SUPREME COURT OF THE UNITED STATES

No. 91–2051

SOUTH DAKOTA, PETITIONER *v.* GREGG BOURLAND, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 14, 1993]

JUSTICE BLACKMUN, with whom JUSTICE SOUTER joins, dissenting.

The land at issue in this case is part of the Cheyenne River Sioux Reservation.[1] The United States did not take this land with the purpose of destroying tribal government or even with the purpose of limiting tribal authority. It simply wished to build a dam. The Tribe's authority to regulate hunting and fishing on the taken area is consistent with the uses to which Congress has put the land, and, in my view, that authority must be understood to continue until Congress clearly decides to end it.

The majority's analysis focuses on the Tribe's authority to regulate hunting and fishing under the Fort Laramie Treaty of 1868, 15 Stat. 635, see *ante*, at 7–14, with barely a nod acknowledging that the Tribe might retain such authority as an aspect of its inherent sovereignty, see *ante*, at 14–15. Yet it is a fundamental principle of federal Indian law that Indian tribes possess "`inherent powers of a limited sovereignty which has never been extinguished.'" *United States* v. *Wheeler*, 435 U. S. 313, 322 (1978) (emphasis omitted), quoting F. Cohen, Handbook of Federal Indian Law 122 (1942). This Court has

[1]The District Court found that conveyance of the taken area to the United States did not diminish the reservation, see App. 96–104, and South Dakota did not appeal that determination. See also *South Dakota* v. *Bourland*, 949 F. 2d 984, 990 (CA8 1991) ("[I]t seems clear . . . that the Cheyenne River Act did not disestablish the boundaries of the Reservation").

recognized that the inherent sovereignty of Indian tribes extends "`over both their members *and their territory*.'" 435 U. S., at 323 (emphasis added), quoting *United States* v. *Mazurie*, 419 U. S. 544, 557 (1975). Inherent tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance. *But until Congress acts, the tribes retain their existing sovereign powers*. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a *necessary* result of their dependent status." 435 U. S., at 323 (emphases added). This Court has found implicit divestiture of inherent sovereignty necessary only "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 protections of the Bill of Rights." *Washington* v. *Confederated Tribes of Colville Reservation*, 447 U. S. 134, 153–154 (1980).[2]

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[2]Neither South Dakota nor the majority is able to identify any overriding federal interest that would justify the implicit divestiture of the Tribe's authority to regulate non-Indian hunting and fishing. In rejecting the Tribe's inherent sovereignty argument, the majority relies on the suggestion in *Montana* v. *United States*, 450 U. S. 544 (1981), 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.'" *Ante*, at 14–15, quoting *Montana*, 450 U. S., at 564. I already have had occasion to explain that this passage in *Montana* is contrary to 150 years of Indian-law jurisprudence and is not supported by the cases on which it relied. See *Brendale* v. *Confederated Yakima Indian Nation*, 492 U. S. 408, 450–456 (1989) (opinion concurring and

The Fort Laramie Treaty confirmed the Tribe's sovereignty over the land in question in the most sweeping terms by providing that it be "set apart for the absolute and undisturbed use and occupation of the [Sioux]." 15 Stat. 636. The majority acknowledges that this provision arguably conferred "`upon the Tribe the authority to control hunting and fishing on those lands.'" *Ante*, at 7, quoting *Montana* v. *United States*, 450 U. S. 544, 558–559 (1981). Because "treaties should be construed liberally in favor of the Indians," *County of Oneida* v. *Oneida Indian Nation*, 470 U. S. 226, 247 (1985), the majority is right to proceed on the assumption that authority to control hunting and fishing is included in the Fort Laramie Treaty.

The question, then, is whether Congress intended to abrogate the Tribe's right to regulate non-Indian hunting and fishing on the taken area—a right flowing from its original sovereign power that was expressly confirmed by treaty. This Court does not lightly impute such an intent to Congress. There must be "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." *United States* v. *Dion*, 476 U. S. 734, 740 (1986); see also *Wheeler*, 435 U. S., at 323 (implicit withdrawal of inherent sovereignty only where "necessary"); *Colville*, 447 U. S., at 153–154 (same).

The majority, however, points not even to a scrap of evidence that Congress actually considered the possibility that by taking the land in question it would deprive the Tribe of its authority to regulate non-Indian hunting and fishing on that land. Instead, it finds Congress' intent *implicit* in the fact that Congress deprived the Tribe of its right to exclusive

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dissenting). There is no need to repeat that explanation here.

use of the land, that Congress gave the Army Corps of Engineers authority to regulate public access to the land, and that Congress failed explicitly to reserve to the Tribe the right to regulate non-Indian hunting and fishing. Despite its citation of *Dion*, *supra*, *Menominee Tribe* v. *United States*, 391 U. S. 404 (1968), and *County of Yakima* v. *Yakima Indian Nation*, 502 U. S. ___ (1992), see *ante*, at 7, the majority adopts precisely the sort of reasoning-by-implication that those cases reject.

The majority supposes that the Tribe's right to regulate non-Indian hunting and fishing is incidental to and dependent on its treaty right to exclusive use of the area and that the Tribe's right to regulate was therefore lost when its right to exclusive use was abrogated. See *ante*, at 8–9. This reasoning fails on two counts. First, treaties "`must . . . be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *Washington* v. *Washington Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676 (1979), quoting *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899). I find it implausible that the Tribe here would have thought every right subsumed in the Fort Laramie Treaty's sweeping language to be defeated the moment they lost the right to exclusive use of their land. Second, the majority's myopic focus on the Treaty ignores the fact that this Treaty merely confirmed the Tribe's pre-existing sovereignty over the reservation land. Even on the assumption that the Tribe's treaty-based right to regulate hunting and fishing by non-Indians was lost with the Tribe's power to exclude non-Indians, its *inherent* authority to regulate such hunting and fishing continued.

The majority's reliance on *Montana* and *Brendale* in this regard is misplaced. In those cases, the reservation land at issue had been conveyed in fee to non-Indians pursuant to the Indian General Allotment

Act of 1887, 24 Stat. 388, which aimed at the eventual elimination of reservations and the assimilation of Indian peoples. See *Montana*, 450 U. S., at 559, n. 9. In *Montana*, the Court concluded: "It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government." *Id.*, at 560, n. 9. See also *Brendale* v. *Confederated Yakima Indian Nation*, 492 U. S. 408, 423 (1989) (opinion of JUSTICE WHITE). The majority finds the purpose for which the land is alienated irrelevant, relying on *Montana*'s statement 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*.'" *Ante*, at 12, quoting *Montana*, 450 U. S., at 560, n. 9 (emphasis added by Court). This statement, however, simply responded to an argument that "[t]he policy of allotment and sale of surplus reservation land was . . . repudiated in 1934." *Ibid*. Read in context, the language on which the majority relies in no way rejects Congress' purpose as irrelevant but rather specifies *which* congressional purpose is relevant—*i.e.*, its purpose at the time Indian land is alienated.

In this case, as the majority acknowledges, see *ante*, at 2–3, Congress' purpose was simply to build a dam. Congress also provided that the taken area should be open to non-Indians for "recreational purposes." See *ante*, at 9. But these uses of the land are perfectly consistent with continued tribal authority to regulate hunting and fishing by non-Indians. To say that non-Indians may hunt and fish in the taken area is not to say that they may do so free of tribal regulation any more than it is to say that they may do so free of state or federal regulation. Even if the Tribe lacks the power to exclude, it may sanction with fines and other civil penalties those

who violate its regulations.

Apparently the majority also believes that tribal authority to regulate hunting and fishing is inconsistent with the fact that Congress has given the Army Corps of Engineers authority to promulgate regulations for use of the area by the general public. See *ante*, at 11, 12, n. 13. I see no inconsistency. The Corps in fact has decided not to promulgate its own hunting and fishing regulations and instead has provided that "[a]ll Federal, state and local laws governing [hunting, fishing, and trapping] apply on project lands and waters." 36 CFR §327.8 (1992); see Tr. of Oral Arg. 50. This regulation clearly envisions a system of *concurrent* jurisdiction over hunting and fishing in the taken area. The majority offers no explanation why concurrent jurisdiction suddenly becomes untenable when the local authority is an Indian tribe. To the extent that such a system proves unworkable, the regulations themselves provide that tribal rights prevail, for part 327 applies to "lands and waters which are subject to treaties and Federal laws and regulations concerning the rights of Indian Nations" only to the extent that part 327 is "not inconsistent with such treaties and Federal laws and regulations." §327.1(f).

In its search for a statement from Congress abrogating the Tribe's right to regulate non-Indian hunting and fishing in the taken area, the majority turns to a provision in the Cheyenne River Act that the compensation paid for the taken area "`shall be in final and complete settlement of all claims, rights, and demands' of the tribe." *Ante*, at 10, quoting Pub. L. 776, §II, 68 Stat. 1191. But this provision simply makes clear that Congress intended no further compensation for the rights it took from the Tribe. It does not address the question of *which* rights Congress intended to take or, more specifically, whether Congress intended to take the Tribe's right to regulate hunting and fishing by non-Indians. The

majority also relies on the fact that §X of the Act expressly reserved to the Tribe the right to hunt and fish but not the right to regulate hunting and fishing. See *ante*, at 10. To imply an intent to abrogate Indian rights from such congressional silence once again ignores the principles that "Congress' intention to abrogate Indian treaty rights be clear and plain," *Dion*, 476 U. S., at 738, and that "`statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *County of Yakima*, 502 U. S., at ___, quoting *Montana* v. *Blackfeet Tribe*, 471 U. S. 759, 766 (1985). Congress' failure to address the subject of the Tribe's regulatory authority over hunting and fishing means that the Tribe's authority survives and not the reverse.[3]

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[3]The majority's assertion that this Court's decision in *United States* v. *Dion*, 476 U. S. 734 (1986), supports its conclusion here, see *ante*, at 13, is difficult to fathom. In *Dion*, this Court found that an exemption in the Eagle Protection Act permitting the taking of eagles for religious purposes was "difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians." *Id.*, at 740. The Court correctly notes that §X of the Cheyenne River Act and §4 of the Flood Control Act cannot be understood except as indications that Congress intended to divest the Tribe of its right to exclusive use of the taken area. See *ante*, at 13. It does not follow, however, that Congress intended to divest the Tribe of its right to regulate the hunting and fishing of non-Indians in the taken area. As already noted, continued tribal authority over hunting and fishing is consistent with public access. And it certainly does not follow from *Dion*, that "[w]hen Congress reserves limited rights to a tribe or its members, the very presence of such a limited reservation of rights suggests that the Indians

It is some small consolation that the Court's decision permits the Federal Government to remedy this situation with a more explicit regulation authorizing the Tribe to regulate hunting and fishing in the taken area. See *ante*, at 11. I regret, however, that the Court's decision makes such action necessary. I dissent.

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would otherwise be treated like the public at large." *Ante*, at 13–14. Indeed, *Dion* stands for the directly opposite presumption that implicit abrogation of treaty rights is disfavored and that "clear evidence" is required "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." 476 U. S., at 740.