

February 10, 1999

Mr. Paul S. Laggis  
Power County Prosecuting Attorney  
20 Hillcrest Avenue  
P.O. Box 419  
American Falls, ID 83211-0419

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Zoning Authority Within Fort Hall Reservation

Dear Mr. Laggis:

Your letter requested this office to address the following questions:

- (1) Whether Power County has authority to require non-Indians residing on non-Indian fee lands within the Fort Hall Reservation to comply with Power County land use and zoning requirements.
- (2) Whether Power County has authority to require non-Indians residing on non-Indian fee lands within the Fort Hall Reservation to obtain county building permits.

**ANALYSIS**

Unfortunately, it is impossible to answer such questions as a matter of law. Accurate analysis requires an involved investigation and analysis of numerous and complex factual issues, including, among others, the location and extent of the non-Indian lands relative to tribal lands, the history and manner in which such lands entered non-Indian ownership, the history of tribal efforts to control land use within the Fort Hall Reservation, and the impact that application of the zoning ordinances of Power County would have upon application of the zoning ordinances of the Shoshone-Bannock Tribes ("Tribes"). We do, however, offer the following analysis as a framework which may guide you in determining your course of action.

**1. Tribal Zoning Ordinances**

Your questions require a two-pronged analysis. First, it must be decided whether the Tribes have zoning jurisdiction over non-Indian lands within the Fort Hall Reservation. If they do not, then the county would clearly have jurisdiction. The Supreme Court has "recognized the rights of States, absent a congressional prohibition, to

exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands.” Yakima County v. Yakima Indian Nation, 112 S. Ct. 683, 688 (1992). If the Tribes are determined to have jurisdiction, however, then the second prong of the analysis is to determine whether the county’s jurisdiction is preempted.

The only Supreme Court decision to directly address tribal authority to impose planning and zoning requirements on non-Indian lands is Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989). Brendale involved two different sections of the Yakima Reservation; the “open” section, where the majority of lands belonged to non-Indians, and the “closed” section, where the vast majority of lands belonged to the Tribe, who strictly restricted access to the area in order to maintain its pristine character.

A sharply divided opinion upheld tribal zoning authority on the closed section of the reservation, and denied such authority on the open section of the reservation. Four members of the Court would have denied tribal zoning authority on both sections, three members would have upheld such authority on both sections, and the two swing votes held that the authority rested on the relative abundance of Indian and non-Indian lands. The two swing votes opined that when non-Indian parcels comprise only a small percentage of the lands in a particular section of a reservation, the tribe has not lost the ability to “define the character of that area,” 492 U.S. at 434, and therefore can impose land-use regulations on non-Indian lands. *Id.* In contrast, where a majority of lands are held in fee by non-Indians, the swing votes concluded that the Tribe “lacks the power to define the essential character of the territory,” *id.* at 445, and therefore lacks zoning authority over non-Indian lands.

Because the votes of the Court members in Brendale were so badly split, the case provides little in the way of reliable guidance. At most, it establishes that the relative abundance of Indian and non-Indian lands is a critical factor in determining whether a tribe has zoning authority over non-Indian lands. What level of non-Indian ownership is necessary to relieve tribes of such zoning authority is difficult to say. The “closed” portion of the reservation at issue in Brendale only contained 3.4% non-Indian lands (by comparison, the Fort Hall Reservation contains 4% non-Indian lands). At first glance, the similarity in percentages suggests that the Brendale holding would apply to the Fort Hall Reservation.

It would be a mistake, however, to place too much reliance on raw percentages of Indian and non-Indian lands. The closed portion of the reservation at issue in Brendale was an area retained in a natural state as a forest and hunting preserve, and was also an area where no county services were provided. All roads into the area were maintained by the Bureau of Indian Affairs and, at the time of the suit, closed to the general public. *Id.* at 415. Non-Indians could not even enter the area without a tribal permit. *Id.* In other words, there was a long history of the Tribe’s exercising jurisdiction over the “closed”

area with the goal of preserving it in its natural state. As the swing votes noted in Brendale, the Tribe had established an “historic and consistent interest in preserving the pristine character of this vast, uninhabited portion of its reservation.” *Id.* at 440. Under those unique circumstances, tribal authority over non-Indian lands was essential to the Tribe’s ability to retain the unique characteristics of the area.

Whether the Shoshone-Bannock Tribes would be able to prove a similar need for tribal regulation of land uses on the Fort Hall Reservation is a factual question beyond the scope of this analysis. Because the resolution of any zoning dispute would depend heavily on factual issues, we do not suggest that you necessarily accept the holding in Brendale as determinative in future cases.

The future application of the holding in Brendale is uncertain for several reasons. First, since the decision was so badly splintered, with no rationale mustering a majority opinion, it is of questionable precedential value and subject to future reexamination by the Supreme Court. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63 (1996). Second, Justice Stevens’ swing opinion relied, in part, on rationale subsequently rejected by the majority of the Court. Justice Stevens viewed tribal zoning authority as falling within the ambit of tribal jurisdiction over non-Indians as defined in Montana v. United States, 450 U.S. 544 (1981). Montana held that tribes have been divested of sovereignty over non-Indians, but defined two exceptions to that rule, the first being when non-Indians enter into consensual relations with a tribe, and the second being where non-Indian conduct “threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” 450 U.S. at 566.

In Brendale, Stevens invoked the second Montana exception by adopting the finding of the trial court that development in the closed area of the Yakima Reservation “would undoubtedly negatively affect the general health and welfare of the Yakima Nation and its members.” 492 U.S. at 443. Subsequent Supreme Court opinions, however, have clarified that effects on the general health and welfare of tribal members are not enough to sustain tribal jurisdiction over non-Indians. In fact, they have warned against the danger that the second Montana exception “can be misperceived,” and applied so broadly that “the exception would severely shrink the rule.” Strate v. A-1 Contractors, 117 S. Ct. 1404, 1415, 16 (1997).<sup>1</sup> Instead, Strate admonishes that the Montana exceptions must be applied in the context of “what is necessary to protect tribal self-government or to control internal relations.” *Id.* at 1416. The kinds of self-governing regulations the Court had in mind are outlined in the preface to the Montana exceptions: “Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members.” *Id.* at 1416, quoting Montana, 450 U.S. at 564.

With the narrowing of the Montana exceptions, future decisions regarding tribal zoning are likely to turn on whether zoning authority over non-Indians is necessary to

protect the tribe's sovereign authority to zone and regulate lands owned by the tribe and its members.

## 2. Preemption of County Zoning Regulations

Generally, state laws may be applied to non-Indians residing within Indian reservations, "unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973). Whether state authority is preempted requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). State jurisdiction is preempted if it "interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983). In assessing federal and tribal interests, "traditional notions of Indian sovereignty provide a crucial 'backdrop,'" as do federal objectives of promoting tribal self-government. *Id.* The preemption analysis, however, is "informed by historical notions of tribal sovereignty, rather than determined by them." Rice v. Rehner, 463 U.S. 713, 718 (1983).

Unfortunately, the Supreme Court in Brendale did not have the opportunity to apply this preemption analysis to determine whether the county would possess concurrent zoning authority over lands subject to tribal zoning ordinances, since the involved county did not appeal. This leaves only the Ninth Circuit's decision in the same case as guidance. *See generally* Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529 (9th Cir. 1987). The Whiteside decision held that county zoning ordinances would be preempted in the face of competing tribal ordinances, especially where the county ordinances allowed uses inconsistent with those allowed by the Tribe's land use plan. *Id.* at 535. The court noted that "[c]omprehensive planning enables a centralized regulatory authority to balance the competing needs of landowners and to distribute land uses in a desirable pattern." 828 F.2d at 534. The court's comments appeared to focus on the concern that competing land use ordinances would defeat the very purpose of zoning, i.e., centralized and comprehensive planning.

This is not to say that a tribal zoning ordinance automatically preempts a county zoning ordinance. In Whiteside, the county ordinance would have allowed the construction of homes, restaurants, bars, and commercial campgrounds in an area zoned by the Tribe as quasi-wilderness. Such obvious conflict led to the conclusion of preemption. In cases where conflict is non-existent or at least less substantial, the possibility exists for concurrent state and tribal regulation. As Justice Stevens noted in Brendale, "overlapping land-use regulations are not inherently suspect," citing as an example federal environmental protections superimposed on county zoning ordinances. 492 U.S. at 440.

Thus, it appears that the question of preemption in the area of zoning law may well depend on existence of an actual conflict between tribal and local zoning regulations. Strate, Rice, and other cases demonstrate that the central question in any future zoning case is whether application of county zoning regulations to non-Indian lands impacts the tribe's right to regulate uses of tribally-owned lands. Where there is no conflict between county and tribal zoning laws, the possibility exists that both sets of zoning ordinances could be applied to non-Indian lands. Where conflict exists, the outcome will likely depend on the impact that land uses allowed by the county ordinance have on the tribe's ability to regulate uses of Indian lands in the same area, especially in areas where tribal lands are predominant.

### **3. Building Permits**

Much of the above analysis applies equally to building permits. Where a tribe lacks zoning authority over non-Indian lands, there is no barrier to requiring county building permits for construction on non-Indian lands within an Indian reservation. In those instances where tribal zoning laws apply to non-Indian lands, a county building permit may be preempted if the permitted use is inconsistent with the tribal ordinance. The circumstances of preemption would be nearly identical to those discussed above. If the use allowed by a county building permit is consistent with the tribal zoning ordinance, there should be no barrier to requiring a county building permit. In such instances, there may be an increased burden on the landowner, but no threat to tribal self-government.

## **CONCLUSION**

Power County possesses the general authority to require non-Indians residing on non-Indian fee lands within the Fort Hall Reservation to obtain county building permits and comply with county land use requirements. Whether such authority is preempted in specific circumstances is a factual question, largely dependent on (1) the relative abundance of non-Indian property in that portion of the reservation that lies within Power County, (2) the nature of the lands and the history of tribal control over the "character" of that portion of the reservation and (3) whether the uses permitted by the county would substantially conflict with uses permitted by the Tribes on surrounding tribal lands, or otherwise negatively affect the Tribes' ability to control the use of tribally-owned lands.

Sincerely,

STEVEN W. STRACK  
Deputy Attorney General

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<sup>1</sup> The Ninth Circuit Court of Appeals has also warned against broad application of the second Montana exception, noting that "the exception would swallow the rule because virtually every act that

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occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the tribe.” County of Lewis v. Allen, 163 F.3d 509, 515 (9th Cir. 1998).