Land & Water Law Review

Volume 29 | Issue 2 Article 6

1994

Indian Law - Tribal Sovereignty - Congress, Please Help Again - The Cheyenne River Sioux Tribe Cannot Regulate Hunting and Fishing because the Non-Indian Interest Controls - South Dakota v. Bourland

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Recommended Citation

McClanahan, John H. (1994) "Indian Law - Tribal Sovereignty - Congress, Please Help Again - The Cheyenne River Sioux Tribe Cannot Regulate Hunting and Fishing because the Non-Indian Interest Controls - South Dakota v. Bourland," *Land & Water Law Review*: Vol. 29 : Iss. 2 , pp. 505 - 532.
Available at: https://scholarship.law.uwyo.edu/land_water/vol29/iss2/6

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Casenotes

INDIAN LAW—TRIBAL SOVEREIGNTY—Congress, Please Help Again—The Cheyenne River Sioux Tribe Cannot Regulate Hunting and Fishing Because the Non-Indian Interest Controls. *South Dakota v. Bourland,* 113 S.Ct. 2309 (1993).

Before 1988, both the Cheyenne River Sioux Tribe[1] and the State of South Dakota had successfully negotiated the issue of regulatory authority over hunting and fishing activities on Cheyenne River Reservation[2] lands, and had each enforced their respective game and fish regulations.[3] However, a dispute arose between the State of South Dakota and the Tribe regarding the 1988 deer season.[4] Consequently, the Tribe announced that it would not honor state hunting licenses, and that hunters within the reservation would need a tribal license to avoid prosecution in tribal court.[5] South Dakota filed an action in federal district court against the Cheyenne River Sioux Tribe to enjoin the Tribe from regulating non-Indian hunting and fishing on the taken area and non-Indian fee land[6] within the reservation.[7]

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1. This note uses the terms "Aboriginal," "Indian," "indigenous," "Native," and "Tribe" interchangeably and with equal respect to the indigenous peoples, including the Cheyenne River Sioux Tribe.

2. Indian reservations are federally protected lands set aside for the residence and exclusive use and benefit of tribal Native Americans. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 34 (1982). Indian Country includes "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 . . . ." 18 U.S.C. § 1151 (1988).

3. South Dakota v. Bourland, 113 S.Ct. 2309, 2314 (1993). The district court found that Indians "derive[d] considerable income from the sale of special licenses." Brief for Respondents at 8, *Bourland* (No. 91-2051); Joint Appendix 168-69 (No. 91-2051) [hereinafter Respondents' Brief].

4. *Bourland*, 113 S.Ct. at 2314. The Tribe was dissatisfied with the State of South Dakota's ill regard for the protection of Tribal buffalo and grazing stock on the reservation. Thus, in the absence of a renewed state-tribal wildlife management agreement, the Tribe expressed its intent to enforce tribal hunting and fishing regulations on the taken area. Respondents' Brief at 14, *Bourland* (No. 91-2051).

5. *Bourland*, 113 S.Ct. at 2314.

6. *Id.* To construct the Oahe dam and reservoir, the federal government took 104,420 acres of the Tribe's reservation land and 18,000 acres of non-Indian fee land located within the reservation. *See infra* notes 100-09 and accompanying text.

7. State of South Dakota v. Bourland, 949 F.2d 984 (8th Cir. 1991). South Dakota named Greg Bourland, Chairman of the Cheyenne River Sioux Tribe and Dennis Rousseau, Director of the Cheyenne River Sioux Tribe Game, Fish, and Parks, as defendants. *Id.*

The federal district court permanently enjoined the Tribe and its members from regulating non-Indian hunting and fishing on the taken land and non-Indian fee land. The court concluded that the Cheyenne River Act did not disestablish the Missouri River boundary of the Cheyenne River Reservation.[8] Nevertheless, relying on *Montana v. United States*,[9] the court found that section ten of the Cheyenne River Act clearly abrogated the Tribe's right to exclusive use and possession of the former trust lands.[10] In turn, the court reasoned that the Tribe also lost the power to regulate hunting and fishing.[11]

The United States Court of Appeals for the Eighth Circuit affirmed in part, vacated in part, reversed in part and remanded.[12] The court of appeals reversed the district court's order permanently enjoining the Tribe from regulating hunting and fishing on the taken land and remanded the case to the district court to consider the Tribe's regulatory authority over the 18,000 acres of non-Indian fee land.[13]

In reaching its decision endorsing Tribal regulation, the court of appeals found that Congress' reservation of mineral, grazing and timber rights to the Tribe was evidence that the conveyance did not include all interests in the land.[14] Because the Tribe retained this significant bundle of property rights, the court found that Congress had not abrogated the Tribe's regulatory power.[15] It also found that the policies behind the taking in question and the takings in *Montana v.*

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8. *Id.* at 990.

9. 450 U.S. 544 (1981). *See infra* notes 52-62 and accompanying text.

10. *Bourland*, 113 S.Ct. at 2314-15.

11. *Id.* Moreover, the court found that Congress did not expressly give the Tribe hunting and fishing jurisdiction over nonmembers on the taken lands. *Id.* at 2315. The Supreme Court recognized the court of appeal's decision vacating this finding because this issue was neither pled nor tried. *Id.* at 2315 n.6. The State did not raise this issue in its petition for certiorari. *Id.*

12. *Bourland*, 949 F.2d at 986. Bowman, Circuit Judge, affirmed the district court's decision not to join either the Tribe or the United States as an indispensable party because the district court did not abuse its discretion in doing so. *Id.* at 989. The court of appeals vacated the district court's decision dealing with tribal regulatory authority over nonmember Indians because this issue was neither pled nor tried. The complaint was limited to jurisdiction over non-Indians. *Id.* at 990.

13. *Id.* at 995. Under the reasoning of 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), the Tribe could not regulate hunting and fishing on the 18,000 acres previously held in fee by non-Indians unless one of the *Montana* exceptions applied. *Id.* at 995. Therefore, the appeals court remanded to the district court so it could again undertake a *Montana* analysis with respect to the 18,000 acres (the district court originally analyzed the taken area as a whole). *Id.* The court of appeals said it was conceivable that the district court could find that one of the exceptions applies in light of its decision that the Tribe retained regulatory authority over the other taken areas. *Id.* at 995 n.20.

14. *Id.* at 993.

15. *Id.*

United States[16] and *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*[17] were distinct.[18] The court of appeals noted that Congress constructed the Oahe Dam for irrigation and flood control purposes, not for settling non-Indians on the taken land.[19] The court of appeals did not discover any clear evidence that Congress considered whether the tribe would retain regulatory authority over hunting and fishing.[20] Therefore, it decided that Congress did not abrogate the Tribe's regulatory power over non-Indian hunting and fishing on the taken lands.[21]

The United States Supreme Court did not agree with any of the court of appeal's reasoning.[22] Instead, the Supreme Court reversed the court of appeals and held that Congress had abrogated the Tribe's power to regulate hunting and fishing.[23] In addition, the Court decided that the Tribe's inherent sovereignty did not authorize tribal regulation of non-Indian hunting and fishing.[24]

This note will review the development of tribal sovereignty and the important historical treaties, statutes, and events the Court considered in reaching its decision. Next, it will analyze the United States Supreme Court's disregard and deviation from previously established principles of inherent sovereignty and federal Indian policy. Finally, this note will describe the Court's current analysis in determining the validity of tribal regulatory jurisdiction over non-Indians.

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16. 450 U.S. 544 (1981). *See infra* notes 52-62 and accompanying text.

17. 492 U.S. 408 (1989). *See infra* notes 63-86 and accompanying text.

18. *Bourland,* 949 F.2d at 992 n.16. Congress passed the Flood Control Act during a period when the federal government encouraged tribal autonomy and self-government. *Id.* Conversely, the court noted that the land taken in *Montana v. United States* was pursuant to the Allotment Acts, which intended to destroy tribal self-government. *Id.*

19. *Id.* at 993 (citing Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 820 (8th Cir. 1983); ETSI Pipeline Project v. Missouri, 484 U.S. 495, 502 (1988) (stating that the purpose of the Flood Control Act was to build the Oahe dam)).

20. *Id.* at 991 (citing United States v. Dion 476 U.S. 734 (1986) (Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless clearly relinquished by treaty or modified by Congress)). The court noted that neither the Flood Control Act, Public Law 870, nor the Cheyenne River Act addressed the issue of Tribal jurisdiction within the taken area. *Id.* at 994.

21. *Id.* at 993-94.

22. South Dakota v. Bourland, 949 F.2d 984 (8th Cir. 1991), *cert. granted,* — U.S. —, 113 S.Ct. 51 (1992). Issues involving Indian law are often difficult to resolve because the Court must conduct a particularized inquiry into present day and historical tribal, federal, state and private interests to determine the validity of tribal assertions of regulatory authority. *See* National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); United States v. State of Montana, 604 F.2d 1162, 1172-73 (1979); *Brendale,* 492 U.S. at 447 (Justice Stevens recognized that the factual predicates in Indian law cases are complicated).

23. *Bourland,* 113 S.Ct. at 2321.

24. *Id.* at 2320.

BACKGROUND

Early in North American history, indigenous peoples lived on the continent in self-governing political communities,[25] exercising sovereign authority over their territory.[26] The North American Indians' exclusive sovereignty lasted only a short time. Colombus's discovery of the "new world" sparked European infiltration, conquest, settlement and colonization; the eventual demise of sovereign power had just begun.[27]

In three early United States Supreme Court decisions,[28] Justice John Marshall formed the fundamental principles that still describe, to some extent,[29] the relationship between the United States government and Indian tribes.[30] These cases first recognized the principle of inher-

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25. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). One commentator also said:

> After the Europeans came and occupied the continent, driving the Natives into enclaves, even these enclaves came under attack, because they were limited to Native people. But they are political communities, founded on tradition and culture, not on race. These political communities are not vestigial: rather they are the repositories of Native hopes and ideals of self-government.

Patrick Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, 45 STAN. L. REV. 1311 (1993) (quoting THOMAS R. BERGER, A LONG AND TERRIBLE SHADOW: WHITE VALUES, NATIVE RIGHTS IN THE AMERICAS, 1492-1992, at 160-61 (1991) (illustrating the use of prior occupancy as justification for the recognition of Native American government)).

26. *Worcester*, 31 U.S. (6 Pet.) at 556-57 (1832); *see also* Merrion v. Jicarilla Apache Tribe 455 U.S. 130, 160 (1982) (power to tax non-Indians is an essential attribute of Indian sovereignty).

27. For an extensive and detailed recent history of Indian and United States relations *see generally* 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984).

28. Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823) (Indian tribes possessed right of occupancy subject to defeasance); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) (Indian tribes are a "domestic dependent nations" under wardship of the federal government); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (state of Georgia had no sovereign power in Indian country). For a detailed discussion of the "Marshall Trilogy," *see* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

29. Frickey, *supra* note 28. Professor Frickey has recently proposed that reviving Chief Justice Marshal's perspective of federal Indian law would develop a more coherent and sensitive method for dealing with the underlying issues of federal Indian law. *Id.*

30. Federal Indian policy has undergone many changes and developments. Basically, Congress has struggled between two conflicting themes: tribal self-government and assimilation of the reservations into existing state and local governments.

Initially, congressional policy promoted tribal self government, but this policy changed after Congress prohibited treaty making in 1871. Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1988)). Next, in 1887, Congress attempted to assimilate Indians into mainstream society by enacting the General Allotment Act. Act of Feb. 8, 1887, ch. 119, § 1, 24 Stat. 388 (1885-1887) (codified as amended 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381 (1982)). This Act allotted parcels of tribal lands to Indians, but the lands not allotted were opened for homesteading by non-Indians. *Id.*

ent tribal sovereignty.[31]

The United States did not grant sovereign power to the Indian nations.[32] Inherent sovereignty[33] arose from the Indians' aboriginal and independent status which pre-existed the United States.[34] A tribe's sovereign power also included a significant geographical component that allowed a tribe to govern all matters and persons within its territory.[35]

After recognizing that the assimilation policy was unsuccessful, Congress passed legislation to promote tribal independence. Indian Reorganization Act of 1934 (IRA), Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-79 (1982)). In the late 1940's, Congress again changed its policy regarding Indians by reversing the IRA's self-determination policy. Congress implemented a termination policy which attempted "to make the Indian's within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, [and] to end their status as wards of the united States." H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953). *See generally* Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

The "termination era" lasted a short time. By the 1960's Congress activated the current self-determination policy. The policy of Indian self-determination has been reaffirmed in: the Indian Civil Rights Act of 1968, 25 U.S.C. § 1301 (1988); the Indian Financing Act of 1974, 25 U.S.C. § 1451 (1988); the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 45, 450a-450n, 458, 458a-458e (1988); and the Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (1988). *See also* Philip J. Smith, *Indian Sovereignty and Self-Determination: Is a Moral Economy Possible? An Essay*, 36 S.D. L. REV. 299 (1991).

31. *See generally Montana*, 450 U.S. at 563-65; United States v. Wheeler, 435 U.S. 313, 323-24 (1978). Treaties and Congressional acts are the other main sources of Indian authority. Historically, treaties were the primal source of Indian authority. FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33-46 (1942). In 1871, Congress provided that the United States would no longer make treaties with Indian tribes, but it still protected all rights under existing treaties. 25 U.S.C. § 71 (1988). This law had little practical effect because the United States, through statutes and executive orders, continues to deal with Indian tribes in a similar manner. *See generally* Antoine v. Washington, 420 U.S. 194 (1975). Executive orders may also be a source of tribal authority. *See* 25 U.S.C. § 398d (1988); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

32. The Constitution only mentions Indians three times. Article I authorizes Congress "[to] regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3; In apportioning the House of Representatives, two parts of the Constitution expressly excepts "Indians not taxed." *Id.* art. I, § 2, cl. 3; *Id.* amend. XIV, § 2; *see generally* Robert Laurence, *The Indian Commerce Clause*, 23 ARIZ. L. REV. 203 (1981).

33. The term sovereignty is difficult to define, and it may point to the power of an independent state. Macklem, *supra* note 25, at 1346. Sovereignty may be defined as "the supreme, absolute, and uncontrollable power . . . the self-sufficient source of political power, from which all specific political powers are derived . . . ." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990).

34. Chief Justice Marshall established this principle:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discover of either by the other should give the discoverer rights in the country discovered, which annulled the preexisting rights of its ancient predecessors.

Worcester, 31 U.S. (6 Pet.) at 542-43.

35. *Id.* at 557. Chief Justice Marshall:

> consider[ed] the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands

More recent Court decisions have also recognized that Indian tribes possess attributes of sovereignty over their members and territory.[36] Realistically, however, the geographical aspect of tribal sovereignty appears hollow,[37] especially when non-Indians are involved.[38] The Court has used the tribes' unique relationship with the United States to achieve this hollowness.

The Indians' incorporation into the United States and the protection enjoyed thereunder have necessarily divested the tribe of some aspects of their sovereignty.[39] The tribes' status as "domestic dependent nations" is primarily responsible for the implicit divesture of tribal sovereign authority.[40] Originally, tribes had been impliedly divested only of the power to

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> within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

Id.

36. United States v. Mazurie, 419 U.S. 544, 557 (1975); *Wheeler*, 435 U.S. at 323. Justice Blackmun has stressed the geographic component of tribal sovereignty:

> The Court has affirmed and reaffirmed that tribal sovereignty is in large part geographically determined. "Indian tribes," we have written, "are unique aggregations possessing attributes of sovereignty over both their members and their territory" We have held that lands obtained under the allotment policy, which permitted non-Indians to purchase lands located within reservations, remain part of those reservations unless Congress explicitly provides to the contrary, and that tribal jurisdiction cannot be considered to vary between fee lands and trust lands . . . .

Brendale, 492 U.S. at 457 (Blackmun, J., concurring in part and dissenting in part) (citations omitted). *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) ("The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty").

37. The Court recently stated: "the platonic notions of Indian sovereignty that guided Chief Justice Marshall have, over time, lost their independent sway." County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S.Ct. 683, 687 (1992) (county could impose ad valorem tax on reservation land patented in fee pursuant to General Allotment Act but could not impose excise tax on sales of such land). For a discussion of this case, *see generally* Christopher A. Karns, Note, *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation: State Taxation as a Means of Diminishing the Tribal Land Base*, 42 AM. U. L. REV. 1213 (Spring 1993); Deborah Jo Borrero, Note, *They Never Kept But One Promise - County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 112 S.Ct. 683 (1992), 67 WASH L. REV. 937 (1992).

38. Justice Johnson may have accurately predicted the current status of tribal jurisdiction over non-Indians when he said "the limitations upon their sovereignty amounts to the right of governing every person within their limits except themselves." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 147 (1810). Justice Rehnquist quoted this statement to support the decision in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

39. *Johnson*, 21 U.S. (8 Wheat.) at 574. However, this has done little to limit powers over tribal members. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 160 (1982).

40. *Worcester*, 31 U.S. (6 Pet.) at 555. Chief Justice Marshall defined the relationship as:

> perhaps unlike that of any other two people in existence. Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the land they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic

alienate their lands and the power to make treaties with foreign nations.[41] More recently, implicit divesture has occurred in circumstances involving the relations between an Indian tribe and non-Indians.[42] In 1978, the Supreme Court expanded the importance of the tribes' dependent status and thereby laid the foundation for future limitations on tribal regulatory authority over non-Indians.

In *Oliphant v. Suquamish Indian Tribe,*[43] the Court established that Indian tribes do not have inherent sovereign power to prosecute non-Indians who violate tribal laws because exercising jurisdiction over non-Indians was inconsistent with the Tribe's status.[44] Thus, the Court used

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> dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Cherokee Nation, 30 U.S. (5 Pet.) at 17. *See also* Gary D. Meyers, *Different Sides of the Same Coin: A Comparative View of Indian Hunting and Fishing Rights in the United States and Canada*, 10 UCLA J. ENVTL. L. & POL'Y. 67, 89 (1991).

A more recent definition by the Supreme Court describes the relationship as: "an anomalous one and of complex character," for despite their partial assimilation into American culture, the tribes have retained "a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (quoting McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973)); *see also* United States v. Kagama, 118 U.S 375, 381-82 (1886).

41. Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 153-54 (1980).

42. The dependent status of Indian tribes within United State's territorial jurisdiction is necessarily inconsistent with the their freedom independently to determine their external relations. *Montana*, 450 U.S. at 564-65 (quoting and emphasizing *Wheeler*, 435 U.S. at 326). *But compare Montana* with Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153-54 (1980) ("tribal powers are not implicitly divested by virtue of the tribes' dependant status" unless "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government").

Tribes may also lose sovereign authority pursuant to congressional action. *Wheeler*, 435 U.S. at 323. Congress' plenary power allows it to abrogate rights established by treaties or other documents. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs") (citing Morton v. Mancari, 417 U.S. 535, 551-52 (1974); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 207-208, nn. 2, 3 and 9-11 (1982)); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (Congress has plenary power over relations between the United States and American Indian Nations); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871) (abrogated treaty with Cherokee Nation). For a comprehensive discussion of this topic *see generally* Nell Jessup Newton, *Federal Power over Indians: Its Source, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984); Karl J. Kramer, Comment, *The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations*, 1986 WIS. L. REV. 989 (1986).

43. 435 U.S. 191 (1978).

44. *Id.* at 208. For a criticism of the *Oliphant* decision, *see* Robert D. Wilson-Hoss, Comment, *Jurisdiction to Zone Indian Reservations*, 53 WASH. L. REV. 677, 695-96 (1978); Russel Lawrence Barsh and James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe*

the tribes' dependent status as a justification for divesting tribal sovereignty. Before *Oliphant*, Indian tribes retained all their inherent tribal power unless an act of Congress or a treaty had specifically taken the power.[45] The Court later expanded *Oliphant* to prevent tribal assertions of criminal jurisdiction over Indians who were not members of that tribe,[46] but Congress expressly overruled that decision.[47]

Although Indian tribes may regulate their own members and members of other tribes, the Court has struggled with, and has often rejected, tribal regulation of non-Indians. In the past, Indians have attempted to regulate non-Indians in many areas such as taxation,[48] zoning,[49] health and safety,[50] and hunting and fishing.[51] By successfully applying the *Oliphant*

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and the Hunting of the Snark, 63 MINN. L. REV. 609 (1978); Jeff Larson, *Oliphant v. Suquamish Indian Tribe: A Jurisdictional Quagmire*, 24 S.D. L. REV. 217 (1979); Curtis G. Berkey, Note, *Indian Law-Indian Tribes Have No Inherent Authority to Exercise Criminal Jurisdiction over Non-Indians Violating Tribal Criminal Laws within Reservation Boundaries . . . .* , 28 CATH. U. L. REV. 663 (1979).

45. Williams v. Lee, 358 U.S. 217, 219 (1959); *see also* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1942). The Court expressly reaffirmed the existence of inherent tribal sovereignty two weeks after the *Oliphant* decision. *See* United States v. Wheeler, 435 U.S. 313, 322 (1978) ("the powers of Indian tribes are, in general, 'inherent powers of a limited sovereignty which have never been extinguished'") (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945)). Moreover, Indian tribes "possess attributes of sovereignty over both their members and their territory." *Wheeler*, 435 U.S. at 323.

46. Duro v. Reina, 110 S.Ct. 2053 (1990).

47. Indian Civil Rights Act, Pub. L. 101-511, 104 Stat. 1892 (codified at 25 U.S.C. § 13-1 (Supp. II 1990)).

Additional legislation has been proposed to rectify other questionable Supreme Court decisions. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (no violation of free exercise of religion clause when Forest Service builds a road approaching sacred Indian burial ground); Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990) (no violation of free exercise clause when an employee was denied unemployment benefits because employee was terminated for using peyote). Proposed Amendments to American Indian Religious Freedom Act, S. 110, 102d Cong., 1st Sess. (1991); Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1993)). *See generally* Alex Tallchief Skibine, *Duro v. Reina and the Legislation That Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL L. REV. 1 (1993).

This type of congressional activity may indicate that the Court's deviations from established principles of Indian law are responsible for the setbacks to Indian rights. *See* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1238 (1990).

48. Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) (Tribe has inherent power to impose severance tax on non-Indian mining activity); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) (Indians' authority to tax is a fundamental attribute of sovereignty which Tribe retains unless divested by federal law or necessary implications of their dependent status); Morris v. Hitchcock, 194 U.S. 384 (1904).

49. *Brendale*, 492 U.S. at 408; Knight v. Shoshone and Arapaho Indian Tribes, 670 F.2d 900 (10th Cir. 1982); Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975); Snohomish County v. Seattle Disposal Co. 425 P.2d 22, *cert. denied*, 389 U.S. 1016 (1967).

50. Cardin v. De LaCruz, 671 F.2d 363 (9th Cir. 1982), *cert. denied*, 459 U.S. 967 (1982)

decision to a civil context in *Montana v. United States*,[52] the Court initiated a confusing[53] view toward tribal regulation of non-Indian activities.

The *Montana* Court[54] held that the Crow Indian Tribe could not regulate[55] non-Indian hunting and fishing on non-Indian fee land located within its reservation boundaries.[56] The Court dismissed the Crow Tribe's argument that its inherent sovereignty sanctioned tribal regulation of non-Indian hunting and fishing. The Tribe had no inherent sovereign power beyond that necessary to govern the Tribe and its internal relations.[57] Without express congressional delegation, the Tribe had no power to regulate non-Indians[58] since that power had no clear relationship to tribal self-government or internal affairs.[59] By establishing two exceptions to these general propositions, the Court acknowledged that tribes retain some power over nonmembers. First, if a non-Indian enters consensual relations with the tribe such as a contract or lease, that individual becomes subject to tribal regulation.[60] Second, a tribe may regulate non-Indian activities if that activity threatens or effects the tribe's political integrity, economic security, or health and welfare.[61] Thus, under *Montana*, a tribe can still

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(Tribe retained inherent sovereign power to impose its building, health, and safety regulations on grocery store business of non-Indian who owned land and store in fee).

51. *Montana*, 450 U.S. 544; *see also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1980) (concurrent state and tribal jurisdiction regarding the regulation of hunting and fishing would threaten Congress' overriding objective of encouraging tribal self-government and economic development); Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) (state can regulate Indian hunting and fishing on lands ceded by the tribe where cession did not indicate an intent to retain hunting and fishing rights).

52. 450 U.S. 544 (1981).

53. *Montana* "added to the growing number of bewildering statements and principles" in the area of tribal sovereignty. Curtis Berkey, *Indian Nations Under Assault*, 16 HUM. RTS. 18, 21-22 (1989-90).

54. Justice Stewart delivered the Court's opinion. *Montana*, 450 U.S. at 544.

55. The Crow Tribe adopted a resolution that prohibited all nonmember hunting and fishing within reservation boundaries. United States v. Montana, 604 F.2d 1162, 1164 (9th Cir. 1979).

56. *Montana*, 450 U.S. at 564-65. The Court found that the Fort Laramie treaty gave the Tribe the right to exclude non-Indians, but that subsequent legislation—the Allotment Acts—divested the Tribe of its regulatory powers. *Id.* at 559.

57. *Id.* at 564.

58. *Id.* at 564 (citing Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Williams v. Lee, 358 U.S. 217, 219-20; United States v. Kagama, 118 U.S. 375, 381-82 (1886); *McClanahan*, 411 U.S. at 171).

59. *Id.* at 565.

60. *Id.* at 565-66 (citing Williams v. Lee, 358 U.S. 217, 223 (1959); Morris v. Hitchcock, 194 U.S. 384 (1904); Buster v. Wright, 135 F. 947, 950 (8th Cir. 1905); Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-54 (1973)).

61. *Id.* at 566 (citing Fisher v. District Court, 424 U.S. 382, 386 (1976); Williams v. Lee 358 U.S. 217, 220 (1959); Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-29 (1906); Thomas v. Gay, 169 U.S. 264, 273 (1898)).

regulate non-Indian activities, even on non-Indian lands. *Montana* becomes an effective limitation on regulatory authority only if interpreted according to Justice White's opinion in *Brendale*.[62]

The next restraint on tribal sovereignty and regulatory authority came in 1989 when the Supreme Court had its first opportunity to apply *Montana's* tribal welfare exception.[63] In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[64] the Court was asked to decide whether the Yakima Indian Nation or Yakima County could zone non-Indian fee lands located within the Yakima Indian reservation.[65] This question arose after two non-Indian fee land holders, Brendale and Wilkinson, objected to the Yakima Nation's zoning regulations.[66] Brendale's land was located in a heavily forested area of the reservation to which the tribe had denied entry since 1972.[67] Conversely, Wilkinson's property was located in an open area where non-Indians owned half the land in fee and comprised 80 percent of the population.[68] A divided Court addressed the controversy in three different opinions.[69]

Justice Stevens announced the Court's judgment regarding Brendale's closed portion of land. He concluded that the Tribe had authority to regulate non-Indian fee lands on the closed but not on the open

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The Court determined that neither exception applied to the Crow Tribe. *Id.* at 566. However, some courts have upheld tribal power over non-Indians under the *Montana* test. *See, e.g.*, Knight v. Shoshone and Arapahoe Indian Tribes, 670 F.2d 900 (10th Cir. 1982); Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982) *cert. denied*, 459 U.S. 916 (1982); Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1978).

62. *See infra* notes 76-79 and accompanying text for a discussion of Justice White's interpretation of *Montana* in Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

63. *See supra* note 61 and accompanying text.

64. 492 U.S. 408 (1989).

65. *Id.* at 413.

66. Both landowners wished to subdivide their respective properties for land development purposes. *Id.* at 418. The proposed developments complied with the county zoning plan, but both violated the tribal zoning ordinances. *Id.*

67. *Id.* at 415.

68. *Id.* at 446-47. The county provided extensive services to this portion of the reservation. *Id.* at 445. The General Allotment Act of 1887 was primarily responsible for the divided nature of the Yakima reservation. *Id.* at 436-37. *See* The General Allotment Act, 25 U.S.C. §§ 331-358 (1958). Under the Act, non-Indians acquired large amounts of reservation land in fee. *See also supra* note 30.

69. A plurality of four justices held that the Tribe did not have authority to zone Wilkinson's "open" land. *Brendale*, 492 U.S. at 414 (Justices Rehnquist, Scalia and Kennedy joined Justice White's plurality opinion). Justice Steven's opinion held that the Tribe had the authority to zone Brendale's "closed" land. *Id.* at 423 (Justice O'Connor joined Justice Steven's opinion; Justices Blackmun, Marshall, and Brennan concurred with the result of Justice Steven's opinion regarding Brendale's property.) Justice Blackmun dissented with respect to Justice White's opinion and concurred only in the result of Justice Stevens opinion allowing tribal zoning of Brendale's closed property. *Id.* at 448 (Joined by Justices Marshall and Brennan).

areas of the reservation.[70] A close examination of the land ownership patterns was necessary to figure out how those patterns affected the Tribe's ability to determine the character of the land.[71] In doing this, Justice Stevens concentrated on whether the Yakima Nation had the power to exclude non-Indians from both parcels.[72] Justice Stevens allowed the Yakima Indian Nation to zone the closed area because the Tribe had maintained the power to exclude nonmembers from entering most of the area.[73] Conversely, the Tribe could not zone the open area that had become assimilated into the surrounding county.[74] Because the Tribe lost the power to exclude non-Indians from the open parcels, it also lost the power to define the essential character of the open area through zoning.[75]

Justice White delivered an opinion that was conclusive only regarding Wilkinson's open land. He relied on *Montana* and denied tribal zoning on both the open and closed areas of the reservation.[76] In applying and interpreting *Montana*, Justice White found relevant the word "may"

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70. *Id.* at 446-47. Justice Stevens distinguished between the "open" and "closed" portions of the reservation. The proposed use of the "open area" would not threaten the tribe's political integrity, economic security or health and welfare. *Id.* at 444. However, the Court said that the Tribe had the power to restrict the use of the closed areas of the reservation because the nonmember's planned development would endanger economically important timber production and threaten cultural and spiritual values of the unique and undeveloped character of the closed area. *Id.* at 443-44.

71. *Id.* at 444.

72. *Id.* at 441.

73. *Id.* Justice Stevens said this power came from the tribes inherent sovereignty and a treaty which confirmed the power. *Id.* at 435. Justice Stevens also compared the Tribe's zoning power to an equitable servitude. *Id.* at 442. He thought that tribal zoning created a equitable servitude that ran with land regardless of how non-Indians acquired the land. *Id.* Thus, the Tribe's ability to control the non-Indian fee land was derived from the tribe's reserved power to regulate the land use. *Id.* One could argue that inherent sovereign power is a type of burden running with the land.

74. *Id.* at 444-45.

75. *Id.* at 444-46. The Tribe's purported failure to exclude non-Indians was actually the result of inauspicious congressional policies. The General Allotment Act caused non-Indians to heavily settle the reservation. *Id.* at 436-37. *See also supra* note 30.

76. *Brendale*, 492 U.S. at 433. Justice White also relied heavily on *Wheeler*. *Id.* at 426-29. The *Wheeler* Court established the general rule that tribes retain sovereignty to the extent that is not divested by treaty, statute, or by implication as necessary result of their dependant status. *Wheeler*, 435 U.S. at 324. The Court in *Montana* expanded this rule when it said that 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 cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564 (citations omitted).

Conversely, Justice Blackmun (and now Justice Souter) endorse *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980). Under *Colville*, a tribe's sovereignty is implicitly divested only to the extent that it is inconsistent with the overriding interest of the national government. *Colville*, 447 U.S. at 153. In *Brendale*, Justice White reasoned that *Colville* was consistent with Montana in that *Colville* involved the power to tax transactions occurring on trust lands and significantly involving a tribe or its members. *Brendale*, 492 U.S. at 426-27. Moreover, Justice White noted that *Montana* cited *Colville* as an example of the sort of "consensual relationship" that could support tribal authority of nonmembers. *Id.*

in that tribes "may" retain inherent power to exercise civil authority over non-Indian fee lands located within their reservation.[77] Justice White's interpretation indicated that a tribe's authority need not extend to all conduct that threatens or directly effects the political integrity, economic security or the health and welfare of the tribe.[78] Instead, the tribe's authority depends on the circumstances.[79] According to Justice White, the impact on a tribe must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe.[80] In this respect, Justice White narrowed *Montana*.

Justice Blackmun[81] attacked Justice White's opinion because, in his view, Justice White reiterated *Montana's* faulty "general principle" that suggests the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the tribe's dependent status, and therefore cannot survive without express congressional delegation.[82] Justice Blackmun emphasized that *Montana* was only one of many landmark cases regarding inherent tribal sovereignty and that it clashed with 150 years of Indian-law jurisprudence.[83] Moreover, Justice Blackmun reasoned that the tribe could zone the reservation land pursuant to *Montana's* second exception[84] because the power to zone was paramount to the Tribe's economic security, or health and welfare.[85] Accordingly, Justice Blackmun would have given the Yakima Nation exclusive authority to zone both the open and closed parcels of non-Indian fee lands.[86]

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77. *Id.* at 429.

78. *Id.*

79. *Id.*

80. *Id.* at 431. The Court in *Montana* did not say what particular level of impact was necessary before a tribe could regulate non-Indian activity. It only required that the activity threaten or have a direct effect on the tribe's political integrity, the economic security, or the health or welfare of the tribe. *Montana*, 450 U.S. at 566. In determining whether a reservation is "open or "closed," Justice Stevens said that it is "impossible to articulate precise rules" and that "the factual predicate to these cases is itself complicated." *Brendale*, 492 U.S. at 447-48.

81. Justice Blackmun, joined by Justices Brennan and Marshall, dissented with regard to Justice White's opinion denying tribal zoning over both parcels and concurred only with the result of Justice Steven's opinion that allowed tribal zoning of Brendale's closed parcel of land. *Id.* at 448.

82. *Id.* at 450 (Blackmun, J., dissenting) (citing *Montana*, 450 U.S. at 564).

83. According to Justice Blackmun, the precedents before and after *Montana* establish the proper "general principal" governing inherent tribal sovereignty: "[T]ribes retain their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be inconsistent with the 'overriding interests of the National Government.'" *Id.* at 450 (Blackmun, J., dissenting joined by Marshall and Brennan, J.J.) (quoting Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 153 (1980)).

84. *Id.* at 466-68.

85. *Id.* at 458. Justice Blackmun also found that the sovereign power to control land use is especially important to Indians because they have a unique historical and cultural connection to the land. *Id.*

86. *Id.* at 465.

In summary, although Chief Justice Marshall established that the Indian tribes are dependent on the United States, the tribes still retained sovereign power over their territory. More recent Supreme Court decisions have manipulated the tribes' dependent status to divest tribal sovereignty, especially the geographic component of that power. In *South Dakota v. Bourland*,[87] the Supreme Court applied the restrictive trends of *Montana* and *Brendale* to prevent the Cheyenne River Sioux Tribe from regulating non-Indian hunting and fishing on reservation lands taken by the federal government for purposes of constructing a dam.[88]

PRINCIPAL CASE

In *South Dakota v. Bourland*,[89] the United States Supreme Court considered whether the Cheyenne River Sioux Tribe could regulate non-Indian hunting and fishing on lands located within the Cheyenne River Reservation, but acquired by the United States for constructing and operating the Oahe Dam and Reservoir.[90] After analyzing the applicable statutes, treaties and governing decisions, the Supreme Court reversed the Eighth Circuit Court of Appeals. The Court held that the Cheyenne River Sioux Tribe could not regulate non-Indian hunting and fishing on the Cheyenne River Reservation because Congress, in the Flood Control and Cheyenne River Acts, had abrogated the Tribe's right to do so under the Fort Laramie Treaty.[91] Justice Blackmun dissented and advocated the tribe's inherent sovereignty, an argument rejected by the majority.[92] A brief summary of the historical events preceding the dispute will illustrate the circumstances and facts the Court used and considered in reaching its decision.

In 1868, the United States and the Sioux Nation entered the Fort Laramie Treaty,[93] which established the Great Sioux Reservation.[94] The origi-

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87. 113 S.Ct. 2309 (1993).

88. *Id.* Since the *Brendale* decision, Justices Thomas and Souter have replaced Justices Brennan and Marshall, who previously supported Justice Blackmun's view of tribal sovereignty.

89. 113 S.Ct. 2309 (1993).

90. *Id.* at 2312. Thomas, J., delivered the Court's opinion, in which Rehnquist, C.J., and White, Stevens, O'Connor, Scalia, and Kennedy, JJ., joined. Blackmun, J., filed a dissenting opinion, in which Souter, J., joined. *Id.*

91. *Id.* at 2315.

92. Justice Blackmun noted that the majority's analysis gave "barely a nod acknowledging that the Tribe might retain such authority an aspect of its inherent sovereignty." *Id.* at 2321.

93. Fort Laramie Treaty, 15 Stat. 635.

94. *Bourland*, 113 S.Ct. at 2312 (citing 15 Stat. 635, 636). The United States held the Cheyenne River Reservation land in trust, for the benefit of the Tribe, but the Sioux retained "absolute and undisturbed use and occupation" of the land. *Id.* In addition, the tribe received the privilege of hunting, fishing, or passing over any of the reservation lands. *Bourland*, 949 F.2d at 988.

nal reservation enjoyed short existence, however, as westward-bound settlers pressured Congress to extinguish substantial portions of the original Sioux reservation land in 1889.[95] As a result, Congress divided the remaining territory into several different reservations, including the Cheyenne River Reservation.[96] Unfortunately, natural disasters necessitated further reductions in the Tribe's reservation lands. Congress enacted the Flood Control Act of 1944 in response to severe flooding of the lower Missouri River Basin[97] in 1943 and 1944.[98] Subsequent legislation authorized limited takings of Indian lands for hydroelectric and flood control dams.[99] The Oahe Dam and Reservoir was one of the largest of such projects.[100]

To construct the Oahe Dam and Reservoir, Congress gave the Departments of the Army and Interior authority to negotiate contracts with the Cheyenne River Sioux Tribe to obtain the land needed for the project.[101] Ultimately, the Tribe conveyed "all tribal, allotted, assigned, and inherited lands or

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The Great Sioux Reservation originally occupied most of what is now South Dakota, west of the Missouri River, and part of what is now North Dakota. The aboriginal territory of the Sioux Nation included the Missouri River, its tributaries, and adjacent riparian lands. Respondents' Brief at 20, *Bourland* (No. 91-2051). The Fort Laramie Treaty gave the Sioux Nation "the following district of country . . . commencing on the east bank of the Missouri River . . . thence along the low water mark on the east bank of the Missouri River," and then west to include all of western South Dakota, up to the 104th meridian. *See* Fort Laramie Treaty of 1868, 15 Stat. 635, Art. 2; Sioux Tribe v. United States, 316 U.S. 317, 319 (1942).

95. Act of March 2, 1889, ch. 405, 25 Stat. 888. *See also* FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 79 (1982). Congress had altered the government's previous goals of tribal self-sufficiency by enacting the General Allotment Act of 1887. ch. 119, § 1, 24 Stat. 388 (current version at 25 U.S.C. §§ 331-358 (1988)). This new policy allowed non-Indians to acquire reservation land previously held in trust for Indians. Moreover, "[a]n avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Montana*, 450 U.S. at 559 n.9. *See generally* FREDERICK HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, (1984). *See also supra* note 30.

96. Act of March 2, 1889, ch. 405, 25 Stat. 888. The Cheyenne River Reservation lies in northwestern South Dakota, with the Missouri River serving as its eastern border. Although Congress significantly reduced reservation lands, the Act expressly preserved the Sioux's original rights under the Fort Laramie Treaty "not in conflict" with the new statute. *Bourland*, 113 S.Ct. at 2313 (citing § 19, 25 Stat. 896).

97. Historically, the Tribe suffered minimal flood damage because of its northern location. The Oahe Dam and Reservoir was necessary to protect areas of Kansas, Missouri, Nebraska, and Iowa, all of which lie below the Oahe dam. H.R. REP. NO. 1047, 81st Cong., 1st. Sess. 3 (1950).

98. Flood Control Act of 1944, ch. 665, 58 Stat. 887. This Act established a comprehensive flood plan and gave the Army Chief of Engineers the responsibility of constructing dams along the Missouri River to prevent future flood disasters. Other purposes included the development of "public park and recreational facilities in reservoir areas" open to public use generally and subject to "such rules and regulations as the Secretary of War may deem necessary." *Bourland*, 113 S.Ct. at 2313 (citing § 4, 58 Stat. 889-890).

99. For a discussion of these transactions *see* Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 813 n.1 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984).

100. *Bourland*, 113 S.Ct. at 2313 (citing Flood Control Act of 1944, ch. 665, 58 Stat. 887).

101. *Id.* at 2313 n.1 (citing Pub.L. No. 870, Ch. 1120, 64 Stat. 1093 (1950)).

interests" in 104,420 acres of its land.[102] In exchange, the government gave the Tribe $10,644,014.[103] This sum was in final and complete settlement of all claims, rights, and demands.[104]

Despite the broad takings language, certain sections of the Cheyenne River Act reserved many rights to the Tribe or tribal members.[105] The Tribe retained mineral rights, grazing rights, continued occupation on the taken land until closure of the dam's gates, and the right to cut and remove timber without charge.[106] In addition, the Tribe received the right of free access to the reservoir shoreline, including the right to hunt and fish,[107] subject, however, to regulations[108] governing the corresponding use by other United States citizens.[109] Once the Court identified this important framework, it considered

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102. *Id.* at 2313-14 (citing Cheyenne River Act of 1954, 68 Stat. 1191).

103. *Id.* at 2314 n.2. The Tribe and its amici argued that right to regulate hunting and fishing was not abrogated because the $10,644,014 appropriated in the Cheyenne River Act did not include compensation for the Tribe's loss of licensing revenue. *Id.* at 2319. The Court rejected this argument because the Act said that the appropriated funds were a final and complete settlement of all claims, rights, and demands. *Id.* It would not conclude that the Act reserved to the Tribe the right to regulate hunting and fishing, simply because the legislative history did not include an itemized amount for the Tribe's loss of licensing revenue. *Id.*

104. More specifically, this amount compensated the Tribe for the loss of wildlife, the loss of revenue from grazing permits, the costs of negotiating the agreement, the costs of "complete rehabilitation" of all resident members, and the restoration of tribal life. *Bourland*, 113 S.Ct. at 2314 n.2. (citing §§ 2, 5, and 13, 68 Stat. 1191-1194).

The Flood Control Act also required non-Indian fee owners to relinquish an additional 18,000 acres for the Oahe Dam and Reservoir Project. *Id.* at 2314. The record did not indicate how non-Indians acquired these lands. *Id.* at 2314 n.3.

105. Although Congress significantly reduced reservation lands, the Cheyenne River Act expressly preserved the Sioux's original rights under the Fort Laramie Treaty "not in conflict" with the new statute. *Id.* at 2312 (citing § 19, 25 Stat. 896).

106. *Id.* at 2314 (citing §§ 6, 7, 9, 10, 68 Stat. 1192-93).

107. The creation of an Indian reservation, by Congressional action, executive order, or treaty, ordinarily reserves the Indian's right to hunt and fish on the reservation. Laurie Reynolds, *Indian Hunting and Fishing Rights: The Role of Tribal Sovereignty and Preemption*, 62 N.C. L. REV. 743, 747 (1984). Hunting and fishing are "normal incidents of Indian life." Menominee Tribe v. United States, 391 U.S. 404, 405-06 (1968). *See also* Meyers, *supra* note 40, at 91.

108. Congress gave the Army Corps of Engineers primary regulatory authority over the water project lands. *Bourland*, 113 S.Ct. at 2320 (citing 16 U.S.C. § 460d; 36 C.F.R. § 327.1(a) (1992)). The Corps had authority to promulgate regulations not inconsistent with treaties and Federal laws and regulations concerning the rights of Indian nations. *Bourland*, 113 S.Ct. at 2320 (citing 36 C.F.R. § 327.1(f) (1992)). The applicable regulation provides that "all federal, state and local laws governing these activities apply on project lands and waters, as regulated by authorized enforcement officials." *Id.* (citing § 327.8, 327.26). The Tribe and the United States (as *amicus curie*) argued that the Army corps regulations permitted the tribe to regulate non-Indian hunting and fishing because it insisted that "tribal" law was a subset of "local" law. *Id.* The majority believed that this argument was undeveloped. *Id.* at 2321. The Court reasoned that Congress had distinguished between local and tribal law when it stated in another regulation that "the primary responsibility for determining zoning and land use matters rests with state, local and tribal governments." *Id.* at n.16 (citing 33 C.F.R. § 320.4(j)(2)).

109. *Id.* at 2313 (citing Cheyenne River Act of Sept. 3, 1954, 68 Stat. 1191, 1193).

whether the Tribe possessed the power to regulate non-Indian hunting and fishing on the taken land.

Justice Thomas began the majority's analysis by noting that Congress possesses the power to abrogate Indians' treaty rights, although it must clearly express its intent to do so.[110] After acknowledging these canons of construction, the Court relied on *Montana v. United States*[111] and *Brendale v. Confederated Tribes and Bands of The Yakima Indian Nation*[112] to determine the existence of tribal regulatory authority, and whether Congress had subsequently abrogated this power.

To establish the Tribe's original right to regulate hunting and fishing, the Court looked to the Fort Laramie Treaty and a parallel treaty in *Montana*.[113] The Fort Laramie Treaty gave the Cheyenne River Sioux Tribe the implicit power to exclude non-Indians from the reservation and, therethrough, the authority to control fishing and hunting on those lands.[114] Thus, the Tribe originally possessed the right to regulate non-Indian use of the lands taken for the Oahe Dam and Reservoir Project.[115] However, the majority quickly negated this right.

Focusing on the power to exclude and the lesser included power to regulate, the Court applied the principle from *Montana* and *Brendale* that an Indian tribe forfeits any right of exclusive use of tribal lands when it conveys them to non-Indians.[116] Consequently, the Court found that the pre-existing regulatory power over non-Indian use of the Cheyenne River Reservation had been implicitly lost.[117] Because the Flood Control Act provided that all such

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110. *Id.* at 2315-16 (citing Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968); United States v. Dion, 476 U.S. 734, 738 (1986)); *see also infra* note 181. In addition, Justice Thomas recognized that the Court liberally construes statutes in favor of the Indians, with ambiguous provisions interpreted to their benefit. *Id.* (citing County of Yakima v. Yakima Indian Nation, 112 S.Ct. 683, 692 (1992)).

111. 450 U.S. 544 (1981). *See supra* notes 52-62 and accompanying text.

112. 492 U.S. 408 (1989). *See supra* notes 63-86 and accompanying text.

113. *Bourland*, 113 S.Ct. at 2316. Both treaties gave the respective tribes "absolute and undisturbed use and occupation [of the land]." Fort Laramie Treaty of 1868, 15 Stat. 649 (treaty with the Crow); Fort Laramie Treaty of 1868, 15 Stat. 635 (treaty with the Sioux); *Montana*, 450 U.S. at 558-59 (Fort Laramie Treaty "arguably" gave Crow Tribe authority to regulate hunting and fishing on reservation).

114. *Bourland*, 113 S.Ct. at 2316 (citing *Montana*, 450 U.S. at 558-59).

115. *Id.*

116. *Id.* at 2316. The nature of the Government's title is not exactly clear. The district court characterized the taking as the transfer of fee ownership from the Tribe to the United States. *Id.* at 2314 n.4. Conversely, the Eighth Circuit Court of Appeals referred to the land as neither non-Indian-owned fee land nor trust land. *Bourland*, 949 F.2d at 990. The Supreme Court assumed that the United States held the 104,420 acres in fee because the nature of the Government's title in the taken land was not relevant to its analysis. *Bourland*, 113 S.Ct. at 2314 n.4. *But see infra* note 190.

117. *Id.* at 2316.

projects would be open to the general public for recreational purposes,[118] the Court found that the "clear effect" of this broad opening eliminated the Tribes's power to exclude non-Indians, and, therefore, the incidental regulatory jurisdiction originally enjoyed by the Tribe.[119]

The majority asserted a secondary justification, derived from the Cheyenne River Act, to abrogate the Tribe's original regulatory power enjoyed under the Fort Laramie Treaty.[120] Because the compensation given for the taken land was a final and complete settlement of all claims, the Court found that the agreement embodied all of the Tribe's rights.[121] Congress could have expressly given the Tribe the more inclusive right to regulate hunting and fishing, but it did not.[122]

Again observing the importance of the relationship between the power to exclude and the incidental power to regulate, the majority displaced the Tribe's argument that it had never claimed the right to exclude

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118. The term recreational purposes includes hunting and fishing. *Id.* at 2317.

119. *Id.* at 2316-17.

120. *Id.* at 2317. The Court stated: "if the Flood Control Act leaves any doubt whether the tribe retains its original treaty right to regulate non-Indian hunting and fishing on lands taken for federal water projects, the Cheyenne River Act extinguishes all such doubt." *Id.*

121. *Id.* at 2317 (citing 68 Stat. 1191). The Tribe and their *amici* asserted an argument based on the compensation received for the taken lands. *Id.* at 2319. They argued that their right to regulate hunting and fishing was not abrogated because the money received did not include compensation for the Tribe's loss of licensing revenue and, thus, Congress breached its duty to fully compensate the tribe for the rights taken. The Court rejected this argument and concluded that the absence of an itemized amount disclosing compensation for lost licensing revenue did not result in a right to regulate hunting and fishing. *Id.*

122. The rights granted under section 10 of the Act "[stood] in contrast" to the expansive right of "absolute and undisturbed use" the Tribe enjoyed under the Fort Laramie Treaty. Consequently, the Tribe did not enjoy the right to exclude and, thus, the right to regulate. *Id.*

Because the Tribe retained mineral, grazing, and timber rights under the Cheyenne River Act, the court of appeals found that the conveyance was not a simple conveyance of all interests in the land. *Bourland*, 949 F.2d at 993. Thus, the court of appeals concluded that Congress had not abrogated the Tribe's preexisting regulatory authority. *Id.* at 994. The Supreme Court disagreed and stated that the explicit reservation of certain rights does not operate as an implicit reservation of all former rights. *Bourland*, 113 S.Ct. at 2318. To justify this approach, the Court relied on United States v. Dion, 476 U.S. 734 (1986) (question was whether an Indian who takes an eagle on tribal land violates the Eagle Protection Act). In *Dion*, the Court required "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Id.* at 740.

The Court, in *Dion*, found an exemption in the statute "difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians." *Id.* Similarly, in *Bourland*, the majority said it could not explain The Cheyenne River Act and the Flood Control Act except as indications that Congress sought to divest the tribe of its exclusive use of the taken area. *Bourland*, 113 S.Ct. at 2319. Thus, the Court said when Congress reserves limited rights to a tribe, it arguably suggests that the Indians would otherwise be treated like the public at large. *Id.* Justice Blackmun believed that *Dion* stood for exactly the opposite conclusion. *Id.* at 2324 n.3 (Blackmun, J., dissenting).

non-Indians.[123] Under *Brendale*, once a tribe loses the right to exclusive use and occupation of its lands, it also loses the power to regulate.[124] In summary, the Flood Control Act's broad opening of the lands for public use and the Cheyenne River Act's limited grant of rights affirmatively abrogated the Tribe's authority to regulate hunting and fishing on the taken lands. Next, the majority compared the nature of the takings in *Montana* and the present dispute.

Justice Thomas conceded that the conveyance of absolute fee title in *Montana* differed from the conveyance in the instant dispute because the Cheyenne River Act preserved certain rights to the Cheyenne River Sioux.[125] However, he rejected the court of appeals' analysis which stressed the contrasting policies underlying the land taken in *Montana* pursuant to the Allotment Act and the instant dispute. Justice Thomas clarified *Montana* by emphasizing that the focus should be on the effect of the alienation, not the purpose.[126] The Tribe's loss of rights attributed to the Cheyenne River Act was enough to divest the Tribe's regulatory power over hunting and fishing.[127]

Justice Blackmun began his dissent by recognizing the majority's inattention to the Tribe's inherent sovereignty.[128] He stressed that inherent sovereignty is a "fundamental principle of federal Indian law" that has never been extinguished.[129] He rejected the majority's position that Congress divested the Tribe of its inherent sovereignty. Since the majority did not identify any "overriding federal interest," it could not justify implicit

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123. *Id.* at 2317. At oral argument, the Tribe contended that it did not want to exclude non-Indians; it only wanted to prevent non-Indians from hunting or fishing without a tribal license. *Id.* The Court found this argument irrelevant because regulatory power is a component of the power to exclude. *Id.* at 2317 n.11 (citing Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 423-24 (1989)).

124. *Brendale*, 492 U.S. at 423-24 (opinion of White, J.).

125. *Id.* at 2318.

126. *Id.* The Court corrected the court of appeals' reliance on the Cheyenne River Act's purpose of "acquiring the property rights necessary to construct and operate the Oahe Dam and Reservoir." *Id.* at 2318 (quoting *Bourland*, 949 F.2d at 993). The Court said "to focus on purpose is to misread *Montana*." *Id.* The court emphasized that "what is relevant . . . is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land." *Id.* (quoting *Montana*, 450 U.S. at 560 n.9).

127. *Id.*

128. He also drew attention to the fact that the Cheyenne River Act did not destroy the reservation boundaries. *Id.* at 2321 (Blackmun, J., dissenting, joined by Souter, J.) The district court found that conveyance of the taken land to the United States did not diminish the reservation. *Id.* at 2314. South Dakota did not appeal this decision. The court of appeals said "it seems clear . . . that the Cheyenne River Act did not disestablish the boundaries of the reservation." *Bourland*, 849 F.2d at 990 (citing Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984)).

129. *Bourland*, 113 S.Ct. at 2321 (citing United States v. Wheeler, 435 U.S. 313, 322 (1978)).

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divesture of the Tribe's inherent sovereignty.[130] Before analyzing whether Congress intended to abrogate the Tribe's original sovereign power, Justice Blackmun renewed his objection to the majority's reliance on a "suggestion" in *Montana* that the exercise of tribal power beyond what is necessary to protect tribal self-government or internal relations.[131]

In Justice Blackmun's view, the majority did not show any evidence that Congress, by taking the land in question, had implicitly deprived the Tribe's authority to regulate hunting and fishing.[132] He emphasized that the authority relied on by the majority did not endorse this type of reasoning-by-implication.[133] Moreover, Justice Blackmun did not give credence to the majority's argument that because the Tribe had lost its right to exclude, it also lost its right to regulate.[134] Even assuming the Tribe had lost its power to exclude, Justice Blackmun argued that the Tribe's inherent sovereignty would overcome and authorize tribal regulation of hunting and fishing.[135]

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130. *Id.* at 2322 n.2. *Colville* enumerated examples of an over riding federal interest:

> where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when the tribes seek to engage in Foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protection of the Bill of Rights.

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 153-54 (1980).

Later in his dissenting opinion, Justice Blackmun addressed the inconsistency brought up by the majority that Congress gave the Army Corps of Engineers authority to promulgate regulations regarding the taken area. *Bourland*, 113 S.Ct. at 2323. The Army Corps did not promulgate any hunting and fishing regulations; instead, it provided that Federal, state and local laws apply on project lands and waters. Thus, Justice Blackmun argued there was no reason why concurrent jurisdiction could not exist, as the Tribe was a form of "local" law. *Id.* at 2324.

131. *Id.* at 2322 n.2. The majority relied on *Montana's* statement that "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." *Id.* at 2319 (quoting *Montana*, 450 U.S. at 564). Justice Blackmun said he already had a chance to state that "this passage in *Montana* is contrary to 150 years of Indian-law jurisprudence." *Id.* at 2322 n.2 (citing *Brendale*, 492 U.S. at 450-56) (Blackmun, J., concurring and dissenting).

132. *Id.*

133. Justice Blackmun did not agree with the majority's reasoning that Congressional intent was implicit in the fact that Congress deprived the Tribe of its right to exclusive use of the land, that Congress failed explicitly to reserve to the Tribe the right to regulate non-Indian hunting and fishing, and that Congress gave the Army Corps of Engineers authority to regulate public access to the land. *Id.* at 2322. Justice Blackmun said the cases that the majority relied upon to make this assertion stood for the opposite conclusion. *Id.* For example, the Court, in *Menominee Tribe of Indians v. United States*, would not lightly impute Congressional intent to abrogate or modify hunting and fishing rights. *Menominee*, 391 U.S. 404 (1968).

134. *Bourland*, 113 S.Ct. at 2323.

135. *Id.* This was the second argument posed by Justice Blackmun to reject the majority's belief that the Tribe's regulatory power was incidental and dependent to its exclusive use of the area. Justice Blackmun based his first argument on the principle that treaties must be construed so that the Indians would naturally understand them. *Id.* (citing Washington v. Washington Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 676 (1979); Jones v. Meehan, 175 U.S. 1, 11 (1899)). Justice

ANALYSIS

Justice Thomas stated that Justice Blackmun "shuts both eyes to the reality that after *Montana*, tribal sovereignty over nonmembers cannot survive without express congressional delegation."[136] Is Justice Blackmun justified in shutting both eyes? Yes. *South Dakota v. Bourland* continued the hostile attitude of the *Montana* and *Brendale* decisions regarding tribal regulation of non-Indians by denying the Cheyenne River Sioux Tribe the power to regulate non-Indian hunting and fishing on land located within its reservation. *Bourland* reiterates the reality of *Montana* and reinforces Justice White's view of tribal regulation enunciated in *Brendale*.[137]

According to Justice Thomas, the Fort Laramie Treaty established the Tribe's right to regulate hunting and fishing on its reservation.[138] Establishing the treaty-based right to regulate hunting and fishing was necessary because the majority bluntly stated that tribal power over non-Indians was never inherent.[139] According to seven justices, tribal sovereignty over nonmembers cannot survive without express congressional delegation; such is the reality of *Montana*.[140] *Bourland* makes it clear that tribal power to regulate non-Indians is very narrow.[141]

Having decided that Indian tribes have extremely limited sovereignty over non-Indians, the Court focused on the Tribe's treaty right to regulate hunting and fishing, and the subsequent legislation that abrogated that right.[142] The Court found no evidence that Congress intended to allow the Tribe to assert regulatory jurisdiction over the taken lands pursuant to its inherent sovereignty.[143] This statement clearly contradicts traditional notions of inherent sovereignty. Inherent tribal sovereignty has never been a product of Congress because it existed before the United States.[144] The majority also ig-

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Blackmun did not believe the Indians anticipated that they would lose their regulatory rights once they lost the right to exclusive use of the land. *Id.*

136. *Id.* at 2320 n.15.

137. *See supra* notes 76-81 and accompanying text.

138. *Bourland*, 113 S.Ct. at 2316. Conversely, Justice Blackmun pointed out that this treaty only confirmed the Tribe's already inherent right to regulate hunting and fishing. *Id.* at 2321 (Blackmun, J., dissenting).

139. *Id.* at 2320 n.15.

140. *Id.*

141. Only three circumstances may justify tribal regulatory authority over non-Indians: express congressional authority, consensual relationships, and infringement on tribal welfare. *See infra* notes 180-194 and accompanying text.

142. *Bourland*, 113 S.Ct. at 2316. Justice Blackmun said the majority had a "myopic focus on the Treaty." *Id.* at 2323.

143. *Id.* at 2319-20.

144. Justice Marshall established that Indians exercised unlimited sovereignty because they had undisturbed control over their people and territory before the Europeans entered the continent. *Worcester*, 31 U.S. (6 Pet.) at 559.

nored the precedents that endorse the geographic nature of inherent tribal sovereignty.[145]

Since the Cheyenne River Act did not destroy the reservation boundaries,[146] the Court should have recognized the Tribe's geographical sovereign authority and allowed tribal regulation. The Court had previously held that the allotment of lands does not diminish tribal sovereignty.[147] In addition, the Department of Interior said a tribe has the sovereign power to determine the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business, whether owned by the tribe, by members thereof, or by outsiders.[148] The Department's statement comports with the typical territorial-based notions of sovereignty. For example, if a Colorado resident owns land in Wyoming and seeks to hunt and fish on that land, she is subject to Wyoming law and regulation.[149] In *Bourland*, however, the Court without explanation made an exception to this widely accepted principle when the Tribe attempted to regulate non-Indian activities.[150]

Justice Blackmun also emphasized the strength of the Tribe's inherent sovereign powers. Justice Blackmun's dissent pointed out that Con-

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145. The majority did not consider the geographical component of tribal sovereignty. The district court found that the Cheyenne River Act did not disestablish the Missouri River boundary of the Cheyenne River Reservation. *Bourland*, 113 S.Ct. at 2314. But the majority failed to recognize that "the Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980). *See also* United States v. Mazurie, 419 U.S. 544, 557 (1975) (Indian tribes "are unique aggregations possessing attributes of sovereignty over both their members and their territory.").

In a post *Montana* case, the Court cited with approval the following statement:

> [n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land with its territorial jurisdiction by citizens or foreigners.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 143 (1982) (quoting Buster v. Wright 135 F. 947 (8th Cir. 1905) (affirmed tribe's right to tax non-Indians on non-Indian owned fee lands)).

146. *See supra* note 128. Regardless of what happens to the title of individual lots within the Cheyenne River Sioux Reservation, once Congress sets aside land for an Indian reservation the entire block retains its reservation status until Congress explicitly indicates otherwise. Solem v. Bartlett, 465 U.S. 463, 470 (1984).

147. Seymour v. Superintendent, 368 U.S. 351 (1962); *see also* Mattz v. Arnett, 412 U.S. 481 (1973)

148. Powers of Indian Tribes, 55 INTERIOR DEC. 14, 50 (1934).

149. Professor Signer, in criticism of the *Brendale* decision, noted that landowners who are not even United States citizens are subject to the zoning laws where their property is located, even though they cannot participate in any elections. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 34 (1991).

150. Interestingly, under the rationales of *Bourland* and *Brendale*, tribal members could withdraw from their tribe and then no longer be subject to tribal regulation (assuming that the tribal member owned the land).

gress has the power to eradicate inherent tribal sovereignty,[151] but until Congress acts, the tribes retain their existing sovereign powers.[152] In addition, the Court has previously found implicit divesture of sovereignty authority only where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government.[153] Examples of overriding interests include instances where tribes seek to engage in foreign relations,[154] alienate their lands to non-Indians without federal consent,[155] or prosecute non-Indians in tribal courts which do not incorporate the protection of the Bill of Rights.[156] If the majority had applied these principles, it would have inevitably concluded that the tribe could have regulated the taken area because no overriding federal interest existed. In fact, the federal interest favored tribal regulation.[157]

The Court did not firmly support the current federal Indian policy promoting tribal self-government and self-sufficiency.[158] The Court announced that when Congress reserves limited rights to a tribe,[159] this indicates that the "Indians would otherwise be treated like the public at large."[160] By treating the tribe as the public at large, the Court effectively rejuvenated the assimilation policy that Congress has strongly rejected.[161]

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151. *See supra* note 42.

152. United States v. Wheeler, 435 U.S. 313, 323 (1978).

153. Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134, 153-54 (1980).

154. Oneida Indian Nations v. Oneida County, 414 U.S. 661, 667-68 (1974).

155. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 547 (1823).

156. *Oliphant*, 435 U.S. at 195.

157. The federal government has a "longstanding policy of encouraging tribal self-government." Iowa Mutuals Ins. Co. v. LaPlante, 480 U.S. 9, 14 (1987). Federal Indian policy "includes Congress' overriding goal of encouraging tribal self-sufficiency and economic development." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 335 (1983); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). And, tribal authority over on-reservation conduct must be construed generously in order to comport with the federal policy of encouraging tribal independence. *Id.* at 144.

158. The Court failed to mention the current federal Indian policy of promoting tribal self-government and sufficiency. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983) (federal government is "firmly committed to the goal of promoting tribal self-government"); Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985) (same); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (question of state's ability to regulate reservation gambling operations must proceed in light of traditional notions of Indian sovereignty and Congress' goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development). One commentator has recently noted the Supreme Court's judicial activism in Indian law cases. *See* Skibine, *supra* note 47, at 806.

159. *See supra* notes 105-07 and accompanying text.

160. *Bourland*, 113 S.Ct. at 2319.

161. The assimilation policy attempted to make Indians more like whites. Greg Overstreet, *Re-Empowering the Native American: A Conservative Proposal to Restore Tribal Sovereignty and Self-Reliance to Federal Indian Policy*, 14 HAMLINE J. PUB. L. & POL'Y 1, 13 (1993) (citing AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN," 1880-1900 (Francis P. Prucha ed., 1973)). But the same author advocates that self-determination is an indirect attempt toward assimilation in that self-determination seeks to assimilate the Indians into the American Welfare State. *Id.* at 17-18.

Moreover, Congress anticipated that tribal development of the Oahe Reservoir would partially offset the detriments to the Tribe.[162] The Court, again, failed to uphold the current federal Indian policy of self-government,[163] while subverting Indian interests for the benefit of non-Indians.[164]

Since Congress is responsible for protecting tribal self-government,[165] it should enact legislation to restrain the Court's judicial activism in the area of tribal sovereignty.[166] Unless Congress focuses the Court's attention on the importance of tribal sovereignty, the Court will likely continue to deny tribal regulation over Indian land and resources.[167] Be-

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The executive branch has also appeared to support tribal sovereignty. Former President Ronald Regan's official Indian Policy recognized Indian tribes as sovereign political entities. *See* Presidents's Statement on Indian Policy, 1983 PUB. PAPERS 96 (Jan. 24, 1983). Former President George Bush stated that "tribal elected governments and the United States have now established a unique and special government-to-government relationship . . . we look forward to greater economic independence and self-sufficiency for Native Americans, and we reaffirm our support for increased Indian control over tribal government affairs." Proclamation No. 6080 3 C.F.R. §§ 192-93 (1990). Former President Bush also stated: "the concepts of forced termination and excess dependency on the Federal Government must now be relegated, once and for all, to the history books [as] we move forward toward a permanent relationship of understanding and trust." Presidential Statement of Jan. 14, 1991. *See also* Douglas A. Brockman, Note, *Congressional Delegation of Environmental Regulatory Jurisdiction: Native American Control of the Reservation Environment*, 41 WASH. U. J. URB. & CONTEMP. L. 133, 135 (1992).

162. Senator McFarland, Chairman of the Committee, realized that the Tribe should be able to "build up a recreational area there that might be valuable." H.R. REP. NO. 1047, 81st Cong., 1st Sess. 3 (1950).

163. *See supra* note 30. For a discussion of recent legislative action regarding federal Indian policy, *see* Nell Jessup Newton, *Let a Thousand Policy-flowers Bloom: Making Indian Policy in the Twenty-First Century*, 46 ARK. L. REV. 25 (1993).

164. At one point, many commentators praised the Court for protecting tribal rights. One commentator concluded that the Court's "decisions generally have been principled, even courageous." WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 2 (1987). More recently, however, many scholars criticize the Court's performance in Indian cases as confused and inconsistent. *See e.g.*, Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1204 (1990). *See also* Singer, *supra* note 149; Karl J. Kramer, *The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations*, 1986 WIS. L. REV. 989 (1986); Robert N. Clinton, *Reservation Specificity and Indian Adjudication: An Essay on the Importance of Limited Contextualism in Indian Law*, 8 HAMLINE L. REV. 543, 567-88 (1985); Robert Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV. 29 (1983).

165. In Worcester v. Georgia, Chief Justice Marshall stated that the acts of Georgia "interfere forcibly with the relations established between the United States and the Cherokee nation, the regulation of which, according to the settled principles of our constitution, are committed exclusively to the government of the Union." *Worcester*, 31 U.S. (6 Pet.) at 561.

166. For a discussion on the constitutionality of Congressional action to overturn Supreme Court decisions, *see generally* Skibine, *supra* note 47. New Mexico Representative William B. Richardson has introduced a bill to improve the management of Indian fish and wildlife resources on Indian lands. INDIAN FISH AND WILDLIFE RESOURCE ENHANCEMENT ACT OF 1993, H.R. REP. NO. 2874, 103d Cong., 1st Sess. (1993). However, Congress still needs to direct a strong statement to the courts regarding the status of tribal sovereignty.

167. Apparently, Congress' recent affirmation of inherent tribal sovereignty over all Indians on their reservations did not sufficiently impress the importance of tribal sovereignty upon the Court. 25

fore the Indian nations can be self-sufficient, they must be given more control over their land and natural resources.[168] The Court's role as an initial arbiter of federal Indian policy is impractical[169] and unwarranted.[170]

The majority could have easily distinguished the circumstances in *Montana* from those in the instant dispute. In *Bourland*, the land acquired by the United States was necessary to construct a dam.[171] It was not acquired in the shadow of Congressional policy that intended to destroy tribal self-government. The express Congressional policy underlying the Cheyenne River Act was to limit the impact on the Tribe and to restore its economic,[172] social, and community relations.[173] The nonmembers whose conduct the tribe sought to regulate in *Bourland* are merely transient hunters and fishers who use the land for limited purposes. As such, they are not fee landowners who desire to use their property as they wish. In *Montana* and *Brendale*, the non-Indian lands were of an entirely different nature because non-Indians, not the United States, held the disputed land in fee simple pursuant to the Allotment policy.[174] Because Congress

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U.S.C. § 1301(2) (Supp. II 1990) (amendment to the Indian Civil Rights Act in response to Duro v. Reina, 495 U.S. 676 (1990)). *See also supra* note 47 and accompanying text.

168. Ross O. Swimmer, *A Blueprint for Economic Development in Indian Country*, 10 J. ENERGY L. & POL'Y 13, 18 (1989). Professor Pommersheim has also convincingly argued that tribal sovereignty over its land is necessary to Indian survival. Frank Pommersheim, *The Reservation as Place*: A South Dakota Essay, 34 S.D. L. REV. 246 (1989).

169. The Supreme Court is more conservative and more inclined against tribal sovereignty than Congress. Robert Laurence, *A Memorandum to the Class*, 46 U. ARK. L. REV. 1, 6 (1993). But some argue that conservative principles should be used to re-empower Indian tribes with the sovereignty they lost via democratic policies. *See generally* Overstreet, *supra* note 161.

Another commentator recently accounted the Supreme Court's unpredictable behavior. Christina D. Ferguson, *Martinez v. Santa Clara Pueblo: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK L. REV. 275 (1993) (noting the that the Supreme Court indulged tribal sovereignty to deny a federal-private cause of action under the federally enacted Indian Civil Rights Act only two weeks after diminishing it in *Oliphant*).

170. Non-Indians do not trust tribal governance and they are unwilling to accept tribal governance or regulation over themselves or nonmembers. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK L. REV. 77, 141 (1993).

An example of the Court's predisposition is a statement by Justice Reed:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955).

171. Admittedly, it also opened the land up to public use. *Bourland*, 113 S.Ct. at 2317.

172. Deregulation of commercial transactions and restoration of tribal authority is an essential step toward economic tribal self-determination. Raymond Cross, *De-Federalizing American Indian Commerce: Toward a New Political Economy for Indian Country*, 16 HARV. J.L. & PUB. POL'Y 445 (1993).

173. Cheyenne River Act of 1954, 68 Stat. 1192.

174. The land subject to dispute in *Montana* and *Brendale* had been conveyed in fee to non-Indians pursuant to the Indian General Allotment Act of 1887, 24 Stat. 388. In *Montana*, the court concluded that "[i]t defies common sense to suppose that Congress would intend that non-Indians

reserved many significant rights to the Tribe in *Bourland*,[175] the Tribe's interests clearly dominated the transient interests of non-Indians. Moreover, since hunting and fishing rights are fundamental attributes of Indian culture,[176] it follows that the Court should protect this interest.[177] However, the Court is reluctant to guard this cultural ideal when the Tribe does not have the exclusive right to the land it seeks to regulate[178] and when non-Indian rights are involved.[179]

Current Supreme Court Analysis of Tribal Regulatory-Jurisdiction over non-Indian lands and activities within the reservation

After *Bourland*, the decision as to whether a tribe may regulate non-Indian lands and resources located within the reservation follows two steps. First, the Court determines whether Congress has expressly granted the tribe regulatory authority over non-Indians by treaty or statute.[180] If this authority exists, the Court will next decide whether the tribe has lost this right.[181]

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purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Montana*, 450 U.S. at 560 n.9.

175. *Bourland*, 113 S.Ct. at 2314.

176. The district court found that subsistence hunting and fishing is an important cultural, social, and religious activity of the tribe. Respondents' Brief at 6, *Bourland* (No. 91-2051); Joint Appendix at 67. The "fundamental sovereign power of local governments to control land use is especially vital to Indians, who enjoy a unique historical and cultural connection to the land." *Brendale*, 492 U.S. at 458 (Blackmun, J., dissenting) (citing FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960) (Black, J., dissenting)).

An illustrative example of the this cultural interest includes a statement by a Western Cherokee who testified during a Congressional hearing regarding the Tellico Dam, which would flood the Cherokees' spiritual homeland:

> In the language of my people . . . there is a word for land: Eloheh. This same word also means history, culture, and religion. We cannot separate our place on earth from our lives on the earth nor from our vision nor from our meaning as a people. We are taught from childhood that the animals and even the trees and plants that we share a place with are our brothers and sister. So when we speak of land, we are not speaking of property, territory, or even a piece of ground upon which our houses sit and our crops are grown. We are speaking of something truly sacred.

Meyers, *supra* note 40 at 80 (1991) (citing PETER MATTHIESSEN, INDIAN COUNTRY 119 (1984)).

177. The cultural diversity and traditional practices of the indigenous peoples could allow them to play a significant role in environmental management. Russel L. Barsh, *The Challenge of Indigenous Self-Determination*, 26 U. MICH. J.L. REF. 277 (1993). The "Earth Summit" directed world governments to develop procedures for involving indigenous peoples in all important decisions. 1 *Reports of the United Nations Conference on Environment and Development*, U.N. Doc. A/Conf. 151/26/Rev.1, ch. 26, at 385-88 (1992).

178. *Bourland*, 113 S.Ct. at 2316-17.

179. Professor Frickey recognized "that the Court in the modern era remains able to apply Chief Justice Marshall's basic approach, at least for disputes in which there is no significant non-Indian interest at stake." Frickey, *supra* note 28, at 22 (citing Bryan v. Itasca County, 426 U.S. 373 (1976)).

180. For example, the Clean Water Act and the Clean Air Act expressly give tribes jurisdiction over all reservation lands. 33 U.S.C. §§ 1251, 1377(e) (1988); 42 U.S.C. § 7474(c) (1988).

181. After *Bourland*, a tribe may lose a regulatory right by express, implied or even *silent*

Second, if Congress has not expressly given a tribe the authority to regulate non-Indian activity, or if it has abrogated the tribal right, the Court makes a particularized inquiry. *Bourland* retained *Montana's* "other potential sources"[182] of tribal jurisdiction over non-Indians.[183] Hence, Tribes may still regulate non-Indians who enter consensual relations with the tribe through contracts, leases or other commercial dealings.[184] And, the tribe may still assert regulatory jurisdiction over non-Indian activities that threaten or directly affect the tribe's political integrity, economic security or health and welfare.[185]

In *Bourland*, the Court did not find an opportunity to explain these "other sources" of tribal authority.[186] Non-Indians had not entered a consensual relationship with the tribe, and the district court did not find any evidence that the Tribe's welfare was in jeopardy.[187] The Court did not expound on the circumstances necessary to threaten or directly affect a tribe so that it could legitimately regulate non-Indian activities. Thus, Justice White's narrow interpretation of the tribal welfare exception in *Brendale* may influence the outcome of future disputes.[188] Under his view, jurisdiction over non-Indian activities will not necessarily be available

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Congressional abrogation. In this respect, the *Bourland* majority merely gave lip service to the statutory canons of construction regarding Indian statutes and treaties. The majority said it "usually" insists that Congress clearly express its intent to abrogate Indians' treaty rights. *Bourland*, 113 S.Ct. at 2315-16 (citing Menominee Tribe of Indians v. United States, 391 U.S. 404, 412-13 (1968); United States v. Dion, 476 U.S. 734, 738 (1986)). The Court retreated from or misapplied these precedents with no explanation.

In the Flood Control Act and Cheyenne River Act, Congress neither mentioned whether the tribe retained its power to regulate hunting and fishing nor did it even consider the matter. Unfortunately, the Court treated this silence with undue merit. Prior Supreme Court precedents reject silence as a means to absolve tribal powers. In *Merrion v. Jicarilla Apache Tribe*, the Court refused to find that the Jicarilla Apache Tribe waived its taxing power because a lease was silent on the matter. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). The *Merrion* Court did not defer to the silence because it would "[turn] the concept of sovereignty on its head." *Id.* at 148. Moreover, the tribe could enforce its severance tax because Congress had not divested this power by express or *silent* means. *Id.* at 149. Similarly, the Court has an obligation to "trend lightly in the absence of clear indications of legislative intent." *Id.* at 149 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).

182. Presumably, to draw attention away from the Tribe's inherent sovereignty, the Bourland Court called *Montana's* tribal welfare and consensual relationship exceptions "other potential sources of tribal jurisdiction over non-Indians." *Bourland*, 113 S.Ct. at 2320.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* Although the court of appeals directed the district court to conduct a *Montana* exceptions-analysis regarding the 18,000 acres of fee land taken from non-Indians, it did not pass upon the district court's previous findings regarding the entire taken area. *Bourland*, 949 F.2d at 995. The Supreme Court left this issue to be resolved on remand. *Bourland*, 113 S.Ct. at 2320.

188. *See supra* notes 76-80 and accompanying text.

where a significant tribal interest is threatened; it will depend on the circumstances.[189]

The Court will also continue to analyze the nature and character of the land in determining whether a tribe may regulate non-Indians. Justice Thomas noted that the taken area was not a "closed" or pristine area, but he did not indicate how to distinguish between "open" and "closed" portions of a reservation.[190] His opinion does show, however, that the Court favors the non-Indian interest. When non-Indian interests are prominent, a tribe will infrequently have regulatory jurisdiction over the lands and natural resources located within its reservation. The Court effectively forces Indian tribes to maintain their "closed" or pristine areas to avoid losing regulatory authority. This is an unfair restraint on a tribe's right to develop its land.[191]

Similarly, a tribe's ability to regulate non-Indian lands and resources within its reservation will depend heavily on the effect of any land alienation. According to the majority, the proper focus is on the effect of the land alienation, not the congressional purpose.[192] If a tribe has lost its right to exclude non-Indians, the Court will likely find that it has also impliedly lost the right to regulate the non-Indian activity.[193] Although non-Indians had not heavily settled the taken lands pursuant to the Allotment policy in *Bourland*, the effect of broadly opening the area to public use precluded tribal regulation.[194]

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189. *Brendale*, 492 U.S. at 429. Justice White argued that tribal zoning pursuant to *Montana's* tribal welfare exception would "make little sense" because zoning authority would only last as long as the Tribe's welfare was in jeopardy. *Id.* at 429-30. Thus, if the threat ended, zoning authority would revert back to the state. *Id.* at 430.

190. *Bourland*, 113 S.Ct. at 2317 n.9. Under *Brendale*, a tribe may be able to maintain and regulate reservation lands where only a small proportion of the closed area is owned in fee. *Brendale*, 492 U.S. at 441. However, *Bourland* may affect this analysis. Although the majority felt that the nature of the governments title in the taken land was irrelevant to the disposition of the case, it assumed that the government's title was in fee. *Bourland*, 113 S.Ct. at 2314 n.4. The government's interest in the "taken" land is far from being fee simple because Congress reserved considerable rights to the Tribe. *Id.* at 2314. To hold property in fee simple the owner must possess all the sticks of a bundle. *See generally*, THOMAS BERGIN AND PAUL HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS (2d ed. 1984); BLACK'S LAW DICTIONARY 615 (6th ed. 1990). If anything, the Court should have concluded that the United States still held the land in trust, for the benefit of the tribe. Moreover, the Cheyenne River Act did not destroy the Cheyenne Sioux reservation boundaries. *Bourland*, 113 S.Ct. at 2314.

191. *Brendale*, 492 U.S. at 465 (Blackmun, J. dissenting) (Justice Blackmun posed that Justice Steven's opinion was patronizing to Indians and reservation life).

192. *Bourland*, 113 S.Ct. at 2318. Conversely, Justice Blackmun argued that the proper question is the Congressional purpose of the alienation. *Id.* at 2323 (Blackmun, J., dissenting).

193. *Id.* at 2316-17 (noting that *Montana* and *Brendale* established this principle). In 1982, the Court specifically rejected the power-to-exclude theory. Merrion v. Jicarilla Apache Tribe, 455 U.S. 145, 143-44 (1982) ("Tribe's authority to tax derives not from its power to exclude but from its power to govern and to raise revenues to pay for the costs of government").

194. *Bourland*, 113 S.Ct. at 2318.

CONCLUSION

In *South Dakota v. Bourland*, the United States Supreme Court maintained an ambivalent view of inherent tribal authority and Indian interests.[195] It frustrated current congressional Indian policy and violated well-established principles of federal Indian law. The Court offered more than a reaffirmation of *Montana* and *Brendale*. Land the federal government holds for the benefit of the tribe and the general public will be subject to state, county, or otherwise non-Indian regulation, even if the tribe retains substantial rights in the land.

After *Bourland*, the tribal interest is clearly secondary to the non-Indian interest. In *Bourland*, the tribe had a greater interest in the taken land than non-Indians, nevertheless the Court denied tribal regulation of hunting and fishing. *Bourland* retained the *Montana* exceptions, and a majority of the Court decided to follow Justice White's narrow interpretation of those exceptions in *Brendale*. Moreover, the Court focused on the extent to which the reservation lands were open to non-Indians. Therefore, Indian tribes must know that the more open their lands are to non-Indians, the less likely they will be able to regulate those lands and resources.[196]

While the relationship between the United States and the Indian tribes is admittedly complex, *Bourland* illustrates that the Court resolves the problem to the detriment of the tribes. The solution lies with Congress, which must, once again, enact legislation to remedy the Court's departure from well-established principles of federal Indian law. Until Congress takes action, the Court will continue to erode Chief Justice Marshall's original vision of tribal sovereignty.[197]

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195. Popular culture has recently recognized "the continuance of the U.S. genocidal policy that's been perpetrated against the native peoples of this country." Daina Darzin, *Rage take on the rights of Native Americans: Machine Dreams*, ROLLING STONE, March 10, 1994, at 19 (quoting Rage Against the Machine musician De la Rocha who was referring to the controversial prosecution of Leonard Peltier for the deaths of two federal agents).

196. Proposed development of the Wind River Indian Reservation will make *Bourland* an important consideration for Wyoming Indians. *See, e.g.*, Norma Williamson, *BIA touts Wind River Indian Reservation Tourism*, CASPER STAR-TRIBUNE, March 21, 1994, at B1. *See also* Walter E. Stern, *Environmental Compliance Considerations for Developers of Indian Lands*, 28 LAND & WATER L. REV. 79 (1993).

197. Although striking and somewhat overwhelming, the suggestion of eliminating Supreme Court jurisdiction over Indian cases becomes even more persuasive after *South Dakota v. Bourland*. *See, e.g.*, Michael C. Blumm and Michael Cadigan, *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction over Indian Cases*, 46 ARK L. REV. 203 (1993).