HOOPA VALLEY TRIBAL COURT OF APPEALS
HOOPA VALLEY TRIBE
HOOPA, CALIFORNIA

Roberta Bugenig, *Appellant/Defendant*
v.
Hoopa Valley Tribe, *Respondent/Plaintiff*

No. A-95-020 (April 23, 1998)

SUMMARY

Appeal of a final Decision and Order entered in the Hoopa Valley Tribal Court on July 11, 1996 against Defendant Roberta Bugenig (Appellant herein) and in favor of the Hoopa Valley Tribe. Appellant challenges the jurisdiction of the tribal court over fee lands located within the borders of the Hoopa Valley Indian Reservation. We *reverse* in part and *affirm* in part.

FULL TEXT

Before: Elbridge Coochise, Chief Justice; Douglas W. Hutchinson, Justice; and Thomas P. Keefe, Jr., Justice.

Appearances: James S. Burling, Pacific Legal Foundation, for Appellant Roberta Bugenig; Thomas P. Schlosser, *Morisset, Schlosser, Ayer & Jozwiak* for Respondent Hoopa Valley Tribe.

Keefe, J.:

This matter came before the Hoopa Valley Tribal Court of Appeals on August 19, 1997, on appeal of a Decision and Order of the Hoopa Valley Tribal Court (Hon. David L. Harding) entered on July 11, 1996. Appellant's timely appeal challenged the jurisdiction of the Hoopa Valley Tribal Court to assert jurisdiction over activities that occur on the Appellant's fee land located within the exterior boundaries of the Hoopa Valley Indian Reservation. Appellant urged this Court to review *de novo* the conclusion of law reached by the court below in its Decision and Order that tribal jurisdiction exists over all territory within the Hoopa Valley Reservation, including fee land such as Appellant Bugenig's. Both parties provided extensive briefs in support of their respective positions, and counsel appeared on behalf of each to present oral arguments before this Court.

I. SCOPE OF REVIEW

We agree that *de novo* review of the conclusions of law reached in this case is desirable, and perhaps even necessary, to a proper disposition of this matter. A full *de novo* review of the facts

relied upon by the tribal court in reaching its conclusions of law, in the absence of clearly erroneous factual determinations, is deemed unnecessary. *See Pullman-Standard v. Swint*, 456 U.S. 273, 102 S. Ct. 1781 (1982). However, some reference to additional facts appearing in the record are necessary, partially occasioned by the fact that the Decision and Order entered in the court below provides no clear delineation between findings of fact and conclusions of law. Nevertheless, the pertinent underlying facts of this case upon which the court relied to reach its legal conclusion are clear.

II. BACKGROUND

This case presents an unfortunate collision between the interests of Appellant Roberta Bugenig, whose ancestors migrated to the area of the Hoopa Valley nearly 150 years ago, and the Hoopa Valley Indian Tribe who have occupied that region since before recorded time. At issue is a restriction in the tribe's ten year forest management plan that prohibits all logging activities within a one-half mile buffer zone adjoining the Hoopa Valley Tribe's sacred White Deerskin Dance Ground and the trail leading thereto.

Appellant purchased land within the restricted area within weeks after the Hoopa Valley Tribal Council action to establish the no logging zone. Her actions in logging a portion of her fee simple property, in apparent compliance with state authorization (later revoked) but in violation of tribal restrictions, brought Appellant Roberta Bugenig into conflict with the tribe. The Hoopa Valley Tribe takes the position that it has regulatory authority over all land located within the boundaries of the Hoopa Valley Indian Reservation. Appellant Bugenig asserts that as a non-tribal member owning a fee simple interest in land located on the reservation, her activities on her land are beyond the jurisdiction of the Hoopa Valley Tribal Court.

At an August 10, 1995, court hearing in which the Hoopa Valley Tribe sought and obtained an injunction against Roberta Bugenig from cutting trees within the one-half mile buffer surrounding the White Deerskin Dance Ground and trail, tribal elder Byron Nelson, Jr., testified,

> The White Deerskin Dance is a world renewal dance. And the intent of the dance . . . is to put everything back in balance that's gotten out of balance from dance to dance. And that's the main emphasis of the dance, it is not only for the good of the Hoopa Tribe, but for all people.[1]

Mr. Nelson further stated:

> This dance is the most important dance site of . . . all dances that the tribe has, particularly the White Deerskin Dance. The site is very ancient. There's scientific evidence that indicates it could be one of the oldest dance sites, oldest ceremonies in the country. The White Deerskin Dance is called Along the River Dance. As you can clearly see, this

[1]Testimony of Byron Nelson, Transcripts of Proceedings; August 10, 1995, p. 48.

particular site isn't really along the river.

When I was doing research on the history book, I kept running across these legends that told when the river went out the other way, meaning going left as it left the valley instead of the right direction. It goes now easterly toward Weitchpec.

And so I had these geologists go out and study the area, and they found that the river did in fact go out to the left up through where Beaver Creek is now and come out in Martins Ferry in the Klamath River. And they stated that it was at least fifty-thousand years ago that the river did go off this way.

So this dance and the trail would very well have gone along the river a long time ago. And the dance site was along the river at one time. So this site is very old . . . . This points to indicating that this is a very ancient site and it's been going on for thousands of years and it should be protected.[2]

The book referred to in Mr. Nelson's testimony, entitled *OUR HOME FOREVER: The Hupa Indians of Northern California* (Nelson, Byron; Hupa Tribe, copyright 1978) contains an extended reference to the significance of the White Deerskin Dance to the Hupa people:

Beyond the coastal mountains of northwestern California, the Trinity River runs through a rich valley which has always been the center of the Hupa world, the place where the trails return. There, the legends say, the people came into being, and there they have always lived. From this central valley, Hupa land spread out in every direction. Starting at the junction of the Klamath and Trinity rivers, the boundary of Hupa territory ran west through the Bald Hills. It turned south along the divide between Pine and Redwood creeks, following the divide to the Grouse Creek area. There it headed east, crossing the Trinity at Cedar Flat. It ran north through the Trinity Alps, around Trinity Summit, and back to the river junction following a line west of Red Cap Creek. Within this land were fields of grass; groves of pine, madrona, and oak; streams, which supported many fish, birds, and animals; and mountain forests of pine, yew, fir, and oak filled with wildlife. The Hupa used all of these resources, but they made their homes and villages beside the Trinity River, in the valley from which they took their name.

At the very heart of that valley was *Takimildin*. This village known as the "Place of the Acorn Feast" was the site of three Hupa ceremonies; the place from which the tribe's main spiritual leader was chosen, and the spiritual center for the people of the valley. For longer than any man could remember, the sacred house had stood there. For thousands of years, spiritual leaders and members of the tribe had come here to pray and meditate, and dancers had met outside the big house on the night before the most sacred White Deerskin Dance to practice. From time to time, fire or flood destroyed the wooden walls of the big house, but

[2] *Id.* at 52.

the Hupa people always rebuilt it on its original, sacred foundations.[3]

> Long before the White Deerskin Dance began in late August or early September, the people of *Takimildin* and *Medildin* began their preparations.
>
> Throughout the years the men worked on the regalia the dancers would use. They stuffed the heads of unusually marked white deerskins which gave the dance its name. These carefully prepared, decorated deerskins were considered tribal property. The dancers held them in trust. Although a child could inherit dance regalia, no individual could buy or sell the skins. Because the White Deerskin Dance revolved around *Takimildin* and the sacred house, the spiritual leader of *Takimildin* began the preparations for the dance each year. Then each district set up three of the six camps which would be used during the ten-day dance. Women prepared baskets of salmon and acorn soup and venison for the feasts. Dancers checked their costumes and rehearsed their steps. Peacemakers worked to settle any unresolved feuds, since the dance could not begin as long as conflict, dissension, or bad feeling remained in the valley. Those who had called the dance had to make a payment to any family in which there had been a death during the year. Holding a dance without this settlement would have offered an insult to the family's grief. Only when all of these things had been done could the dance begin.
>
> The dancers met at *Takimildin*, and all of the people went by canoes to *Xowunkut*, the first dance place. There the spiritual leaders prepared the dance grounds, the women organized the feast, and the dancers dressed and painted themselves. When all was ready, dancers from one of the two districts took their places. At the center of the line stood the singer. He wore a headband of painted buckskin decorated with strips of wolf hair, and an open twine net which reached to his shoulders. On either side of him, the dancers who carried the deerskins formed a line. They wore headbands, but no nets. When the singer began, the dancers moved back and forth. Two dancers, who wore headdresses of sea lion tusks with closely twined nets which hung to their waists, carried red or black obsidian blades. Starting at opposite ends, they danced back and forth in front of the line of men holding the deerskins. When the dancers from the first district had completed a set, dancers from the other district took their places. The dance went on in this way through the afternoon.
>
> After an evening of feasting and celebration, the people moved downriver to *Tsemeta*, just below the mouth of Hostler Creek, for the next dance. They danced, feasted, and played games there. Then came the Boat Dance. Dancing in four large dugout canoes, the dancers drifted downriver toward *Meskut*. Near the village the four canoes came toward the bank together and then backed out into the river ten times, then paddled forward and back before they landed. Then the people went to the dance grounds for the Mock Dance. This dance received its name because the dancers performed it like the regular dance, but substituted funny or improper things for those usually done. They might, for example, carry ordinary rocks in place of the rare obsidian blades. After dancing at *Meskut*, the people moved to *Tceindeqotdin* and *Tselundin* to repeat the dances and feasts. At *Tceindeqotdin* they enjoyed a day of rest, gambled and played games. Then they walked to the next dance site at the end

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[3] Nelson, Byron; *OUR HOME FOREVER: The Hupa Indians of Northern California,* p.5.

of the valley beneath Bald Hill. For the last dances of the ceremony, they moved to *Noltukalai*, the place "among the oak tops" on Bald Hill. There, the legends say, the immortals watched the people of the valley dance with the precious white deerskins and the sacred obsidian blades.[4]

III. STATEMENT OF FACTS

On August 21, 1865, Austin Wiley, Superintendent of Indian Affairs for the State of California, acting under authority of the United States of America, issued an Executive Order stating, in part:

> *I do hereby proclaim and make known to all concerned that I have this day located an Indian reservation to be known and called by the name and title of the Hoopa Valley Reservation, Cal., to be described by such metes and bounds as may hereafter be established by order of the Interior Department, subject to the approval of the President of the United States. Settlers in Hoopa Valley are hereby notified not to make any further improvements upon their places, as they will be appraised and purchased as soon as the Interior Department may direct.*

On June 23, 1876, President Ulysses S. Grant issued an Executive Order describing the reservation's boundaries encompassing a portion of lands adjoining the Trinity River the perimeter of which was

> *declared to be the exterior boundaries of the Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,573.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes . . . .*

The reservation was subsequently extended by Executive Order of President Benjamin Harrison in 1891, and later partitioned and returned to its original size by the Hoopa-Yurok Settlement Act of 1988 (Pub. L. 100-580, 102 Stat. 2929; 25 U.S.C.A. §1301(I) et seq.). That law states in part:

> *Effective with the partition of the joint reservation as provided in subsection (a) of this section, the area of land known as the "square" (defined as the Hoopa Valley Reservation established under Section 2 of the Act of April 8, 1864 (13 Stat. 40), the Executive Order of June 23, 1876, and Executive Order of 1480 of February 17, 1912) shall thereafter be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.*

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[4] *Id.* at 32-3.

The act further states:

> *The existing governing documents of the Hoopa Valley Tribe and the governing body established and elected thereunder, as heretofore recognized by the Secretary, are hereby ratified and confirmed.*

The Hoopa Valley Tribe is organized under a constitution and amendments approved by the Secretary of the Interior on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972. A specific indication of Congressional intent in passing the Hoopa-Yurok Settlement Act can be found in the Senate Report accompanying the legislation which states:

> *[P]laintiffs [in Puzz v. United States] challenged the right of the United States to recognize the governing body of the Hoopa Valley Tribe as sole governing authority of the reservation entitled to manage the reservation resources . . . absent statutory delegations . . . . This legislation will remove the legal impediments to the Hoopa Valley Indian Tribe to governance of the Hoopa Square . . . .*

Article II of the Constitution and Bylaws of the Hoopa Valley Tribe states:

> **The jurisdiction of the Hoopa Valley Tribe shall extend to all lands within the confines of the Hoopa Valley Indian Reservation boundaries as established by Executive Order of June 23, 1876, and to such other lands as may hereafter be acquired by or for the Hoopa Valley Indians.**

Article IX Powers and Duties of Tribal Council includes in Section 1 (f):

> **(1) To provide assessments or license fees upon non-members doing business or obtaining special privileges within the reservation, subject to the approval of the Commissioner of Indian Affairs or his authorized representative. (2) To promulgate and enforce assessments or license fees upon members exercising special privileges or profiting from the general resources of the reservation.**

Article IX, Section 1 (l) authorizes the governing Tribal Council:

> **To safeguard and promote the peace, safety, morals, and general welfare of the Hoopa Valley Indians by regulating the conduct of trade and the use or disposition of property upon the reservation, provided that any ordinance directly affecting non-members of the Hoopa Valley Tribe shall be subject to the approval of the Commissioner of Indian Affairs or his authorized representative.**

The property involved in this dispute is located on the Hoopa Valley Indian Reservation in an area referred to as Bald Hill, and was originally allotted to members of the Hoopa Tribe under the General Allotment Act. One twenty acre portion held in trust for Mae Wallace Baker was subsequently converted to fee simple patent in 1947. Another parcel, held in trust for Robert Pratt, was sold out of trust status in 1958 to Don H. Gould. Both parcels later became the property of a

California Limited Partnership called the Gould Family Partnership. The present day Hoopa Valley Indian Reservation, referred to as "the Hoopa Square," has less than one percent of its approximately ninety thousand acres held in fee simple status by non-Indians such as Appellant Bugenig.

In September 1994, the Hoopa Valley Tribe notified all land owners within that portion of the reservation known as Bald Hill of a proposal which would, among other things, establish a buffer zone of one-half mile around the tribe's sacred White Deerskin Dance area and trail. The proposal was included in the tribe's ten year forest management plan in anticipation of a FY-95 tribal timber harvest of 10.4 million board feet. The Hoopa Valley Tribe itself had approximately $5 million worth of standing timber located within the no-cut zone. (Declaration of Nelson Colegrove, August 10, 1995, Exhibit "D," Hoopa Valley Tribal Court).

The harvest management plan included as one of its goals, to "*protect cultural and religious resources within the proposed sale area.*" The notice went on to request public input on six specific matters, stating:

> . . . **Public Issues** which could affect the timber sale planning process have been identified. Public input and involvement is requested on these issues. . . .

Among the issues was listed the following:

> 5. Buffer for Deerskin Dance Trail:
> - A one-half mile no-action buffer on either side of the trail and surrounding the site is proposed for any projects initiated by this process. Public input as to the adequacy of buffer is requested.
> - Timber harvest may be proposed on fee land within the trial buffer. Can the Council regulate harvest on fee land to protect cultural sites? Forestry will consult with the BIA regarding this potentially precedence-setting action.

In addition to notifying all tribal allottees, the non-tribal owners of six parcels of fee land within the Bald Hill area, including the Gould Family Trust, were mailed a copy of the project proposal and request for public involvement, which was captioned as follows:

> BALD HILL LANDOWNERS: This letter outlines proposed timber harvest activities that could affect you or your property. Please review and contact Tribal Forestry or your Council Representative if you have any questions or comments.

At the time this notice was sent, the land in question was owned by the Gould Family Partnership. Coincident with the notice and public hearings being conducted, the Hoopa Valley Tribe prepared an archaeological evaluation of the proposed timber harvest area and enlisted the participation of the Bureau of Indian Affairs in initiating a consultation with the State of California under Section 106 of the National Historic Preservation Act. The BIA letter stated in part:

> The results of [the] studies documented the presence of two archaeological/cultural sites in

> the APE that are evaluated as potentially eligible for inclusion on the National Register of Historic Places. The site of the White Deerskin Dance Grounds and trail is considered very significant to the tribe.

The letter further stated:

> As you can see from the enclosed AE document, the Hoopa Valley Tribe has prepared a plan to restrict any logging activities in the vicinity to the White Deerskin Dance Ground and associated trail that should avoid all impacts to the area, with the exception of minor visual impacts to the surrounding setting. The tribe will provide a one-half mile buffer around the site for logging activity avoidance and will also restrict logging traffic in the area during the actual dance activities.

On January 28, 1995, following extensive consultations with tribal leaders involved in tribal ceremonial dances, two public hearings and other public discussions in open tribal council meetings, the Hoopa Valley Tribal Council adopted a modified timber harvest plan for FY-95 that included the following listed mitigation measures:

> CULTURAL 1) A ONE-HALF MILE BUFFER AROUND THE WHITE DANCE GROUND ON BALD HILL AND THE TRAIL LEADING TO IT WILL BE MAPPED AND ADHERED TO IN ALL ACTIVITIES ASSOCIATED WITH THE 1995 BALD HILL TIMBER SALE. NO TIMBER HARVEST UNITS OR OTHER TIMBER SALE-RELATED ACTIVITY (EXCEPT LOG TRUCKS AND OTHER VEHICLES PASSING THROUGH BUFFER ZONE ON MAIN ROADS) WILL BE LOCATED WITHIN THE BUFFER ZONE. THIS PROHIBITION OF ACTIVITIES WILL APPLY TO TRIBAL TRUST LAND, TRUST ALLOTMENTS, AND FEE LAND WITHIN THE ½ MILE BUFFER.
>
> CULTURAL 2) ON THE FRIDAY AND SATURDAY* WHEN THE WHITE DEERSKIN DANCE IS HELD ON BALD HILL, LOG HAULING FROM THE BALD HILL 1995 TIMBER SALE WILL CEASE, TO MINIMIZE DISTURBANCE TO THE DANCERS AND THOSE ATTENDING THE DANCE.
> *Actual dates will be determined by Dance Leaders.

The Hoopa Valley Tribal Council gave notice of this action to all Bald Hill land owners both by letter and by publication in a local newspaper on January 25 and February 1, 1995.

On February 7, 1995, the Office of Historic Preservation for the State of California responded to the previous BIA consultation letter stating:

> *In order to achieve a no-effect determination, the tribe and BIA have identified means of protecting . . . the White Deerskin Dance Site. These measures appear adequate, and I concur with your findings in these cases.*

Appellant Bugenig purchased her land from the Gould Family Partnership on March 22,

1995, and recorded her deed in Humboldt County, California on June 1, 1995. The land is located near where her family has lived for nearly 150 years. On June 19, 1995, Appellant Bugenig applied to the State of California for a less than three acre conversion exemption, stating under penalty of perjury that she intended to convert 2.5 acres of her newly acquired land to pasture. On that same date, Appellant Bugenig appeared before the tribal council meeting to request a permit from the tribe to haul logs cut from her property over reservation land. That request was denied.

On July 5, 1995, an authorized representative of the Planning and Building Department of the County of Humboldt California found Bugenig's proposed conversion exemption to be "in conformance with the County's General Plan and Zoning regulations, and noticing requirements established pursuant thereto" and found that "[n]o discretionary permits are required for this conversion." Appellant Bugenig indicated to the court that "[t]hroughout the planning process, she intended only to achieve her modest goal of building a home in which to live." With the exemption, Appellant felt she "would be able to raise the money needed to fulfill her dreams of building her retirement home," and that to achieve that goal, she "was obligated to cut down some of the trees on her land."

Despite the previous denial of a tribal permit, Appellant Bugenig sent a personal check dated July 24, 1995, and made out to the Hoopa Valley Tribe containing the notation "Right of Way 1-95 EX-407-HUM." On July 26, Appellant Bugenig began cutting trees on her land. On July 28, Hoopa Valley Tribal Council Chairman Dale Risling, Sr., returned a check for $140 to Bugenig that had been sent to the tribe by Appellant to secure a hauling permit from the tribe to remove timber from her property. Chairman Risling directed Appellant to cease and desist from clearing timber, citing the fact that the Bugenig property was within the one-half mile buffer zone in which no logging was allowed.

On August 3, 1995, the Hoopa Valley Tribal Court issued a Temporary Restraining Order followed by an Order of Preliminary Injunction on August 10, 1995, restraining any timber harvest on the property. Appellant was subsequently notified by the State of California Department of Forestry and Fire Protection that her conversion exemption was being revoked. The initial correspondence dated October 10, 1995, indicated that:

> The Department concurs that the Hoopa Valley Indian Tribe is a legally recognized federal tribe, and can regulate activities within the reservation boundaries. With this no-cut zone being a zoning issue as well as a designated archeological site, the Department feels the tribe does have jurisdiction to restrict activities to protect the site's integrity.

One week later, on October 17, the same agency wrote Appellant once again, attempting to "clarify the Department's position" and indicating that the grounds for revocation in the earlier letter "were not correctly stated." The letter went on to state:

> The Conversion Exemption is not in compliance with the forest practice rules, specifically 1104.1a(2)l. Under this subsection, no timber operations are allowed on significant historical or archeological sites. Such sites are defined in Section 895.1 as sites that have

> significant or religious importance to California Indians as determined by the Native American Heritage Commission or locally federally recognized tribal government. Clearly, the Hoopa Valley Tribe is federally recognized and they have clearly designated the White Deerskin Danceground, Trail and the buffer zone as being of significant importance to the tribe.

On September 9, 1996, nearly a year after the revocation of her state exemption and in disregard of the Decision and Order of the Hoopa Valley Tribal Court, Appellant removed the cut trees from her property utilizing a tribal road without a permit. She was found in civil contempt by the tribal court on October 24, 1996. Bugenig's appeal of the trial court's decision was accepted on April 21, 1997. Execution of the trial court's order was stayed pending this appeal, and the trial court granted Appellant's request for relief from posting a bond. The injunction barring logging activities on Appellant Bugenig's land remains in effect.

IV. ISSUES ON APPEAL

The sole question presented on appeal for our consideration is succinctly stated in the Appellant's brief: *"Did the trial court err as a matter of law when it ruled that the tribe had jurisdiction over Appellant Bugenig's activities on her fee land located within the exterior boundaries of the Hoopa Valley Indian Reservation?"*

V. DISCUSSION

Both Appellant Bugenig and Respondent Hoopa Valley Tribe correctly point to the United States Supreme Court decisions in *Montana v. United States*, 450 U.S. 544 (1981) and *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989) as providing the legal standards by which the facts of this dispute must be measured. The court below relied upon the Brendale clarification of the so-called *Montana* exceptions in concluding that jurisdiction over the logging activities conducted on Appellant Bugenig's fee land was properly the subject of tribal jurisdiction. To appropriately apply those legal precedents to the case at hand demands an understanding of the specific facts of those cases, and an understanding of why and how the legal standards set forth in those decisions apply to the facts and circumstances existing on the Hoopa Valley Indian Reservation.

In *Montana*, the high Court dealt with the sources and scope of the power of the Crow Indian Tribe of Montana to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. The tribe's assertion of regulatory authority was premised upon its claim of ownership of the bed of the Bighorn River, on its treaties, and upon its inherent sovereignty. The facts of the case disclosed that under the First Treaty of Fort Laramie of 1851, 38.5 million acres of Crow territory were identified, in which the tribe did not "surrender the privilege of hunting, fishing, or passing over" any of the lands that came into dispute in the case. An 8 million acre Crow Reservation was subsequently established in the Second Treaty of Fort Laramie in 1868 that included land through which the Bighorn River flowed.

Congress later acted in 1882, in 1891, in 1904, and in 1937 to reduce the Crow Reservation, over time, to slightly more than 2.3 million acres. Additionally, the General Allotment Act of 1887 and the Crow Allotment Act of 1920 allowed individual tribal members to hold patents in fee of reservation land that could be sold to non-Indians after 25 years. Today, just slightly under 70 percent of the reservation is still held in trust, 52 percent for individual allottees and 17 percent for the Crow Tribe. The United States owns less than 1 percent. Non-Indians hold 28 percent of the reservation in fee status, and the State of Montana owns about 2 percent.

When the Crow Tribal Council passed a resolution prohibiting hunting and fishing on the reservation by any non-tribal members, the State of Montana brought suit, having asserted its right to regulate the hunting and fishing of non-Indians, and having stocked the reservation with both fish and game since the 1920's. In examining the source and extent of the Crow Tribe's authority over hunting and fishing by non-Indians, the Court stated, "the regulatory issue before us is a narrow one." It found that neither the treaties nor the tribe's inherent sovereignty supported the Crow Tribe's claim to ownership of the riverbed, or to regulatory authority over non-Indian hunting and fishing on non-tribal land. The Court reviewed with favor a line of previous decisions that found the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." At 564 (citation omitted). The Court felt that the hunting and fishing activities of non-Indians on non-tribal lands bore no clear relationship to tribal self-government or internal relations, thus "the general principles of retained inherent sovereignty did not authorize" the tribe's resolution.

In further discussing its application of the general principles of retained sovereignty, the Court's opinion cited its own recent decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), in which a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians was rejected. But in once again restating the limitations, the Court reaffirmed the circumstances where inherent sovereignty remained with tribes, citing a line of case authority stretching back to 1904, stating:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements. (Citations omitted). A tribe may also retain inherent power to 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. (Citations omitted).

The standard applied in the *Montana v. United States* decision became the stuff of vigorous and spirited discussion eight years later when the Court considered *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, et al.*, 492 U.S. 408 (1989). That case, involving land use questions arising from a tribal zoning ordinance, resembles more closely the dispute between Appellant Bugenig and the Hoopa Valley Tribe than do the hunting and fishing regulations in the

Montana case. The 1.3 million acre Yakima Reservation contains land that is 80 percent trust land held by the United States for individual allottees and the tribe, and 20 percent fee land held by both Indians and non-Indians. *Brendale* actually consisted of three separate but related actions: one involving a 160 acre tract owned by Mr. Brendale, located in a so-called "closed" portion of the Yakima Reservation where approximately 97 percent of the land remained in trust status; another involving a 40 acre tract owned by Mr. Wilkinson in the so-called "open" area of the reservation where nearly half the land was in fee status; the third case arose from a challenge to the Yakima Tribe's zoning authority over fee land anywhere on the reservation brought by Yakima County.

In *Brendale*, the Court produced a patchwork of opinion not unlike the various forms of land status existing on the Yakima Reservation. Despite rejecting tribal claims of zoning authority over the Wilkinson tract, and over most other fee land on the Yakima Indian Reservation, a majority opinion by Justice Stevens, joined by Justice O'Connor, and concurred in by separate opinion of Justice Blackmun, joined by Justice Brennan and Justice Marshall held that the Yakima Tribe possessed zoning authority over the Brendale property. The similarities between the Brendale property, located in an area of the Yakima Indian Reservation that remains 97 percent tribally controlled, and where "the tribe has preserved the power to define the essential character of that area" (*Brendale* at 3013) and the Bugenig land, located on a reservation that remains nearly 99 percent tribal and within an area of paramount spiritual importance to the Hupa people draws our attention.

In developing a standard of comparison for determining the right of a fee landholder to develop his parcel "without regard to an otherwise common scheme" (*Brendale* at 3014), Justice Stevens asked, "More simply, the question is whether the owners of the small part of fee land may bring a pig into the parlor." He went on to state:

> . . . the fact that a very small proportion of the closed area is owned in fee does not deprive the tribe of the right to ensure that this area maintains its unadulterated character. This is particularly so in a case such as this in which the zoning rule at issue is neutrally applied, is necessary to protect the welfare of the tribe, and does not interfere with any significant state or county interest. (*Brendale* at 3015).

At trial, the court found that "[b]y conducting logging activities not in compliance with tribal law, the defendant acted in contravention of tribal law, threatening and physically disturbing the integrity and sacred status of the White Deerskin Dance area and Trial [sic]." The court also found that the activity "threatened the health and welfare of the tribe and the Hoopa Valley People's customs and traditions. (Decision and Order at page 10).

The court further stated, "The Hoopa Valley Tribe has the power and authority to define areas of sacred significance and through establishment of the buffer no-cut zone in the Bald Hill area, has exercised that power. *U.S. v. Montana*, 450 U.S. 544, 566 (1981)."

Our attention is drawn to the footnote accompanying the case law cited by the Supreme Court

in support of the second *Montana* exception, wherein the Court stated:

> As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservation livable. *Arizona v. California*, 373 U.S. 546, 599 (1963).

Given that logic, it would seem to follow that a timber harvest regulation, neutrally applied, the purpose and effect of which is to preserve the sanctity of the Hoopa Tribe's most sacred spiritual location for the present and future use of tribal members would be a right retained by the Hupa people to ensure that their reservation remained livable. Or as Justice White would have it, the Hoopa Valley Tribe has neither relinquished nor abrogated, in the fact of Appellant Bugenig's effort to "bring a pig into the parlor" to the White Deerskin Dance Ground, its inherent sovereign authority "to ensure that this area maintains its unadulterated character." (*Brendale* at 3015).

VI. CONCLUSION

We are unpersuaded by what appears in the record that Appellant's action in appearing at a tribal council meeting to request a permit to remove logs across tribal property constituted a sufficient instance of a "consensual relationship" or "commercial dealing" to make this dispute involving activities on the fee land itself subject to the first *Montana* exception allowing for tribal jurisdiction and therefore, reverse that portion of the lower court's decision.

However, support for the Hoopa Valley Tribe's assertion of jurisdiction over the one percent fee land located on the Hoopa Valley Indian Reservation is found in the plain language of the Hoopa-Yurok Settlement Act of 1988 and its legislative history. We affirm that portion of the lower court's decision.

We further affirm the lower court's ruling that the *Brendale* standard as applied to the second *Montana* exception supports the right of the Hoopa Valley Tribe to implement neutrally applied regulations to reasonably restrict encroachment upon what tribal member and trial witness Byron Nelson referred to as "that sacred place 'among the oak tops' on Bald Hill, where, the legends say, the immortal watch the people of the valley dance with the precious white deerskins and the sacred obsidian blades."

VII. ORDER

Therefore, based on the foregoing, it is hereby ordered that the judgment of the tribal court is **reversed** in part and **affirmed** in part.