

mity with the provisions of the Colville Land Use and Development Code.

#### Full Text

Before DUPRIS, Chief Justice; FRY, NELSON, STEWART, McGEOGHAN, BONGA, CHENOIS, PASCAL and MILES, Justices

FRY, Justice

#### Memorandum Opinion and Order Affirming Procedural History

Non-Indian Daniel Hoover (Hoover) filed an action in federal district court alleging the Colville Confederated Tribes (Tribes) lacked jurisdiction to regulate fee lands owned by him and located within the Colville Confederated Tribes Reservation. The district court determined the Colville Tribal Court had authority to determine its jurisdiction regarding Mr. Hoover's claim and ordered him to exhaust those remedies available in tribal court before seeking relief in the federal system.

The Tribes subsequently filed an action in tribal court seeking an injunction to restrain Hoover from developing his real property without complying with the provisions of the Colville Land Use and Development Code. The tribal court granted an injunction and Hoover appealed to this court arguing that the Tribes are without legal authority to regulate non-Indian fee lands located within their reservation.

Daniel Hoover died in 2000. The personal representative of his estate, Jerry Thon, has substituted in as plaintiff.

#### Jurisdiction

This Court has personal and subject matter jurisdiction of this case pursuant to the Constitution of the Colville Confederated Tribes<sup>1</sup> and the Colville Tribal Code.<sup>2</sup> *Also see Colville Confederated Tribes v. Stockwest*, CV86-624, 21 Indian L. Rep. 6075 (1984) and *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 12 Indian L. Rep. 1035 (1985).

#### Standard of Review

The question of jurisdiction is entirely one of law. The standard of review for questions of law is non-deferential to findings and conclusions of the trial court and is de novo. *CCT V. Naff*, 2 CCAR<sup>3</sup> 50, 22 Indian L. Rep. 6031 (1995); *United States v. McConney*, 726 F.2d 1195 (9th Cir. 1984).

<sup>1</sup>AMENDMENT X—JUDICIARY—Article VIII Judiciary—Section 1. There shall be established by the Business Council of the Confederated Tribes of the Colville Reservation a separate branch of government consisting of the Colville Tribal Court of Appeals, the Colville Tribal Court, and such additional Courts as the Business Council may determine appropriate. It shall be the duty of all Courts established under this section to interpret and enforce the laws of the Confederated Tribes of the Colville Reservation as adopted by the governing body of the Tribes. The Business Council shall determine the scope of the jurisdiction of these courts and the qualifications of the judges of these courts by statute.

<sup>2</sup>Colville Tribal Code 1-1-70 *Jurisdiction defined*. The jurisdiction of the Tribal Court and the effective area of this Code shall include all territory within the Reservation boundaries, and the lands outside the boundaries of the Reservation held in trust by the United States for Tribal members of the Tribes, and it shall be over all persons therein; provided, however, that criminal jurisdiction of the Court shall not extend to trial of non-Indians...

Colville Tribal Code 2-2-1 *Jurisdiction Generally*. The Court shall have jurisdiction of all suits involving persons residing within the Tribal jurisdiction as defined by this Code and all other suits in which a party is deemed to have consented to the jurisdiction of the Court, or in which the events giving rise to the action occurred within the Tribal jurisdiction as defined by this Code.

<sup>3</sup>CCAR is the Colville Court of Appeals Reporter, available through the Colville Tribal Court of Appeals.

### CONFEDERATED TRIBES OF THE COLVILLE RESERVATION COURT OF APPEALS

#### ESTATE OF Daniel HOOVER v. COLVILLE CONFEDERATED TRIBES

No. AP99-001 (Mar. 18, 2002)

#### Summary

The Colville Confederated Tribes Court of Appeals affirms the trial court's entry of an order permanently enjoining the appellant and those acting in concert with him from developing, improving, or otherwise changing the land use of his property within the Hellsgate Reserve without first obtaining the necessary permits from the Colville Confederated Tribes in confor-

### Statement of Relevant Facts<sup>4</sup>

#### History

Prior to the presence of the white man, the ancestors of the tribes and bands of the Colville Confederated Tribes<sup>5</sup> occupied an area comprised of what is now eastern Washington, southern central British Columbia, and portions of Idaho and Oregon.

In 1872, President Grant created the Colville Confederated Indian Reservation by Executive Order—without a treaty and without the consent of the tribes and bands of Indians residing in the area. The original reservation was over three million acres in size, but was reduced to its present size of approximately one million four hundred thousand acres under an agreement dated May 9, 1891, when gold was discovered in the northern half of the Reservation.

The Reservation is located within portions of Okanogan and Ferry Counties in north central Washington State. Originally, all the land within the Reservation was held in trust for the Tribes. Lands were later allotted and homesteaded within the Reservation as a result of the allotment policies of the early twentieth century. Approximately seventy-nine percent (79%) of the reservation lands are now held in trust for the Tribes and its members. The remainder is held by federal agencies or is owned in fee by Indians and non-Indians.

#### The Hellgate Reserve

In 1977, the Tribes designated the southeast corner of the Reservation as the Hellgate Game Reserve. The area was chosen because of its remote character, limited access, limited development, small population, natural geographic boundaries and critical range habitat. It is critical winter range habitat for deer, elk, and other wildlife.

The Reserve is bordered on the south and east by the Columbia River, on the west by the San Poil River arm of Lake Roosevelt and on the north by Silver Creek Road. It is situated entirely within the exterior boundaries of Ferry County and contains slightly more than one hundred thousand acres.

Approximately 87% of the land within the Reserve is in trust status, 11% of the land is in non-Indian and Indian fee ownership, and the remaining 2% is owned by the Federal Bureau of Reclamation.

The Reserve contains no cities, towns, or areas of concentrated development or settlement. At the time of hearing, there were fourteen permanent homes and five summer cabins within its boundaries. Almost all the buildings existed prior to the Tribes' designation of the areas as a reserve and enactment of its Land Use and Development Code.

The Reserve is managed specifically for conservation of wildlife and native plants. The area plays an integral role in preserving game populations and maintaining the hunting and gathering traditions of the Tribes. It consists of diverse topography and habitat with rugged hill country, dry land range, clear streams and coniferous forests. It contains abundant and diverse wildlife, including elk and deer. Tribal members, whose average annual income is approximately \$7,000.00, depend significantly on wildlife and plant life within the Reserve for cultural needs and sustenance.

<sup>4</sup>The facts in this case are uncontroverted. Although Mr. Hoover did not challenge the trial court's findings of fact in his notice of appeal, he did so in his brief. Mr. Hoover informed the Court during oral argument that he did not contest the findings of fact. We also note that Mr. Hoover controverted none of the Tribes' expert witness testimony. The statement of relevant facts is taken from the findings of fact entered by Judge Wynne and is, in most instances, verbatim.

<sup>5</sup>The Colville Tribes consist of twelve distinct Tribes or Bands: San Poil, Nespelem, Colville, Okanogan, Methow, Wenatchee, Chelan, Entiat, Moses, Palouse, Chief Joseph Band of Nez Perce, and the Lakes.

The Tribes have managed and regulated the Reserve to preserve its natural and cultural values. They have implemented strict wildlife management practices, including restriction of camping and off-road vehicle use.

The Tribes have actively implemented a policy to reacquire fee property within the Reservation, and the Reserve has been targeted as a priority for purchases in order to enhance wildlife habitat. The Reserve has reacquired 9,272 acres within Reserve boundaries since 1992 at a cost of over five million dollars. The Bonneville Power Administration, an agency of the federal government, has assisted in funding these purchases through authorization of the Pacific Northwest Electric Power Planning and Conservation Act,<sup>6</sup> which specifically provides for land acquisition and wildlife enhancement.

The Hellgate Reserve plays a significant role in the continuation of the Tribes' culture. It is a place designated to preserve their hunting and gathering traditions and allow for extended family camps. The camps are a valued part of tribal life and cultural survival; traditions which have passed down through generations.

The Reserve contains a variety of plants<sup>7</sup> used by tribal members for food, as medicine, and in traditional ceremonies required for continued survival of the Tribes' culture.

The plants and animals protected and preserved through comprehensive management of the Reserve are not only a food source, but also play a vital and irreplaceable role in the cultural and religious life of tribal members. Annual medicine dances, root feasts and ceremonies incorporate animal and plant life found within the Reserve. These dances, feasts, and ceremonies play an integral role in the well being and survival of the Tribes and their members.

#### Management and Regulation of the Reserve

The Tribes have managed and regulated the Hellgate Reserve to preserve its natural and cultural values. Wildlife and fish are important to the Tribes' culture and provide an important food source to its members. The Tribes expend about three million dollars per year managing game, fish, and other species found within the Reservation. A significant portion of this money is earmarked for management activities and land acquisition within the Reserve.

In 1977, the Tribes, in cooperation with the United States Department of the Interior, acquired fifty head of elk from the Wind Caves National Monument in South Dakota to reestablish an elk herd on the Reservation for supplementation of subsistence deer herds. The Tribes' Fish and Wildlife Department determined the Hellgate area was best suited for the elk, based upon extensive winter range habitat of the area. Since then, the elk, subject to comprehensive tribal management, have flourished, greatly increasing in number within the Reserve and in other areas of the Reservation. Estimates place the size of the herd within the Reservation at over eight hundred animals.

Hunting and fishing in the Reserve are limited. There is, for instance, a six-month subsistence deer season in effect elsewhere on the Reservation, while deer hunting within the Reserve has been limited to an annual nine-day buck hunt. Elk hunting, at the time of hearing, was limited to a restrictive lottery system. The Tribes do not permit non-member hunting on trust and fee lands within the Reserve. The no-hunting restriction on fee lands is through implementation of an intergovernmental agreement with the State of Washington.

In addition to restriction of hunting within the Reserve, the Tribes conduct wildlife management practices such as tagging

<sup>6</sup>16 U.S.C. § 839, P.L. 96-501, Dec. 5, 1980, 94 Stat. 1333.

<sup>7</sup>Culturally important plants include black camas, wild carrots, Indian potatoes, willow, rose bush, pine nut, black moss, huckleberry, and chokecherry.

and monitoring big game, surveys, raptor nesting site protection, and wilderness recreation restrictions. Tribal resource and law enforcement personnel devote significant portions of their time to management activities in the Reserve. These activities are funded by trust funds derived primarily from sales of timber and from grants and contracts through the Indian Self-Determination Act.

The Tribes permit timber harvests within the Reserve, provided they are conducted in a manner consistent with tribal wildlife management practices. Timber resources represented the largest revenue source for the Tribes at the time of hearing. All timber sales go through the Integrated Resource Management Planning (IRMP) process<sup>8</sup> designed to minimize harm to the environment and to ensure compatibility with the purposes of the Reserve. The Tribes review timber harvest sales on fee lands within the Reserve in accordance with an intergovernmental agreement with the Washington State Department of Natural Resources and the Washington State Department of Ecology.

In 1992, the Tribes, Ferry County and Okanogan County entered into an Intergovernmental Land Use Planning Agreement (ILUPA) which provided for resolution of land use conflicts for private lands and a joint permit process for lands within Reservation boundaries. As a result of the agreement, the Tribes and the counties agreed on permit conditions for over two hundred developments and land use changes within the Ferry County side of the Reservation. In 1997, Ferry County unilaterally withdrew from the agreement, which remains in effect between the Tribes and Okanogan County.

Ferry County does not fund, participate in, or assist in the management or development of natural resources or wildlife within the Reserve. Land use plans for Ferry County treat the Reserve no differently than other rural areas within the county. It provides no zoning controls comparable to those of the Tribes.

#### Land Use and Development Code

In November 1978, the Colville Business Council<sup>9</sup> enacted an Interim Land Use and Development Ordinance. In 1988, following an extensive resource inventory, data collection, and public meetings, the Council adopted a Comprehensive Plan for the Reservation. The Plan requires environmental and cultural review of all proposed development within the Reservation.

Prior to the adoption of the Land Use and Development Code in 1992, the Tribes issued public notices and held public meetings to solicit comments from both Indian and non-Indian communities. Land planning efforts included participation by the Reservation community and county governments.

The Code established zoning within the Reservation, including commercial, industrial, residential, special requirement, rural, forestry, game reserve, and wilderness. The zones set forth different levels of development and regulation consistent with the community values established in the Comprehensive Plan.

The Code requires all persons proposing subdivision and development within the Reservation, including the Reserve, to apply for a permit through the land use review process. Proposed land use activities are reviewed and permits are issued by the Colville Planning Department to ensure compatibility with the Code. There is provision for review of adverse decisions by the Land Use Review Board. Individuals questioning an appeal by the Land Use Review Board decision may seek judicial review in tribal court, a constitutionally separate branch of tribal government.

The Tribes permit a wide variety of development in highly populated areas of the Reservation having an adequate infrastructure. Some uses in less populated areas are severely restricted. In order to protect and provide for the general welfare of Reservation residents and to preserve the continued existence of the Tribes, a balance was achieved between the interests expressed by the general public and the protection of important cultural values. As a result, the Tribes have restricted development in certain areas. The Reserve is one such area and remains largely uninhabited and undeveloped in conformity with the Code.

The Tribes incorporate a holistic objective to planning based on ecosystems, watersheds, and natural boundaries. In 1994, the Tribes adopted an Integrated Resource Management Plan (IRMP) based on their community values. The IRMP is an interdisciplinary method of evaluating impact to ecosystems and watersheds as a whole. The Plan has three phases, 1) data collection and analysis of past and current natural resources, 2) drafting a management document based upon membership values and desires, and 3) implementation and monitoring. A basic premise of the IRMP is that tribal members are experts when it comes to the use of their land.

#### Hoover's Development

Daniel Hoover purchased 72.75 acres of land within the boundaries of the Reserve in 1987. The land had been an allotment of a tribal member and was converted to fee status in 1925 under the Bureau of Indian Affairs's policy of forced fee patents.

Hoover built a residence on the property without notifying tribal officials and subdivided the land through Ferry County, selling two 20-acre parcels to non-Indians. Each parcel was developed with a single recreational-use cabin. One owner obtained a tribal permit to build with conditions for mitigating the impact on wildlife. In 1991, tribal officials became aware of the non-permitted land use by Hoover and notified him in writing of tribal land use requirements.

Hoover's remaining property consists of 32.75 acres adjoining tribally managed shorelands on Lake Roosevelt.<sup>10</sup> In 1992, Hoover sought to develop his property further by constructing a second residence without obtaining tribal permits. The Tribes and Ferry County attempted to resolve the permitting issues through an intergovernmental agreement mediation process (ILUPA). The process was cut short when Hoover sued the Tribes and Ferry County in federal court.

In December 1995, the Tribes became aware that Hoover was again attempting to subdivide his property further, without going through the Tribes' permitting process. The proposed subdivision of four lots comprised a "major sub-division" under the Tribes' Land Use and Development Code and required a conditional use permit. Under the Ferry County Zoning Code, it was considered a "minor sub-division," requiring little review and no evaluation of how it would impact the Reserve.

The Tribes without rezoning, a variance, or conditions limiting uses on its site would not have approved the proposed development. Hoover was notified in February 1996 that acting to subdivide, sell, and develop lots within the Reserve without obtaining requisite tribal permits constituted a violation of tribal law.

Hoover ignored the notice from the Tribes and submitted a final subdivision plat to Ferry County for recording. He indicated he planned to sell lots in a shoreline housing development without applying for approval from the Tribes.

<sup>8</sup>See page 9 [6037] for a description of the IRMP process.

<sup>9</sup>The Colville Business Council is the 14-member governing body of the Colville Confederated Tribes, with duties established by the Colville Tribal Constitution, Article II—Governing Body.

<sup>10</sup>Lake Roosevelt is a lengthy man-made lake created by the construction of Grand Coulee Dam during the 1930s. The dam, in combination with others further down the Columbia River, virtually eliminated the annual salmon runs which had been a substantial food source for the Tribes.

### Impact of uncontrolled fee land development within the Reserve

The population of north central Washington, including that of the Reservation, is growing rapidly. Ferry County more than doubled its population between 1970 and 1997, according to census data. Planning and zoning regulations were enacted by the Tribes to help address the impact of growth within the Reservation while attempting to preserve traditional community values.

Uncontroverted credible expert testimony and scientific studies presented at the hearing strongly indicate that unchecked increases in housing development within the Reserve will significantly adversely impact wildlife species and native plants. Specifically, species such as deer, elk, bear, cougar, and bald eagle are sensitive to human habitation and will decline in numbers with increased and uncontrolled housing development. Wildlife studies show increased housing will result in fewer mule deer. Studies also show forest and songbird species will decrease in number and bald eagles will nest further from shorelines when nearby housing developments appear.

Uncontrolled development will increase the number of roads, traffic, and off-road activity—all of which impact native wildlife and plants. Roads cause increased runoff and dust, which impact streams and watersheds. Roads divide wildlife corridors and create barriers to migration routes. Roads kill natural plant life and spread non-native noxious weeds, which crowd out native plants.

Increasing housing without land use controls will result in more septic systems, noise, dust, artificial lighting, wood use, smoke, and pets in natural areas. These factors negatively impact wildlife habitation.

The impact resulting from lack of land use control on fee lands within the Reserve is magnified because the fee lands are disproportionately located in low-lying areas adjoining water. Low elevation riparian lands within the Reserve are important components of the arid ecosystems on which wildlife depend, and are the most important winter range for deer and elk.

Native plants and animals within the Reserve are essential to ceremonies and other traditions of the Tribes. Tribal cultural practices such as camping, hunting, vision quests, and gathering medicines are not compatible with uncontrolled development and increased housing density. Uncontrolled development places at risk important components of the Tribes' cultural and religious traditions.

Unregulated development of fee lands within the Reserve would significantly impact adjoining tribal trust lands. Increased car exhaust, wood smoke, water use, waste discharge, human activity, traffic, dust, garbage, and erosion from grading and construction, do not stop at fee land boundaries. The inability of the Tribes to apply comprehensive planning regulations to fee lands within the Reserve will substantially impair the Tribes' ability to preserve the general character, cultural and religious values, and natural resources associated with the Reserve.

The inability of the Tribes to fairly and impartially enforce comprehensive planning regulations to all lands within the Reserve presents a clear danger to the continued cultural identity and existence of the Tribes, and threatens the health and welfare of their members.

### Issue

The sole issue before this court is whether real property owned by a non-Indian in fee is subject to zoning regulations of the Tribes when the property is within a game reserve situated entirely within the exterior boundaries of the Colville Confederated Tribes Reservation.

### Discussion of Issue

The recently decided case of *Atkinson Trading Co., Inc. v. Shirley, et al.*, No. 00454, 532 U.S. 645, 28 Indian L. Rep. 1019 (2001), more clearly defined the extent of jurisdiction Indian tribes possess over non-Indians on fee lands within the exterior boundaries of Indian reservations. The United States Supreme Court continues to hold that inherent sovereign powers of an Indian tribe do not extend to activities of non-members of the Tribe within reservation boundaries. *Atkinson, supra*, does recognize the exceptions to this general rule as set forth in *Montana v. United States*, 450 U.S. 544, 8 Indian L. Rep. 1005 (1981), which states, "First, (a) tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationship with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements.... Second, (a) tribe may ... exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana* at 565.

In addition to the foregoing exceptions, the Court has long held that Indian tribes have jurisdiction over non-Indians when expressly authorized by Congress. See *Montana*, 450 U.S. 544, 564, 101 S. Ct. 1245, 1258.

We have closely scrutinized the facts of this case and the jurisdictional requirements determined by the Supreme Court in matters such as this. For the following reasons, we are of the opinion that the Tribes possess the necessary authority to regulate the use of Hoover's fee land within the Reserve.

### Express Delegated Authority

Federal courts have found congressional delegation of authority for tribes. See *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 28 Indian L. Rep. 2006 (9th Cir. 2000) (hereinafter *Bugenig I*); and *Bugenig v. Hoopa Valley Tribe*, 266 F.3d 1201, 28 Indian L. Rep. 2274 (9th Cir. 2001) (hereinafter *Bugenig II*); *United States v. Mazurie*, 419 U.S. 544, 2 Indian L. Rep. No. 2, p. 1 (1975); *Rice v. Rehner*, 463 U.S. 713, 10 Indian L. Rep. 1057 (1983). The statutory language delegating the requisite authority was viewed by Justice White, writing in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 16 Indian L. Rep. 1044 (1989), wherein he cited two statutes where Congress expressly delegated authority to Indian tribes. The first is 18 U.S.C. § 1161, which authorizes tribes to make laws regarding liquor sales in "Indian Country." The Act defines Indian Country as including "all lands within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through reservations."

The second statute cited by Justice White is the Clean Water Act, 33 U.S.C. § 1377 *et seq.* It authorizes Indian tribes to be treated as states in setting clean water standards for federal Indian reservations. The terms "federal Indian reservation" is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 33 U.S.C. § 1377(h).

*Bugenig I* labeled the phrase "notwithstanding the issuance of any patent ..." as the "gold standard" in finding the requisite delegation of authority. *Bugenig v. Hoopa Valley Tribe*, 229 F.3d 1210, 1219 (9th Cir. 2000). The Clean Water Act meets the "gold standard" because it includes the requisite phrase. The Act expressly delegates congressional authority to those Indian tribes able to meet certain requirements. Those tribes meeting the requirements have authority to establish water quality stan-

dards (Section 1313) and to determine standards for rural septic systems for the entire reservation, including fee lands owned by non-Indians (Section 1254(q)). The Act includes direction for the state or tribe to establish, for approval by the Administrator, procedures, processes, and methods (including land use requirements) to control sources of water pollution. Section 1324(a)(2).

The Tribes, having met requirements to be "treated as a state" under the Clean Water Act,<sup>11</sup> possess the equivalent of state jurisdiction for the limited purpose of regulating clean water use for all lands within the exterior boundaries of the Colville Reservation, including non-Indian fee lands. The explicit authority of the Clean Water Act confers jurisdiction upon the Tribes to regulate water quality use of non-member fee lands within the boundaries of the Reserve regarding water quality.

The Court in *Bugenig v. Hoopa Valley Tribe, et al.*, 229 F.3d 1210 (9th Cir. 2001) or *Bugenig II*, noted that *United States v. Mazurie, supra*, "instructs that any determination that Congress delegated to the Tribe authority ... involves two distinct questions. First, we must be sure that Congress ... actually delegated regulatory authority to the Tribe. Second, if we conclude that Congress did delegate such authority, we must analyze whether exercising that delegation was lawful."

Congress has clearly delegated its authority to regulate water quality on federal Indian reservations to tribes meeting certain requirements. Challenges to its authority to do so have been rebuffed. See *Montana v. United States Environmental Protection Agency*, 137 F.3d 1135, 25 Indian L. Rep. 2075 (9th Cir. 1998), and *City of Albuquerque v. Browner*, 97 F.3d 415, 23 Indian L. Rep. 2213 (10th Cir. 1996).

The Tribes received authority from the federal Environmental Protection Agency in 1991 to enact water quality regulations for the entire Reservation in accordance with the provisions of the Tribes' Constitution and Codes. This included fee lands owned by non-Indians within the boundaries of the Reservation. The Tribes were delegated authority to zone for control of water quality standards over Indians and non-Indians on the Colville Indian Reservation. We would be well advised to allow the Tribes to exercise zoning controls over land use even as they are appropriately exercising authority over water quality on their Reservation. *Cavenham Forest Products, Inc. v. Colville Confederated Tribes*, 1 CCAR 39, 18 Indian L. Rep. 6037 (Colville Confederated 1991) (recognizing Tribes' authority to require compliance with the Tribes' Land Use Ordinance by a non-Indian business on the Reservation). The *Cavenham* decision was based upon general principles of tribal sovereignty and applicability of the tests in the *Montana* case.

Yet, there is an additional consideration in determining whether the Tribes' jurisdiction to regulate non-member fee land within the Reserve goes beyond the Clean Water Act. For this, we look to the *Montana* exceptions, and actions of the United States government in determining the character of the Reserve.

### The Montana Exceptions

The first *Montana* exception (consensual relationships) is not applicable to this case.

The second exception authorizes tribal regulation of "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political

integrity, the economic security, or the health or welfare of the tribe." *Montana* at 565. The findings of fact show clearly that the requirements of the second exception have been fulfilled inasmuch as Hoover's proposed conduct (that of developing land for construction of additional residences within the Reserve) would affect the health and welfare of the members of the Tribes.

### Health and Welfare

The average annual income of tribal members is thousands of dollars below the national poverty level and their employment rate is near fifty percent.<sup>12</sup> Reduced economic circumstances and cultural traditions cause many members to depend on subsistence hunting of large game animals, primarily deer and elk. The dependence upon subsistence hunting is greater now than before construction of Grand Coulee Dam that, together with the construction of other dams downstream on the Columbia River, destroyed the salmon runs which had previously provided a substantial subsistence food source.

Hoover's planned development would have an impact on the ecology and environment because any increase in the number of homes within the Reserve would directly affect the deer and elk population. Were he granted permission to construct his development, the Tribes would have no ground to prevent other non-member fee owners from developing their properties within the Reserve. It is clear from the evidence adduced at trial that the Tribes had little choice in preventing Hoover from proceeding. They either had to allow him and others to build in the Reserve, and thus destroy or greatly diminish an important, necessary food and culture source, or prevent him from building and thus preserve a valuable source of subsistence hunting and cultural participation.

In addition to game animals, tribal members use many varieties of plants within the Reserve as a food source. The importance of the plants lies in their use for maintaining and preserving cultural traditions.

### Health and Welfare—Spirituality and Cultural Preservation

The trial court found

Plants and animals preserved through comprehensive management in the reserve are not only a source of food, but also play a vital and irreplaceable role in the cultural and religious life of Colville people. Annual medicine dances, root feasts, and ceremonies of the Longhouse religion all incorporate natural foods such as deer and elk meat and the roots and berries found in the Hellsgate Reserve. The ceremonies play an integral role in the current well being and future survival of Colville people, both individually and as a tribal entity. Finding of Fact 36.

*Bugenig II* is the only federal court in our experience to refer to the spiritual health of a tribe. It is well known in Indian Country that spirituality is a constant presence within Indian tribes. Meetings and gatherings all begin with prayers of gratitude to the Creator. The culture, the religion, the ceremonies—all contribute to the spiritual health of a tribe. To approve a planned development detrimental to any of these things is to diminish the spiritual health of the Tribes and its members.

The spiritual health of the American Indian is bound with the earth. Their identity as a people becomes invisible in the city, away from nature. It is the land and the animals which renew and sustain their vigor and spiritual health. The nature of the spirituality of the American Indian was well-expressed by Luther Standing Bear when he said:

Nothing the Great Mystery placed in the land of the Indian pleased the white man, and nothing escaped his transforming hand. Wherever forests have not been

<sup>11</sup>In accordance with the requirements of 33 U.S.C. § 1324(a)(2), the Tribes have adopted a land use policy implemented through their zoning ordinance. The provisions of the ordinance affecting water quality within the Reservation are therefore valid and enforceable against all persons within the exterior boundaries of the Reservation. As such, the Tribes are able to regulate water quality standards affecting Hoover's property within the Reservation.

<sup>12</sup>Annual income is \$7561 and the unemployment rate is 48%. Finding of Fact No. 41.

mowed down, wherever the animal is recessed in their quest for quiet protection, wherever the earth is not bereft of four footed life—that to him is an “unbroken wilderness.”

But, because for the Lakota there was no wilderness, because nature was not dangerous but hospitable, not forbidding but friendly, Lakota philosophy was healthy—free from fear and dogmatism. And here I find the great distinction between the faith of the Indian and the white man. Indian faith sought the harmony of man with his surroundings, the other sought the dominance of surroundings.

In sharing, in loving all and everything, one people naturally found a due portion of the thing they sought, while, in fearing, the other found need of conquest.

For one man the world was full of beauty; for the other it was a place of sin and ugliness to be endured until he went to another world, there to become a creature of wings, half-man and half-bird.

Forever one man directed this Mystery to change the world He made; forever this man pleaded with Him to chastise his wicked ones, and forever, he implored his God to send His light to earth. Small wonder this man could not understand the other.

But the old Lakota was wise. He knew that man's heart, away from nature, becomes hard; he knew that lack of respect for growing, living things soon led to his lack of respect for humans, too. So he kept his children close to nature's softening influence.<sup>13</sup>

These words describe not only the faith and spirituality of the Lakota, but of all Indian peoples. It is the “harmony of man with his surroundings” that the Tribes seek in maintaining the Reserve in a state compatible with nature.

The evidence is highly persuasive that the encroachment of human habitation would have a detrimental effect on the animals, plants, and herbs used for sustenance, medicinal, and ceremonial purposes—the continued existence of which is vital to the spiritual health of the Tribes and their members.

#### Implicit Authority

The United States Supreme Court has clearly stated that, aside from the *Montana* exceptions, Indian tribes may regulate non-member activities on reservations only when Congress has explicitly granted the tribes explicit authority to do so. We believe this approach unduly restrictive because it ignores the clear reality of circumstantial evidence. In almost all matters, courts should look at the totality of circumstances rather than seeking a specific mantra (i.e. “notwithstanding the issuance of any patent”)<sup>14</sup> and we see no rational reason to do otherwise here.

The Tribes' action in denying Hoover permission to develop his properties can be affirmed, at least in part, because of its authority under the Clean Water Act. Further analysis is instructive.

#### The Pacific Northwest Electric Power Planning and Conservation Act

Particularly germane to this case are the millions of dollars the federal government has provided the Tribes to purchase 9,272 acres of fee lands within the Reserve for the purpose of wildlife habitat enhancement.

The money for repurchase of fee lands within the Reserve<sup>15</sup> was appropriated by Congress and distributed through the Bonneville Power Administration, an agency of the federal government. Congressional funding and authorization of this program is through the Pacific Northwest Electric Power Planning and Conservation Act of 1984, 16 U.S.C. § 839 *et seq.* (hereinafter PNEPPCA).

The Act authorizes development of “regional plans and programs related to energy conservation, renewable resources, other resources, and protecting, mitigating, and enhancing fish and wildlife resources...” 16 U.S.C. § 839(3)(A).

The Reserve has been an ideal candidate to satisfy one of the Act's intended goals—the enhancement of fish and wildlife habitat. Funds have been appropriated through PNEPPCA to the Tribes for the purpose of protecting “renewable resources ... and ... enhancing fish and wildlife resources” within the Reserve. In accordance with a five-party agreement<sup>16</sup> with federal agencies and the Spokane Tribe of Indians, the Tribes retain primary management authority of the portions of Lake Roosevelt within the Colville Indian Reservation. This includes Hoover's shoreline property.

#### Zoning Conflicts

The Clean Water Act expressly authorizes the Tribes to regulate water quality and sewer systems on the reservation, including the Reserve. We have found no other express congressional authority for the Tribes to regulate non-member fee lands. Arguably, this means all other zoning authority to regulate non-member fee lands within the Reserve resides with Ferry County. We see this as unworkable. Ferry County unilaterally withdrew from participation in the successful Interim Land Use Planning Agreement when Hoover filed his complaint in federal court. Ferry County has since approved development within the Reserve that is incompatible with the goals of the Tribes and federal government in maintaining the area in its natural pristine condition. It is well known in Indian Country that county governments do not, as a general rule, cooperate with Indian tribes and do not provide the same level of services within reservations as they do in other areas of a county. We do not believe it realistic to expect Ferry County Commissioners to be sympathetic with the Tribes' goal to regulate development within the Reserve in accordance with its land use regulations.

What then is the role of Ferry County regarding its zoning regulations applicable within the Reserve as to lot size and other building regulations? What is its interest in regulating zoning within a hundred thousand-acre game reserve, and how can it effectively adhere to its comprehensive plan when it does not have the authority to issue water quality regulations?

Clearly, the interests of Ferry County within the Reserve are minimal and are insignificant compared to those of the Tribes. The Tribes have multiple interests in the Reserve, not the least of which is retaining its culture, physical and spiritual health and welfare.

Again, we are of the opinion we should look at the totality of circumstances. We see the circumstances as this—the Tribes have express delegated authority to regulate water quality within the Reservation. The Tribes have enacted a Comprehensive Land Use and Development Code that is neutral in its application to Indians and non-Indians. The Tribes have closed the Reserve to unrestricted development and actively work to

<sup>13</sup>*Native American Wisdom*, 1991, published by Classic Wisdom New World Library, compiled by Kent Nerburn, Ph.D. and Louise Menckel, M.A. The quotation is on pages 47 and 48.

<sup>14</sup>*See Bugenig I*, at page 1219.

<sup>15</sup>It should be noted that the repurchase monies have been appropriated for only lands within the Reserve. There is no record in this case of federal monies being used for repurchase of lands outside the Reserve but within the Reservation.

<sup>16</sup>The Lake Roosevelt Cooperative Management Agreement participating parties consist of the National Park Service, the Bureau of Reclamation, the Bureau of Indian Affairs, the Spokane Tribe of Indians, and the Confederated Tribes of the Colville Indian Reservation.

enhance its wildlife. The Reserve has a "vital and irreplaceable role in the cultural and religious life of Colville people." The large game animals within the Reserve are an important food source for the Colville people. Finally, Congress has appropriated millions of dollars for purchase of fee lands within the Reserve in order to help maintain the area in a natural state.

What are the interests of Ferry County vis-à-vis the Tribe? The Reserve is comprised of over one hundred thousand acres with less than twenty-five residential structures within it. Access to these permanent and summer homes is by a single road that traverses the length of the Reserve. The Colville Tribal Police Department provides police protection. Emergency medical services are provided by the Colville Tribal Emergency Services.

Most of the structures, including Hoover's proposed development, are at or near the end of the road. Other than occasional road maintenance and sporadic police protection, the County appears to have little presence or interest in the Reserve. It does not appear to have any interest in determining the character of the land and certainly none in preserving the pristine nature of the land.

#### Characterization of the Reserve

The Tribes' ancestors and members have sustained themselves from the land for thousands of years. They harvested the roots and the berries from the plants for food and medicine; they caught salmon from the Columbia River, and they killed deer for meat. In 1977, with the Columbia River dammed and the salmon long gone, the Tribes acquired fifty head of elk to establish a large game animal to supplement the deer herds.

The elk were released in the Hellsgate area (the Reserve) because it was best suited to survival of the herd. This is the first record of initial efforts to characterize the area as a game reserve. The herd has now grown to over eight hundred animals and is subject to a closely regulated annual hunt.

In addition to introducing the elk herd, the Tribes and the federal government, for over ten years, have participated in a land buy-back program within the Reserve. The purpose of the program is to purchase fee lands and return them to their natural state. Over nine thousand acres have been purchased for this purpose—primarily with federal funds. The Tribes and the federal government are in the midst of a long-range plan to define and characterize the area as a natural habitat for plants and animals.

The Tribes, in addition to the buy-back program, have developed land use regulations for the Reserve. Public notice and public hearings were held prior to the adoption of the regulations. An appeals process with access to the tribal court was allowed. The regulations apply equally to tribal members and non-members—there is no preferential treatment.

The record is devoid of Ferry County's long-range plans for fee lands within the Reserve. However, a letter from the Ferry County Prosecuting Attorney dated August 12, 1991,<sup>17</sup> was written in response to the Tribes' request for comments on its proposed Land Use and Development Code. It implies the County considered Hoover's property, and that of other non-Indians near it, to be an "open area." While encouraging an intergovernmental agreement be finalized (which subsequently occurred in the form of ILUPA), the Prosecuting Attorney urged the Tribes not to adopt the proposed Code as "there may be areas where enactments by other entities afford better protection of the environment and more orderly growth management."<sup>18</sup> We have seen no evidence that this has occurred in the ten years since the letter was written.

We deduce from the record that there will be no additional land becoming available for development within the Reserve

and that more fee lands will be purchased from non-Indians to be returned to their natural state. The result of this is predictable—services provided by Ferry County to non-Indians owning property in the Reserve will be diminished, along with the County's interest in the property. This will have little impact on non-Indians in the area, as public services such as fire and ambulance are being provided by the Tribes.

#### Conclusion

The trial court correctly entered its order permanently enjoining Daniel Hoover and those acting in concert with him from developing, improving, or otherwise changing the land use of his property within the Hellsgate Reserve without first obtaining the necessary permits from the Colville Tribes in conformity with the provisions of the Colville Land Use and Development Code. The order is *Affirmed*.

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*Counsel for appellees:* Tim Brewer

*Counsel for appellant:* Eric Richter

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<sup>17</sup>Exhibit 90 of the evidence introduced at trial.

<sup>18</sup>*Ibid.*