

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

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SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

PHILIP BRENDALÉ, Petitioner V. CONFEDERATED TRIBES
AND BANDS OF THE YAKIMA INDIAN NATION, ET AL.;
STANLEY WILKINSON, Petitioner V. CONFEDERATED
TRIBES AND BANDS OF THE YAKIMA INDIAN NATION;
and

CAPTION:

COUNTY OF YAKIMA, ET AL., Petitioners V.
CONFEDERATED TRIBES AND BANDS OF THE YAKIMA
INDIAN NATION

CASE NO:

87-1622; 87-1697; 87-1711

PLACE:

WASHINGTON, D.C.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 PHILIP BRENDALE, :

4 Petitioner :

5 v. :

No. 87-1622

6 CONFEDERATED TRIBES AND BANDS :

7 OF THE YAKIMA INDIAN NATION, :

8 ET AL.; :

9 -----x
10 STANLEY WILKINSON, :

11 Petitioner :

12 v. :

No. 87-1697

13 CONFEDERATED TRIBES AND BANDS :

14 OF THE YAKIMA INDIAN NATION; :

15 -----x
16 COUNTY OF YAKIMA, ET AL., :

17 Petitioners :

18 v. :

No. 87-1711

19 CONFEDERATED TRIBES AND BANDS :

20 OF THE YAKIMA INDIAN NATION. :

21 -----x
22
23 Washington, D.C.

24 Tuesday, January 10, 1989

1 The above-entitled matters came on for oral
2 argument before the Supreme Court of the United States
3 at 1:36 o'clock p.m.
4

5 APPEARANCES:

6 JEFFREY C. SULLIVAN, ESQ., Yakima, Wash.; on behalf of
7 the Petitioners.

8 TIM WEAVER, ESQ., Yakima, Wash.; on behalf of the
9 Respondents.
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P R O C E E D I N G S

(1:36 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1622, Philip Brendale versus Confederated Tribes and Bands of the Yakima Indian Nation, and companion cases.

Mr. Sullivan, you may proceed whenever you're ready.

ORAL ARGUMENT OF JEFFREY C. SULLIVAN, ESQ.

ON BEHALF OF THE PETITIONERS

MR. SULLIVAN: Mr. Chief Justice, and may it please the Court:

Yakima County is the second largest county in the State of Washington. The Yakima Indian Reservation consists of --

QUESTION: Largest geographically or population?

MR. SULLIVAN: Geographically.

There's approximately 180,000 people in Yakima County. 25,000 reside on the reservation. 5,000 of those are Indians and 20,000 are non-Indians. The reservation itself consists of approximately 1.3 million acres, 80 percent of which is owned in trust, 20 percent is owned by non-Indians in fee simple, or approximately 260,000 acres.

1 There are 10,467 separate parcels of deeded
2 land on the reservation, 500 miles of roads; county
3 roads, there's a state highway and a lot of BIA roads.

4 The issue in this case is the scope of
5 regulatory control, civil regulatory control, that a
6 tribe can exercise over non-members on deeded land. At
7 the heart of this case is the tension that's created by
8 two sets of promises made by Congress.

9 On the one hand, you have the promise that
10 Congress made to the Indians through the treaties. On
11 the other hand, you have the promise that Congress made
12 to the citizens whom they invited onto those lands
13 through the General Allotment Act.

14 We believe this case involves the application
15 of this Court's ruling in Montana versus United States.
16 In Montana, the Court was called upon to determine the
17 extent of power that the tribe still retained in the
18 area of civil regulation. In that case we were dealing
19 with the hunting and fishing rights of those non-members
20 on deeded land.

21 This Court, in examining the prior opinions of
22 the Court, including Wheeler and Oliphant, determined
23 first that the exclusive use and benefit language of the
24 Crow treaty did not give them the right to control those
25 non-members. They did not have the inherent right, nor

1 did they have the treaty right.

2 The Court recognized that, Oliphant, the
3 intent of Congress, that the inherent right had been
4 removed, particularly with respect to the non-Indian --
5 removed from the tribe, this inherent power with respect
6 to non-Indians on their own land.

7 We submit that Montana actually, however, did
8 establish a bright line test, the bright line test that
9 we are asking this Court to impose. The Court said --

10 QUESTION: How did the case ever get here if
11 it's so bright?

12 MR. SULLIVAN: Well, because the Ninth
13 Circuit, we submit, did not read it correctly. And in
14 fact, the court misperceived it dramatically. The court
15 said, meaning the Ninth Circuit, that in fact the treaty
16 provided those rights and that the tribe had inherent
17 rights, and then went on to rule that -- adopt a per se
18 rule of jurisdiction for tribes based upon its reading
19 of Montana.

20 The court said -- I mean, the Montana language
21 is: "Though Oliphant only determined the inherent
22 tribal authority in criminal matters, the principles on
23 which it relied support the general proposition that the
24 inherent sovereign powers of an Indian tribe do not
25 extend to the activities of non-members of the tribe."

1 That's the rule.

2 QUESTION: And then it goes on to say: "To be
3 sure, Indian tribes retain inherent sovereign power to
4 exercise some forms of civil jurisdiction over
5 non-Indians on their reservations."

6 MR. SULLIVAN: Which is the first exception,
7 the first exception, because you go on with that
8 language, which then goes on to distinguish, putting in
9 consent relationships, talks specifically about business
10 dealings, contracts and leases.

11 We have no objection to that language. We
12 agree. It's the kind of language, it's the kind of
13 situation --

14 QUESTION: So what about the other exception?

15 MR. SULLIVAN: The second exception is where
16 we believe the problem exists. The Court, in
17 establishing the second exception, did two things. One,
18 it says "a tribe may also retain," which is a question
19 as to whether in fact they retain any inherent power at
20 all.

21 We believe that in fact this second exception
22 needs to be narrowed, it needs to be clarified, or it
23 needs to be eliminated.

24 QUESTION: May also retain what? Will you
25 state what the second exception is?

1 MR. SULLIVAN: I will, Your Honor. The second
2 exception says: "A tribe may also retain inherent power
3 to exercise civil authority over the conduct of
4 non-Indians on fee lands within the reservation when
5 that conduct threatens or has some direct effect upon
6 the political integrity, economic security, or health
7 and welfare of the tribe."

8 QUESTION: And the Ninth Circuit kind of took
9 off with that, didn't they?

10 MR. SULLIVAN: Yes, they did.

11 Not only did they disregard the first part of
12 the test and granted, in our view, the Inherent power in
13 the treaty power, but then read this exception so that
14 it swallowed the rule.

15 We submit that if the Ninth Circuit's opinion
16 is allowed to stand, any properly drawn ordinance passed
17 by an Indian nation would in fact confer civil
18 regulatory control. The broad reading --

19 QUESTION: What were the findings of the
20 district court in regard to the Montana factors?

21 MR. SULLIVAN: The district court made two
22 completely opposite set of findings. With respect to
23 Mr. Brendale's property, which was then located in what
24 we call the closed area of the reservation -- and our
25 position is is that that's an entirely different

1 situation now because the closure no longer exists.
2 There is the letter from the Bureau of Indian Affairs
3 Solicitor that's attached, or Assistant Administrator,
4 that's attached to the appendix, is an appendix in Mr.
5 Brendale's brief, in which now that area is open.

6 But with respect to that, the court made
7 specific findings of fact that, with reference to Mr.
8 Brendale's property, attempting to apply, I think, the
9 Montana exception, and found that it would have an
10 impact and therefore the tribe should exercise
11 jurisdiction in that area.

12 With respect to Mr. Wilkinson's property,
13 which is -- Wilkinson's property, which is in a
14 completely different area of the reservation, on the
15 northern boundary four miles from the city of --

16 QUESTION: It's in the open area?

17 MR. SULLIVAN: It's in the open area, that's
18 correct.

19 There the court made specific findings that
20 not only would this development have no impact, none,
21 using its language, "on the tribe or its ability to
22 govern itself, its economic security, or its health and
23 welfare," the court -- and those findings,
24 interestingly, in both cases were left undisturbed by
25 the Ninth Circuit.

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QUESTION: Are those fact findings?

MR. SULLIVAN: Yes, they are fact findings.

QUESTION: And binding on the Ninth Circuit?

MR. SULLIVAN: I think they are fact findings that are binding unless they're clearly erroneous or not supported by the evidence.

QUESTION: Binding on us, too, I take it?

MR. SULLIVAN: I think they are binding on you.

QUESTION: If they are on the Court of Appeals, or to the extent that they are binding.

MR. SULLIVAN: To the extent that they're binding, unless they're, again, clearly erroneous and not supported by the evidence.

QUESTION: Well, are you challenging -- you're challenging the result below in both cases, aren't you?

MR. SULLIVAN: No. Well, as far as the Ninth Circuit is concerned, yes, I think the Ninth Circuit should be reversed. I think that the trial court should be reversed with respect to Mr. Brendale's property out in the closed area.

The reason that we believe the trial court should be reversed out in the closed area, we agree with the findings, but we don't agree with his conclusion of law. Judge Quackenbush in making that decision was

1 concerned, we believe, about the wrong part of the
2 test.

3 Judge Quackenbush was concerned about a
4 balancing test similar to the test used in Mescalero
5 Apache versus New Mexico, and specifically referred to
6 that in questions to me, saying: You know, don't I have
7 to balance this; and what's the state interest, the
8 federal interest, the county interest in this property?

9 Our position is that that isn't the rule in
10 Montana. The rule in Montana as set out by this court
11 is the county, the city, the state begins with
12 jurisdiction.

13 QUESTION: So you're saying -- I thought you
14 thought that the district court was proceeding under the
15 right rule, but apparently not. You say he sought some
16 balancing test rather than the Montana exception, is
17 that what it is?

18 MR. SULLIVAN: Well, I think that what
19 happened is that Judge Quackenbush when he -- clearly,
20 we all relied on Montana. It was briefed by both
21 parties and we believed it to be the law. I think that
22 what happened was that Judge Quackenbush took a broad
23 reading of his second exception, which we believe needs
24 to be narrowed as a result of the Ninth Circuit's
25 opinion.

1 QUESTION: Well, what do you think the county
2 can zone on the reservation beyond the fee owners of
3 non-members?

4 MR. SULLIVAN: That's all. We should be able
5 to --

6 QUESTION: I thought there was language in
7 your brief that went further than that.

8 MR. SULLIVAN: What we said was, I think, that
9 there's two tests that I guess that we would concede.
10 Initially, we were indicating that we thought we should
11 zone all of the fee land, including that owned by
12 members.

13 QUESTION: You don't take that position any
14 more?

15 MR. SULLIVAN: No, we do not. We do not take
16 the position that the Indian -- excuse me --
17 non-members, we're talking about non-member-owned fee
18 land only.

19 QUESTION: Both the open and closed portions?

20 MR. SULLIVAN: That's correct. We believe
21 that --

22 QUESTION: Explain to a non-westerner what
23 this distinction is between open and closed portions?

24 MR. SULLIVAN: I think it's best illustrated
25 by this joint appendix. This map was included --

1 QUESTION: I'm not concerned about its
2 territory. I'm concerned what does it mean to be closed
3 and what does it mean to be not closed, and what causes
4 it to be closed or not closed?

5 MR. SULLIVAN: In 1954 the Yakima nation got
6 the Bureau of Indian Affairs to close all of the public
7 roads into the forested area of the reservation. The
8 only people allowed in the forested area of the
9 reservation are members of the Yakima Indian nation and
10 people who are permitted there by the Yakima Indian
11 nation or the BIA.

12 So that area was closed to any non-member or
13 non-permittee. You could not go onto that land, you
14 could not use the public roads that were constructed
15 with public dollars.

16 QUESTION: And the reason was to protect the
17 resources in that closed area, I take it?

18 MR. SULLIVAN: The reason was, as I think the
19 evidence would show, was to protect the timber resource,
20 to protect the game and fish, and to have a place for
21 the tribe.

22 QUESTION: So how under whatever test you want
23 to apply, how can that decision by the BIA subject a
24 non-Indian who has a fee interest in a portion, that the
25 BIA comes in and says, sorry, your fee interest is now

1 in a closed portion?

2 why should that alter whatever test we apply?

3 MR. SULLIVAN: Well, I think that that, it
4 alters it because it was a mind set in which everybody
5 tried the case, Your Honor. Once you eliminate that and
6 take it out of the fact and just say that we treat it as
7 a forested area, just exactly the same as a national
8 forest, in which mostly there is forest lands owned by
9 the federal government and checkerboarded deeded lands,
10 and look at it in that fashion, then I think you change
11 the manner in which the court looked at those lands.

12 QUESTION: But what did the BIA do? It just
13 said, you can go ahead and use the public roads. Did it
14 change all aspects of the closing? It didn't say people
15 can go on and use that property?

16 MR. SULLIVAN: No, no, clearly. But you would
17 not have been able to use it prior to the closure.

18 QUESTION: So it's still closed in a sense?

19 MR. SULLIVAN: Just to the -- correct, it's
20 closed to the extent that your land and my land are
21 closed. We have a road that goes by them. We don't
22 allow trespassers to come upon it.

23 I agree, we would not -- as a non-permittee or
24 as a non-member, I wouldn't be able to go on the land.
25 Mr. Brendale, and the record reflects this, who owned

1 the land out there, had to go to court repeatedly in
2 order to get even access.

3 QUESTION: Do you take the position that the
4 county can zone property in the closed area and, for
5 instance, permit tourist development in an area that the
6 tribe is trying to keep pristine and undeveloped?

7 MR. SULLIVAN: That potential exists under the
8 scheme that I suggest.

9 QUESTION: You say yes, the county can do
10 that?

11 MR. SULLIVAN: Yes, they could. They would
12 have to --

13 QUESTION: Even though it's a little patch in
14 the middle of the closed area of the reservation?

15 MR. SULLIVAN: I submit that the rules of this
16 Court would allow for that, yes, Your Honor.

17 QUESTION: And the term "closed area" is just
18 a term that came up in this case? It's not defined in
19 the regulations?

20 MR. SULLIVAN: No.

21 QUESTION: It's not even a term of art that
22 the BIA uses, I take it?

23 MR. SULLIVAN: No.

24 QUESTION: It's not even common to other
25 Indian reservations.

1 MR. SULLIVAN: That's correct, it's unique to
2 this Indian reservation.

3 QUESTION: So it doesn't matter if I'm a
4 non-westerer at all.

5 [Laughter.]

6 QUESTION: And here I thought I was the only
7 one who didn't --

8 QUESTION: A non-Yakima.

9 QUESTION: May I ask you a question about
10 this, because if you went back to the early days of some
11 of the reservations, didn't the tribes have the complete
12 power to exclude non-Indians?

13 MR. SULLIVAN: Sure.

14 QUESTION: That's not unusual, to have closed
15 areas as part of a reservation.

16 MR. SULLIVAN: Well, I think that the --

17 QUESTION: Maybe it's unusual today, but at
18 least historically it wouldn't have been unusual.

19 MR. SULLIVAN: Historically, no. In 1955 when
20 the treaty was written, the power was there.

21 QUESTION: The whole reservation was closed.

22 MR. SULLIVAN: The whole reservation was trust
23 --

24 QUESTION: Well now, if you have a closed area
25 today, which means I suppose your zoning inspectors have

1 no right to go into the area, how would you ever enforce
2 your zoning laws?

3 MR. SULLIVAN: Well, two things. One, I think
4 the closed area is now open and so we can go on the
5 public roads, so that we would be in a position to
6 inspect. So that limitation is removed.

7 QUESTION: I'm sorry, I don't really
8 understand that. I thought there was a closed area.

9 MR. SULLIVAN: Well, I suppose that is up to
10 dispute. The letter from the Bureau of Indian Affairs
11 -- what closed this area other than a resolution from
12 the tribe, these are federally funded roads which are
13 public roads and can only be closed for some very
14 specific emergencies.

15 The BIA has finally said, in April of 1988,
16 you can go on those roads. They are now public roads.

17 QUESTION: You mean any member of the public
18 can enter the closed area on those roads?

19 MR. SULLIVAN: That is correct.

20 QUESTION: So there is no closed area there
21 now.

22 MR. SULLIVAN: Correct. That's our whole
23 point. It's not closed, and that's why you have to --

24 QUESTION: But they can only go on the roads.
25 You can't get off and build fires or camp or fish or

1 anything like that.

2 QUESTION: But you can't do that if you're
3 driving on the Lincoln Highway.

4 MR. SULLIVAN: And that's my point. If Mr.
5 Brendale, who owns the land, invites me on the land, I
6 can go. If one of the tribal members invites me to go
7 on the land as a permittee, I can go.

8 QUESTION: Yes, but you can only go on his
9 land.

10 MR. SULLIVAN: That's correct. But again, I
11 would not -- as the Chief Justice indicates, there are
12 places throughout the entire nation that that is the
13 case. You just can't get out of your car and set up a
14 fire on somebody's private land.

15 QUESTION: Yes, but if there's a big area that
16 a big portion of it is inaccessible to anyone except
17 those permitted by the tribe or anyone who is in the
18 middle of a public road, I still don't understand how
19 your agents can enforce zoning ordinances in
20 inaccessible portions of the closed area.

21 MR. SULLIVAN: Well, first of all, you know,
22 looking at zoning, we would not be interested, nor would
23 the county I think even consider, a plat, for example,
24 which is what was proposed by Mr. Brendale, unless there
25 was access to it. I.e., the roads are now open, he's

1 going to have to have access before his plat is going to
2 be allowed. The thing --

3 QUESTION: I guess your answer would be that
4 if indeed you're correct that the county has
5 jurisdiction, it would be arbitrary and capricious for
6 the BIA to close the roads to the county zoning
7 inspectors.

8 MR. SULLIVAN: Well, that's correct. It's not
9 only arbitrary --

10 QUESTION: It couldn't be closed for that
11 purpose, I assume, if you're right about the law.

12 MR. SULLIVAN: Well, I agree, coupled with the
13 fact that there's a specific Code of Federal Regulations
14 that says all roads that are built with public money are
15 public roads.

16 QUESTION: The county only wants to reach that
17 part of the closed area that is in private ownership in
18 fee.

19 MR. SULLIVAN: That's exactly right.

20 QUESTION: By a non-member.

21 MR. SULLIVAN: By a non-member. The reality
22 is, we talk about our pristine forests and yet the
23 testimony is that the tribe, their own logging
24 operation takes out over 100 million board-feet a year.
25 They agreed that that would be round-trip 40,000 logging

1 trucks going back and forth in one year.

2 You know, there's a lot of activity going out
3 on that closed area of the reservation. This isn't a
4 wilderness area.

5 QUESTION: Is there anything in the county
6 zoning ordinances which require the zoning authorities
7 to respect the interests of the tribe as such?

8 MR. SULLIVAN: Not specifically, but that's
9 exactly what one of our contentions is, Justice Kennedy,
10 is that the second exception to the Montana ruling was a
11 statement by this Court that, if a tribe or if a county
12 or a city is going to impose civil regulatory control,
13 they should take into account the special needs of the
14 tribe.

15 Let me give you an example. In this case, Mr.
16 Brendale, so you understand, he files for a plat. The
17 tribe gets notice of that. The tribe in turn -- our
18 zoning administrator said this is going to have -- this
19 is going to be -- excuse me -- environmentally
20 insignificant.

21 The tribe goes: How can you do that? That's
22 crazy. So they appeal, have a three-day hearing before
23 the Board of County Commissioners. The County
24 Commissioners of Yakima County ordered an environmental
25 impact statement before Mr. Brendale could go forward.

1 At that point, the tribe sued. We say, look,
2 how can the tribe -- how can what we did affect their
3 political integrity when we did what they want? We
4 granted their request for an environmental impact
5 statement in Mr. Brendale's property.

6 Our view is that this exception, rather than
7 reading it broadly, if we don't do away with it
8 altogether -- I mean, we honestly believe --

9 QUESTION: Well, is that duty of yours to
10 protect tribal interests enforceable by federal law?
11 Suppose you are arbitrary so far as the tribe was
12 concerned. They alleged that you were not protecting
13 their interests. Does that create a federal cause of
14 action? I take it not.

15 It's just a zoning question. The tribe just
16 -- you protect the tribe's interests just like you
17 protect anybody else's interests.

18 MR. SULLIVAN: Absolutely, we do, and I think
19 it's demonstrated --

20 QUESTION: But not to any greater extent and
21 not because of any compulsion of federal law.

22 MR. SULLIVAN: No, there's no direction in the
23 federal law other than the Montana test, which we
24 believe, if you read it closely, when they say "may
25 retain," that in fact this Court was establishing,

1 telling us, to the extent that there's federal mandate
2 from this Court in Indian matters, yes, we're bound to
3 take into consideration those special needs.

4 QUESTION: You're going to argue the easier
5 case, too, pretty quick?

6 MR. SULLIVAN: Well, I will in just a second
7 if I can get to.

8 I think, though, that if not, if in fact we
9 are going to say what does that second exception in
10 Montana mean -- the tribe encouraged you to take a very
11 broad reading. We say take a narrow reading.

12 QUESTION: As I understand them, they say that
13 you have no power at all to zone, and that it should be
14 the tribe that zones.

15 MR. SULLIVAN: That's correct.

16 QUESTION: It's just not a claim that this is
17 an improvident zoning decision, that ought to be
18 reworked by the county. It's says that they don't have
19 any authority at all to zone.

20 MR. SULLIVAN: That's correct. And I think
21 that they're asking -- the essence of the Yakima's
22 position and the amicus position is, you need to repeal
23 Oliphant or overrule Oliphant, you need to overrule
24 Montana.

25 QUESTION: Well, you're telling us we need to

1 overrule Montana, too. It seems to me both sides are
2 taking very extreme positions with regard to the
3 language of the Montana case.

4 MR. SULLIVAN: I think initially we were. I
5 want to suggest to you some language -- not language,
6 but the framework of a test that we believe works and
7 will give --

8 QUESTION: You would concede that the action
9 of the county in its zoning policies can have an effect,
10 a direct effect, on the economic security or health or
11 health or welfare of the tribe? It could, it can?

12 MR. SULLIVAN: It could and it can, there's no
13 question.

14 QUESTION: That's what zoning does, isn't it?

15 MR. SULLIVAN: Yes, it does. But what we're
16 suggesting, though, when you look at the other side of
17 the coin, what is it to give, this Court has said that
18 we are only going to have the tribes exercise regulatory
19 control over non-Indians on deeded lands under extreme
20 circumstances.

21 We suggest that the test should be a
22 compelling interest test. We equate compelling interest
23 with self-government. If the county is going to do
24 something or the city that would affect the tribe's
25 ability to govern their own members or their own land,

1 then yes, it should be knocked down. There's no
2 question about it.

3 And the tribe should have authority, if they
4 pass an ordinance that will affect their own people, to
5 have control over non-members. Let me give you an
6 example. It's an example that was used in the state's
7 brief.

8 But if the tribe wants to pass an ordinance
9 that says, we are going to impose a sales tax on our
10 members, then we concede they should -- the Safeway
11 store in the city of Toppenish, which is deeded land in
12 a non-Indian, they should in fact be required to collect
13 that tax, which is the other side of the Colville test,
14 in which this Court said to the Indians: You're going
15 to have to collect tax on trust land.

16 It's our position that you need to take the
17 same -- treat Indian and non-Indian the same with a
18 general rule. If the general rule is that the tribe
19 shall have jurisdiction over trust land, the general
20 rule should be that the cities, the counties, the
21 political subdivisions should have control over the
22 non-member deeded land.

23 It seems to me that without that we end up
24 with sort of a crazy situation, which is, in an example
25 out of the South Dakota brief. It's a little extreme,

1 but it's true. In Oliphant, we're saying, if it's a
2 crime, a 25 dollar speeding ticket, the tribe can't do
3 it. It can't do it.

4 In this case, the Ninth Circuit upholds an
5 ordinance whose penalty provision is exclusion from the
6 reservation.

7 QUESTION: Oliphant was the interpretation of
8 a statute.

9 MR. SULLIVAN: I think Oliphant was the
10 interpretation of statutes in the sense that it
11 determined that for the criminal process, for
12 jurisdictional, both treaty reserved jurisdiction and
13 inherent jurisdiction, the tribes had no criminal
14 jurisdiction over non-Indians.

15 And to the extent that it interpreted the
16 General Allotment Acts and found that that's what they
17 provided, it becomes a statutory interpretation. But it
18 seems to me it set out broad principles that this Court
19 has followed, followed in Montana, and should follow
20 here.

21 QUESTION: Mr. Sullivan, you know, you picked
22 the absolute worst example of county regulation to make
23 this argument for. The fact is that, unlike a sales
24 tax, which is collected at one point, zoning by its
25 nature, that the decisions are made on the basis of the

1 entire surrounding area.

2 So it just seems wierd to say that the county
3 has jurisdiction to zone one little parcel that's in the
4 middle, totally surrounded by Indian-owned land or trust
5 lands, and say that it's the county that should have the
6 right to determine whether doing something on that
7 isolated parcel is going to affect the surrounding
8 land.

9 It seems to me the people that have the
10 interest in zoning there are the people who own the
11 surrounding land.

12 MR. SULLIVAN: But it's exactly the same
13 situation the county has when it's going to zone a piece
14 of land that's right next to a city. These tensions
15 between two governments that have an interest in
16 particular land for zoning questions is not new.

17 All we're saying, Justice Scalia, is give us a
18 rule that both can understand, that's clear, and that's
19 the bright line, and then provide for an exception
20 requiring us to take into account the tribes interest,
21 but only the interest where what we're doing is
22 affecting their ability to control themselves or their
23 members. There is just --

24 QUESTION: What about Mr. Wilkinson?

25 MR. SULLIVAN: Well, with respect to Mr.

1 Wilkinson, It seems to me that, again, the test that we
2 are suggesting, even under the Montana misapplication, I
3 guess, which I'm calling it a misapplication to a
4 certain degree by the trial court -- you know, Mr.
5 Wilkinson's property, as I say, is on the north edge of
6 the county. It's four miles from the populated city.

7 There are on that side of what we call the
8 Ahtanum Ridge, which is the north ridge of the
9 reservation, there are 480 non-Indians, there are 2048
10 Indians. There was testimony with respect to the
11 irrigated farmland.

12 Again, the court specifically found that that
13 development has no impact. Let me just say something
14 about that development, just to give you an example of
15 why I think there are in fact constitutional issues
16 here.

17 The tribe's zoning ordinance, as you know,
18 calls for no judicial review, not even by the tribal
19 court. It can't be reviewed by a state court. Mr.
20 Wilkinson's property under -- the tribe's view is that
21 it is farmland. The testimony is unequivocal in the
22 case that that land is useless unless you can get water
23 to it.

24 Mr. Wilkinson has no water. The effect of the
25 tribe's zoning if it applies to him is a taking, a

1 taking which cannot be redressed because the tribe
2 specifically in the zoning ordinance, in addition to
3 their other position, still indicate that they maintain
4 their sovereign immunity.

5 If it please the Court, I'd like to reserve
6 whatever I have left.

7 CHIEF JUSTICE REHNQUIST: Very well, Mr.
8 Sullivan.

9 Mr. Weaver, we'll hear now from you.

10 ORAL ARGUMENT OF TIM WEAVER, ESQ.,

11 ON BEHALF OF THE RESPONDENTS

12 MR. WEAVER: Mr. Chief Justice, members of the
13 Court:

14 I'd like to -- I represent the Yakima Indian
15 Nation, the other half of this controversy.

16 It's an unfortunate fact of time and
17 occurrence that we ended up with this argument about the
18 closed area and the open area. Mr. Sullivan is correct
19 in saying there is no "closed area."

20 There is a reservation reserved area, a zoning
21 and land use decision made by the Yakima Indian Nation
22 to deal with the area in which Mr. Brendale has his
23 property.

24 QUESTION: How much is trust land.

25 MR. WEAVER: Which is -- well, 25,000 acres

1 out of 740,000 acres, approximately, is held in fee,
2 Your Honor. The remainder of it is in trust land.

3 QUESTION: How long -- all right, go ahead.
4 Excuse me.

5 MR. WEAVER: I think that we can clear up a
6 little bit of the problem very quickly with regard to
7 the Brendale property. What we're talking about here, I
8 think all the Justices have recognized, is the police
9 power function of the sovereign, which there's no
10 question the Yakima Nation is a sovereign.

11 Mr. Sullivan in his argument to the district
12 court in the Whiteside II case, the open area case,
13 advised the court in regard to the Brendale issue: "We
14 couldn't present any testimony about the services we
15 provide. They don't exist. The real interest out there
16 in the closed area does belong to the Yakima Indian
17 Nation, we agree."

18 The county didn't appeal to the Ninth Circuit
19 in the Brendale case. I can only assure that the county
20 had decided that what their counsel had advised the
21 district court was correct.

22 QUESTION: How did the Brendale case get to
23 the Ninth Circuit?

24 MR. WEAVER: Mr. Brendale --

25 QUESTION: Oh, Mr. Brendale, he appealed.

1 MR. WEAVER: Right, yes, Mr. Brendale
2 appealed. Mr. Brendale filed the petition in this
3 Court, Mr. Chief Justice. His counsel is not here
4 today. That matter is being now argued by the county.

5 I think that the question with regard to the
6 reservation reserved area is very clear. Under whatever
7 test the Court wishes to discuss, it's clear that the
8 Yakima Indian Nation has retained jurisdiction to zone
9 all lands within that area.

10 Mr. Sullivan raises the question of the
11 inability of Mr. Brendale to have an impact. I believe
12 that the same is exactly true of Mr. Brendale's
13 situation, the situation that Mr. Sullivan wishes to put
14 my client in, and that is that the tribal zoning process
15 is an open process.

16 As a matter of fact, the zoning code we
17 enacted in 1972 almost mirrors the county's zoning
18 ordinance.

19 QUESTION: There's quite a bit of difference,
20 it seems to me, between saying that it's the Yakima
21 tribe's zoning law that's going to apply to Mr.
22 Brendale's property and saying that the county zoning
23 law is being exercised in a way inconsistent with
24 Montana.

25 MR. WEAVER: I'm not certain that I --

1 QUESTION: Well, suppose the county zoning law
2 had come out the other way, that it had said to Mr.
3 Brendale, in view of what the surrounding property is
4 used for, we are not going to allow you to develop that
5 piece of land.

6 Now, you would still be saying it's none of
7 your business, this is the Yakima zoning law that should
8 apply.

9 MR. WEAVER: That's correct.

10 QUESTION: Well, that's quite a different
11 approach than what you would assume would rule what the
12 county can do under Montana.

13 MR. WEAVER: Well, I think, Your Honor, that
14 the question in the closed area is, quite frankly --

15 QUESTION: There isn't any closed area any
16 more, you told me.

17 MR. WEAVER: On the reservation, the
18 reservation reserved area. No, I didn't tell you that,
19 Your Honor. That's Mr. Sullivan.

20 QUESTION: Go ahead.

21 MR. WEAVER: In the reservation reserved area,
22 that the interest of the county simply isn't there.
23 They admit that they don't have a police power interest
24 in that area in which the Court ought to recognize them
25 being able to now assert that interest there.

1 I think that the record is clear. They've
2 admitted it and they haven't appealed.

3 QUESTION: Well, but the case is nonetheless
4 here. They've briefed the thing, and they are asking us
5 to reverse the Ninth Circuit on the Brendale property,
6 as well as on the Wilkinson property.

7 Maybe all you're saying is they don't have
8 much of an argument. But certainly, technically it's
9 before us.

10 MR. WEAVER: Yes, I believe it is before you,
11 Your Honor. I think that where the sovereign, however,
12 who claims the authority at the trial of the case
13 disclaims any interest, they have a difficult time
14 reasserting it at this level.

15 QUESTION: Why do you say they have no
16 interest? I don't know that the county doesn't have an
17 interest that its county citizens should, those subject
18 to its jurisdiction, should be able to use their
19 property in a reasonable manner.

20 MR. WEAVER: I don't --

21 QUESTION: They may not have any interest in
22 limiting his use of the property, but they certainly
23 have an interest in his being able to use it
24 reasonably. He's one of their citizens subject to their
25 jurisdiction.

1 MR. WEAVER: Oh, yes, I believe that's true,
2 Your Honor. And under the Yakima Nation zoning code
3 that citizen does have the opportunity to use his
4 property in a reasonable manner.

5 We have not -- there's no allegation before
6 this Court of any confiscatory zoning, of any arbitrary
7 and capricious action in either of these cases on behalf
8 of the Yakima Nation.

9 QUESTION: Well, if there were would the
10 landowner have the right to test it? He's not a member
11 of the tribe. He can't vote for the tribe. There's no
12 judicial review. Am I right about all those things?

13 MR. WEAVER: He's certainly not a member of
14 the tribe and can't vote. I think this Court has dealt
15 with that issue, however, Justice Kennedy, in other
16 cases.

17 For instance, in the Mazurie case that issue
18 was specifically brought forth and discussed as an issue
19 in which the fact that the fee land owner on the
20 reservation couldn't vote was not a determination in the
21 issue. And I think that --

22 QUESTION: How would a non-member go about
23 challenging an Indian zoning matter that the non-member
24 thought was totally arbitrary and capricious?

25 MR. WEAVER: Well, under the tribal zoning

1 authority, Justice O'Connor, they would first of all go
2 to the zoning administrator. They then would go to the
3 board of adjustment. And the final step would be to the
4 tribal council.

5 It is correct that under the current tribal
6 zoning code there is not direct judicial review. I
7 caution the Court, however, that issue is not here
8 before you, and the --

9 QUESTION: Do you take the position, however,
10 that the tribe has the sole zoning power even within
11 incorporated cities on the reservation?

12 MR. WEAVER: Well, yes, I believe that under
13 --

14 QUESTION: But you're saying that they have
15 the power to zone any property, whoever owns it, inside
16 the boundaries of the reservation?

17 MR. WEAVER: Well, yes, in a manner of
18 speaking, Your Honor, that's correct. Of course, under
19 the tribal zoning code and under a decision made in the
20 tribe's sovereign power, they have chosen not to assert
21 that authority within the cities.

22 I think that's an issue that needs to be
23 discussed on a reasonableness basis.

24 QUESTION: Mr. Weaver, I don't think you're
25 accurate, by the way, that there's been no assertion of

1 confiscatory zoning. I think Mr. Sullivan just said
2 that one of these parcels was zoned agricultural when
3 there is no water for it. I think I heard him say
4 that.

5 MR. WEAVER: Well, of course --

6 QUESTION: I think his complaint was that it
7 was confiscatory, precisely what you're saying is not at
8 issue here.

9 MR. WEAVER: Well, that may be what the issue
10 is that he has presented, Your Honor. That certainly
11 was not an issue that was presented and tried to the
12 district court.

13 The question, of course, is that these lands,
14 there are many of these lands that are zoned, for
15 instance, by the county that are agricultural lands that
16 are either to some degree or totally within that same
17 category.

18 For him to come before you and say that every
19 single situation where there's an agricultural land
20 under the county zoning ordinances is not correct,
21 either.

22 I think in looking at what Mr. Sullivan asks
23 this Court to do, Your Honors, I heard him say that now
24 under the rule in Montana that the county starts with
25 the position that it has jurisdiction and that the tribe

1 must come before the Court and prove its interest. I
2 find nothing in any of the briefs -- and there are a lot
3 of them filed here, as you know -- that supports that
4 position.

5 I find nothing in any Act of Congress or in
6 the treaty with the Yakimas, that Your Honors must
7 construe in looking at this issue, that makes that
8 determination.

9 QUESTION: May I interrupt with kind of a
10 basic question here?

11 MR. WEAVER: Certainly.

12 QUESTION: So much of the argument has been
13 devoted to language in the Montana opinion as being the
14 sole test for deciding the case. That language as I
15 understand it dealt with the question whether the
16 inherent sovereignty of the tribe dictated the result in
17 that portion of the case.

18 I'm wondering if both of you really think that
19 that's the only issue, is the inherent sovereignty
20 issue, or is it possible that the language of the basic
21 treaty or some Act of Congress has something to do with
22 this case?

23 MR. WEAVER: Thank you, Your Honor. Yes, that
24 was as a matter of fact going to be my next point. I
25 think that the test in Montana, which Mr. Sullivan now

1 says is the sole test upon which this Court should test
2 Indian sovereignty, simply is not the case, particularly
3 with regard to the differences between the Yakima treaty
4 and the treaty in the Crow case, and with the decisions
5 of this Court discussing the Yakima treaty.

6 The Yakima treaty has been here five times,
7 Your Honor; the Winans case, the Suford case, the
8 Washington Passenger Fishing Vessel case, the Colville
9 case, and the Yakima Indian Nation versus Washington.
10 In every single one of those cases, this Court has held
11 -- and I refer you specifically to Winans since it was a
12 case determined during the allotment era, when, as the
13 county alleges, the intent of Congress was to totally
14 deprive Indians of all vestiges of sovereignty.

15 In 1905 this Court held in the Winans case
16 that the Yakima treaty was a true treaty of what we call
17 cession, all rights reserved that weren't ceded to the
18 government of the United States.

19 That is important because when you look at the
20 provisions of the Yakima treaty, specifically article 1,
21 the Yakima Nation ceded to the United States government
22 in 1855 the lands to which it claimed and occupied.
23 When you look, when you read the Crow treaty, for
24 instance, the treaty you were construing in Montana, the
25 Crows simply gave up all right and claim that they had

1 to the lands of the United States.

2 QUESTION: What language is it in the Yakima
3 treaty that you think entitles your client to a more
4 favorable ruling on an effort to zone than the
5 comparable language in the Crow treaty?

6 MR. WEAVER: First of all, the language of
7 cession, that the Yakima Nation ceded its own lands.

8 QUESTION: But that doesn't say anything about
9 the reserve power.

10 MR. WEAVER: Okay, the next issue is in
11 article 2 of the Yakima treaty, Your Honor, that says --
12 that reserved from those lands that the Yakima Nation
13 owned, to which they had title, which is recognized
14 specifically in the treaty, they reserved the lands
15 which constitute the present Yakima Nation boundary for
16 the exclusive use and benefit of their membership.

17 Now, you discussed the exclusive use and
18 membership language or similar language in the Crow
19 treaty. However, it's not tied to that other specific
20 treaty language. There is no specific language of
21 reservation in the Crow treaty.

22 QUESTION: Yes, but then comes allotments.

23 MR. WEAVER: And I think that the last point
24 that I'd like to make before I discuss that issue is the
25 specific guarantees, the specific discussion between the

1 Yakima leaders at the treaty grounds in 1855 and
2 Governor Stevens, that the Yakima Nation would have
3 their own government, would have their own laws, that
4 they would be provided with an area where the white man
5 would not enter.

6 The Allotment Act issue --

7 QUESTION: Which immediately violated that.

8 MR. WEAVER: Well, I believe that I would have
9 to say, Your Honor, that the Allotment Act, when you
10 start trying to figure out what was happening -- I think
11 there were 20 briefs before the Court and each one of
12 them says something different.

13 But I would --

14 QUESTION: You're right, absolutely right.

15 MR. WEAVER: I would certainly agree that
16 under the General Allotment Act of 1987 -- and of
17 course, that's another point; the Court has to look at
18 all these Acts, and the Act specifically dealing with
19 Yakima and its construction -- that there was an intent
20 of Congress at the very least to pass communal ownership
21 of tribal lands into non -- or into Indian hands,
22 through the Allotment Act, and to provide those Indians
23 with a piece of property under their ownership.

24 I think also it's hard to deny that Congress
25 intended that some or a good portion of those lands

1 would pass out of Indian ownership. I think there are
2 also Acts that allowed non-Indians to move onto
3 reservations and own lands that weren't allotted. The
4 Court's dealt with that situation in its recent decision
5 in Solem versus Barnett, in which it held that Acts of
6 that type shouldn't be construed as a divestment of
7 tribal sovereignty or tribal boundaries and government
8 over lands of that type unless there is clear evidence
9 of specific intent, unambiguous intent of Congress that
10 such a divestiture was intended.

11 We point out in our brief, I think in the
12 first couple of pages, some discussion of Congressional
13 sentiment -- I'm not sure whether you can call it
14 Congressional intent -- that speaks of the background of
15 the 1905 Surplus Lands Act at Yakima, that says these
16 Indians haven't consented, these Indians are causing us
17 problems, we need to open these lands to non-Indian
18 settlers.

19 At first blush you look at that and you think,
20 my goodness, that language clearly indicates that
21 Congress was taking something away. The reason that we
22 cite that language, the reason that we cite it, is that
23 when you look at these Acts and when you look at what
24 Congress intended, it's important that you look
25 specifically at the Act and you also specifically look

1 at what Congress knew at the time they passed those
2 Acts.

3 If you look at, for instance, the Surplus
4 Lands Act, it doesn't say anything in that Act that we
5 are divesting the Indians of any jurisdiction over these
6 lands within their boundaries. It doesn't say anything
7 as to the effect, for instance, of a potential
8 diminishment of the reservation.

9 Congress clearly knew at the time they passed
10 that Act, for instance -- it was contemporaneous with
11 this Court's decision in Winans which reserved all
12 rights to the Yakima Nation not granted in the treaty.
13 It was with clear knowledge of this Court's rulings
14 going clear back to Worcester versus Georgia giving
15 tribal governments the right to be governed by their own
16 laws and to govern their own territory.

17 QUESTION: You don't suggest that the settlers
18 in their dealings with non-Indians on the sovereign
19 would be subject to the tribal courts, are you?

20 MR. WEAVER: Well, I think that once --

21 QUESTION: If you say no to that, then you've
22 given up the principle.

23 MR. WEAVER: Well no, certainly I think that
24 the question of course of jurisdiction in the tribal
25 courts, for what purpose? Your Honor, I think that this

1 Court clearly has held in two very recent cases, the
2 Iowa Mutual case -- and I've suddenly drawn a blank on
3 the second case, but have held that, with regard to
4 civil jurisdiction matters in tribal court, that's
5 clearly an area within the retained sovereignty of an
6 Indian tribe, at least to test their jurisdiction.

7 Mr. Sullivan tells you that we want you to
8 overrule the Oliphant case. I don't believe in my
9 brief, unless I'm mistaken, that we ask you to do that.
10 I think that the Oliphant case is consistent with the
11 position taken by the Yakima Nation.

12 I don't see anything in the Oliphant case that
13 says that Indian tribes didn't reserve all rights
14 granted to them. What you said in Oliphant was that you
15 found an overriding and compelling federal interest that
16 had continued virtually since treaty time that simply
17 overrode the powers of tribes to try non-Indians for
18 crimes committed on their reservation.

19 I think in that regard, Justice Scalia, the
20 Yakima treaty probably deals with that issue. It
21 discusses the requirement that the Yakima tribe
22 relinquish to the United States offenders against its
23 laws.

24 I think the important thing to remember with
25 regard to the issue, for instance, the Oliphant issue

1 versus the issue of land use planning, we're talking
2 here about land use planning, zoning. What happens on
3 this piece of property directly affects what happens on
4 the next piece of property.

5 If someone wants to build a garbage dump next
6 to your house, it's pretty darn difficult for you to say
7 to the zoning authority: Gee, you ought to just stick
8 on that piece of property and not let that use override
9 onto my property.

10 QUESTION: Don't we have some district court
11 findings here with regard to one of these cases,
12 Wilkinson, to the effect that the tribe's interests were
13 not affected?

14 MR. WEAVER: Yes, there are some findings, and
15 I appreciate you asking me that question because I think
16 there's a misperception.

17 QUESTION: Shouldn't we recognize those
18 findings and accept those?

19 MR. WEAVER: No, I don't believe you do, and
20 I'll explain, Justice O'Connor. There's a misperception
21 here as to what the Ninth Circuit did with regard to the
22 findings.

23 First of all, we challenged those findings in
24 the appeal process. The Ninth Circuit reviewed those
25 findings on a clearly erroneous distinction and, while

1 their opinion doesn't simply say we hereby determine
2 that these findings were clearly erroneous, what they
3 say is: We reviewed the findings on a clearly erroneous
4 basis; we find that there was evidence -- and this is
5 another distinction.

6 The district court didn't find, for instance,
7 that -- or at least the reversal wasn't based on a fact
8 that, for instance, the sewage from Dr. Whiteside's
9 property would not pollute Ahtanum Creek. The court
10 didn't come in and say, oh, we disagree with that.

11 The finding that they discussed was a finding
12 of no evidence, a totally different standard, I believe,
13 on which the circuit could review. The circuit said, we
14 find it clearly erroneous that the tribe presented no
15 such evidence.

16 I think when you look in our brief at page 31
17 and also at pages 6 and 7 you'll find the evidence that
18 the tribe presented. You don't need to reach that
19 issue, however, Justice O'Connor, I don't believe. And
20 I don't think that the Ninth Circuit's opinion has done
21 violence to Rule 52(b), because the Ninth Circuit
22 determined as a matter of threshold law, on the same
23 basis that this Court ruled as far back as 1926 in the
24 Euclid case that zoning, unlike hunting and fishing by
25 non-Indians on their property on the Crow reservation,

1 that zoning per se is a threat to the political
2 integrity, health, welfare, and societal wellbeing and
3 economic wellbeing of the Yakima Indian people.

4 They determined that Judge Quackenbush
5 improperly determined as a matter of the first Instance
6 legally that we had not fulfilled the test in Montana.

7 I think that's another interesting --

8 QUESTION: May I just interrupt there.

9 MR. WEAVER: Sure.

10 QUESTION: What you've just said relates to a
11 question that Justice White asked earlier, and you seem
12 to be describing what happens here as sort of all or
13 nothing at all, either the tribe has jurisdiction or the
14 county has jurisdiction.

15 And I know you don't like Montana or applying
16 the test of Montana, but I read the second exception to
17 Montana as not speaking in that fashion when it says "A
18 tribe may retain inherent power to exercise civil
19 authority over the conduct of non-Indians on fee lands
20 within its reservation when that conduct threatens or
21 has some direct effect on."

22 I don't think what that means in context is
23 that, since any activity affected by zoning would affect
24 the tribe, the tribe must have total jurisdiction over
25 zoning. I think it meant, should zoning be permitted by

1 the county in such a way that the particular zoning
2 might affect the tribe, then there would be a problem
3 and the tribe might have some jurisdiction.

4 MR. WEAVER: Well, of course I certainly don't
5 agree with that analysis, and it's based on the reserved
6 rights doctrine of the tribe.

7 QUESTION: You do agree that it's sort of
8 central to this controversy?

9 MR. WEAVER: Well, yes, and I think it
10 presents an interesting dilemma, not only for the tribes
11 but for the counties, because the next time the county
12 makes a determination to put in an 80-person
13 subdivision, then suddenly, rather than the 40 people
14 living in this immediate area, you have 120.

15 At some point under those circumstances, if
16 that continues, you're going to have a situation that
17 directly affects and that the tribe does have a
18 protectable interest.

19 I don't believe by making that statement,
20 however, that the Ninth Circuit misperceived either the
21 rule in this case or in Montana. I don't believe, Your
22 Honor, of course, that Montana is controlling in this
23 case.

24 I believe that the Yakima Nation has retained
25 its authority over all the entire reservation to govern

1 its own people and its own population. That's not a
2 unique theory.

3 QUESTION: You're saying they have retained
4 the authority to control the use of property anywhere
5 within the reservation boundaries.

6 MR. WEAVER: Yes, in which they have a
7 legitimate police power interest. Yes, that's correct,
8 because --

9 QUESTION: You say they have a legitimate --

10 MR. WEAVER: Certainly.

11 QUESTION: -- police power interest.

12 MR. WEAVER: They do.

13 QUESTION: And it's not just whenever, it's
14 everywhere within the boundaries of the reservation.

15 MR. WEAVER: Yes.

16 QUESTION: Including the cities and towns.

17 MR. WEAVER: Yes. I think if I were here
18 today with a case where Mr. Sullivan was representing
19 the Mayor of Toppenish and he represented to you that
20 Toppenish was 100 percent fee land, that it was
21 land-locked, as it is, it cannot affect -- the expansion
22 of the city of Toppenish cannot affect the agrarian,
23 agricultural interests that the tribe is trying to
24 protect, that I would have a difficult time convincing
25 you that the police power interests of the tribe should

1 extend into --

2 QUESTION: But you just wouldn't -- if you
3 lost here, you just couldn't zone. But I can't know why
4 you would say the result is then that the county can do
5 it.

6 MR. WEAVER: I'm not certain that I follow
7 exactly your analysis.

8 QUESTION: Well, suppose you lost that case.
9 Could anybody zone?

10 MR. WEAVER: Within the city?

11 QUESTION: Yes.

12 MR. WEAVER: Well, the cities are zoning.

13 QUESTION: Well, the county couldn't do it.
14 The county couldn't.

15 MR. WEAVER: Yes, I believe that's correct. I
16 believe that's correct.

17 One point that I would like to make in
18 conclusion is that you should not ignore the statement
19 in Montana that the exercise of tribal government beyond
20 what is necessary to protect tribal self-government is
21 not retained.

22 That's the issue in this case. The power to
23 zone, the power to control the homeland which was
24 guaranteed to the tribes by the United States government
25 in their treaties, is inherent, is so inherent in that

1 power to self-govern, that to take that away you're
2 going to end up with the inability of the tribe to
3 protect its homeland, its agrarian homeland.

4 QUESTION: May I ask you a question about the
5 three incorporated towns. You say the tribe, if it
6 chose to exercise, could exercise zoning authority
7 there.

8 Is it your view they could exercise exclusive
9 zoning authority? I take it now --

10 MR. WEAVER: I believe under the reserved
11 powers doctrine, Your Honor.

12 QUESTION: It could. Now, under the present
13 situation is it -- I didn't quite catch a minute ago --
14 the county or the incorporated villages that exercise
15 zoning power now, or both?

16 MR. WEAVER: In the towns?

17 QUESTION: In the towns.

18 MR. WEAVER: It's the towns who exercise that
19 authority, not the county.

20 QUESTION: I see.

21 MR. WEAVER: In conclusion, I believe that the
22 Court can uphold the Ninth Circuit's opinion in both of
23 these cases. Clearly, in the Brendale closed area case,
24 under whatever test Your Honors apply, I believe you
25 find that the Yakima Nation has retained its right to

1 zone in that area.

2 I think, as I said, it's an unfortunate
3 circumstance in the way these cases were tried that they
4 didn't both come to the Court on the same basis, because
5 the interests of the Yakima Nation are no less
6 compelling in the open area than they are in the closed
7 area.

8 The closed -- you need to remember that the
9 Yakima Nation owns over 50 percent of the land in trust
10 in the closed area. It has a greater interest
11 physically. It's where the most governance is needed.
12 It's the agricultural land base of the tribe from which
13 it derives \$5 million a year income from the
14 agriculture, in which it owns more of that agricultural
15 land than non-Indians.

16 It's where most of the people reside. Now,
17 the people situation is in fact in the area where the
18 tribe is governing, it's not 25,000/5,000, as Mr.
19 Sullivan stated. 10,000 of those people live -- excuse
20 me, 20,000 and 5,000.

21 Instead, in the open area it's 10,000 people
22 outside the towns and 5,000 Indians, if that in effect
23 somehow tips the balance. I don't believe it does. But
24 there is not the inequities that they point out.

25 The tribe has a real and legitimate interest

1 in protection of this area.

2 Mr. Chief Justice, my time has expired.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
4 Weaver.

5 Mr. Sullivan, you have three minutes
6 remaining.

7 REBUTTAL ARGUMENT OF JEFFREY C. SULLIVAN, ESQ.

8 ON BEHALF OF THE PETITIONERS

9 MR. SULLIVAN: Mr. Chief Justice:

10 I think one of Mr. Weaver's analogies just
11 towards the end here points out part of the problem, why
12 we believe that there are constitutional issues here in
13 terms of taking and how the tribe is protected and
14 individual citizens are not.

15 The Mayor of the City of Toppenish is a Yakima
16 Indian. She participates fully, as do the tribal
17 members, in the government of the cities, the counties,
18 and the state. Mr. Brendale and Mr. Wilkinson, as was
19 pointed out, cannot vote, do not participate.

20 The General Allotment Acts in our view
21 eliminated the exclusive use language upon which Mr.
22 Weaver attempts to rely. Footnote 9 in the Montana
23 decision goes through this. The tribes -- and both
24 Oliphant and in Montana attempted to use the same
25 language.

1 we believe that the language difference -- and
2 I think there is a couple of words difference between
3 the Crow treaty and the Yakima treaty -- is a
4 distinction without a difference, and that this Court's
5 rulings previously in this matter should in fact, should
6 follow that language and should rule that Montana does
7 apply.

8 But I think the question Justice Stevens had,
9 is it the only case. I think it's the only case in the
10 sense that it follows the law up to that point as it's
11 developed in the whole area of the Indian law.

12 We're confronted with this question of civil
13 regulatory control, and what we are suggesting is a rule
14 based on Montana that puts us on an equal basis with the
15 tribe. We start out with the basis with all Indians
16 that they control the deeded lands -- excuse me, the
17 trust land -- no matter where it is. They acknowledge
18 their position is, if there was one lot of trust land in
19 the middle of the city of Toppenish, they should
20 exercise control over it and in fact do exercise control
21 over it for all purposes, including taxation and
22 zoning.

23 There's a Code of Federal Regulations that
24 says that. What the county is saying -- and then there
25 are some exceptions. This Court in Colville gave a very

1 narrow exception and said, tribes, that's true, you can
2 control your trust land, but within a very narrow
3 exception, when the state government's interest is being
4 affected by what you are doing, in fact the state can
5 have some control over trust land, i.e., you're going to
6 be required to collect taxes.

7 All we're asking for is an equal right, that
8 you approach even a Brendale situation as to start with
9 the county having jurisdiction and then we're saying the
10 carefully circumscribed exception. Because of the
11 constitutional limitations, we believe that exception
12 can't be given the broad analysis that the tribes are in
13 fact encouraging, but in fact should be extremely
14 narrow.

15 And what this Court should say to the tribe
16 is: If the state action will affect their ability to
17 govern themselves and their members -- that's what their
18 inherent sovereignty, that's what's left of their
19 inherent sovereignty.

20 It's just Judge Quackenbush said, the problem
21 is the Allotment Act. But we have to deal with
22 history. We can't just overlook history. We've got to
23 recognize that, because of an Act of Congress, we have
24 non-Indians, American citizens, who are on this
25 property, who have rights. And in order to balance

1 those rights, we are suggesting that the exception needs
2 to be very narrow.

3 Lock at the cases that were cited in support
4 of the exception. Fisher involved all Indians and
5 adoptions, and in fact has been basically, the need for
6 Fisher, eliminated by the Indian Child Welfare Act.

7 The other cases that were cited in support of
8 that second exception I believe give weight to our
9 argument that it was intended to be strict, very
10 narrow.

11 Thank you very much.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
13 Sullivan. The case is submitted.

14 [Whereupon, at 2:33 p.m., the case in the
15 above-entitled matter was submitted.]

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the

Supreme Court of The United States in the Matter of:

NO. 87-1622 - PHILIP BRENDALE, Petitioner V. CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION, ET AL.;

~~NO. 87-1697 - STANLEY WILKINSON, Petitioner V. CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION; and~~

NO. 87-1711 - COUNTY OF YAKIMA, ET AL., Petitioners V. CONFEDERATED TRIBES

AND BANDS OF THE YAKIMA INDIAN NATION

and that these attached pages constitutes the original

transcript of the proceedings for the records of the court.

BY alan friedman

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