NO. 02-1029

IN THE
SUPREME COURT OF THE UNITED STATES

SNOHOMISH COUNTY and STEPHEN HOLT, Director, Snohomish County Department of Planning and Development Services,

Petitioners,

v.

KIM GOBIN; GUY MADISON; THE TULALIP TRIBES OF WASHINGTON,

Respondents

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TULALIP TRIBES

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QUESTIONS PRESENTED

Whether Congress expressly authorized Snohomish County, in § 5 or § 6 of the General Allotment Act, as amended, 25 U.S.C. §§ 348 - 349, to regulate land uses on land owned in fee by an enrolled member of the Tulalip Tribes and located on the Tulalip Reservation.

Whether the County failed to show exceptional circumstances justifying its land use jurisdiction over development activities of tribe member on reservation fee land, considering the Tribes' governmental interest in harmonizing the resource, housing and economic interests of its members, and considering the County's undisputed lack of jurisdiction on restricted lands comprising more than 50% of the Tulalip Reservation.

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STATEMENT OF THE CASE

Respondent Tulalip Tribes of Washington ("the Tribes") adopts and concurs with the statement of the case presented by Respondents Gobin and Madison. Additionally, the Tribes would like to emphasize the following.

The petition should be denied because it fails to identify any apparent conflict with any relevant decision of this Court, or between any of the U.S. courts of appeal. The petition also fails to show that the court of appeals misapplied any relevant precedent of this Court, or that the circumstances presented in the petition present any compelling or important federal questions warranting review.

This is true, first, because Judge Trott, writing for the unanimous panel below, correctly stated the law. The parties unanimously agreed that the rules of decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), would govern whether the County could regulate Respondent Gobin's development activities in this case.

Second, the Court of Appeals correctly applied the law. Consistent with *County of Yakima*, the panel found no "unmistakably clear" congressional intent authorizing *in rem* jurisdiction to impose the County's "development restrictions" on Respondent Gobin's land Consistent with *Cabazon*, the panel found no "exceptional circumstances" justifying County jurisdiction, after weighing the Tribes' legitimate self-government interests against the harm sought to be avoided, the "restricted" status of at least 50% of the Tulalip Reservation, and the intergovernmental relationships of the parties. This case illustrates the reason for the rule, that certiorari is rarely granted where the claim of error is predicated on a misapplication of a properly-stated rule of law.

Finally, the decision of the court of appeals in this case contravenes no relevant decision of this Court and, as the County admits, creates no conflict among the courts of appeal. Review now would be precipitous, and would lack the benefit of analysis by other courts in different circumstances. The panel correctly denied County jurisdiction "in this case." A new standard fashioned solely on the arguments of these parties might not apply, for example, on a different reservation, or where tribal regulation is less "comprehensive", or where the intergovernmental relationships are less "congenial."

In sum, the Court of Appeals correctly stated and applied the law, based on a fair reading of the record. Perhaps more germane here, is that, as the County rightly acknowledges, there is no split of authority in the circuits. The petition falls far short of satisfying this Court's criteria for issuance of the writ, and should be denied.

REASONS FOR DENYING THE PETITION

The Tulalip Tribes adopts the argument and rationale presented by Respondents Gobin and Madison, as reasons why the writ should not be granted. In addition, the Tribes would like to emphasize the following.

1. The Petition Should Not Be Granted Because The Petition Presents None Of The Considerations Governing Issuance of a Writ of Certiorari

Discretionary review on a writ of certiorari will be granted only for "compelling reasons." U.S.Sup.Ct. Rule ("Rule") 10.

A principal purpose of review on certiorari, is to resolve conflicts among the U.S. courts of appeals concerning the meaning of federal law, *Braxton v. U.S.*, 500 U.S. 344, ____, (1991), on the same important matter. Rule 10(a), supra. Another consideration governing review, is that a U.S. court of appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. Id., Rule 10(c). Conversely, the petition is "rarely" granted when the asserted error consists of the misapplication of a properly stated rule of law. Rule 10, supra.

There is nothing "compelling" in Snohomish County's petition that satisfies any of these considerations. First, the County rightly acknowledges that the decision below, reported at 304 F.3d 909, is one of first impression. Pet. ____. With this admission, there is obviously no circuit-level conflict to resolve. Rule 10, supra.

The only consideration asserted in support of granting the writ, is that the decision below contravenes relevant decisions of this Court. Pet. 8 - 9; see Rule 10(a), supra. The County's argument can be reduced to this: That the panel improperly applied the "express congressional authorization" and "exceptional circumstances" tests announced by this Court in Cabazon. As to the former, the County argues that the court of appeals simply misread the law in refusing to declare that Congress expressly authorized *in rem* county jurisdiction to abate unlawful conditions of the land, citing *County of Yakima*. Pet. 9 - 12. As to the latter, the County argues that the panel improperly failed to consider the Tribes' "diminished sovereignty" on fee lands, citing *Brendale*, when weighing the Tribes' interests against the County's interests under the "exceptional circumstances" test announced in *Cabazon*.

Neither argument has merit. For the reasons below, this case does not present "rare" circumstances justifying this Court's certiorari jurisdiction to review the asserted misapplication of a properly stated rule of law.

a. *County of Yakima* Does Not Support The County's Petition, Because Congress Has Not Manifested A Clear Intention That Alienability Authorizes *In Rem* Regulation of Respondent Gobin's Land.

The County argues that sections 5 and 6 of the Indian General Allotment Act, 25 U.S.C. §§ 348 , 349, as amended, expressly allow the County to enforce its land use code through *in rem* abatement proceedings, to prevent Indian development on Indian-owned fee lands on an Indian reservation. Pet. 10-11. Conceding, apparently, that *County of Yakima* forecloses any assertion of plenary jurisdiction against subsequent Indian owners under sections 5 or 6 of that Act, the County argues, rather, that its land use code can be enforced *in rem*, to abate a "condition of the land" that Respondent Gobin's development activities might create. Id. at 11.

The court of appeals squarely rejected this argument, and properly so. In *County of Yakima*, this Court held that Congress, in § 5 of the Indian General Allotment Act, as reaffirmed in the Burke Act proviso in § 6, _____, expressed a clear intention that allotted lands were taxable upon removal of federal restrictions by issuance of a fee patent. 502 U.S. at 259, citing *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 262-63 (1976). Support for this conclusion was traced to a decision from this Court in 1906:

> As the first basis of its decision, before reaching the "further" point of personal jurisdiction under § 6, ... the *Goudy* Court said that, although it was certainly possible for Congress to "grant the power of voluntary sale, while withholding the land from taxation or forced alienation," such an intent would not be presumed unless it was "clearly manifested." * * * For "it would seem strange to withdraw [the] protection [of the restriction on alienation] and permit the Indian to dispose of his lands as he pleases, while at the same time releasing it [sic] from taxation."

County of Yakima, 502 U.S. 251, 263, citing *Goudy v. Meath*, 203 U.S. 146, 149 (1906). "Thus," concluded the majority opinion, "when § 5 rendered the allotted lands alienable and encumberable, it also rendered them subject to assessment and forced sale for taxes." 502 U.S. at 264, 112 S.Ct. At 691.

Although divided 8-to-1 whether Congress expressly intended that taxation of land would flow as a consequence of its alienability, this Court unanimously rejected Yakima County's excise tax, imposed on the proceeds from the sale of that land. 502 U.S. at 268. Although the phrase "taxation of ... land" could be construed to include the taxation of land sale proceeds, and although that interpretation would be consistent with "*Goudy*'s emphasis upon the consequences of alienability," the tax was invalidated because it is "surely not ... the phrase's unambiguous meaning ... ." Id. The Court reasoned that while the Burke Act proviso does not attempt to describe a state's full range of *in rem* jurisdiction on alienable reservation land, it does describe the full range of jurisdiction to tax. "And that description is 'taxation of ... land.'" 502 U.S. at 268.

From the preceding quote, the County argues that *County of Yakima* reserved decision on whether its "full range of *in rem* jurisdiction" includes enforcement of county land use laws. Pet. 11. The court of appeals rejected the County's argument, and properly so. "Congress has ... acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Accordingly, "state laws

generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly [so] provided ... ." *Cabazon*, supra, 480 U.S. at 214. This is where the County fails to demonstrate that the panel reached a result at odds with *County of Yakima*. Certainly, no one contends that Congress specifically mentioned land use and zoning laws in the Dawes Act, or in the Burke Act proviso. Rather, in *County of Yakima*, the "express" congressional authority for the land tax sustained in was manifested in the rational relationship between the power of voluntary sale and, especially in that case, forced alienation for taxes. 502 U.S. at 264. Here, the County never even attempts to argue why Congress intended that consequences of alienability include state land use jurisdiction over Indians and their reservation lands -- let alone prove that relationship with sufficient certitude that it can said with confidence to be what Congress "expressly" intended. To the court of appeals, this omission was fatal to the County's appeal. Pet. 15a; see *County of Yakima*, ____.

With no demonstrated relationship between the consequences of alienability and state land use laws, and with no other "express" congressional authority for its jurisdictional assertions, the County fails to make a compelling case that the panel's decision conflicts with the relevant decisions of this Court. Rule 10(c).

b. County Land Use Abatement Laws Are Not An "Encumbrance ... of Land" Within the Meaning Of The Burke Act Proviso

Next the County contends that "an *in rem* zoning ordinance enforceable only through *in rem* abatement proceedings, is an authorized encumbrance of the land." Pet. 12. This argument is also uncompelling.

Nowhere in its petition does the County cite to any particular county code provision which provides this enforcement authority. Pet. 11 - 12. In the district court and the court of appeals, however, the County did produce selected excerpts. See CA Excerpts 115 at 38-45. From those excerpts, it appears the County's "abatement" authority is found at SCC 28.08.050-.060. Id. at 45. SCC 28.08.050 authorizes the director to "order any person who creates or maintains a violation of any land use ordinance ... to commence corrective work ... ." Id. (emphasis added). If the work is not completed within a specified time, the director is authorized to "abate the violation and cause the work to be done. He will charge the costs thereof as a lien against the property and as both a joint and separate personal obligation of any person who is in violation." Id.(emphases added). Additionally, the director has authority to seek "legal or equitable relief to enjoin any acts or practices or abate any conditions" constituting a land use violation. Id. (SCC 28.08.060).

Referring, apparently, to these local laws, the County concludes that the panel "ignore[d]" that "land use ordinances often regulate the condition of the land itself and authorize enforcement of the land without reference to persons." Pet. 11 (emphasis added). See also CA Excerpts 115

at 1-2..[1]

As a preliminary matter, the court of appeals agreed with the parties that Respondent Gobin's land is "freely encumberable". Pet 15a. Referring to the scope of permissible encumbrances, however, the panel observed that "the operative phrase is 'encumbrance *of land*.'" Pet. 16a (emphasis in original). In *County of Yakima*, this Court refused to extend the scope of permissible encumbrances under the Burke Act proviso to include an excise tax on the proceeds from the sale of Indian land. 502 U.S. at 269. Consistent with *County of Yakima*, the panel therefore held that "[e]ncumbrances with respect to land or encumbrances of the transactions involving land or based on the value of the land ... are not permitted. *Id.* at 269." Pet. 16a. The court of appeals concluded that Congress, in making reservation land freely encumberable, did not "expressly" intend that Respondent Gobin's development activities should be regulated by taking actions *in rem* against her property:

> The objectionable County density requirement, in particular, does not burden the land itself, but rather burdens the use to which Gobin seeks to put the land. Indeed, apart from Gobin's proposed activities, the County's land use regulations have no force. These regulations resemble the excise tax in *County of Yakima*. Although tangentially related to land, they are not inextricably linked to the land itself.

Pet. 16a - 17a. This ruling was sound, and is faithful to this Court's established case law. Since the development restrictions are aimed, not at Respondent Gobin's land, but at her development activity, it is thus "quite reasonable to say, in other words, that though the object of the [development] here is land, that does not make land the object of the [development restrictions], and hence does not invoke the Burke Act proviso." *County of Yakima*, 502 U.S. 268-69 (bracketed language substituted for original). And it does not aid the County's argument that these abatement laws (SCC 28.08.050-.060, supra) are enforceable as liens against real estate:

> A lien upon real estate to satisfy a tax does not convert the tax into a tax upon real estate. * * * The excise tax remains a tax upon the Indian's activity of selling the land, and thus is void, whatever means may be devised for its collection.

502 U.S. at 269.

Finally, the County's code provisions actually enforce against unlawful "conditions of the land" by proceeding both *in rem* and *in personam*. For example, SCC 28.08.050 (CA Excerpts

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[1] The County first raised this argument in a document filed in the district court on the day of argument, after close of briefing on summary judgment. Entitled "County's Cited Case Law", CA Excerpt 115 consists of excerpts from the Snohomish County Code, enacted apparently not earlier than 1985, together with four Washington appellate decisions. It is sufficient to say that none of these cases from 1916, 1917, 1918, and 1946 support the County's proposition, CA Excerpt 115, at 1, "that enforcement of a land use violation is *in rem* jurisdiction." Even less so, do these early cases support the notion that the county uses its abatement authority in land use cases, or that it does so very "often". Pet. 11.

115, at 45) authorizes the director to "order" the owner/actor to comply, and creates personal liability in the owner/actor for failure to comply. Id. Indeed, it is unclear whether these laws can be enforced at all, in the absence of personal jurisdiction. Id.

In sum, these laws are of the same character and quality as the excise tax laws invalidated in *County of Yakima*. Congress has not expressly provided that the county's land use laws may regulate Indian development of Indian lands, whatever means may be devised for their enforcement, and the court of appeals so held. The petition fails to make a compelling case that the court of appeals contravened any established precedent of this Court on the scope of permissible encumbrances under the Indian General Allotment Act, 25 U.S.C. §§ 348 - 349, as amended.

c. *Brendale v. Yakima Indian Nation* Is Wholly Inapplicable To This Case

Finally, the petition argues that the "reasoning" employed by the court of appeals supports exclusive tribal authority over non-member owned fee land, contrary to this Court's decision in *Brendale*. Pet. 12. This argument plainly lacks merit, since nothing in this case involves an assertion of tribal jurisdiction over non-member owned fee lands. See *County of Yakima*, 502 U.S. at 267[2]; see also CA Excerpt 61, at 3 - 4 (striking portions of the Tribes' intervention complaint, and denying intervention to the City of Everett, on grounds that the case does not involve tribal jurisdiction over non-member owned reservation lands).

In sum, on this point too, the petition fails to demonstrate that the court of appeals contravened any relevant precedent of this Court. Rule 10(a). For the reasons shown, the decision below was correct and well reasoned.

2. **"Exceptional Circumstances"**

Next, the petition asks this Court to review the panel's asserted misapplication of the "exceptional circumstances" test announced by this Court in *Cabazon*. Pet. 13 - 18. The County's argument can be reduced to this: That court of appeals placed undue weight on the federal and tribal interests, and insufficient weight on the County's interests. The County does not disagree with the statement of the law announced by the court of appeals, but disagrees with how both lower courts applied the law to the facts of this case.

a. *Brendale* Is Not Controlling In Cases Asserting The Restriction Of A State's Congressionally Conferred Powers.

In deciding whether to sustain the County's assertion of jurisdiction over tribal Indians in their dealings with non-Indians, the task facing the court of appeals was to determine whether:

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[2] "*Brendale* and its reasoning are not applicable to the present cases, which involve not a proposed extension of a tribe's inherent powers, but an asserted restriction of a State's congressionally conferred powers."

> state authority is pre-empted by the operation of federal law, and "[s]tate jurisdiction is pre-empted ... 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." * * * The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. (Citations omitted)

Cabazon at ___, citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983); see also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).[3] The County acknowledges that this inquiry is "context specific" -- in other words, that the result in the case turns directly on its facts. Pet. 13

The County complains, specifically, that the court of appeals erred by requiring a demonstration how the absence of county jurisdiction in this case would create any difficulties for the County that are incrementally greater than those it already faces on the reservation, considering, in particular, the undisputed fact that the County lacks land use jurisdiction on more than half of the Tulalip Reservation now held in trust or restricted status. Pet. 14-15; see also Pet. App. 18a, 28a. The County concludes that this standard is legally incorrect, because it fails to account for "diminished tribal sovereignty" over certain reservation lands under the rule announced in *Brendale*, 492 U.S. at 408 (opinion of White, J).

As this Court recognized in *County of Yakima*, however, the argument lacks merit. The County concedes, as it must, that *Brendale* involved assertions of *tribal* jurisdiction over *non-Indians* -- considerations that are entirely absent from this case. 492 U.S. at 424-28 (opinion of White, J.); 492 U.S. at 435-37 (opinion of Stevens, J.), cited at Pet. 14-15. For these reasons, this Court in *County of Yakima* held that:

> *Brendale* and its reasoning are not applicable to the present cases, which involve not a proposed extension of a tribe's inherent powers, but an asserted restriction of a State's congressionally conferred powers.

502 U.S. at 267; see also CA Excerpt 61, at 3 - 4, discussed above. Considering this distinction, it is not surprising that the court of appeals did not mention "diminished tribal sovereignty" under *Brendale* as a factor in its decision.

The "incremental impact" test used by the panel in determining the "exceptional" nature of the County's lack of land use jurisdiction over Respondent Gobin, was both reasonable and practical here. It is established that more than half of the 22,000 acre Tulalip Reservation is owned in trust or restricted status, Pet. 28a, CA Excerpts 71 p. 8, and therefore already beyond the reach of the County's land use laws. See 25 U.S.C. 403a-2, *Santa Rosa Band of Indians v.*

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[3] Nowhere in the petition does the County assert that its jurisdictional assertions do not interfere or are compatible with federal and tribal interests.

Kings County, 532 F.2d 655, 664 (9th Cir.1976) (no county land use jurisdiction on trust lands); *Snohomish County v. Seattle Disposal Company*, 70 Wn.2d 668, 425 P.2d 22 (1967), *cert. denied*, 389 U.S. 1016 (1967) (no county land use jurisdiction on lands owned by the Tulalip Tribes). Under these circumstances, it is not surprising that the County failed to convince the district court that inability to enforce its land use laws in this case caused any incremental impacts, let alone impacts sufficient to withstand summary judgment. Pet. 15. The County's inability to make the required showing does not render the panel's "incremental" yardstick invalid. It just undermines the weight of the the County's argument regarding the "exceptional" impact from the panel's decision on the delivery of county services.

Because this case involves no assertions of tribal jurisdiction over non-Indians, the panel did not err in failing to consider "diminished tribal sovereignty" under *Brendale*. For these reasons, the County fails to demonstrate how certiorari would resolve an important issue of federal law in this case, or demonstrate that the panel has departed from this Court's established precedent.

b. Tribal Interests, As Reflected In Federal Law, Are Legitimate And Paramount To The County's Interests

The County contends that the panel gave undue weight to the federal and tribal interests, and insufficient weight to the County's interests. Pet. 15 - 18. It argues, first, that the Tulalip Tribes' interests in this case are "almost nonexistent." Pet. 13.

The County cites no law, however, for the remarkable proposition that an Indian tribe has "almost nonexistent" interests in Indian development of reservation land. In fact, it has long been the law of this Court, that reservation Indians have a "right" to make their own laws and be ruled by them. The Tulalip Tribes' interests in exercising its powers of self-government over the natural and economic resources of the Tulalip Reservation, and over the activities of its members in this case, are legitimate, are strongly reflected in existing federal policies, and are paramount to the claimed interests of the County.

The zoning power is a particularly vital component of tribal sovereignty. The Tulalip Reservation was set aside as a homeland for Indians, and control over Reservation land goes to the heart of the Tribes' ability to govern. See *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 658 n.14 (2001) ("[Z]oning is 'vital to the maintenance of tribal integrity and self-determination.'"), quoting *Duro v. Reina*, 495 U.S. 676, 688 (1990); *Brendale*, supra, 492 U.S. at 433 (op. of Stevens, J.) ("Zoning is the process whereby a community defines its essential character."). Land use decisions should be made by tribal policy makers, pursuant to tribal laws, regarding use of a tribal member's lands within her reservation.

The County's exercise of jurisdiction in this case infringes on the Tulalip Tribes' vital interests. This Court, in examining whether state action impinges on the affairs of reservation Indians, has stated:

> 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.

Williams v. Lee, supra, 358 U.S. at 219-220. State law is generally inapplicable when reservation conduct involving Indians is at issue, because the state's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 144. This is so because, as this Court has repeatedly emphasized, "there is a significant *geographical* component to tribal sovereignty, a component which remains highly relevant to the pre-emption inquiry; and an important factor to weigh in determining whether state authority has exceeded the permissible limits". Id (emphasis added). For these reasons this Court has consistently guarded the authority of Indian governments over their reservations, land resources, and internal and social relations:

> Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory; they are "a separate people" possessing "the power of regulating their internal and social relations...."

United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975); see also id. at 544-548; *Williams v. Lee*, 358 U.S. at 223.

In its petition, the County argues for the first time[4] that the Tribes has no sovereign interest at risk in this case over any "artificial competitive advantage" that will be enjoyed by tribal developers. Pet 16, citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 177, 100 S.Ct. 2069, 2093, 65 L.Ed.2d 10 (1980).

In *Colville*, the State of Washington asserted jurisdiction to require tribal vendors to collect and pay cigarette taxes from vendor sales to non-Indians. This Court determined that the State's interest (access to cigarette tax revenue) outweighed the "minimal burden" on tribal vendors to collect and pay that tax to the State.

The County's reliance on *Colville*, a tax case, is misplaced. In the "special area" of state taxation of Indian tribes and tribal members, this Court has announced it will follow a *per se* rule where "balancing of interests" is left to Congress. *County of Yakima*, ____, citing *Cabazon*. *Colville* has no bearing on this case.

The County's concern for fair competition is factually unsupported in the record, and avoids the true issue: Whether in infringement cases, after a "particularized inquiry" of the interests at stake, state jurisdiction is preempted. Regarding the County's interests, there is nothing in the record to support the conclusion that any "artificial competitive advantage" enjoyed by a tribal developer would impair the County's asserted interest in avoiding "sham

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[4] The petition raises this issue for the first time as an "exceptional circumstance". Pet. 16. The County briefly argued this issue as support for "express authority", in its opening brief to the Ninth Circuit, at 28-29.

transactions", CA Excerpts 48 and 52, in having "adequate legal authority" under its storm water regulations, id. Excerpt 49, in providing a "continuum" of county services on the reservation, id. Excerpt 50, in maintaining reservation roads, id. Excerpt 51, or in enforcing its critical areas ordinances to protect endangered species, id. Excerpt 53.

Regarding tribal interests, it is clear from the County's push for fair competition among land developers, that a simple veto power over land use disputes can itself cause an impermissible infringement upon a tribe's right of self-government:

> 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. * * * ...Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations'... . * * * [S]ubjecting 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 local 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. And even when local regulations are adopted in the best of faith, the differing economic situations of reservation Indians and the general citizenry may give the ordinance of equal application a vastly disproportionate impact.

Santa Rosa Band, supra, 532 F.2d at 663-64 (citations omitted).

The Tulalip Tribes has strong interests in regulating the conduct of its members, in promoting economic development and housing, in managing reservation resources, and in promoting tribal self-government and the general welfare of the community. Its interests in managing reservation land uses are reflected in the policy statement and findings supporting the enactment of the Tulalip Zoning Ordinance, "Ordinance 80", whose purpose is:

> 1.0 Purpose. To safeguard and promote the peace, health, safety and general welfare of the Tulalip Reservation and its people; to ensure adequate land supply for future generations through careful planning and zoning; to discourage land development in areas that pose a potential threat to public health and the Reservation's fisheries and shellfish resources; to promote and preserve the unique Indian character, identity and culture of the Tulalip Indian Reservation as the Tribes permanent homeland; to reduce the potential for conflict between new residential development and the resource-based economy of the Tulalip Indian Reservation; to provide for the orderly use of the Reservation's lands; to provide landowners with consistent standards for Reservation land use activities by providing certainty and stability in land use decision-making; and to protect and enhance the natural beauty and resources of the Tulalip Reservation.

Tulalip Ordinance 80, Section 1, CA Excerpts 71 at 28. This statement of legislative policy is

supported by findings that tribal land use regulation is necessary to protect Reservation surface and ground waters, tribal reserved fishing and hunting rights, wildlife habitat, the tribal land base, and the "essential Indian character of the Reservation and Reservation community." Id. at 29-30. Together, these laws provide strong policy justification for tribal regulation of member conduct affecting land uses on the Tulalip Reservation.

These Tribes' interests in planning for the Reservation's growth and development are strongly reflected in federal law. Congress' consistent and strong support for Indian self-determination has been the cornerstone of federal Indian policy since the mid-20th century. Examples of federal laws reflecting a congressional policy favoring Indian self-determination are summarized in *Cabazon*, 480 U.S. at 216, n.19, and in *New Mexico v. Mescalero Apache Tribe*, supra. In *New Mexico*, this Court identified several statutes enacted to promote tribal self-government in the context of land use regulation. For example, in the Indian Financing Act of 1974, as amended,

> It is hereby declared to be the policy of Congress ... to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non- Indians in neighboring communities.

25 U.S.C. § 1451. Also, in the Indian Self-Determination and Education Assistance Act of 1975, as amended,

> The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self- determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

25 U.S.C. § 450a(b).

Locally, the Tribes' vehicle for managing the growth of the reservation has received federal approval. Tulalip Ordinance 80, adopted in 1995, is the foundation of the Tulalip Tribes' land use regulatory program. It was approved that same year by the Superintendent of the Western Washington Agency Office, Bureau of Indian Affairs. The BIA's approval was upheld by the Assistant Area Director ("AAD"), Program Services, Northwest Regional Office, Department of Interior. CA Excerpt 71, p. 81-82.

In sum, the County fails to acknowledge the Tulalip Tribes' legitimate and strong interests in regulating Indian development of the Tulalip Reservation, and that the Tribes' interests are strongly reflected in federal law. The County's concern over unfair competition finds no support in the record, and, even if true, has not been demonstrated to present any threat to the County's

asserted interests.

It is scant justification for the assertion of state jurisdiction that a tribal member will benefit from the resources of her reservation in a manner that is not shared by non-Indians. On this point alone, the petition should be denied.

3. Any County Administrative Problems Can Be Resolved Via Government-To-Government Relationship

The County's final justification is that the decision below will cause nightmarish "jurisdiction-switching" consequences. Pet. ___. This Court has already refused to adopt a jurisdictional approach, however, where the personal law of a tribal Indian would depend on her parcel ownership. Here, both courts that considered the question in this case, have concluded that speculation of potential "sham transactions"would not result in circumstances so "exceptional" as to justify county jurisdiction in this case. The County's concern for potential "civil rights liability" is easily mitigated through intergovernmental cooperation and careful recordkeeping and investigatory techniques. In short, the County's "nightmare" scenarios are simply not present in this case. This Court should not grant certiorari just to re-evaluate the "exceptional" nature of the panel's decision on the County's land use program.

On grounds twice rejected by the courts below, the County seeks certiorari to convince this Court that the panel's decision will cause a "nightmare." Pet. ___. It argues that this Court was sympathetic to the problem of administrative inconvenience, when it held in *County of Yakima,* "as a general proposition," that administrative burdens are associated with jurisdiction-shifting based on changing parcel ownership. Pet. 19, citing *County of Yakima*, 502 U.S. at 265. What this Court actually held, however, was that § 6 of the Indian General Allotment Act would not be extended to authorize plenary jurisdiction over subsequent Indian owners of allotted parcels. 502 U.S. at 263. To do so "would create a 'checkerboard' pattern in which an Indian's personal law would depend upon his parcel ownership ... [and] produce almost surreal administrative problems, making the applicable law of civil relations depend not upon the locus of the transaction but upon the character of the reservation land owned by one or both parties." Id. The County seizes on a further observation where the majority stated it "cannot resist observing, moreover," that the joint federal/tribal proposal in that case "also produces a 'checkerboard,' and one that is less readily administered: They would allow state taxation of only those fee lands owned (from time to time) by nonmembers of the Tribe." 502 U.S. at 265.

The significance of the preceding quote from *County of Yakima*, is that § 6 of the Indian General Allotment Act would not be extended to authorize plenary in rem jurisdiction over subsequent Indian purchasers of allotted lands. From the quote, it can also be argued that "surreal administrative problems" were not sufficient to extend § 6 to include plenary state jurisdiction over Indians, considering the present federal policies supporting Indian self-determination. Just as plenary state jurisdiction under § 6 would not be extended in *County of Yakima* based on "surreal administrative problems", so jurisdiction should not be extended here, in the face of those same federal policies, on the claim that administrative necessity constitutes an "exceptional

circumstance" justifying state jurisdiction under *Cabazon*, supra. Both lower courts rejected the claim, after close consideration of the County's affidavits and arguments.

Nor were the lower courts swayed that fears of "sham transactions" justified state jurisdiction in this case. After reviewing the facts and arguments, neither of the two courts below were convinced that the County's problems with Mr. Merkel, Pet. 20, were sufficient to sustain jurisdiction in this case. Pet. p. 19a, 29a.

The County did not argue below that "potential civil liability" posed an exceptional circumstance justifying state jurisdiction. _____. This Court will not grant certiorari to consider an issue not argued before the lower courts. [cite]. In any case, there should be no need for concern over civil liability from improper enforcement, under proper coordination with tribal and BIA personnel to determine the tribal affiliation of record owners.

This Court has long justified a particularly narrow scope of review, on a request for review of factual determinations twice concurred in by the lower courts. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949). This Court's "two-court rule" is rooted both in the need to conserve its scarce resources in the face of an increasing docket, and in support of the long-standing principle that factual determinations of the lower courts are reviewed on appeal for clear error. _____. Here, relying solely on the assertion that its concerns are "important", the County does not even argue that the lower courts failed to follow this Court's precedent. There is nothing "compelling" about the fear of "sham transactions" and "administrative necessity" that warrants a third review of these fact-based issues in this Court.

4. Conclusion

The petition falls far short of presenting any compelling circumstances that support the granting of certiorari in this case. In its petition, the County admits this is a case of first impression, and that there is no split of authority in the courts of appeal on the issues decided below. In support of its petition, the County contends merely that the panel misapplied a properly stated rule of law. We have demonstrated that the court of appeals did not contravene any controlling decision of this Court, and in reaching its decision, adhered faithfully to this Court's precedent. For these reasons, we respectfully request that the petition be denied.

Respectfully submitted, _____, 2003.

THE TULALIP TRIBES OF WASHINGTON

_____

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APPENDIX

(Selected Excerpts from Title 28, Snohomish County Code)
Source: http://www.mrsc.org/codes.aspx#county

28.08.050 Abatement proceedings--Authorized.

In addition to or as an alternative to any other judicial or administrative remedy provided in this title or by law or other ordinance, a director may order a land use ordinance violation to be abated. A director may order any person who creates or maintains a violation of any land use ordinance, or rules and regulations adopted thereunder, to commence corrective work and to complete the work within such time as a director determines reasonable under the circumstances. If the required corrective work is not commenced or completed within the time specified, a director may proceed to abate the violation and cause the work to be done. He will charge the costs thereof as a lien against the property and as both a joint and separate personal obligation of any person who is in violation.
(Added Ord. 85-017, § 2, May 1, 1985).

28.08.060 Abatement proceedings--Legal relief.

Notwithstanding the existence or use of any other remedy, a director may seek legal or equitable relief to enjoin any acts or practices or abate any conditions which constitute or will constitute a violation of any land use ordinance or rules and regulations adopted thereunder.
(Added Ord. 85-017, § 2, May 1, 1985).