperscript{27} F. COHEN, supra note 6, at 122-23.

\textsuperscript{28} Nineteenth century foundations for the recognition of tribal self-governmental powers were most clearly articulated in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), wherein Chief Justice Marshall concluded that "[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial." Id. at 559.

Recent Supreme Court reaffirmations of the doctrine of inherent tribal sovereignty include Santa Clara Pueblo v. Martinez, 98 S. Ct. 1670 (1978) (restricting appeals to federal courts from tribal forums), United States v. Wheeler, 98 S. Ct. 1079 (1978) (holding that tribal powers to try and to punish tribal members not delegated by Congress but inherent attributes of sovereignty), Oliphant v. Suquamish Indian Tribe, 98 S. Ct. 1011 (1978) (recognizing inherent sovereignty, but finding that tribal powers to try and to punish nonmembers on criminal charges is not one of its attributes), and United States v. Mazurie, 419 U.S. 544 (1975) (holding that tribal power to regulate on-reservation liquor sales by nonmembers an attribute to inherent sovereignty).

The scope of these tribal powers is uncertain. See United States v. Mazurie, 419 U.S. 544, 557 (1975) (reserving decision on whether tribe has independent authority to regulate distribution of liquor by non-Indians on the reservation). See Part II-B-2 infra (discussing Martinez, Wheeler, and Oliphant).

\textsuperscript{29} The two most important congressional enactments confirming tribal internal powers are the Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (current version at 25 U.S.C. §§ 461-479 (1976)), and the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1341 (1976). The Indian Reorganization Act recognized the rights of tribes to govern themselves and to enter into certain relationships with other legal entities. The Department of the Interior has interpreted the Indian Reorganization Act as
Limitations on these inherent tribal powers come from two sources. First, Congress has extensive general powers over Indians and Indian lands, and can act to limit tribal powers. Second, state assumptions of jurisdiction over reservations, without congressional authority, have been permitted when the interests of a state can be protected without undue interference with tribal government.

II. LIMITS ON TRIBAL SOVEREIGNTY

A. Congressional Enactments

In addressing the issue of zoning jurisdiction, the first question concerns those congressional enactments that may be interpreted as specifically withdrawing from Indian tribes the jurisdiction to zone their reservations. Federal statutes which may be so construed include the Dawes Act and Public Law 280 in conjunction with the Indian Civil Rights Act.

1. The Dawes Act

The 1887 Dawes Act, or General Allotment Act, was enacted to alter the land ownership patterns of individual Indians in order to...
Reservation Zoning

promote their assimilation into the dominant society. The statutory
scheme provided for the allotment of parcels of reservation land to In-
dians under a twenty-five year trusteeship. During the trust period,
the allotted land could not be sold or encumbered. At the end of this
period, a patent in fee would issue to the allottee.

States have claimed that assertions of jurisdiction over reservations
are justified by language in the Dawes Act which provides that upon
the allotting and patenting of lands, "each and every member of the
respective bands or tribes of Indians to whom allotments have been
made shall have the benefit of and be subject to the laws, both civil
and criminal, of the State or Territory in which they may reside." The
meaning of this passage is obscured by congressional failure to
specify whether each Indian became subject to state laws upon the pa-
tenting of his or her land, or whether all lands on a reservation had to
be patented before any Indian became subject to state jurisdiction.
Clarification is important because the allotment policy was termi-
nated by the Indian Reorganization Act of 1934; consequently,
most reservations include both privately owned lands and trust lands
that were not subjected to the patenting procedures. Parcels of each
are usually randomly distributed throughout reservations in a "check-
erboard" pattern.

If, as states have argued, each Indian allottee became subject to
state jurisdiction upon the issuance of his or her fee patent, states
would have jurisdiction over those parcels of reservation lands. The
federal government, however, would retain jurisdiction over lands re-
mainng in trust status. Alternately, if the statute requires that all al-
lotments on a reservation be patented before the reservation as a
whole becomes subject to state jurisdiction, then the federal govern-
ment retains jurisdiction over any reservation that has any trust lands
remaining.

35. See D. Otis, supra note 10, at 8–9.
37. Id. § 6 (current version at 25 U.S.C. § 349).
38. Indian Reorganization Act of 1934 Pub. L. No. 73-383, § 1, 48 Stat. 984 (cur-
rent version at 25 U.S.C. § 461 (1976)).
(list of reservations and land ownership status of each).
40. See, e.g., Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 478
(1976).
Although the Dawes Act has never been explicitly repealed, the interpretation of the provision transferring jurisdiction to states should no longer be open to question. First, the ambiguous language of the pertinent provision has most recently been construed to require the patenting of all reservation lands prior to the transfer of jurisdiction to states.\(^4\) Second, the Supreme Court has disfavored checkerboard jurisdiction, under which different authorities would be responsible for various tracts of reservation lands, depending upon the ownership of the lands.\(^4\) Third, even assuming that the intent of Congress as expressed in the allotment acts was to checkerboard the reservations, subsequent federal statutes clearly vitiate the continuing effect of that intent.\(^4\) Finally, and most persuasively, because the assimilation purposes of the allotment acts have not been fulfilled,\(^4\) the legislative intent behind the jurisdictional transfers of the Dawes Act can no longer be used as support for such transfers.\(^4\)

State jurisdiction to zone reservations under the Dawes Act would


\(^{42}\) The Court rejected an argument basing state jurisdiction on the Dawes Act:

[The] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government.


\(^{45}\) In Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976), the Supreme Court found that the Dawes Act had been “repudiated” by the Indian Reorganization Act which ended the allotment system and provided support for tribal self-government. Id. at 479 (quoting Mattz v. Arnett, 412 U.S. 481, 496 n.18 (1973)).
Reservation Zoning

have particularly unfortunate consequences because checkerboard jurisdic-
tion would result in county or city zoning jurisdiction over certain parcels, and tribal jurisdiction over the remainder. Unless the two regulating authorities pursued identical long-range goals and enacted identical zoning ordinances, contiguous parcels would often be zoned for inconsistent uses. Land use planning is predicated on the theory that planning the development or nondevelopment of a given area will balance the competing needs of the residents and landowners, and will distribute land uses in a desirable pattern. Checkerboard zoning authority exercised by different governmental entities with different values and goals would present a serious, if not insurmountable, obstacle to the effectuation of the planning goals of each.

2. Public Law 280 and the Indian Civil Rights Act

The other statutory provisions arguably supportive of state zoning jurisdiction over reservations are found in Public Law 280 and the Indian Civil Rights Act. Public Law 280 transfers some elements of jurisdictional power over Indian lands from federal to state governments in six states. The Indian Civil Rights Act provides for assumption of jurisdiction by any other state so long as the Indian tribe affected consents. The Indian Civil Rights Act repealed the

46. See 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 1.08 (1974).
49. At the time of its passage, Public Law 280 accurately reflected the general direction of national policy toward assimilation of Indians and termination of tribal ties and reservations. Nevertheless, it preserved many aspects of federal protection of tribal members. See Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 662 (9th Cir. 1975), cert. denied, 429 U.S. 1038 (1977). Significantly, Public Law 280 did not immediately transfer to all state governments civil and criminal jurisdiction over all reservations, nor did it terminate the trust status of reservation lands. Id. at 662; West, Public Law 280, in MANUAL OF INDIAN LAW F-1, F-1 (3d ed. 1977); Goldberg, supra note 29, at 538.
50. The mandatory states include Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin. 28 U.S.C. § 1360(a) (1976) (civil jurisdictional transfers).
provision of Public Law 280 which provided for state assumption of jurisdiction without tribal consent, but left intact assumptions of jurisdiction made prior to the repeal.

The expansion of population centers adjacent to many reservations has increased the incentives for states to assert jurisdiction over pollution, zoning, and other aspects of reservation land use. But state pressure for regulatory control may conflict with current federal policy encouraging tribes to develop and exercise self-governmental powers. Public Law 280, as a product of a bygone era of assimilation, has become a focal point in the Indian struggle for self-determination.

Judicial interpretation has been influenced by both the 1953 expression of congressional intent in Public Law 280 and by a more realistic assessment of the place of the Indian reservation in society today.

In a recent decision, Bryan v. Itasca County, the United States Supreme Court ruled that the grant of civil jurisdiction in Public Law 280 merely conferred upon states the jurisdiction to adjudicate private civil causes of action arising on a reservation, and not jurisdic-


The South Dakota statutes have since been held invalid by the South Dakota Supreme Court, which found that the state statute establishing checkerboard jurisdiction did not comply with Public Law 280 requirements for states with constitutional disclaimers in assuming jurisdiction over reservations. In re Hankins, 80 S.D. 435, 125 N.W.2d 839 (1964). The Ninth Circuit has held a Washington statute creating mandatory partial assumption of jurisdiction unconstitutional as a denial of equal protection. Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, 552 F.2d 1332 (9th Cir. 1977).

55. For an excellent and comprehensive analysis of challenges to Public Law 280. See generally Goldberg, supra note 29.
tion to enforce their civil regulatory laws on reservations. The Court relied on congressional intent and rules of construction requiring that ambiguous statutes be construed in favor of the Indians.

B. Unauthorized State Assumptions of Jurisdiction

Neither the Dawes Act nor Public Law 280 supports state jurisdictional claims to regulate land use and zoning on reservations. Consequently, tribes should be able to exercise their inherent sovereign powers free from such state regulation. State jurisdictional forays onto

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57. The failure of Congress to consider the implications of state civil regulatory authority over reservations led the Court to rule that the civil jurisdictional transfers of Public Law 280 did not include such authority. Id. at 389–90. In Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied, 425 U.S. 1038 (1977), the Ninth Circuit discussed the implications of the application of state zoning laws, delegated to local governments, for Indian reservations:

> Extension of local jurisdiction is inconsistent with tribal self-determination and autonomy. Were regulation of reservation affairs preempted by local governments, present tribal governments would be relegated to the positions of overseers of tax-exempted property, or the board of directors of a business. . . .

> Subjecting the reservation to local jurisdiction would dilute if not altogether eliminate Indian political control of the timing and scope of the development of reservation resources, subjecting Indian economic development to the veto power of potentially hostile non-Indian majorities. Local communities may not share the usually poorer Indian's priorities, or may in fact be in economic competition with the Indians and seek, under the guise of general regulations, to channel development elsewhere in the community.

532 F.2d at 663–64. The court accordingly held that the application of county zoning regulations to the Santa Rosa rancheria is prohibited. An attempt has been made to distinguish Santa Rosa from Bryan v. Itasca County on the basis that state or tribal zoning laws such as those discussed in Santa Rosa could carry “criminal” penalties, thereby bringing attempts to enforce such regulations under the criminal sections of Public Law 280, while the taxation laws considered in Bryan did not carry such “criminal” penalties. Waldmeir, Local Land Use Regulations as State Civil Law: An Analysis of the Santa Rosa Court's Interpretation of Public Law 280, 12 Tulsa L.J. 425, 430 n.9 (1977). Two difficulties exist with this analysis. First, it is unlikely that Congress intended that states could assume civil regulatory control over reservations merely because a state happened to provide “criminal” penalties for violations of civil regulatory laws. If this were the case, tribes could control the exercise of state jurisdiction by choosing to impose “civil” or “criminal” penalties at any given time. Second, taxation regulations are as susceptible of criminal-type penalties as are zoning regulations.

58. Public Law 280 is ambiguous because it refers to civil laws “of general application” and “civil causes of action” as if they were identical. See Public Law 280, § 4(a), 28 U.S.C. § 1360(a) (1976). The former would seem to include state regulatory laws, the latter only lawsuits between private individuals. The Court chose the latter interpretation based on its analysis of Congressional intent, 426 U.S. at 379–83, and the “eminently sound and vital canon” . . . that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” 426 U.S. at 392 (quoting Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918)). Accord, Antoine v. Washington, 420 U.S. 194, 199–200 (1975); Mattz v. Arnett, 412 U.S. 481, 504–05 (1973); Choate v. Trapp, 224 U.S. 657, 675 (1912).
reservations, however, have not been eliminated by the absence of congressional approval. The following section will analyze unauthorized state assumptions of jurisdiction over reservations.

1. *Traditional Supreme Court reconciliations of unauthorized state assumptions of jurisdiction and inherent tribal sovereignty*

Even without congressional authorization, states have successfully asserted jurisdiction over some matters relating to reservations. The first modern Supreme Court attempt to reconcile decisions affirming such jurisdiction with the concept of inherent tribal sovereignty was *Williams v. Lee.* Recognizing the evolution of the doctrine of tribal sovereignty in the early nineteenth century, the Court put forth the following test: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."

Subsequent opinions have focused on two elements of this test: "Absent governing Acts of Congress" (preemption) and "infringed on the right of reservation Indians to make their own laws and be ruled by them" (infringement). These tests for state assumption of jurisdiction have proven difficult to apply. Their application to the problem of state zoning jurisdiction is the next step in evaluating state claims to jurisdiction in this area.

a. *Federal preemption*

The general doctrine of federal preemption withdraws from states jurisdiction over those areas which Congress has made subject to fed-
eral control. In the context of zoning jurisdiction, several arguments support tribal claims that the federal government has preempted states from exercising such jurisdiction. First, the United States Supreme Court has held that, at least under some circumstances, Public Law 280 governs jurisdictional transfers to states after 1953. Also, a recent Supreme Court case pointed out that the Indian Civil Rights Act denied states the power they formerly had under section 7 of Public Law 280 to assume civil or criminal jurisdiction over Indian country without the prior consent of the tribe, thereby manifesting "a congressional purpose to protect tribal sovereignty from undue influence." The Act arguably represents a congressional response to the problems of reservation jurisdiction, which was meant to be comprehensive and therefore preemptive of any transfers not undertaken pursuant to its provisions.

Other more specific statutory provisions support the argument that the federal government has preempted the field of reservation zoning, at least over trust lands. The Indian Reorganization Act of 1934 reaffirmed the doctrine of tribal sovereignty over all tribal lands and the authority of tribal governments to assert that sovereignty. Specifically, it confirmed tribal powers to "prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." Also, leases of trust lands are regulated by two other federal laws that specifically restrict the application of state and local zoning laws on reservations.

64. Kennerly v. District Court, 400 U.S. 423 (1971). The Blackfeet Tribal Council had attempted to cede concurrent jurisdiction to Montana by tribal statute. Id. at 425. The Supreme Court ruled that, notwithstanding the inherent sovereignty of the tribe, the transfer was ineffective because the Indian Civil Rights Act requires a vote by all tribal members to consent to the passage of jurisdiction to states where the subject matter of the transfer is within the terms of the Act. Id. at 428–29 (quoting Indian Civil Rights Act § 406, 25 U.S.C. § 1326 (1976)).
68. Congress has provided that the Secretary of the Interior shall oversee all leases or extensions of leases of trust lands, and shall specifically examine, inter alia, "the effect on the environment of the uses to which the leased lands will be subject" and the "relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures." 25 U.S.C. § 415 (1976). Also, federal regulations promulgated pursuant to 25 U.S.C. § 2 (1976) (powers to manage all Indian af-
Finally, Congress has provided that the term "Indian country," as used in certain jurisdictional statutes, includes all lands within the exterior boundaries of reservations.\textsuperscript{69} Such lands are considered Indian country "notwithstanding the issuance of any patent,"\textsuperscript{70} which suggests a congressional intent to treat each reservation as a jurisdictional whole.\textsuperscript{71} The authority to zone fee patent lands would, accordingly, follow the authority to zone trust lands.\textsuperscript{72}

The Supreme Court has not yet addressed the issue of preemption as applied to land use and zoning regulations on reservations. In \textit{Santa Rosa Band of Indians v. Kings County},\textsuperscript{73} the Ninth Circuit found that the county was preempted from applying its zoning laws to reservation lands. The holding of the court was limited to the issue of zoning jurisdiction over trust lands, as there were no fee patent lands on the reservation.\textsuperscript{74} The \textit{Santa Rosa} reasoning, however, is not so limited. The court extended several Supreme Court cases applying the preemption doctrine under varying circumstances.\textsuperscript{75} It concluded that state attempts to zone reservations have been preempted. The appellate court supported its view that Congress intended to preempt and reserve to the federal government jurisdiction not explicitly granted to states by reference to the following: the Indian Reorganization Act, which established the trust relationship, authorized tribal constitutions, and supported tribal self-government;\textsuperscript{76} the "historical back-

\begin{footnotesize}
\begin{enumerate}
\item[70.] \textit{Id.}
\item[71.] See note 47 supra.
\item[72.] The distinctions between tribal and federal authority to zone land held in trust by the federal government for individual Indians are beyond the scope of this comment. For a current interpretation by the Department of the Interior, see Memorandum from Thomas W. Fredericks, Associate Solicitor for Indian Affairs, to the Assistant Secretary for Indian Affairs, Department of the Interior (Jan. 19, 1978) (on file with \textit{Washington Law Review}).
\item[73.] 532 F.2d 655 (9th Cir. 1975), \textit{cert. denied}, 429 U.S. 1038 (1977).
\item[74.] \textit{Id.} at 657.
\item[75.] The leading cases are McClanahan v. State Tax Comm'n, 411 U.S. 164 (1973) (preemption precluded application of state income tax to reservation Indian who earned all of her income from reservation sources); Kennerly v. District Court, 400 U.S. 423 (1971) (see note 64 supra); and Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685 (1965) (state preempted from assessing gross receipts tax on federally licensed trader on the reservation). \textit{McClanahan} extended \textit{Warren} in holding that specifically controlling federal statutes are not necessary for a finding of preemption, and that more general expressions of congressional intent can be sufficient. 411 U.S. at 170, n.6.
\item[76.] 532 F.2d at 658.
\end{enumerate}
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drop of tribal sovereignty”;

77 the existence of federal criminal justice systems for reservations;

78 congressional grants of power to tribal governing authorities;

79 and Public Law 280’s definition of the limits of jurisdiction granted “‘P.L. 280 states.’”

80 Conflict of the county ordinances with federal regulations for trust lands

81 was one basis for the decision. However, the two arguments apparently most persuasive to the Ninth Circuit were that state assumption of jurisdiction is preempted except as explicitly conferred

82 by Public Law 280 or the Indian Civil Rights Act, and that Congress did not intend to transfer zoning jurisdiction to states, because tribal self-government would thereby have been destroyed.

83 These arguments apply to all reservation lands, trust or fee.

b. Infringement

The preemption test looks to conflicts between federal and state laws. The infringement test, on the other hand, looks to conflicts between state laws and tribal rights to self-government. According to the Supreme Court in McClanahan v. Arizona State Tax Commission,

84 the preemption test should be emphasized because it is more helpful in resolving the practical aspects of disputes. Inherent tribal sovereignty is to be used primarily as a background for interpretation of treaties and statutes.

85 Under the infringement analysis, unauthorized state assumptions of jurisdiction are valid only to the extent that tribal self-government is not thereby impaired.

86 The usefulness of infringement reasoning is open to question, as courts generally follow McClanahan in emphasizing the preemption test.

87 Nevertheless, examina-
tion of complicated questions such as zoning jurisdiction benefits from an infringement analysis because, unlike the preemption test, it looks to the actual effects state jurisdiction would have on tribal governments.

In order successfully to urge the infringement test as a barrier to state zoning jurisdiction, tribes must be prepared to show that the state or local zoning ordinances conflict with actual self-governmental activities of the tribe.\(^8^\) This would present a problem for those Indian tribes that lack the resources to fund professionally-prepared comprehensive plans and zoning ordinances. In addition, many reservations are too small in both area and population to justify extensive land use planning and zoning regulations. Some tribes, however, have undertaken comprehensive planning, implemented by professionally-prepared zoning ordinances.\(^8^9\) Under such circumstances, it should not be difficult to show that state or local zoning ordinances that conflict with tribally-authorized plans do in fact infringe upon tribal self-governmental powers.\(^9^0\)

Although arguments based on an infringement analysis have not been as persuasive to the Supreme Court as those based on the preemption test, the issue of zoning jurisdiction presents a problem of local and state interference with tribal self-government which cannot always be resolved through application of the general preemption doctrine alone. For example, a court may find that state zoning of trust lands is preempted, but refuse to hold that state zoning of fee pa-

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\(^8\) See note 5 supra.

\(^9\) However, it can also be argued that, since sovereignty includes both the power to enact and the power to demur from enactment, a tribe's choice not to participate in a field of regulation when it clearly has the authority to regulate if it chooses, should also preempt state occupation of that field.

\(^8^9\) For example, the Swinomish Indian Tribal Community of La Conner, Washington, has adopted detailed and comprehensive plans and zoning ordinances to regulate land uses on the Swinomish Reservation. See note 5 supra.

\(^9^0\) Smaller tribes may wish to control the uses of their reservation lands by more informal regulatory mechanisms, such as general guidelines and specific notice, hearing, and appeal procedures. However, a reviewing court may not view informal regulatory mechanisms in the same light as planning and zoning done in more traditional and structured fashions.
Reservation Zoning

tented lands is preempted.\textsuperscript{91} The application of infringement reason-
ing would enable a court to conclude that state and local regulation of checkerboard parcels of reservation lands infringes upon tribal self-
government and control of the reservation, and is therefore impermis-
sible.

c. Tribal preemption

More sophisticated variations of the preemption and infringement doctrines are now being developed to analyze certain civil jurisdic-
tional issues such as taxation, water rights, hunting and fishing, and zoning jurisdiction. In \textit{Fisher v. District Court},\textsuperscript{92} the Supreme Court mentioned that state court jurisdiction over a child custody matter had been preempted by tribal laws implementing federal policy clearly expressed in the Indian Reorganization Act.\textsuperscript{93} Subsequently, tribes have argued that the enactment of tribal statutes preempts state jurisdiction over other fields of law.\textsuperscript{94}

This "tribal preemption" doctrine elevates tribal laws to the level of congressional enactments for preemption purposes by virtue of con-
gressional language authorizing and supporting tribal self-govern-
ment. Two conditions are probably needed for the successful use of
this doctrine. First, the delegation from the federal government
should be specific.\textsuperscript{95} Second, it appears to be critical that tribes enact

\textsuperscript{91} For examples of federal treatments of trust lands that may facilitate a finding of preemption or supercession, see note 68 supra. In the absence of such specific regulation, a finding of preemption of state jurisdiction over fee patent lands is less certain.

\textsuperscript{92} 424 U.S. 382 (1976).


\textsuperscript{95} In \textit{Fisher}, the Court relied on the general language of § 16 of the Indian Reorganization Act, supporting tribal self-government, to sustain the tribe's argument that tribal court jurisdiction over adoptions involving tribal members was in response to a delega-
tion of power from the federal government. 424 U.S. at 387. However, the Court in \textit{Oliphant v. Suquamish Tribe of Indians}, 98 S. Ct. 1011 (1978), cautioned that the general language of the Indian Reorganization Act would not support the argument that the federal government intended that tribes have the power to try and punish nonmem-
bers for violations of tribal criminal code provisions. \textit{Id.} at 1014, n.6. Although the \textit{Oli-
comprehensive tribal regulatory ordinances and a plan for disbursement of funds through governmental programs such as day care, education, and water, sewer, and road services.\textsuperscript{96}

2. \textit{Recent Supreme Court analyses of tribal sovereignty}

In addition to examining limits on the ability of states to exercise jurisdiction on reservations, the Supreme Court has recently focused on the extent of tribal power to regulate conduct on reservation lands, especially the conduct of non-Indians. In its inquiry into tribal powers, the Court seems to be altering the traditional preemption and infringement analyses by first examining congressional removal of tribal powers, and then, if it finds that they have not been removed, looking at the effects of these tribal powers on the interests of states in protecting the rights of their non-Indian citizens who live on reservations. Although their impact cannot yet be measured, the 1978 decisions of \textit{Oliphant v. Suquamish Indian Tribe}\textsuperscript{97} and \textit{United States v. Wheeler}\textsuperscript{98} indicate that the Court is concerned with considerations of fairness to non-Indian reservation residents who have no rights to participate in reservation governments.\textsuperscript{98}

\textit{Oliphant} involved tribal power to try to punish a nonmember for an alleged violation of a tribal criminal law on reservation land. Although the Court reaffirmed the basic doctrine that tribes retain elements of internal sovereignty not specifically withdrawn by Congress, it recognized that many reservations are now inhabited by non-Indians as well as Indians.\textsuperscript{100} Apparently in deference to the right of these non-Indian residents, the Court ruled that powers that are inconsistent with the "status" of Indian tribes, are withdrawn from the tribes.\textsuperscript{101} By "status," the Court seemed to refer to the relation of tribal governments to all reservation residents, as evidenced by legisla-
Reservation Zoning
tive, judicial, and executive decisions and policies. The Court concluded in *Oliphant* that the tribe does not have the power to try and to punish non-Indians for violations of tribal law. Although the Court failed to give any substantial content to the "status" test, the political circumstances of disenfranchised nontribal members were clearly important to the holding.

In *Wheeler*, the Court determined that tribal courts and federal courts are not branches of the same sovereignty, and consequently fifth amendment double jeopardy provisions were not violated when an Indian defendant was indicted by a federal grand jury subsequent to tribal punishment for the same incident. The Court applied the *Oliphant* "status" test to determine the nature of the tribal power to try and to punish its own members: tribal powers endure unless they have been taken away by congressional enactment, or are inconsistent with the "status" of the tribe. The Court reasoned that the tribal powers that were lost by reason of their dependent "status" are those powers involving the relations between an Indian tribe and nonmembers of the tribe. Here, tribal powers to punish a member for violation of a tribal law were found to be within the "status" of the tribe. Since the tribal and federal governments are separate sovereignties, the tribe as well as the federal government, could try and punish the defendant. By reducing the jurisdictional questions to the issue of tribal membership, the Court greatly simplified what had become a very complex issue.

Extending *Oliphant* and *Wheeler* to areas of civil jurisdiction would be inappropriate for several reasons. In both cases, the Court discussed exclusively issues of criminal jurisdiction, and gave no indi-

102. *Id.* at 1019.
103. *Id.* at 1019, 1021.
104. *See id.* at 1013 n.1, 1022.
105. 98 S. Ct. at 1086. First, the Court found that such powers have never been removed by Congress and that the power of an Indian tribe to try and to punish its members is an attribute of retained tribal sovereignty, and is not derived from federal delegation of authority. *Id.* at 1086-87.
106. *Id.* at 1087-88.
107. Distinctions between civil and criminal actions are difficult to draw, especially when civil regulatory laws appear to carry criminal sanctions for noncompliance. Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976). Proper treatment of this question is beyond the scope of this comment. The problem has been analyzed in Waldmeir, *Local Land Use Regulations as State Civil Law: An Analysis of the Santa Rosa Court's Interpretation of Public Law 280*, 22 TULSA L.J. 425, 430 n.9 (1977). However, the author's approach is of questionable value. *See* note 57 supra.
cation that it had considered the question of civil jurisdiction. In fact, a 1975 opinion of Justice Rehnquist, the author of the Oliphant opinion, permitted tribal civil jurisdictional control over reservation sales of liquor by nontribal members in spite of their disenfranchisement. 108

Distinguishing between criminal and civil jurisdiction is important because the latter can present complex issues that cannot be adequately addressed by the Oliphant-Wheeler approach. For example, the problem of the allocation of water rights on reservations cannot be resolved by a holding that a tribe has jurisdiction over the waters flowing on, through, or next to lands belonging to it or its members, but not over the same water flowing on the land of non-members. 109 Similarly, tribal and state checkerboard zoning jurisdiction would defeat the purposes of the comprehensive planning and zoning schemes of each. 110

A further limitation on the applicability of the Oliphant-Wheeler analysis is its failure to give consideration to the traditional preemption, infringement, and tribal preemption analyses that have been applied in challenges to state jurisdiction. 111 In shifting its focus from "interference with tribal self-government" to the "status" of a tribe, the Court has adopted a standard that appears to be more responsive to claims that tribal governmental institutions are unfair, than to claims that a state is infringing on tribal sovereign rights. The significance of this apparent shift is unclear largely because the Court neither justified nor acknowledged it.

The Court specifically addressed the civil jurisdictional powers of tribal governments in Santa Clara Pueblo v. Martinez. 112 In denying the right of a tribal member to appeal from a tribal civil decision on equal protection grounds to federal district court, the Court noted that Congress intended questions arising in civil contexts to be adjudi-

110. "Checkerboard" zoning jurisdiction is discussed in Part II-A supra.
111. Although Oliphant and Wheeler involved questions of criminal jurisdiction, and the preemption and infringement tests have been primarily applied to questions of civil jurisdiction, see cases discussed in Part II-B-1 supra, the tests were formulated in Williams v. Lee, 358 U.S. 217 (1959), as a response to problems of criminal as well as civil jurisdiction.
cated in tribal forums. Review of tribal decisions was limited to habeas corpus relief by the Indian Civil Rights Act, and the Court concluded that any other de novo review of tribal decisions would intrude impermissibly on tribal governments. The Court relied on the intent of Congress to promote tribal sovereignty, and noted that "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians. . . . Non-judicial tribal institutions also have been recognized as competent law-applying bodies." Because the right of an incarcerated defendant to a habeas corpus writ challenging the validity of her or his confinement is of fundamental importance, Congress specifically provided for it in the Indian Civil Rights Act. The Court emphasized that this was an exception carved out by Congress, and that in all other instances, tribal courts and agencies are the appropriate forums for the administration of tribal laws. The Court did not directly utilize a preemption or infringement analysis, although its language strongly suggests a concern for the integrity of tribal self-government.

The Martinez dictum referring to "disputes affecting important personal and property interests of both Indians and non-Indians" does not distinguish between disputes about enforcement of tribal civil regulatory laws and disputes between individuals. The question of the proper forum for resolution of disputes between individuals arising on reservations had been answered in favor of tribal forums by the Court in Williams v. Lee. Arguably, the language of the Court in Martinez indicates that it considers disputes about enforcement of tribal civil regulatory laws to be within the powers of tribal courts as well. The distinction between private disputes and general civil regulation was clearly drawn in the 1976 case of Bryan v. Itasca County, and could have been utilized in Martinez, had the Court considered the distinction critical in that setting.

The effects of Oliphant and Wheeler are unclear, especially in ar-
eas of civil jurisdiction such as zoning. Although their holdings may not directly apply to questions presented by tribal and state zoning conflicts, their reasoning cannot be ignored. They give a clear warning that the Court will look closely at the underlying problem of fairness to non-Indian reservation residents when confronted with a question of tribal jurisdiction over nonmembers.

III. TRIBAL ZONING

A. Political Considerations

As demonstrated by the foregoing discussion, state attempts to zone reservation lands, both trust and fee patent, can be challenged, and tribal zoning of the same lands can be supported, under established principles of Indian law. However, most reservations today are faced with the political reality of non-Indian residents who cannot, as a matter of right, participate in tribal government. This circumstance should be considered by tribal officers and planners who are administering or contemplating zoning controls. A tribe with a reservation that is ninety-five percent trust land, with a correspondingly small proportion of non-Indian residents, will be in a better political position than a tribe with a preponderance of non-Indian residents on its reservation.

Nontribal members typically have no right to vote in tribal elections, participate in tribal decisions, hold office, or serve as jurors. All of these raise questions about tribal regulation of the uses of their lands. Because non-Indians' complaints about regulation without representation are widespread,\textsuperscript{119} tribes should study possible compromises that preserve their rights to control their reservations, yet permit non-Indian representation in tribal decisions.\textsuperscript{120}

\textsuperscript{119} See \textit{Interstate Congress for Equal Rights and Responsibilities, Are We Giving America Back to the Indians?} (1976) (copy on file with \textit{Washington Law Review}).

\textsuperscript{120} A further consideration is the common fear that Indians may pursue their regulatory programs in a discriminatory manner, in order to force non-Indians to leave the reservation. However, the Indian Civil Rights Act provides equal protection and due process guarantees to all persons appearing before tribal courts, which would include those bringing challenges to tribal regulations. Indian Civil Rights Act § 202. 25 U.S.C. § 1302 (1976).
B. Compromise Suggestions

One suggestion, contemplated by the Suquamish Tribe in Washington state, is to provide for non-Indian representation on tribal planning councils. Ultimate authority under this plan would remain with tribal members, however, in order to preserve their control.121

Another possibility is to delegate ultimate planning authority over predominantly non-Indian areas within a reservation to resident planning commissions. Typically, most non-Indians settle in well-defined areas within reservations. Tribes could grant zoning powers to a planning commission composed of, and answerable to, the area's residents. Tribes would, of course, restrict the exercise of the delegated powers within these areas. For example, the tribe could regulate the impact of the local rules on water use, pollution, aesthetics, waste disposal, and traffic volume on the reservations. Too severe restrictions could, of course, render the planning commission's powers merely cosmetic, and fail to address adequately complaints about non-representation.122

IV. CONCLUSION

The power of an Indian tribe to zone all reservation lands inheres in its sovereignty over those lands, and has never been withdrawn by Congress. States' attempts to zone reservations are arguably preempted by congressional enactments, and would likely interfere with the functions of tribal self-government. However, tribal plans for the exercise of zoning powers should take into account the impacts of such actions on non-Indian reservation residents. The care taken by tribal governments to protect the interests of such non-Indians will be influential in the resolution of this controversy.

Robert D. Wilson-Hoss


122. A study has also been made of the rights and powers of Indian tribes to charter municipalities for non-Indian reservation residents. Gonzales, Indian Sovereignty and the Tribal Right to Charter a Municipality for Non-Indians: A New Perspective for Jurisdiction on Indian Land, 7 N.M.L. Rev. 153 (1977).