No. 02-1029

In The Supreme Court of the United States

SNOHOMISH COUNTY; 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

PETITION FOR WRIT OF CERTIORARI

STEVEN JOSEPH BLADEK, DPA
Counsel of Record
THOMAS M. FITZPATRICK, DPA
SNOHOMISH COUNTY PROSECUTING ATTORNEY – CIVIL DIVISION
2918 COLBY AVENUE, SUITE 203
EVERETT, WASHINGTON 98201
(425) 388-6330
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether the express *in rem* jurisdiction over reservation fee lands established by Congress in sections 5 and 6 of the Indian General Allotment Act (as amended and codified at 25 U.S.C. §§ 348 and 349) and recognized by this Court in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), allows Snohomish County to zone or impose any land use regulations against fee land located on the Tulalip Indian Reservation when the land is owned by a member of the Tulalip Tribes.

2. Whether, in light of the diminished tribal authority over reservation fee lands recognized by this Court in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989), and the minimal federal and tribal interests in maintaining exclusive tribal jurisdiction over private open-market development, the legitimate regulatory interests of state and local government allow Snohomish County to zone or impose any land use regulations against Reservation fee lands or tribal members developing those lands when the land is owned by a member of the Tulalip Tribes.

PARTIES TO THE PROCEEDING

The petitioners are Snohomish County and Stephen Holt, Director, Snohomish County Department of Planning and Development Services. There are no parent companies or wholly owned subsidiaries.

The respondents are The Tulalip Tribes of Washington; Kim Gobin; and Guy Madison.

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Petitioner Snohomish County respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-19a) is reported at 304 F.3d 909. The opinion of the district court (App. *infra*, 22a-31a) and the judgment of the district court (App., *infra*, 20a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 2002. (App., *infra*, 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 5 and 6 of the Indian General Allotment Act of 1887, 24 Stat. 389-90, as amended by the Burke Act of 1906, 34 Stat. 182, codified at 25 U.S.C. §§ 348 and 349, are reproduced at App., *infra*, 39a-41a and 42a. The relevant Indian treaty is the Treaty of Point Elliot, 12 Stat. 927 (Jan. 22, 1855), which is reproduced at App. *infra*, 32a-38a.

STATEMENT

This case raises the important question of whether and to what extent state and local governments have authority to zone or impose land use regulations on reservation fee lands when tribal members own those lands in unrestricted fee simple. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331 (general federal question jurisdiction) and 28 U.S.C. § 1362 (federal question jurisdiction in civil actions brought by Indian tribes).

A. The Land and Its Surroundings

The fee land at issue in this case is a twenty-acre parcel situated in unincorporated Snohomish County in

northwestern Washington State. It lies on the northern border of the Tulalip Indian Reservation and is currently owned by Kim Gobin, an enrolled member of the Tulalip Tribes of Washington (the "Tribes").

The Tribes is a federally recognized tribe with a 22,000-acre reservation set aside for its "exclusive use" under the Treaty of Point Elliot. 12 Stat. 927; App., *infra*, 33a. Similar to what has happened on many reservations throughout the United States, however, much of the Tulalip Reservation is no longer preserved for exclusive tribal use. Large portions of the Reservation were allotted to individual Indians subject to restrictions on alienation, encumbrance and taxation that were later removed, and much of the land allotted to individual Indians was later sold to non-Indians.

Currently, about 50% of the Reservation is held in trust by the United States for the Tribes or individual tribal members or is in restricted fee status because the Tribes repurchased the land after its transfer to non-Indians.[1] The remaining 50% of the Reservation is owned by tribal members and nonmembers in unrestricted fee simple. Land ownership throughout the Reservation is in a checkerboard pattern, with open access provided to members and non-members on a road system operated and maintained by Snohomish County. C.A. Excerpt 85 at 5.

As the area has evolved, the Reservation has become an integral part of Snohomish County and is subject to the same urban sprawl growth pressures as the surrounding metropolitan area. C.A. Excerpt 71 at 2. The Reservation is located entirely within Snohomish County between the County's major population centers, the cities of Everett, Marysville, and Arlington. Approximately 10,000 people currently live on the Reservation, and of those, no more than 20% are tribal members with the remaining 80% being non-

[1] Under 25 U.S.C. § 403a-2, land purchased by the Tribes after June 18, 1956 is restricted fee land because it may be sold only with approval from the Secretary of the Interior.

members. All Reservation residents may vote in County elections while only tribal members may vote in elections for the Tribes. C.A. Excerpt 85 at 2-3.

Gobin's land is located on the northern border of the Reservation. It is adjacent to off-reservation land under County jurisdiction and is accessible only by a road operated and maintained by the County. C.A. Excerpt 71 at 112-14. It was patented under the Treaty of Point Elliot in 1885, and restrictions on its sale, encumbrance and taxation were removed in 1962 when the Secretary of the Interior approved a deed to a non-Indian owner. Gobin purchased her twenty-acre parcel for speculative land development in 1998. C.A. Excerpt 64 at 2-3.

B. Land Use Regulation on the Reservation

The County and the Tribes each have a comprehensive ordinance governing zoning and land use on the Reservation. By its terms, the Tulalip ordinance applies to all lands within Reservation boundaries whether trust or fee and regardless of ownership. C.A. Excerpt 71 at 56, 80. The Secretary of the Interior approved the Tulalip ordinance using a "narrow scope of review" without determining "the precise scope of tribal authority or . . . whether every conceivable application of [the] ordinance is within that authority." Docket 71 at 82, 84.

The County ordinance applies to all real property in unincorporated Snohomish County, although the County historically has not asserted land use jurisdiction on Indian trust lands. On unrestricted Reservation fee lands, the County historically has exercised its zoning and land use jurisdiction against the land and its owners without reference to tribal affiliation. C.A. Excerpt 85 at 4.

The County and the Tribes have zoned the Reservation in similar ways. C.A. Excerpt 84 at 88. In adopting its most recent countywide land use plan, the

County established a sub-area plan specific to the Reservation and, at the request of the Tribes, down zoned the Reservation to lower densities to more closely match tribal zoning. C.A. Excerpt 85 at 10. A distinction remains, however, in the ability of each government to approve development different than what is allowed by the basic zoning map. The Tulalip ordinance allows the Tribes to approve a re-zone and subdivision for single-family residences in greater density than is possible under the current County ordinance.

C. Gobin's Project

In January 1999, Gobin submitted an application to the Tribes to subdivide and re-zone her land but never submitted a similar application to the County. When the Tribes notified the County of the application, the County stated that, unless the land were taken into trust, the County would assert jurisdiction, would not recognize subdivided lots as legal lots, and would subject non-legal lots to development restrictions. C.A. Excerpt 71 at 123-24.

As approved by the Tribes, Gobin's subdivision consists of twenty-five single-family residential lots on individual wells and septic systems. Current County ordinances would allow only ten such lots on the same parcel of land.

Other than permitting Gobin's residential subdivision, the Tribes has no governmental or proprietary interest in Gobin's land or her project. Gobin does not propose to build tribal housing, but to develop twenty-five single-family residences for the open market. C.A. Excerpt 64 at 2. Based on current growth trends in the County and the number of non-member residents on the Reservation and surrounding areas, it is probable that non-members will purchase most if not all homes in any such open-market development. *See* C.A. Excerpt 85 at 2-3.

In September 1999, Gobin[2] filed a complaint for declaratory relief against the County and Stephen Holt, the County Director of Planning and Development Services. The complaint alleged that the County has no jurisdiction over fee land owned by Gobin or to enforce restrictions against her based on her development of that land because she is an enrolled member of the Tribes. In October 1999, the Tribes intervened and sought a judgment declaring that the Tribes has exclusive jurisdiction over Gobin's development activities on the Reservation.

D. Proceedings Below

On summary judgment motions from Gobin and the Tribes, the District Court entered a judgment declaring that the Tribes has exclusive jurisdiction to regulate land use on reservation fee lands owned by tribal members. The Ninth Circuit affirmed. In answering the questions presented, each court applied the standard set forth in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214-216 (1987), which recognizes state jurisdiction over tribal Indians on their reservations only when Congress expressly provides for it or in the exceptional circumstance that state interests outweigh federal and tribal interests in tribal self-determination, self-sufficiency, and economic development. In resisting summary judgment, the County relied on both express jurisdiction and exceptional circumstances. The County argued that Congress expressly granted state and local governments *in rem* jurisdiction on reservation fee lands and that, under the exceptional circumstances test, the County may exercise jurisdiction concurrent with that of the Tribes over its members. At a minimum, the County sought

[2] Gobin's brother, Guy Madison, is also a named plaintiff even though he is alleged to be a co-developer only and has no interest in the land at issue in this case. C.A. Excerpt 64 at 1-2.

a weighing of the state, federal and tribal interests at stake after a trial on the merits.

In arguing that Congress granted express jurisdiction over reservation fee lands, the County relied upon the *in rem* jurisdiction established under sections 5 and 6 of the Indian General Allotment Act (GAA) and recognized by this Court in the context of taxation in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992). In rejecting the County's argument, the District Court held that the *in rem* jurisdiction that Congress authorized by allowing unrestricted alienation, encumbrance and taxation of fee land does not include zoning or any land use regulation regardless of whether it is imposed against the land or the owner because all such regulations have an effect of limiting the owner's development activity. The Ninth Circuit upheld this holding by using slightly different reasoning. It held that Congress did not authorize jurisdiction because the ability to alienate land is unrelated to land use jurisdiction and the ability to encumber land does not authorize regulation that burdens activity on the land.

In contending that this case presents an exceptional circumstance, or that this determination must be made after trial, the County emphasized that tribal interests must be examined in light of the diminished tribal authority over reservation fee lands recognized by the Court in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). The County also emphasized the minimal federal and tribal interests in maintaining exclusive tribal jurisdiction over private development, and the serious administrative and practical problems posed when exclusive jurisdiction shifts between the Tribes and the County based upon whether a tribal member owns the land at any given time.

In rejecting the County position, the District Court and the Ninth Circuit recognized that the County has legitimate and important interests at stake—maintaining

County roads and storm sewers, protecting endangered species, and protecting public health and safety—but held that tribal interests in self-government are of greater importance. In so holding, neither court discussed whether tribal authority is diminished on fee lands. Other than stating that county and tribal regulations may differ, neither Court discussed how county regulation of private development would interfere with tribal self-determination. Neither court discussed whether County interests were sufficient to sustain less than plenary jurisdiction, such as allowing the County to enforce development restrictions *in rem* against fee land, but not against owners that are tribal members, or allowing County enforcement against the land owner if the land is subsequently transferred to a non-Indian owner again. In contrast, and without reference to federal or tribal interests, each court held that to maintain any jurisdiction over member-owned fee land, the County must somehow demonstrate that its governmental interests on fee lands as a whole are greater than its interests on Indian trust lands.

REASONS FOR GRANTING THE PETITION

This case presents the critical question of whether state and local governments have any authority to zone or impose land use regulations on reservation fee lands when a tribal member owns those lands. In conjunction with this Court's decision in *Brendale*, the consequence of the Ninth Circuit's decision is that exclusive zoning and land use jurisdiction over individual parcels of reservation fee land will shift between local and tribal government based upon whether a member or non-member owns the land at any given moment. This Court should review the decision of the Ninth Circuit because: (1) it conflicts with the express *in rem* jurisdiction granted to state and local governments over reservation fee lands recognized by this Court's decision in *County of Yakima*; (2) it misapplies and rewrites this Court's

exceptional circumstances jurisprudence by failing to consider whether tribal sovereignty on fee lands is diminished and the nature and extent of federal and tribal interests in maintaining exclusive tribal jurisdiction over private development; and (3) it creates a broad and unworkable rule of law that will cause serious zoning and land use enforcement problems for states, counties, and Indian tribes throughout the country.

A. The Court of Appeals Decision Conflicts with Principles of *In Rem* Jurisdiction on Fee Land Established in *County of Yakima*.

In *County of Yakima*, the Court considered whether a county could impose both an *ad valorem* property tax on land patented under the General Allotment Act as well as an excise tax on its sale. In upholding the *ad valorem* property tax, but not the excise tax, the Court held that GAA sections 5 and 6, each independently, manifested an unmistakably clear intent to allow states to tax fee-patented land based on *in rem* jurisdiction over the land. *County of Yakima*, 502 U.S. at 259, 263-65. The Court held that GAA section 5 manifested such intent by allowing fee owners to alienate their reservation fee land without restriction, and that GAA section 6 (as amended by the Burke Act) manifested such intent by establishing that fee ownership would free the land of "all restrictions as to sale, incumbrance, or taxation." *County of Yakima*, 502 U.S. at 563-65 (quoting 25 U.S.C. § 349); *see also Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 112 (1998) (discussing *County of Yakima*). The Court held that GAA sections 5 and 6 each establish *in rem* jurisdiction over reservation fee land, but specifically left open the extent of that jurisdiction:

> While the Burke Act proviso does not purport to describe the entire range of *in rem* jurisdiction States may exercise with respect to fee-patented reservation land, we think it does describe the entire range of *jurisdiction to tax*. And that description is "taxation of . . . land."

County of Yakima, 502 U.S. at 268.

In the context of this case, the reserved questions raised by the quoted passage are (1) whether alienability under GAA section 5 allows the County to zone or impose other land use regulations *in rem* against the land, as opposed to *in personam* against the landowner or developer, and (2) whether such a zoning or other land use regulation is an authorized encumbrance of land under GAA section 6. Other than this case, there appears to be no federal authority answering these questions. By answering both questions in the negative, the decision of the Court of Appeals conflicts with the reasoning and import of *County of Yakima* and *Goudy v. Meath*, 203 U.S. 146 (1906).

As to the first question, the *County of Yakima* Court emphasized the reasoning from *Goudy* that a county's ability to tax fee land flows directly from its alienability because it would be "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. at 263 (quoting *Goudy*, 203 U.S. at 149). As the Ninth Circuit has recognized, "[t]he logic propounded by the *Goudy* Court and approved by [*County of Yakima*] requires an Indian, even though he receives his property by treaty, to accept the burdens as well as the benefits of land ownership." *Lummi Indian Tribe v. Whatcom County, Washington*, 5 F.3d 1355, 1357 (9th Cir. 1993), *cert. denied*, 512 U.S. 1228 (1994).

The reasoning that requires the burden of *in rem* taxation to follow the benefits of unrestricted land ownership

applies equally to *in rem* zoning and land use restrictions. Just as it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from taxation, it would be strange to allow a tribal member to sell his fee land without restriction while exempting the land from zoning and development restrictions that apply to all other lands on the open market. In refusing to apply this reasoning from *County of Yakima*, the Court of Appeals specifically noted that it had been reluctant to apply it even in the context of taxation. 304 F.3d 909, 915 n.2.[3] The Court should grant the petition to determine this important and outstanding question of federal law.

On the second question, whether zoning or land use restrictions are an encumbrance of land, the Court of Appeals decision misconstrues and misapplies the reasoning in *County of Yakima*. In *County of Yakima*, the Court held that an *ad valorem* property tax is an allowed taxation of land while an excise tax on the activity of selling land is not a tax on the land itself, and therefore is not permitted. In this case, the Court of Appeals reasoned that, even if zoning and land use regulation may be considered an encumbrance, it must be considered a prohibited encumbrance on activity with respect to land rather than a permitted encumbrance of the land itself because such regulations prohibit development activity. What this reasoning ignores is that land use ordinances often regulate the condition of the land itself and authorize enforcement against the land without reference to persons.

In the context of determining whether a county zoning ordinance is a prohibited encumbrance of reservation trust lands, the Ninth Circuit itself has held that zoning may be understood as an encumbrance of land rather than an

[3] The Court of Appeals cites its comment from *Lummi Indian Tribe* that the conclusion from *County of Yakima* that taxation follows alienability under GAA section 5 "may be hard to square with the requirement" "that Congress' intent to authorize state taxation of Indians must be unmistakably clear." *See Lummi*, 5 F.3d at 1358.

encumbrance of activity on the land. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 667 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977). In so holding, the Ninth Circuit dismissed arguments that its interpretation of zoning regulations as encumbrances could be read more broadly:

> As we read "encumbrance," it is directed, consonant with the flavor of the word's narrow legal meaning, at traditional land use regulations and restrictions directed against the property itself, and does not encompass regulations of activity which only incidentally involve the property.

Santa Rosa Band, 532 F.2d at 667 n.20. What the County contends in this case is that regulation directed at the condition of the land, such as an *in rem* zoning ordinance enforceable only through *in rem* abatement proceedings, is an authorized encumbrance of the land. It is not a restriction on development activity itself but on the condition of the land whether it is developed or not and regardless of who conducts activity on the land.

By basing its reasoning on the tribal member as the actor in developing member-owned fee land, the decision below also conflicts with *Brendale*. *Brendale* held that a tribe has no authority to zone non-member-owned fee land in open areas of a reservation. 492 U.S. at 432, 444-48. Contrary to that holding, the reasoning employed by the Ninth Circuit supports exclusive tribal authority over land use activities of tribal member developers on non-member-owned fee land. The Court should grant the petition to determine this important legal issue.