

## THE EXTENT OF INDIAN REGULATORY AUTHORITY OVER NON-INDIANS: *SOUTH DAKOTA V. BOURLAND*

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### INTRODUCTION

Prior to the formation of the political entity we know as the United States, the aboriginal Indian tribes inhabiting this continent were considered to be "self-governing, sovereign, political communities."<sup>1</sup> When the colonies formed a union of states, the Indian tribes ceded some of their land to the new country and came under the protection of the United States, but the tribes survived as distinct entities.<sup>2</sup> As "domestic dependent nations," the tribes became unique aggregations in our country, possessing some of their original sovereign powers, but nonetheless subordinate to the Federal Government.<sup>3</sup> Much of Indian law is concerned with defining what attributes of Indian sovereignty have survived following the creation of the United States. A particularly troublesome area of Indian law has been resolving the issue of when Indian tribes may exercise regulatory authority over residents of Indian reservations who are not members of the tribe.

Although Congress has plenary power over the Indian tribes and could divest them of all sovereign authority, it has not done so in all respects.<sup>4</sup> It is generally accepted that Indian tribes retain whatever attributes of inherent sovereign authority previously enjoyed by them that were not explicitly divested by Congress or that were not neces-

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1. See *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 451 (1989) (Blackmun, J., concurring).

2. *Id.* This was not necessarily voluntary on the part of all Indian tribes. Many treaties signed by the Indians were the result of conquest of the tribes by federal military forces. *Williams v. Lee*, 358 U.S. 217, 218 (1959). Through treaties, these tribes promised to cease warring against white persons and received in exchange federal aid, protection, and land grants. *Id.*

3. *Brendale*, 492 U.S. at 451 (Blackmun, J., concurring); *Montana v. United States*, 450 U.S. 544, 563 (1981); *Buster v. Wright*, 135 F. 947, 950-51 (8th Cir. 1905).

4. *Rice v. Rehner*, 463 U.S. 713, 719 (1983) (stating that Congress has plenary power over Indian tribes and could divest all tribal powers if it wanted).

sarily divested by implication because of the dependent status of the tribes.<sup>5</sup> Those aspects of sovereignty that are impliedly divested are generally categorized as "external relations"—those relations that an Indian tribe would conduct with, for example, a foreign nation.<sup>6</sup> Those aspects of the Indian tribes' sovereignty that were retained by the tribes are categorized as "internal relations"—relations between a tribe and its members, for example.<sup>7</sup>

Early on, it was assumed that "internal relations" had a territorial aspect to it, including all activities that occurred within the boundaries of an Indian tribe's reservation, whether those activities concerned members of the tribe, non-Indians, or Indians who were not members of the tribe.<sup>8</sup> However, in 1981 the United States Supreme Court decided *Montana v. United States*,<sup>9</sup> which seemingly undermined this assumption by holding that activities of individuals who were not members of the tribe and which occurred within the reservation but on property not owned by the tribe constituted "external relations."<sup>10</sup> Thus, the Court established a general rule that the tribe has no inherent sovereign power over activities of non-Indians on non-Indian fee lands.<sup>11</sup> The Court in *Montana* also held that a tribe's treaty right to exclusive use and occupation of its reservation could be abrogated by the somewhat involuntary alienation of tribal lands under federal allotment acts.<sup>12</sup>

For eight years following the *Montana* decision, the Supreme Court did not revisit the holding of that case. At least one case was decided by the Supreme Court during that intervening period that implicated the analysis set forth in the *Montana* decision, yet the court did not follow *Montana*.<sup>13</sup> Finally, in 1989 the Court was again squarely

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5. *United States v. Wheeler*, 435 U.S. 313, 326 (1978).

6. *Id.*

7. *Id.*

8. *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 151 (1980) (stating that "[t]here is a significant geographical component to tribal sovereignty"); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (stating that the fact that a merchant was non-Indian was irrelevant to the inquiry of whether a tribe could assert civil jurisdiction over him because the merchant was within the tribe's reservation and the debt the merchant sought to collect arose on the reservation).

9. 450 U.S. 544 (1981).

10. *Montana*, 450 U.S. at 564.

11. *Id.* at 564-65.

12. *Id.* at 558-61, 559 n.9.

13. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330 (1983) (holding that *Montana* did not apply to the issue of whether an Indian tribe or the State of New Mexico had the authority to enforce hunting and fishing regulations on the tribe's reservation where at least a small portion of the reservation was owned by nonmembers of the tribe).

faced with an issue implicating the *Montana* analysis in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*.<sup>14</sup>

In *Brendale*, a deeply divided Court disagreed on how to interpret its decision in *Montana* and whether the *Montana* decision should be followed or viewed as an aberration in the law. Only four Justices faithfully applied the *Montana* analysis.<sup>15</sup> Three Justices advocated the pre-*Montana* analysis and the remaining two Justices proffered a new method of analyzing such cases.<sup>16</sup> For four more years following *Brendale*, the issue of tribal regulatory authority over non-Indians continued in turmoil.

In 1993, the Supreme Court in *South Dakota v. Bourland*<sup>17</sup> addressed the issue again, and this time a seven-Justice majority championed the Court's decision in *Montana*, although the *Montana* analysis did not escape all battle scars.<sup>18</sup> The Court's decision in *Bourland* resolved some questions regarding Indian sovereignty and treaty rights over alienated land, but also created other questions.<sup>19</sup> The unanswered questions as well as the policy implications of the *Bourland* decision are the subject of this Article.

## CASES PRIOR TO *MONTANA v. UNITED STATES*

### A. *BUSTER v. WRIGHT*

The United States Court of Appeals for the Eighth Circuit decided *Buster v. Wright*<sup>20</sup> in 1905. Although the case exemplified the early approach to Indian law, it is still cited with approval in recent decisions by the United States Supreme Court.<sup>21</sup> The issue in *Buster v. Wright* was whether the Creek Indian Nation ("Nation") could enforce a tribal business permit tax against merchants living in an incorporated township within the Nation's reservation.<sup>22</sup> The Nation

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14. 492 U.S. 408 (1989).

15. See *Brendale*, 492 U.S. at 414-32 (White, J., concurring). Justice White was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy.

16. Justice Blackmun, joined by Justices Brennan and Marshall, advocated following the pre-*Montana* case law. *Brendale*, 492 U.S. at 448-68 (Blackmun, J., concurring). Justice Stevens, joined by Justice O'Connor, proposed a new analysis, although it was not acknowledged as such. *Id.* at 433-48 (Stevens, J., concurring).

17. 113 S. Ct. 2309 (1993).

18. *South Dakota v. Bourland*, 113 S. Ct. 2309, 2312-21 (1993).

19. See *infra* notes 312-417 and accompanying text.

20. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

21. See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143-44 (1982); *Montana v. United States*, 450 U.S. 544, 565-66 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980).

22. *Buster v. Wright*, 135 F. 947, 948 (8th Cir. (1905), *appeal dismissed*, 203 U.S. 599 (1906). Initially, federal Indian policy allowed tribes to hold reservation lands communally, although a few early treaties provided for the allotment of tribal reservation lands to individual Indian families. See FELIX COHEN, HANDBOOK OF FEDERAL INDIAN

threatened to enforce its tax by closing down the businesses of merchants who did not pay the tax and by reporting the merchants for

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LAW 613 (1982) [hereinafter COHEN]. When a treaty reserved a defined area of land to a tribe, the tribe's rights to the land were usually defined as the right to exclusive use and occupation of the land, while fee title to the land remained in the United States as trustee for the tribe. 41 Am. Jur. 2d *Indians* §§ 23-25 (1968). Such lands are known as "trust lands." Whether a tribe holds trust land or whether the tribe owns land in fee, a tribe cannot convey its land without the consent of the federal government. 41 AM. JUR. 2D *Indians* §§ 23, 40 (1968). While property is in trust status, it cannot be alienated without the federal government's permission (usually granted through the Secretary of the Interior), it cannot be reached by the creditors of the beneficiary unless pursuant to a mortgage that the government has pre-approved, and it is not subject to state or local taxation. See 25 U.S.C. §§ 464, 465, 483a.

Beginning in 1854, the federal government began encouraging the Indian tribes with whom the government executed treaties to agree to the allotment of reservation lands to individual Indian families as a term of the treaty. COHEN, *supra* note 22, at 613. In 1887, this federal policy changed from one allowing allotment based on the tribes' consent to a mandatory policy of allotment. See *id.* (citing General Allotment Act of 1887, chapter 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354, 381)).

Under the General Allotment Acts and similar subsequent acts affecting individual tribes, the reservation lands of most tribes were either allotted to individual Indian families or sold outright to non-Indian purchasers as "surplus" reservation lands. COHEN, *supra* note 22, at 613-14. The land which was allotted to individual Indians was usually subject to a restraint on alienation for a period of 25 years, after which time the government issued the Indian a "fee patent" and the Indian could sell his land to whomever he wished. *Id.* at 618-20. See also BLACK'S LAW DICTIONARY 1356 (5th ed. 1983) (defining "trust allotments" as "[a]llotments to Indians, in which a certificate or trust patent is issued declaring that the United States will hold the land for a designated period in trust for the allottee"); 41 AM. JUR. 2D *Indians* § 33 (1968) (stating that Indian allottees are issued patents "whereby the Federal Government holds the land in trust for 25 years"). Land sold by such a patent-holder became known as "fee-patented" property. Although such fee-patented property could be owned by non-Indians, it was still within the reservation boundaries (i.e. the conveyance of the property did not usually disestablish the reservation boundaries to exclude the parcel). See *Solem v. Bartlett*, 465 U.S. 463, 481 (1984) (holding that the sale of allotted and surplus lands on the Cheyenne River Sioux Reservation did not affect the reservation boundaries as originally established). While the restriction on alienation was still in effect, the proper term for the parcel was an "allotment" or a "trust allotment." COHEN, *supra* note 22, at 615. The restriction on alienation applicable for some allotments has been extended or even continued indefinitely. 25 U.S.C. § 462.

In 1934, Congress passed the Indian Reorganization Act, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79), which halted the large-scale policy of allotment as to tribes who consented to the act. See 25 U.S.C. § 461. However, the act did not reverse the effects of allotments that had been made up to that point.

The court in *Buster* stated that the property on which the merchants' businesses were located was allotted land, but the opinion also states that the merchants expressed an intent to buy the property, suggesting that they did not yet own it. See *Buster*, 135 F. at 948. Possibly the merchants had had agreements with Indian allottees to purchase the property upon expiration of a restriction on alienation, but the restriction on alienation of the parcels was still in effect at the time the lawsuit was brought.

deportation from the reservation.<sup>23</sup> The tax was assessed only against nonmembers of the Nation.<sup>24</sup>

The merchants filed an action for injunctive relief before the federal territorial court for Indian Territory, which refused such relief.<sup>25</sup> The decision of the territorial trial court was upheld on appeal to the United States Court of Appeals for the Indian Territory.<sup>26</sup> The merchants then appealed to the Eighth Circuit, which affirmed the territorial courts' decisions.<sup>27</sup>

The merchants stated that the Nation had agreed to allow nonmembers to establish incorporated town sites on the reservation and to purchase land within those towns by an agreement ratified on March 1, 1901.<sup>28</sup> The merchants then argued that, by virtue of the sale of the land, the Nation had lost the power to tax business activities of nonmembers on alienated land.<sup>29</sup> The merchants also relied upon federal legislation that prohibited the deportation from Indian territory of any person who had lawfully purchased any land in a designated town site on an Indian reservation.<sup>30</sup>

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23. *Buster*, 135 F. at 948. Treaties executed with Indian tribes typically granted to the tribe the right to exclusive use and occupation of reservation lands and the right to exclude all unwanted non-tribal members, except certain government agents. *See, e.g.*, *South Dakota v. Bourland*, 113 S. Ct. 2309, 2316 (1993) (examining rights guaranteed to the Cheyenne River Sioux Tribe in the Fort Laramie Treaty); *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 414-15, 415 n.1 (1989) (examining rights guaranteed to the Yakima Nation in the Treaty with the Yakimas); and *Montana v. United States*, 450 U.S. 544, 558 (1981) (examining rights conferred on the Crow Tribe by the 1868 Fort Laramie Treaty).

24. *Buster*, 135 F. at 948.

25. *Id.*

26. *Id.*

27. *Id.* at 959. Actually, there appears to have been two appeals from the territorial trial court to the territorial appellate court. *Id.* at 959. The first time the trial court dismissed the merchants' action, the appellate court reversed and remanded the case to the trial court. *Id.* On remand, the trial court again dismissed the action and this time the appellate court affirmed. *Id.* It was from the second opinion of the territorial appellate court that the merchants appealed to the Eighth Circuit. *Id.*

28. *Buster*, 135 F. at 950.

29. *Id.* The merchants relied on the Creek agreement ratified by the federal government on March 1, 1901. *Id.* In this agreement, the Creek Nation agreed to allow town sites:

to be laid out within the territorial limits of the Creek Nation, that the lots therein were to be appraised, that [nonmembers of the Nation] who occupied these lots were to be permitted to purchase [the lots] for one-half of their appraised value, that all lots in such town sites might be sold to purchasers without regard to [tribal membership], and that upon the payment of the purchase price each vendee should receive a deed from the principal chief of the nation, approved by the Secretary of the Interior.

*Id.* at 951.

30. *Buster*, 135 F. at 950 (citing to the provisions of the Act of May 27, 1902, Ch. 676, 31 Stat. 861, 866, §§ 10-16).

Initially, the Court noted that the Nation's power to regulate the conduct of business within its territory did not stem from treaty or congressional enactment, but was an attribute of the Nation's inherent sovereignty.<sup>31</sup> The Court also recognized that, although Congress has plenary power over the Indian tribes and could divest them of all governmental powers, nonetheless the Indian tribes retain all aspects of sovereignty that Congress has not taken away and that the tribes themselves have not limited by contract.<sup>32</sup>

The court rejected the merchants' argument that the Nation's sale of the land to the merchants divested the Nation of taxing power over the merchants.<sup>33</sup> The court stated that "the jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it, or by the existence of municipalities therein endowed with the power to collect taxes for city purposes, and to enact and enforce municipal ordinances."<sup>34</sup> Analogizing the tribe's authority to that of the federal and state governments, the court stated that no "sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein . . . nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners."<sup>35</sup> The court characterized the land owned by nonmembers of the Nation as "isolated lots and tracts of land" within the reservation.<sup>36</sup>

The court also drew support for its conclusion that the Nation had inherent sovereign taxing authority over the merchants from a provision in the 1901 land transfer agreement, which stated that the Nation's tribal government would continue until March 4, 1906, subject to congressional legislation.<sup>37</sup> The court interpreted this as an express assurance that the tribal government would continue to exercise the full gamut of governmental powers over all persons in its territory that it had exercised up to the time of the land transfer.<sup>38</sup>

The court implied that the merchants had been aware of this state of affairs before the land transfer agreement was concluded with the Nation in 1901.<sup>39</sup> The court relied for this implication on an opinion of the Attorney General interpreting the Act of June 28, 1898 ("1898 Act").<sup>40</sup> The 1898 Act provided generally for the establishment of

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31. *Id.*

32. *Id.*

33. *Id.* at 951-52.

34. *Id.*

35. *Id.* at 952.

36. *Id.*

37. *Id.* at 953.

38. *Id.*

39. *See id.* at 953-54.

40. *Id.* at 953 (citing Act of June 28, 1898, chapter 517, 30 Stat. 495, 500, 516).

town sites within Indian territory and the purchase of lots within those sites by non-Indians.<sup>41</sup> The Attorney General's opinion stated that purchasers of these lots would nonetheless remain subject to Indian permit taxes.<sup>42</sup>

As further evidence that the merchants knew they would be subject to the tribal permit taxes prior to buying the reservation land, the court pointed out that the subject of tribal taxation was specifically contemplated by the parties in negotiating the 1901 Creek Nation Agreement ("1901 Agreement").<sup>43</sup> The court noted that the 1901 Agreement provided specific exemptions from tribal taxes for agricultural land and for cattle grazing, but not for mercantile businesses.<sup>44</sup> Thus, the court stated that the intent of the parties as evidenced by the 1901 Agreement was that mercantile businesses would be subject to tribal taxation.<sup>45</sup>

The analysis of the *Buster* decision reveals the notion that a tribe's governance of internal affairs was thought to be geographically defined—an Indian tribe's retained inherent sovereignty over internal affairs was coextensive with its territorial limits.<sup>46</sup> Although this notion has come into question in recent years, *Buster* continues to be cited with approval by the Supreme Court.<sup>47</sup>

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41. *Id.*

42. *Id.*

43. *Id.* at 954.

44. *Id.*

45. *Id.* Although the court held that the Nation could validly impose its business permit taxes on the merchants, the court recognized that the Nation could enforce the tax by closing the businesses, but not by ejecting the merchants from its territory. *Id.* (citing Act of May 17, 1902, chapter 888, 32 Stat. 259). Even so, the court did not reverse the territorial trial court's refusal of injunctive relief concerning the Nation's threatened ejection of the merchants because, at the time the trial court acted, the federal legislation prohibiting such ejection had not yet been enacted. *Id.* at 959 (noting that the trial court dismissed the merchants' bill on August 27, 1901, and the federal statute prohibiting ejection was not enacted until 1902).

46. *Buster*, 135 F. at 951. *Cf.* *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams*, the Court decided that a state court could not entertain an action by a non-Indian merchant to collect from two Indians on a debt that arose on the reservation. *Id.* at 217, 223. The Court rested this conclusion on both the lack of jurisdiction in the state court and an affirmative finding of jurisdiction in tribal court. *Id.* at 220-23. In discussing the tribal court's jurisdiction over the merchant, the Court stated that it was irrelevant that the merchant was non-Indian in view of the fact that the merchant was on the reservation and the debt arose on the reservation. *Id.* at 223. It is unclear from the facts recited by the Court whether the merchant was conducting business on fee land or tribal land. *See id.* at 217.

47. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 143-44 (1982); *Montana v. United States*, 450 U.S. 544, 565-66 (1981); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 153 (1980).

B. *OLIPHANT V. SUQUAMISH INDIAN TRIBE*

Some of the first cases to challenge the geographically defined notion of "internal affairs" involved the subject of whether Indian tribes could assert criminal jurisdiction and if so, the scope of such jurisdiction. In *Oliphant v. Suquamish Indian Tribe*,<sup>48</sup> the issue facing the Court was whether the Suquamish Indian Tribe could assert criminal jurisdiction over non-Indians.<sup>49</sup>

The tribe argued that it had the authority to assert criminal jurisdiction over non-Indians as an attribute of its retained inherent sovereignty.<sup>50</sup> Although the tribe expressly rejected its treaty with the United States and affirmative congressional delegations of power as the sources of its criminal jurisdiction, the Court nevertheless engaged in an extended discussion of treaty provisions with other tribes, an 1878 district court opinion on the subject, congressional enactments, and the treaty with the Suquamish.<sup>51</sup> The Court justified the broad scope of its examination by stating that treaties and legislation "form the backdrop for the intricate web of judicially made Indian law."<sup>52</sup> The Court drew upon the history of Indian treaties and legislation in concluding that Congress, lower federal courts, and the executive branch have all presumed that tribes do not have the authority to exercise criminal jurisdiction over non-Indians.<sup>53</sup> The Court said that this shared presumption was not determinative, but nevertheless "carries considerable weight."<sup>54</sup>

However, the Court went on to observe that even putting aside congressional policy and the specific provisions of the tribe's treaty, the tribe's criminal jurisdiction over non-Indians was nonetheless divested by implication as a result of the tribe's dependent status.<sup>55</sup> The Court explained as follows:

Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress. Indian tribes do retain elements of "quasi-sovereign" authority after ceding their lands to the United States and announcing their dependence on the Federal Government. But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly termi-

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48. 435 U.S. 191 (1978).

49. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

50. *Id.* at 196.

51. *Id.* at 200.

52. *Id.* at 206.

53. *Id.*

54. *Id.*

55. *Id.* at 208-12.

nated by Congress and those powers "inconsistent with their status."<sup>56</sup>

The Court implied that the tribe, as a quasi-sovereign entity, had an interest in protecting its territory within the external political boundaries of the reservation, just as would any other sovereign nation, but that the United States' interest in protecting its citizens from "unwarranted intrusions on their personal liberty" was inconsistent with a tribe's assertion of criminal jurisdiction over non-Indians.<sup>57</sup> The suggestion that a tribe's assertion of criminal jurisdiction over non-Indians would be an "unwarranted intrusion" on the personal liberties of non-Indians was based on the facts that: (1) the Bill of Rights does not apply to tribal courts; (2) the Indian Civil Rights Act does apply, but the protections it affords are not the same as in the Bill of Rights; and (3) non-Indians are not part of the Indian culture, do not share the same norms and codes of conduct, and would not be tried by their peers.<sup>58</sup>

Thus, the *Oliphant* Court held that one aspect of Indian sovereignty involving activities within a tribe's territory was impliedly divested.<sup>59</sup> This undermined the idea that "internal relations" were coextensive with a tribe's territorial boundaries.

### C. *UNITED STATES V. WHEELER*

In *United States v. Wheeler*,<sup>60</sup> the Court again was called upon to determine an issue relating to Indian criminal jurisdiction. Anthony R. Wheeler had pleaded guilty in tribal court to the misdemeanor offense of contributing to the delinquency of a minor and was subsequently indicted in federal court for rape arising out of the same acts.<sup>61</sup> Wheeler moved for dismissal of the indictment on the basis

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56. *Id.* at 208 (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1009 (9th Cir. 1976) (emphasis in original)).

57. *Id.* at 209-10.

58. *Id.* at 210-11 (quoting *Ex Parte Crow Dog*, 109 U.S. 556, 571 (1883) (describing reasons why it would be unfair for federal criminal jurisdiction to apply to Indians)).

59. *Oliphant*, 435 U.S. at 212. Justice Marshall filed a dissenting opinion in which then-Chief Justice Burger joined. The dissent argued that the tribe's exercise of criminal jurisdiction over non-Indians who committed crimes on the reservation was not inconsistent with the dependent status of Indian tribes. *Id.* at 212 (Marshall, J., dissenting). Accordingly, the dissent stated that such sovereign authority could only be abrogated by an explicit, affirmative act of Congress. *Id.*

60. 435 U.S. 313 (1978).

61. *United States v. Wheeler*, 435 U.S. 313, 314-16 (1978). The federal government had authority to prosecute Wheeler pursuant to the Major Crimes Act, 18 U.S.C. §§ 1153. Under this act, federal criminal jurisdiction was extended to encompass crimes such as murder, manslaughter, kidnapping, and rape when committed by one Indian against another Indian within Indian country. See 18 U.S.C. § 1153. Congress enacted the Major Crimes Act in response to the decision in *Ex Parte Crow Dog*, 109 U.S. 556 (1883). In *Crow Dog*, the Supreme Court held that an Indian who had killed

that the tribal offense was a lesser included offense of the federal charges and that the Federal Government and the tribal government constituted the same sovereign.<sup>62</sup> The lower courts found that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution was violated because the federal prosecution constituted a second prosecution by the same sovereign for the same crime.<sup>63</sup> The United States Court of Appeals for the Ninth Circuit held that Indian tribes constitute the same sovereign as the Federal Government because the tribes derived their criminal jurisdiction from the Federal Government.<sup>64</sup>

In *Wheeler*, the Supreme Court stated that the tribe's authority to prosecute Wheeler, an Indian member of the tribe, for criminal acts committed on the tribe's reservation was beyond dispute.<sup>65</sup> The only issue for the Court was the source of this tribal power: If the source of the tribal power was the Federal Government, then the Double Jeopardy Clause would be violated by the federal prosecution, but if the tribe's criminal jurisdiction emanated from an independent source, then the Double Jeopardy Clause would not be violated because there would not be an identity of the two sovereigns.<sup>66</sup>

The Court recognized that, prior to the Indian tribes becoming dependent on the United States, the tribes had enjoyed the inherent sovereign power to exercise criminal jurisdiction over their own members.<sup>67</sup> The Court then reiterated the general rule that Indian tribes retain the original aspects of their sovereignty that Congress has not taken away through legislative acts or treaty provisions or that were not divested "by implication as a necessary result of their dependent status."<sup>68</sup> Examining treaties with the tribe and legislation affecting the tribe, the Court found no explicit divestiture of the tribe's criminal jurisdiction.<sup>69</sup> The question then became whether the tribe's authority was divested by necessary implication of its dependent status.

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another Indian on the reservation was subject only to tribal criminal jurisdiction to the exclusion of federal criminal jurisdiction. *Id.* at 568, 572. The case was something of a sensation because the tribal court had imposed only the punishment of requiring Crow Dog to support the family members of the deceased Indian. See COHEN, *supra supra* note 22, at 236. Tribal criminal jurisdiction over Indian tribal members is presently limited to the imposition of a maximum of one year imprisonment and a \$5000 fine. See 25 U.S.C. § 1302(7).

62. *Wheeler*, 435 U.S. at 316.

63. *Id.*

64. *Id.* at 319.

65. *Id.* at 322.

66. *Id.* at 320-22.

67. *Id.* at 322-23.

68. *Id.* at 323.

69. *Id.* at 323-25.

The Court stated that "[t]he areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and *nonmembers of the tribe*."<sup>70</sup> The Court listed several examples of these types of areas, such as direct relations with foreign countries, alienation of Indian lands to non-Indians, and the assertion of criminal jurisdiction over "nonmembers."<sup>71</sup> The Court explained that:

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among *members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.<sup>72</sup>

The Court concluded that the source of tribal criminal jurisdiction over its own members was the tribe's inherent sovereignty, not a delegation from the Federal Government and that this power had not been impliedly divested.<sup>73</sup> Therefore, a federal prosecution following a tribal prosecution for the same offense did not violate the Double Jeopardy Clause.<sup>74</sup>

In announcing its decision in *Wheeler*, the Court seemed to solidify the dichotomy emerging from *Oliphant* that relations between a tribe and "nonmembers" could constitute the type of "external relations" over which a tribe's inherent sovereign powers could be impliedly divested. Although *Wheeler* was a unanimous decision, the language of that opinion was to become the subject of bitter dispute in later cases.

#### D. *WASHINGTON V. CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION*

A third case decided one year before *Montana* is also of interest. In *Washington v. Confederated Tribes of the Colville Indian Reservation*,<sup>75</sup> one issue decided by the Court was whether the Confederated Tribes of the Colville Indian Reservation could enforce a tribal tax on cigarette purchases made by nonmembers of the tribe on the reserva-

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70. *Id.* at 326 (emphasis supplied).

71. *Id.*

72. *Id.* (emphasis supplied).

73. *Id.* at 328-29.

74. *Id.* at 329-30.

75. 447 U.S. 134 (1980).

tion.<sup>76</sup> The Court stated that if the purchases occurred on trust lands and significantly involved the tribe or tribal members, then the tribe's sovereign authority to tax survived unless divested explicitly by statute or treaty or by "necessary implication of [the tribe's] dependent status."<sup>77</sup>

The Court then found that no federal law explicitly divested the tribe of its taxing power.<sup>78</sup> The Court also found that the tribe's taxing power was not implicitly divested because the assertion of tribal taxation would not undermine any overriding federal interest.<sup>79</sup> Thus, although the dichotomy between members of a tribe and nonmembers was emerging in the area of tribal criminal jurisdiction, the territorial notion of a tribe's sovereignty in internal matters appeared to prevail when the subject was tribal regulatory jurisdiction.

### *MONTANA v. UNITED STATES*

In *Montana v. United States*,<sup>80</sup> the United States Supreme Court was presented with the issue of whether the Crow Tribe could regulate or prohibit hunting and fishing by nonmembers of the tribe on land that was located within the tribe's reservation, but was owned in fee either privately or by the State of Montana.<sup>81</sup> The Court decided that the tribe could not enforce such regulations or prohibitions.<sup>82</sup> Two possible sources of the tribe's asserted regulatory authority were considered and rejected by the Court: the tribe's treaty rights and its retained inherent sovereignty.<sup>83</sup>

#### A. TRIBAL TREATY RIGHTS

In 1851, intertribal warfare between several Indian tribes, including the Crow Tribe, led to the negotiation of the First Treaty of Fort Laramie, in which the tribe agreed to certain boundaries that defined the Crow Tribe's territory.<sup>84</sup> This treaty provided that, by entering into the agreement, the tribe did not "surrender the privilege of hunt-

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76. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

77. *Id.* at 152 (citing *Wheeler*, 435 U.S. at 313).

78. *Id.* at 153-54.

79. *Id.* at 154.

80. 450 U.S. 544 (1981).

81. *Montana v. United States*, 950 U.S. 544, 548-49, 557 (1981). Actually, two issues were presented to the Court. The other issue was whether the State of Montana, the tribe, or the United States had title to the bed of the Big Horn River, which ran through the reservation. *Id.* at 550. The Court resolved this issue in favor of the State of Montana. *Id.* 556-57.

82. *Montana*, 450 U.S. at 557.

83. *Id.*

84. *Id.* at 547-48. The treaty was apparently negotiated with several tribes. *Id.*

ing, fishing, or passing over" any of the lands that had been the subject of dispute between the tribes.<sup>85</sup>

In 1868, the Crow Tribe entered into the Second Treaty of Fort Laramie ("Second Treaty"), which reserved eight million acres of land to the tribe.<sup>86</sup> This treaty granted the Crow Tribe the exclusive right to use and occupy the reservation and provided that non-Indians would be prohibited from passing over, settling upon, or residing in the reservation.<sup>87</sup>

Although the reservation established by the Second Treaty was originally owned by the United States in trust for the tribe, this changed markedly with the passage of the General Allotment Act of 1887 and the Crow Allotment Act of 1920 ("Allotment Acts").<sup>88</sup> Under these two acts, Congress authorized "the issuance of patents in fee to individual Indian allottees within the reservation."<sup>89</sup> Twenty-five years after the issuance of the patent, an Indian allottee could sell the patented land in fee to whomever he chose.<sup>90</sup> Largely due to the sale of fee-patented lands under the Allotment Acts, roughly thirty percent of the land within the Crow Tribe reservation came to be owned in fee by non-Indians.<sup>91</sup>

The Court held that the Second Treaty conferred upon the Crow Tribe the authority to prohibit or regulate hunting and fishing by non-members of the tribe, but only on such land as the tribe enjoyed the right of "*absolute and undisturbed use and occupation.*"<sup>92</sup> Of course, because the treaty originally established a right of exclusive occupation over the entire reservation, the right to regulate and prohibit hunting and fishing was originally coextensive with the reservation boundaries.

However, the Court stated that the tribe's rights under the Second Treaty had to be read in light of the subsequent acts of Congress, specifically the Allotment Acts.<sup>93</sup> The Court concluded that the Allotment Acts had reduced the quantity of land within the reservation over which the tribe enjoyed the right to exclusive occupation.<sup>94</sup>

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85. *Id.* at 548.

86. *Id.*

87. *Id.* The treaty made an exception for certain federal agents. *Id.*

88. *Id.* (citing the General Allotment Act, chapter 119, 24 Stat. 388, and the Crow Allotment Act, 41 Stat. 751).

89. *Id.*

90. *Id.*

91. *Id.* Of this 30%, 28% was held in fee by non-Indians, 2% was held in fee by Montana, and the United States held less than 1%. *Id.*

92. *Montana*, 450 U.S. at 558-59 (quoting 1868 Fort Laramie Treaty, Art. II, 15 Stat. 649) (emphasis in original).

93. *Id.* at 559, 561.

94. *Id.* at 559, 559 n.9, 561 (citing *Puyallup Tribe v. Washington Game Dep't*, 433 U.S. 165, 174 (1977)).

Given that the purpose of the Allotment Acts was the destruction of Indian tribes as separate sovereigns and the assimilation of the tribes into the non-Indian community, the Court found that the purpose of the Allotment Acts was incompatible with the preservation of tribal authority over hunting and fishing by nonmembers of the tribe on fee-patent land.<sup>95</sup> Thus, the Court concluded that the Allotment Acts and the subsequent alienation of Indian lands abrogated the treaty right which the tribe had initially enjoyed to prohibit and regulate hunting and fishing by nonmembers on the reservation.<sup>96</sup>

The Court noted that the purpose of the Allotment Acts had been repudiated by the subsequent Indian Reorganization Act of 1934.<sup>97</sup> However, the Court stated that the repudiation of the Allotment Acts by subsequent legislation was irrelevant and that the salient inquiry was what effect alienation under the Allotment Acts had had on the tribe's treaty right to exclusive use and occupation of land within the reservation.<sup>98</sup> Thus, the 1934 legislation did not change the Court's conclusion.

#### B. INHERENT SOVEREIGNTY OF THE TRIBE

The Court considered a second source of the tribe's asserted authority to prohibit and regulate nonmember hunting and fishing on fee-patented lands: the tribe's retained inherent sovereignty.<sup>99</sup> The Court cited the discussion in *Wheeler* that traced the development of Indian tribes from sovereign political bodies to their present status as domestic entities dependent within the territorial jurisdiction of the Federal Government.<sup>100</sup> This history resulted in Indian tribes being unique entities that have retained some attributes of sovereignty and lost others.<sup>101</sup>

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95. *Id.* at 559 n.9.

96. *Id.* at 561. The Court also rejected the Ninth Circuit's view that 18 U.S.C. § 1165 augmented the tribe's regulatory authority over nonmembers on fee land. *Id.* at 561-62. Section 1165 provides that any person who hunts, traps, or fishes without permission or lawful authority on Indian trust lands, lands reserved by the United States for the use of Indians, or on land subject to a restraint on alienation in favor of the United States, can be fined. See 18 U.S.C. § 1165. The Court held that, rather than augmenting the tribe's power, section 1165 supported the Court's analysis that the tribe had no regulatory power because the statute limited criminal behavior to unauthorized acts on *tribal land*. *Montana*, 450 U.S. at 561-62. By excepting reservation fee lands from the statute, the Court believed Congress to be establishing the fact that non-Indians could hunt and fish as they pleased on lands held in fee by non-Indians. *Id.* at 562-63.

97. *Montana*, 450 U.S. at 559 n.9 (citing the Indian Reorganization Act, 48 Stat. 984 (codified at 25 U.S.C. § 461)).

98. *Id.*

99. *Id.* at 563-66.

100. *Id.* at 563-64 (quoting *United States v. Wheeler*, 435 U.S. 313, 323, 326 (1978)).

101. *Id.*

Generally, the Court noted that a tribe's inherent sovereignty is limited to those powers necessary to defend tribal self-government and to order internal tribal relations.<sup>102</sup> The Court stated that the exercise of tribal authority beyond what is necessary for self-government and ordering internal affairs can only stem from a congressional delegation, as the tribe's inherent sovereignty outside these areas is implicitly divested by reason of the tribe's dependent status.<sup>103</sup> Finally, relying on *Wheeler* and *Oliphant*, the Court concluded that an Indian tribe's inherent sovereignty does not usually encompass "activities of nonmembers of the tribe."<sup>104</sup>

In the absence of an express congressional delegation of tribal civil authority over nonmembers, the Court expressed two exceptions to the general rule under which a tribe might nonetheless exercise authority over nonmembers, even on non-Indian fee land.<sup>105</sup> First, the Court stated that Indian tribes retained inherent authority to tax, license, or otherwise regulate "nonmembers who enter [into] consensual relations with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."<sup>106</sup> Second, the Court stated that an Indian tribe "may" assert civil jurisdiction over "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."<sup>107</sup> These became known as the two "*Montana* exceptions."

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102. *Id.* at 564. The Court gave examples of retained inherent sovereignty as including the power to punish tribal members for crimes, the power to decide who should be members of the tribe, the power to establish rules of inheritance for tribal members, and the power to regulate tribal members' domestic relations. *Id.*

103. *Montana*, 450 U.S. at 564-65.

104. *Id.* at 564-66 (quoting *Wheeler*, 435 U.S. at 326 (stating that tribes have been implicitly divested of inherent authority over "relations between an Indian tribe and non-members of the tribe" and that internal relations constitute "only the relations among members of a tribe"); citing *Oliphant*, 435 U.S. at 209). The Court stated that hunting and fishing by nonmembers on fee-patented land "bears no clear relationship to tribal self-government or internal relations." *Id.*

105. *Montana*, 450 U.S. at 565-66.

106. *Id.* at 565-66 (citing *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152-54 (1980); *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), *appeal dismissed*, 203 U.S. 599-600 (1906)).

*Morris* involved the question of whether an Indian tribe could enforce a grazing permit tax on livestock which non-Indians were grazing on allotted trust lands. *Morris*, 194 U.S. at 384-85, 392-93. The Court held that the tribe could enforce the tax and could eject the livestock from the reservation if the tax was not paid. *Id.* at 393. The Court supported its conclusion by citing an Attorney General's opinion, the tribe's treaty, and the Act of June 28, 1868, 30 Stat. 495, ch. 517. *Id.* at 383-93.

107. *Montana*, 450 U.S. at 566. In support of this second exception, the Court cited the following cases: *Fisher v. District Court*, 424 U.S. 382, 383, 389 (1976) (stating that as between a state court and a tribal court, the tribal court had exclusive jurisdiction over an adoption proceeding in which all parties were tribal members and resided on

Based on the undisturbed findings made by the district court, the Supreme Court held that neither of the two exceptions were implicated by the facts of the case.<sup>108</sup> Thus, the Court concluded that the tribe had no inherent sovereign authority to regulate the hunting and fishing of nonmembers on fee-patented land within the reservation.<sup>109</sup> The dissenting and concurring Justices made no comment upon the Court's analysis of the tribe's treaty rights and inherent sovereignty rights.<sup>110</sup>

## CASES FOLLOWING *MONTANA v. UNITED STATES*

### A. *MERRION v. JICARILLA APACHE TRIBE*

In the twelve years following the Supreme Court's decision in *Montana v. United States*,<sup>111</sup> the validity of the holdings of that case became uncertain. In *Merrion v. Jicarilla Apache Tribe*,<sup>112</sup> the Jicarilla Apache Tribe had executed mineral leases to non-Indians pur-

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the tribe's reservation); *Williams*, 358 U.S. at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-29 (1906) (stating that plaintiff's complaint failed to state a basis for federal question jurisdiction where plaintiff owned land in fee on an Indian reservation and claimed exemption from taxes imposed by a political subdivision of the state); *Thomas v. Gray*, 169 U.S. 264, 273 (1898) (holding a county tax on cattle of nonmembers which were grazed on trust lands leased to them by tribal members did not impermissibly tax the Indians or the Indian land).

108. *Montana*, 450 U.S. at 566-67. Specifically, the Court stated that the non-Indian hunters and fishermen did not enter into agreements or contracts with the tribe, so the first circumstance was inapplicable. *Id.* at 566. The second circumstance was not implicated because the tribe did not argue that its economic or political security would be threatened if the tribe were not allowed to regulate hunting and fishing on fee-patented lands. *Id.* Furthermore, the Court noted that the district court expressly found that the tribe had "traditionally accommodated itself to the State's 'near exclusive' regulation of hunting and fishing on fee lands within the reservation." *Id.* (quoting *United States v. Montana*, 457 F. Supp. 599, 609-10 (D. Mont. 1978)). Finally, the Court noted that state regulations applicable to fee lands did not interfere with the tribe's regulation of trust lands. *Id.* (citing *Montana*, 457 F. Supp. at 609).

109. *Montana*, 450 U.S. at 563, 567.

110. Although three Justices dissented and one Justice filed a concurring opinion, none of these Justices attacked the majority's analysis of the tribe's treaty and sovereign rights. Justice Blackmun filed an opinion dissenting in part in which Justices Brennan and Marshall joined. *Id.* at 567-81 (Blackmun, J., dissenting). These three Justices disagreed with the majority's holding that the bed of the Big Horn River belonged to Montana, arguing that ownership of the river bed passed to the tribe through the 1868 treaty. *Id.* The dissenters expressed no opinion on the other holdings of the majority. *See id.*

Justice Stevens wrote an opinion concurring in the majority's judgment. *Id.* at 567-69 (Stevens, J., concurring). He wrote separately to clarify his interpretation of the law upon which the majority relied to reach its conclusion that Montana owned the river bed. *Id.* As with the dissenters, Justice Stevens expressed no opinion on the analysis of the majority with respect to the tribe's treaty and inherent sovereign rights. *See id.*

111. 455 U.S. 130 (1982).

112. 450 U.S. 544 (1981).

suant to which the lessees would develop petroleum resources on lands owned by the tribe.<sup>113</sup> Some time after these leases had been executed, the tribe promulgated a severance tax on oil and gas taken from tribally owned lands.<sup>114</sup> The lessees, nonmembers of the tribe, sought a permanent injunction in federal district court to enjoin the tribe from imposing the tax on them.<sup>115</sup>

The Court held that the tribe had inherent sovereign authority to impose the tax on the nonmember lessees.<sup>116</sup> The opinion painted the picture of tribal taxing authority with a broad brush, implying that the tribe's authority extended to all activities on all lands within the reservation boundaries.<sup>117</sup> The Court did not cite *Montana* in its opinion.

#### B. *NEW MEXICO V. MESCALERO APACHE TRIBE*

A decision following on the heels of *Merrion* added to the uncertainty of the continued validity of the *Montana* decision. In *New Mexico v. Mescalero Apache Tribe*,<sup>118</sup> the issue was whether state hunting and fishing regulations applied to the activities of nonmembers on the reservation of the Mescalero Apache Tribe.<sup>119</sup> In *Mescalero Apache Tribe*, the Court at least acknowledged the existence of the *Montana* decision, but held that *Montana* was inapplicable.<sup>120</sup> The Court distinguished the facts of the case before it from *Montana* by stating that *Montana* involved fee land held by nonmembers of the tribe, while the issue presented in *Mescalero Apache Tribe* involved land owned by or

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113. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 135 (1982).

114. *Id.* at 135-36.

115. *Id.* at 136.

116. *Id.* at 152.

117. *Id.* at 137-52. The Court stated at various points in the opinion that the power to tax is an essential attribute of tribal self-government and territorial control and that all three branches of the federal government have assumed that this is so. *Id.* at 140. The implied territorial basis of the tribe's taxing power is also evident in the Court's analogy to state powers, which the Court noted includes the right to impose severance taxes on mineral leases anywhere within state borders. *Id.* at 138.

Justice Stevens filed a dissenting opinion in which then Chief Justice Burger and then Justice Rehnquist joined. *Id.* at 159-90 (Stevens, J., dissenting) The dissent argued that the tribe's power to tax nonmembers was tied to its power to exclude the nonmembers from its territory and when the tribe lost the latter, it lost the former power as well. *Id.* The dissent cited *Montana* for the proposition that once a tribe has lost the power to exclude nonmembers, it also loses the power to pass legislation affecting nonmembers unless Congress expressly delegates that power to the tribe. *Id.* at 171-72. The dissent also voiced the opinion that limiting the power that tribes are allowed to assert over nonmembers is appropriate because nonmembers are typically not allowed to participate in tribal governance. *Id.* at 183.

118. 462 U.S. 324 (1983).

119. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330-31 (1983).

120. *Id.* at 330-31.

in trust for the tribe itself.<sup>121</sup> However, the facts recited by the Court reveal that some of the land involved in *Mescalero Apache Tribe* was not owned by the tribe.<sup>122</sup>

C. *UNITED STATES V. DION*

The facts of *United States v. Dion*<sup>123</sup> involved Dwight Dion, a member of the Yankton Sioux Tribe who was tried and convicted of violations of the Endangered Species Act for shooting four bald eagles on the reservation of the Yankton Sioux Tribe in South Dakota.<sup>124</sup> Dion had also been indicted for violation of the Bald Eagle Protection Act ("Eagle Protection Act") for shooting a golden eagle, but the district court had dismissed that charge before Dion's trial.<sup>125</sup> On appeal, the Supreme Court considered whether Dion could be subject to criminal penalties for killing bald and golden eagles when the treaty that the Yankton Sioux had signed with the Federal Government granted members of the tribe the exclusive right to hunt on the tribe's reservation lands.<sup>126</sup> The Government argued that the tribe's treaty hunting rights had been abrogated by Congress.<sup>127</sup>

The Court stated that before it would find that subsequent legislation had abrogated Indian treaty rights, congressional intent to that effect must be "clear and plain."<sup>128</sup> However, the Court observed that legislative intent to abrogate Indian treaty rights does not necessarily require an express statement to that effect if the evidence of legislative intent is otherwise sufficiently compelling as shown by the face of the statute, its legislative history, and other surrounding circumstances.<sup>129</sup> In the final analysis, the Court stated that what is necessary is evidence that Congress recognized a conflict between the

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121. *Id.*

122. *Id.* at 326. The tribe's reservation was comprised of over 460,000 acres, 193.85 of which were not owned by the tribe. *Id.* Of the 193.85 acres of land not owned by the tribe, 23.8 acres were privately owned. Ten acres were owned by a Catholic church and 160 acres were owned by an unspecified entity. *Id.* at 326 n.1, 326 n.2.

123. 476 U.S. 734 (1986).

124. *United States v. Dion*, 476 U.S. 734, 735 (1986) (citing the Endangered Species Act, 87 Stat. 884 (as amended 16 U.S.C. § 1531 *et seq.*)).

125. *Id.* at 735 (citing Bald Eagle Protection Act, 54 Stat. 250, 16 U.S.C. § 668 *et seq.*).

126. *Id.* at 735-37. The United States Court of Appeals for the Eighth Circuit had held that the treaty granted members of the Yankton Sioux Tribe the right to kill bald and golden eagles and that neither the Endangered Species Act nor the Eagle Protection Act had abrogated that treaty right. *Id.* at 736.

127. *Id.* at 738.

128. *Id.*

129. *Id.* at 739 (quoting *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973))).

proposed statute and rights guaranteed by treaty and that Congress chose to abrogate the treaty rights.<sup>130</sup>

In reviewing the Eagle Protection Act, the Court found that its ban on killing bald and golden eagles was framed in sweeping language and that the list of prohibited acts was carefully drawn and extensive.<sup>131</sup> However, the Eagle Protection Act also contained a narrow exception whereby the Secretary of the Interior was authorized to issue permits for the killing of bald or golden eagles if necessary "for the religious purposes of Indian tribes."<sup>132</sup> The Court concluded that the face of the statute, coupled with its legislative history, revealed an intent to abrogate Indian treaty rights to hunt and kill bald and golden eagles on Indian reservations.<sup>133</sup> The Court concluded that Congress, in passing the Eagle Protection Act, had abrogated tribal hunting rights as described in the treaty.<sup>134</sup> Thus, the Court held that the defense Dion asserted based on the tribe's treaty rights would not prevent his prosecution and conviction under the Eagle Protection Act.<sup>135</sup>

D. *BRENDALE V. CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION*

Finally, what had been an unspoken conflict between *Montana* and the cases decided subsequent to *Montana* was addressed openly in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*.<sup>136</sup> At the initiation of that lawsuit, the Yakima Nation reservation was divided into an "open" area and a "closed" area.<sup>137</sup> The closed area was closed to the general public and contained about 25,000 acres

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130. *Id.* at 739-40.

131. *Id.* at 740.

132. *Id.* at 740 (quoting 16 U.S.C. § 668a).

133. *Id.* at 740, 743-45. The legislative history revealed that Congress initially did not plan to include the exception for Indian religious purposes, but only did so after concerns were expressed in a letter to Congress from the Assistant Secretary of the Interior explaining the religious importance of the golden eagle to many Indian tribes. *Id.* at 740-42. The legislative history also revealed that the impetus for providing protection for the golden eagle was that Indian killings of the bird threatened to exterminate the species. *Id.* at 742-43.

134. *Dion*, 476 U.S. at 743.

135. *Id.* at 746. The Court also held that Dion's treaty defense would not bar prosecution under the Endangered Species Act. *Id.* However, this holding was not based on an independent determination that Congress intended to abrogate Indian treaty rights through the Endangered Species Act. *Id.* at 745. Rather, the Court held that once Congress had abrogated Dion's treaty rights under the Eagle Protection Act, those treaty rights no longer existed to provide the basis of a defense under the Endangered Species Act. *Id.* at 745-46.

136. 492 U.S. 408 (1989).

137. *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 415 (1989).

of fee land out of a total of approximately 807,000 acres.<sup>138</sup> In the open area of the reservation, public access was not limited, and about one-half of this area was comprised of land owned in fee.<sup>139</sup> The reservation was located in Yakima County and both the county and the Yakima Nation promulgated conflicting zoning ordinances covering property uses of reservation land.<sup>140</sup> The issue before the Court was whether the Yakima Nation had the authority, either by virtue of its treaty rights or by virtue of its retained inherent authority, to enforce zoning regulations on non-Indian fee lands in the reservation.<sup>141</sup>

Six Justices held that the tribe could not enforce its zoning ordinances in the open area, although for different reasons.<sup>142</sup> Five Justices held that the tribe could enforce its zoning ordinances in the closed area, although again, the analysis differed among the Justices.<sup>143</sup> Only four Justices, joining in Justice White's opinion, reiterated and followed the analysis set forth in *Montana*.<sup>144</sup>

### 1. Justice White's Opinion

Justice White wrote that although the treaty that the Yakima Nation had negotiated with the Federal Government had granted the Nation the right to exclusive use and occupation of lands within the reservation, the Allotment Acts changed the nature of the Nation's ownership of reservation lands.<sup>145</sup> Justice White reiterated the teaching of *Montana* that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands."<sup>146</sup>

The Nation argued that the Indian Reorganization Act of 1934 should be interpreted as having annulled the Allotment Acts and

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138. *Id.* at 415. The district court found that the closed area contained a number of places which were religiously and culturally significant to the Yakima Nation and that a large proportion of the Nation's income derived from timber harvesting within the closed area. *Id.* at 420 n.5. The district court characterized the closed area as "pristine" and "wilderness-like." *Id.* at 445 (Stevens, J.) (quoting from *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 750, 752 (E.D. Wash. 1985)). Most of the closed area was undeveloped forest land and the activities of the few permittees who were allowed in were sharply circumscribed by the tribe. *Id.* at 438-39.

139. *Id.* at 415-16. Unlike the closed area, the open area was largely developed both residentially and commercially. *Id.* at 445 (quoting *Whiteside*, 617 F. Supp. at 752). The district court found that the open area was not religiously or culturally significant to the Nation. *Id.* at 446 (quoting *Whiteside*, 617 F. Supp. at 755).

140. *Brendale*, 492 U.S. at 414, 416-17. Yakima County is a political subdivision of the State of Washington. *Id.* at 414.

141. *Id.* at 421-22.

142. *Id.* at 432, 445.

143. *Id.* at 444, 449.

144. *Id.* at 422-32. Justices Scalia and Kennedy and Chief Justice Rehnquist joined Justice White. *Id.* at 414.

145. *Id.* at 422.

146. *Id.* (quoting *Montana*, 450 U.S. at 561).

thereby resuscitated formerly abrogated treaty rights.<sup>147</sup> Justice White stated that the 1934 legislation was irrelevant because, although it halted the further allotment of Indian lands and sought to encourage tribal sovereignty and self-sufficiency, it did not reverse the effects of the alienation that had already occurred under the Allotment Acts.<sup>148</sup> As to the Nation's asserted treaty rights, Justice White specifically stated that he would follow the *Montana* analysis and hold that treaty rights to exclusive occupation of reservation lands cannot support a tribe's assertion of regulatory authority over fee lands held by nonmembers of the tribe.<sup>149</sup>

Justice White also rejected the Nation's inherent sovereignty as a basis for its zoning authority.<sup>150</sup> Relying on *United States v. Wheeler*,<sup>151</sup> Justice White stated that the original sovereign power of Indian tribes to govern in the area of "external relations" had been impliedly divested by reason of the tribes' dependent status and that "relations between an Indian tribe and nonmembers of the tribe" are generally considered to be an aspect of "external relations."<sup>152</sup> Thus, Justice White concluded that, according to *Montana*, the Nation had no inherent sovereign power to enforce zoning ordinances on nonmembers' fee land unless Congress expressly delegated such power to the Nation or unless one of the two *Montana* exceptions were present.<sup>153</sup>

The parties agreed that the first *Montana* exception (the "consensual relationship" exception), was not applicable here, so Justice White addressed the second *Montana* exception (dealing with the political integrity, economic security, or health and welfare of a tribe).<sup>154</sup> Justice White rejected a categorical approach that would characterize all zoning authority as activity having a direct effect on the economic security, political integrity, or health and welfare of the

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147. *Id.* at 423 (citing Indian Reorganization Act of 1934, 48 Stat. 984).

148. *Id.* at 423.

149. *Id.* at 425.

150. *Id.* at 432.

151. 435 U.S. 313 (1978).

152. *Brendale*, 492 U.S. at 425-26 (quoting *United States v. Wheeler*, 435 U.S. 313, 326 (1978)).

153. *Id.* at 428. Neither party contended that there was an express congressional delegation of power to the tribe. *Id.*

Justice White attempted to reconcile the decision in *Montana* with the decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, in which the Court upheld the imposition of tribal taxes on cigarettes purchased by nonmembers on the reservation. Justice White explained that the activities at issue in *Colville* took place on tribal trust lands while the activities at issue in *Montana* took place on fee lands. *Brendale*, 492 U.S. at 427. Furthermore, Justice White argued that the facts of *Colville* were an example of the consensual relationship circumstance described in *Montana* under which the assertion of tribal sovereign authority is allowed. *Brendale*, 492 U.S. at 427.

154. *Id.* at 428-29.

tribe.<sup>155</sup> Justice White emphasized that the *Montana* Court had held that a tribe "may" exercise inherent sovereignty over nonmembers under the second exception.<sup>156</sup> Justice White argued that the use of the word "may" meant that tribal authority was not automatic if the factors described in the second *Montana* exception were present, but rather that the exercise of tribal authority pursuant to the second exception "depends on the circumstances."<sup>157</sup>

Addressing the facts of *Brendale*, Justice White stated that the Nation must show that the effect of the activities of nonmembers on fee lands will be or are "demonstrably serious" and that the activities "imperil the political integrity, the economic security, or the health and welfare of the tribe."<sup>158</sup> Justice White suggested that even if the tribe met that burden, the second *Montana* exception did not necessarily clothe the tribe with zoning authority.<sup>159</sup> Rather, if the tribe demonstrated facts in support of the second *Montana* exception, the result was only that the state would then be required to respect the tribe's interest in exercising the state's zoning authority.<sup>160</sup> If the state refused to respect valid tribal interests properly demonstrated to exist, then the tribe would be entitled to an injunction against the state actors, but the tribe would not be entitled to exercise direct authority over the nonmembers.<sup>161</sup> Based on the foregoing analysis, Justice White concluded that the Yakima Nation had no inherent authority over the fee lands in the open area of the reservation.<sup>162</sup>

## 2. Justice Stevens' Opinion

Justice Stevens stated that the power of Indian tribes to exclude unwanted persons from their lands also encompasses the lesser power

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155. *Id.* (emphasis in original).

156. *Id.* at 429.

157. *Id.*

158. *Id.* at 431.

159. *Id.* at 430-31.

160. *Id.* at 431.

161. *Id.* Justice White seems to have devised this argument in answer to the criticism that under the second *Montana* circumstance, zoning authority over a particular parcel of land could bounce back and forth between the state and tribe with every change in the use of that parcel. *Id.* at 430. This result would be avoided under Justice White's approach by ensuring that the zoning authority would remain in the state, subject to being enjoined if the state failed to respect valid tribal interests. *Id.* at 430-31.

162. *Brendale*, 492 U.S. at 432. Justice White pointed out that, after this lawsuit had been initiated, the tribe opened up the "closed" area. *Id.* at 415 n.2. Justice White stated that the open and closed areas did not warrant different analyses and that he only retained those appellations for the sake of convenience. *Id.* Justice White expressed no opinion regarding the Nation's right to enforce its zoning ordinances in the closed area because he found that the proceedings before the Yakima County zoning board were not yet complete as to that parcel. *Id.* at 432.

to regulate persons whom the tribes allow to enter their lands.<sup>163</sup> Justice Stevens stated that the Yakima Nation's power to exclude originally stemmed from both the Nation's inherent sovereignty and from the Nation's treaty rights.<sup>164</sup> Although Justice Stevens agreed that the Allotment Acts diminished the Yakima Nation's power to exclude and the lesser included power to determine the character of reservation land, he found it inconceivable that Congress intended for the Nation to have lost all authority "to determine the character of the tribal community" simply by virtue of having sold a "few lots" of reservation land.<sup>165</sup> Justice Stevens characterized the Nation's power to exclude, however diminished, as similar to an equitable servitude that runs with the land.<sup>166</sup>

Based on his equitable servitude analogy, Justice Stevens concluded that the Nation could enforce its zoning ordinances on fee lands in the closed area of the reservation.<sup>167</sup> Although the tribe's power to exclude non-Indians was diminished by the sale of a "relatively insignificant" portion of the land in the closed area, this did not require the conclusion that the tribe had also lost the power to determine the character of the surrounding land.<sup>168</sup> Justice Stevens characterized the tribe's power to zone the fee land in the closed area as simply an incident to the tribe's "power to preserve the character of what remains almost entirely a region reserved for the exclusive benefit of the Tribe."<sup>169</sup>

However, Justice Stevens concluded that the Nation had lost its power to enforce its zoning ordinances on fee land in the open area.<sup>170</sup> Because the tribe had lost its former authority to exclude due to the passage of "large" portions of the open area into non-tribal ownership, Justice Stevens concluded that the tribe had also lost its lesser right to regulate.<sup>171</sup> Justice Stevens noted that even if the tribe were to exercise its power to exclude non-Indians from *trust lands* in the open

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163. *Brendale*, 492 U.S. at 434-35 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144-45 (1982)).

164. *Id.* at 435.

165. *Id.* at 437.

166. *Id.* at 442.

167. *Id.* at 444.

168. *Id.* at 441.

169. *Id.* at 442.

170. *Id.* at 444-45.

171. *Id.* Justice Stevens addressed Justice White's statement that the closed area was no longer closed. See *supra* note 162 (discussing Justice White's views). Justice Stevens argued that the open-closed dichotomy was still a valid analytical construct because, although the Nation had decided to allow the public to use roads maintained by the Bureau of Indian Affairs in the closed area, the Nation still required permits to leave the roads and still restricted activities of permittees within the closed area. *Brendale*, 492 U.S. at 439-40.

area, the tribe would nonetheless be unable by so doing to control "the essential character" of the open area.<sup>172</sup> Thus, whether the tribe had lost its power to regulate under Justice Stevens' analysis depended to a large extent on whether "vast ranges" of reservation land had passed to nonmembers in fee, or whether only a "very small" proportion of reservation land was held by nonmembers.<sup>173</sup> Justice Stevens likened his analysis to the "change of neighborhood" doctrine, whereby an equitable servitude will lapse when, in comparison to the general vicinity surrounding the parcel, the restriction is outmoded, no longer useful, or is inequitable to enforce.<sup>174</sup>

Justice Stevens tried to reconcile his approach with the Court's decision in *Montana* by pointing out that the tribal regulation in *Montana* discriminated against nontribal members, but the zoning ordinance promulgated by the Yakima Nation did not.<sup>175</sup> Justice Stevens also pointed out that in *Montana*, the activities of the nonmembers on fee lands would have had no dire effects on the tribe, while in *Brendale* the district court had specifically found that the activities of nonmembers on fee lands in the closed area of the reservation would affect the welfare of the Nation.<sup>176</sup> Finally, Justice Stevens stated that in *Montana*, the state had had an ownership interest in the bed of the Big Horn River and had stocked the river and some of the game, thus giving rise to a state interest in enforcing state hunting and fishing regulations.<sup>177</sup> By contrast, neither Yakima County nor the State of Washington asserted an ownership interest in *Brendale* that would have given rise to a heightened state interest in seeing county zoning ordinances enforced in the closed area of the reservation.<sup>178</sup> Thus, Justice Stevens suggested that his approach was not at odds with the Court's opinion in *Montana*.

### 3. Justice Blackmun's Opinion

Justice Blackmun reiterated the now-familiar rule that Indian tribal sovereignty is not implicitly divested except in the area of external relations because, in that area, the exercise of tribal sovereignty is "necessarily inconsistent with the tribes' dependent status."<sup>179</sup> Jus-

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172. *Brendale*, 492 U.S. at 446.

173. *Id.* at 437, 444.

174. *Id.* at 447.

175. *Id.* at 443.

176. *Id.* This finding was based on the pristine nature of the closed area and its religious and cultural significance to the tribe. *See id.* at 420 n.5; *id.* at 438-39, 445.

177. *Id.* at 443-44.

178. *Id.* at 444.

179. *Id.* at 451-52 (citing *Oliphant*, 447 U.S. at 153-54; and *Wheeler*, 435 U.S. at 326) (emphasis in original). Justices Brennan and Marshall joined Justice Blackmun. *See id.* at 448.

tice Blackmun then explained that "external powers" included matters such as the alienation of Indian lands to non-Indians, the assertion of criminal jurisdiction over non-Indians, and negotiation with foreign nations.<sup>180</sup> However, Justice Blackmun argued that the exercise of *civil* jurisdiction by an Indian tribe over a nonmember located within reservation boundaries was an aspect of the internal affairs of a tribe.<sup>181</sup> Based on this characterization, Justice Blackmun concluded that the inherent sovereign tribal power to exercise civil authority over nonmembers within the reservation, even on fee lands, could not be divested by implication.<sup>182</sup>

Justice Blackmun argued that this tenet rang especially true when the civil authority the tribe sought to assert was zoning authority.<sup>183</sup> This is because zoning authority is categorically a power that is "central to 'the economic security, or the health or welfare of the tribe.'"<sup>184</sup> Justice Blackmun pointed out two facts: (1) that no party questioned the Nation's right to enforce zoning laws on tribal lands within the reservation and (2) that tribal lands and fee-patented lands were intermingled in a haphazard checkerboard pattern.<sup>185</sup> These facts led Justice Blackmun to the conclusion that if the Nation were denied the right to zone fee lands, the Nation would also effectively be deprived of its undisputed right to determine the character of tribal lands.<sup>186</sup> Furthermore, Justice Blackmun argued that the nature of zoning authority is such that it could not be concurrent between the tribe and county because the authority, by its very nature, was nullified if not exclusively exercised by a single sovereign.<sup>187</sup> Thus, Justice Blackmun concluded that the Nation should be allowed to enforce its zoning ordinances over all fee land on its reservation, in both the open and closed areas.<sup>188</sup>

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180. *Id.* at 452, 452 n.3.

181. *Id.* at 453-54. Justice Blackmun understands the concept of internal affairs as being geographically defined. *Id.* at 457 (stating that "tribal sovereignty is in large part geographically determined").

182. *Brendale*, 492 U.S. at 454 (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982)).

183. *Id.* at 458-59.

184. *Id.* at 458 (quoting *Montana*, 450 U.S. at 566).

185. *Id.* at 460-61.

186. *Id.*

187. *Id.* at 465-68. Justice Blackmun did concede that, on other reservations, fee land may be segregated from tribal lands to a large extent so that the tribe would no longer have a legitimate zoning interest in fee lands. *Id.* at 467 n.9. In this vein, Justice Blackmun noted that the Nation had never attempted to assert zoning authority over three incorporated towns located in the open area of the reservation. *Id.* Therefore, he expressed no opinion as to the "difficult question" of the Nation's power to enforce zoning authority in these towns. *Id.*

188. *Id.* at 468.

Justice Blackmun openly attacked the decision in *Montana v. United States*. Although he stated that the right result was reached in that case, he suggested that the Court "simply missed its usual way" in declaring the proper analysis of tribal authority.<sup>189</sup> Justice Blackmun characterized as anomalous the presumption announced in *Montana* that Indian tribes do not have inherent sovereign authority over nonmembers absent express congressional delegation or the presence of one of the two *Montana* exceptions.<sup>190</sup>

Justice Blackmun seemed to imply that *Montana* had been overruled *sub silentio*. He pointed out that the presumption against inherent tribal sovereignty over nonmembers established in *Montana* was not relied upon in the Court's decisions in *New Mexico v. Mescalero Apache Tribe*, *National Farmer's Union Insurance Cos. v. Crow Tribe*,<sup>191</sup> or *Iowa Mutual Insurance Co. v. LaPlante*,<sup>192</sup> all of which were decided subsequent to *Montana*.<sup>193</sup> Finally, Justice Blackmun pointed out that after *Montana* had been decided, the Court cited *Buster v. Wright*<sup>194</sup> with approval.<sup>195</sup> Justice Blackmun stated that the *Buster* decision stood for the proposition that a sovereign does not lose authority over persons within its territory merely because "foreigners" own or occupy land within that territory.<sup>196</sup> Justice Blackmun seems to have suggested that, because the *Buster* analysis was

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189. *Id.* at 449-50, 455.

190. *Id.* at 455-56. Justice Blackmun also argued that his analysis was consistent with *Montana*, if one reads *Montana* to allow tribal regulation of conduct of non-Indians on the reservation "whenever a significant tribal interest is threatened or directly affected." *Id.* at 457. The key factor of the *Montana* decision was, in Justice Blackmun's opinion, the fact that the tribe had not even alleged that an identifiable tribal interest was affected. *Id.* at 459.

191. 471 U.S. 845 (1985).

192. 480 U.S. 9 (1987).

193. *Brendale*, 492 U.S. at 456. Justice Blackmun's recitation here is a little misleading. Although the decision in *Mescalero Apache Tribe* arguably implicated the holding in *Montana*, the holdings in *National Farmers Union Insurance Co.* and *Iowa Mutual Insurance Co.* did not implicate *Montana*. These two cases merely established a rule of comity requiring civil litigants to first present their claims in tribal court when the events giving rise to a lawsuit occur on an Indian reservation or involve tribal members who reside on the reservation. See *Iowa Mutual Ins. Co.*, 409 U.S. at 16 n.8, 19-20; *National Farmers Union Ins. Cos.*, 471 U.S. at 852-53, 856-57. The Court in these two cases emphasized that it was not establishing a rule of jurisdiction, but merely a rule of comity which would allow tribal courts to address in the first instance whether they had jurisdiction of a claim. After exhausting tribal remedies, the litigants could then file an action in federal district court where the court would review whether the tribal court had proper jurisdiction of the action and, if not, then the court would review the merits of the lawsuit. Therefore, *National Farmers Union Ins. Cos.* and *Iowa Mutual Ins. Co.* did not stand for the proposition that tribal courts had civil jurisdiction over nonmembers.

194. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

195. *Brendale*, 492 U.S. at 457-58 (citing *Merrion*, 455 U.S. at 143 (quoting *Buster*, 135 F. at 952)).

196. *Id.* at 457-58.

antithetical to the *Montana* analysis and was relied on after *Montana* was decided, that *Montana* was no longer valid.

Finally, Justice Blackmun responded to Justice White's argument that the use of the word "may" by the *Montana* Court in describing the second *Montana* exception meant that the presence of the second exception did not automatically clothe the tribe with jurisdiction. Justice Blackmun stated that neither party in *Montana* had alleged that the state's enforcement of its own hunting and fishing regulations would have an effect on tribal political integrity, economic security, or health or welfare.<sup>197</sup> Therefore, Justice Blackmun dismissed the *Montana* Court's discussion of the second exception as "pure dictum."<sup>198</sup> Furthermore, Justice Blackmun stated that under the facts presented in *Brendale*, the second *Montana* exception should not be viewed narrowly in terms of the threats posed by particular uses of fee lands, but rather the threat to the tribe should be analyzed more broadly as the threat to the tribe caused by loss of comprehensive zoning authority.<sup>199</sup> Viewed in this perspective, Justice Blackmun argued that Justice White's concern would be nonexistent because zoning authority would not shift from the Nation to the county depending on the particular use of fee lands.<sup>200</sup>

#### E. *DURO V. REINA*

One other case of note was decided before *South Dakota v. Bourland*<sup>201</sup> and after *Montana*. In *Duro v. Reina*,<sup>202</sup> the Supreme Court was faced with the issue of whether Indian tribes could assert criminal jurisdiction over Indians who commit crimes on the reservation but who are not members of the tribe asserting jurisdiction.<sup>203</sup> The Court noted that, although the decision in *United States v. Wheeler* had consistently described the tribe's sovereignty in terms of tribal power over "nonmembers" versus "members," Wheeler was in fact a member of the prosecuting tribe in that case.<sup>204</sup> Therefore, the *Duro* Court viewed the issue of tribal criminal jurisdiction over nonmember Indians as one of first impression.<sup>205</sup> The Court concluded that In-

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197. *Id.* at 459.

198. *Id.*

199. *Id.* at 459-60.

200. *Id.*

201. 113 S. Ct. 2309 (1993).

202. 495 U.S. 676 (1990).

203. *Duro v. Reina*, 495 U.S. 676, 679 (1990). Albert Duro was not a member of the tribe asserting criminal jurisdiction over him and he was not eligible to become a member of that tribe. *Id.* at 679, 688.

204. *Duro*, 495 U.S. at 685.

205. *Id.*

dian tribes could not assert criminal jurisdiction over nonmember Indians.<sup>206</sup>

The Court stated that a tribe's relations with nonmembers on the reservation do not constitute the type of "internal governance" over which an Indian tribe retains inherent sovereign power.<sup>207</sup> In support of this statement, the Court cited its decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*<sup>208</sup> for the proposition that state taxation on reservations extends to nonmembers, not merely to the more limited category of non-Indians.<sup>209</sup> The Court distinguished the area of tribal *criminal* jurisdiction from tribal *civil* jurisdiction, stating that the Court's decisions in the latter category "recognize broader retained tribal powers" over nonmembers than in the former category.<sup>210</sup> The Court stated as an example that civil tribal authority may exist "in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination."<sup>211</sup> Thus, although the Court acknowledged that some of the inherent sovereignty retained by tribes is territorial in nature, at least with respect to criminal authority, tribal sovereignty is limited to the internal relations of tribal members.<sup>212</sup>

In reaching its conclusion that Indian tribes could not exercise criminal jurisdiction over nonmember Indians, the Court observed that the nonmember Indian stands in the same relation to the tribe as a non-Indian does: Neither is eligible to become a member of the tribe; and as nonmembers, neither can serve on tribal juries, hold tribal office, or vote in tribal elections.<sup>213</sup> The Court also supported its conclusion by noting the serious impact criminal charges have on personal liberty and that tribal courts do not contain the same personal liberty guarantees as state and federal courts.<sup>214</sup> The Court emphasized that in tribal governments, "[t]ribal courts are often 'subordinate to the political branches of tribal governments' and their legal methods may depend on 'unspoken practices and norms.'"<sup>215</sup> Also, the Court noted that the Bill of Rights does not directly apply to proceedings in tribal

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206. *Id.* at 695-96.

207. *Id.* at 686-87. The Court focused on the tribe's inherent sovereignty because there was no allegation made that Congress had expressly delegated or expressly divested the tribal power at issue. *Id.* at 684.

208. 447 U.S. 134 (1980).

209. *Duro*, 495 U.S. at 684 (quoting *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 161).

210. *Id.* at 687-88.

211. *Id.*

212. *Id.* at 688.

213. *Id.*

214. *Id.* at 693.

215. *Id.* (quoting COHEN, *supra* note 22, at 334-35).

courts, although the Indian Civil Rights Act does mandate some procedural protections.<sup>216</sup>

Justice Brennan filed a dissenting opinion in which he argued that Indian tribes do have criminal jurisdiction over nonmember Indians.<sup>217</sup> Justice Brennan argued that Indian tribes retain *all* aspects of inherent sovereignty unless explicitly taken away or implicitly divested because such sovereignty is "*necessarily* inconsistent with the overriding interest of the greater sovereign."<sup>218</sup> Justice Brennan argued that the tribal exercise of criminal jurisdiction over nonmember Indians was not inconsistent with an overriding federal interest and hence was not implicitly divested.<sup>219</sup>

Justice Brennan interpreted the Court's decision in *Oliphant v. Suquamish Indian Tribe*<sup>220</sup> as based in large part on congressional acts that demonstrated a solicitude for non-Indians.<sup>221</sup> By contrast, Justice Brennan found that congressional legislation historically and presently revealed an intent to allow tribal criminal jurisdiction over all Indians and to exempt crimes committed by one Indian against another from the reach of state and federal criminal jurisdiction.<sup>222</sup>

Justice Brennan had the satisfaction of having his views vindicated by Congress only a few months later. Congress passed temporary emergency legislation overruling the Court's holding in *Duro* in the fall of 1990 and then passed permanent legislation to the same effect the following year.<sup>223</sup> Thus, Indian tribes currently have the

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216. *Id.* The Indian Civil Rights Act ("ICRA") is found at 25 U.S.C. §§ 1301-1341. Although the ICRA contains, for example, due process and equal protection guarantees, other guarantees from the Bill of Rights are absent. See 25 U.S.C. § 1302. The ICRA contains neither a guarantee of a right to counsel for indigent criminal defendants nor a privileges and immunities provision. See *id.* One authority has noted that, because the cultural norms intrinsic in the Bill of Rights are foreign to the social traditions of many Indian tribes, tribes have not extensively applied the protections found in the ICRA. See COHEN, *supra* note 22, at 663-64. Furthermore, federal review of a tribal court's disposition of claims under the ICRA is limited to entertaining petitions for writs of habeas corpus for persons in tribal custody. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69-70, 72 (1978) (holding that the only remedy available in federal court under the ICRA is a writ of habeas corpus).

217. *Duro*, 495 U.S. at 701-03 (Brennan, J., dissenting). Justice Marshall joined in Justice Brennan's dissent. *Id.* at 698.

218. *Id.* at 699 (emphasis in original).

219. *Id.* at 699-700.

220. 435 U.S. 191 (1978).

221. *Duro*, 495 U.S. at 701.

222. *Id.* at 701-03.

223. The temporary legislation became effective November 5, 1990. See Department of Defense Appropriations Act, Pub. L. No. 101-511, Title VIII, § 8077(b)-(d), 104 Stat. 1856, 1892-93 (1990) (codified at 25 U.S.C. § 1301(2), (4)). The permanent legislation was passed on October 28, 1991. See Criminal Jurisdiction Over Indians, Pub. L. No. 102-124, § 1, 105 Stat. 616 (1991) (codified at 25 U.S.C. § 1301(2), (4)). Some senators expressed reservations regarding the permanent legislation, but the bill was passed nevertheless. In part because of the reservations expressed by these senators, Congress

inherent sovereign power, confirmed by federal statute, to assert criminal jurisdiction over nonmember Indians who commit crimes on the reservation.<sup>224</sup>

### *SOUTH DAKOTA v. BOURLAND*

The tumultuous history of *Montana v. United States*<sup>225</sup> was brought to an end with the June 14, 1993, decision by the United States Supreme Court in *South Dakota v. Bourland*.<sup>226</sup> Although some questions still remain following *Bourland*, this much is evident: *Montana* has not been abandoned by the Court.

#### A. FACTS

Pursuant to the Flood Control Act of 1944, the United States government negotiated with the Cheyenne River Sioux Tribe for the purchase of a tract of land within the tribe's reservation.<sup>227</sup> The government wanted the land for the purpose of building the Oahe Dam and Reservoir.<sup>228</sup> Of the land that the government acquired for this purpose, 104,420 acres were owned by or in trust for the tribe and 18,000 acres were privately owned fee lands.<sup>229</sup> The government eventually secured an agreement to transfer the tract of land it desired (the "taken land"), and the Oahe Dam was built.<sup>230</sup>

Part of the taken land was submerged under the waters of the Oahe Reservoir; part of the taken land abutted the reservoir.<sup>231</sup> The Cheyenne River Act, which authorized the transfer of the taken land from the tribe to the government, reserved certain limited rights to the tribe concerning the taken land.<sup>232</sup> For example, tribal members retained certain mineral rights in the land, the right to hunt and fish on the taken land, and the right to lease unflooded portions of the taken land, including lands that had formerly been held in fee by non-

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agreed to study the problem of the handling of matters arising under the Indian Civil Rights Act by tribal courts. However, consideration of the bill appears to have been indefinitely postponed. See S. 11770 CONG. REC. (Aug. 6, 1992).

224. See 25 U.S.C. § 1301(2), (4).

225. 450 U.S. 544 (1981).

226. 113 S. Ct. 2309 (1993).

227. *South Dakota v. Bourland*, No. 88-3049, slip op. at 7-8 (D.S.D. Aug. 21, 1990) (unpublished).

228. *Id.*

229. *Bourland*, 113 S. Ct. at 2313-14.

230. *Bourland*, slip op. at 7-8.

231. *Bourland*, 949 F.2d at 988.

232. *Id.* (citing the Act of Sept. 3, 1954, Pub. L. No. 776, 68 Stat. 1191).

Indians.<sup>233</sup> Almost all of the land abutting the taken area consisted of tribal trust lands.<sup>234</sup>

Pursuant to the Indian Reorganization Act of 1934, the Cheyenne River Sioux Tribe passed hunting and fishing regulations that the tribe then enforced on land that was to become the taken land against all persons who hunted or fished thereon.<sup>235</sup> The State of South Dakota also enforced state hunting and fishing regulations on the taken land and on fee lands within the reservation, but only against non-members of the tribe.<sup>236</sup>

For many years, the tribe and the state negotiated compromises regarding their conflicting regulations.<sup>237</sup> In 1988, however, negotiations between the tribe and state over the upcoming deer hunting season reached an impasse.<sup>238</sup> Shortly thereafter, the tribe announced that it would not honor state hunting licenses for any hunting anywhere within the reservation and that those who hunted within the reservation without a tribal license would be prosecuted criminally by the tribe.<sup>239</sup>

In response to the tribe's announcement, the state filed a complaint with the United States District Court for the District of South Dakota, Central Division, seeking declaratory and injunctive relief.<sup>240</sup> The state specifically asked the district court to decide three issues: (1) whether the tribe had the authority to assert criminal jurisdiction over *non-Indians* who hunted and fished on the reservation; (2) whether the tribe had the authority to exclude *non-Indians* from public lands within the reservation; and (3) whether the reservation boundaries had been diminished when the federal government gained possession of the taken land.<sup>241</sup>

## B. DISTRICT COURT OPINION

Following a trial to the court, the district court issued its decision on August 21, 1990.<sup>242</sup> Although the state sought a ruling as to the tribe's authority over "non-Indians," the court indicated it would rule on the issue of whether the tribe had authority over "nonmembers" of

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233. *Id.*

234. *Bourland*, slip op. at 12.

235. *Id.* at 9-10 (citing the Indian Reorganization Act of 1934, 48 Stat. 984).

236. *Id.* at 10. Although the district court used the term "nonmembers," it is more likely that the state enforced its regulations against "non-Indians." See *id.* at 3.

237. *Bourland*, 949 F.2d at 988.

238. *Id.*

239. *South Dakota v. Bourland*, 113 S. Ct. at 2314; *Bourland*, 949 F.2d at 988.

240. *Bourland*, 949 F.2d at 988; *Bourland*, slip op. at 1-3.

241. *Bourland*, slip op. at 3 (emphasis added).

242. *Id.* at 1.

the tribe, whether they be non-Indians or Indians.<sup>243</sup> The district court relied on the Supreme Court's decision in *Duro v. Reina*<sup>244</sup> for the conclusion that no distinction should be drawn between a tribe's authority over "non-Indians" and over "nonmember Indians."<sup>245</sup>

The district court recognized that there were differences of opinion among the Justices of the Supreme Court regarding whether *Montana* affected a reversal of "traditional Indian law principles by establishing a presumption that tribes lack civil jurisdiction over nonmembers unless such authority is affirmatively delegated by Congress."<sup>246</sup> After discussing the various opinions filed in *Brendale v. Confederated Tribes and Bands of the Yakima*,<sup>247</sup> the district court concluded that *Montana* remained viable.<sup>248</sup> Accordingly, the court examined whether the Cheyenne River Sioux Tribe had the power to enforce its hunting and fishing regulations either pursuant to treaty rights or pursuant to its retained inherent sovereignty.

Regarding the tribe's treaty rights, the district court followed *Montana* and interpreted those rights in light of the subsequent alienation of reservation lands.<sup>249</sup> As had the *Montana* Court, the district court concluded that, although the tribe's treaty with the federal government originally granted the tribe the right to exclusive occupation of the entire reservation and therefore the lesser included right to regulate those whom the tribe allowed to enter the reservation, this right had been abrogated by the alienation of reservation lands to nonmembers and to the federal government.<sup>250</sup> Accordingly, the district court found no treaty right that justified the tribe's assertion of regulatory authority over the taken and fee lands.<sup>251</sup>

Next, the district court considered whether the tribe had the authority to regulate pursuant to the tribe's retained inherent sover-

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243. *Id.* at 2 n.1.

244. 495 U.S. 676 (1990).

245. *Bourland*, slip op. at 2 n.1. The district court's decision was issued after the Supreme Court's decision in *Duro* and before Congress passed legislation abrogating *Duro*. The district court was correct that *Duro* eliminated the distinction between non-Indians and nonmember Indians regarding an Indian tribe's ability to assert *criminal jurisdiction*. However, the state also asked for a declaratory judgment and injunction concerning the tribe's ability to exclude non-Indians from the taken lands and fee lands—an aspect of authority which could arguably be characterized as civil in nature. As to an Indian tribe's *civil* authority over nonmember Indians, the *Duro* Court expressed no opinion and even indicated that there are good reasons for a different result in the civil context. *Duro*, 495 U.S. at 687-88. Therefore, it seems apparent that the district court read *Duro* too expansively.

246. *Bourland*, slip op. at 35.

247. 492 U.S. 408 (1989).

248. *Bourland*, slip op. at 38.

249. *Id.* at 39-40, 49.

250. *Id.*

251. *Id.*

eighty. Because the issue concerned the tribe's authority over nonmembers on land not owned by the tribe, the district court followed *Montana* and required that there be an express congressional delegation of regulatory authority to the tribe or that one of the two *Montana* exceptions be present.<sup>252</sup> The court found no express delegation of regulatory authority either as to the fee lands or as to the taken lands.<sup>253</sup> Therefore, the tribe could enforce its regulations over the taken lands and fee lands only if one of the two *Montana* exceptions were presented by the facts.<sup>254</sup>

The court held that the first *Montana* exception was not present.<sup>255</sup> The court found that "nonmember hunters and fishermen on nonmember fee land and the taken area 'do not enter any agreements or dealings with the [Cheyenne River Sioux] Tribe'" as required by *Montana*.<sup>256</sup>

The district court also concluded that the second *Montana* exception was not present.<sup>257</sup> This conclusion was based on findings of fact that the tribe had not developed comprehensive wildlife or fisheries management programs, due in part to the tribe's failure to develop a recreational hunting and fishing industry, which would generate revenues to support such a management scheme.<sup>258</sup> Thus, the economic security of the tribe was not affected by the absence of license fees.<sup>259</sup> Furthermore, the court found that the tribe's regulations discriminated against nonmembers whereas the state's regulations were neutral.<sup>260</sup> The Court also found that the taken and fee lands were not "pristine"—the tribe had never attempted to deny access to the areas by nonmembers and the tribe made no attempt to show that the lands had special cultural, spiritual, or religious significance to the tribe.<sup>261</sup>

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252. *Id.* at 34-35, 38, 52.

253. *Id.* at 47, 48-49 n.8, 49, 51-52. The court examined the Flood Control Act of 1944, the Cheyenne River Act, (Act of Sept. 30, 1950, 64 Stat. 1093, Pub. L. No. 870), the Act of 1950 (Pub. L. No. 870, 64 Stat. 1093), and the Lacey Act (16 U.S.C. § 3371 *et seq.*) to see if Congress had expressly delegated regulatory authority to the tribe in the taken area. *Id.* The Act of 1950 merely authorized "the Army and the Department of Interior to negotiate a contract with the Cheyenne River Tribe and the Standing Rock Sioux Tribe for land needed for the Oahe Dam and Reservoir." *Bourland*, 949 F.2d at 988. The Lacey Act prohibits the importing, exporting, transporting, selling, receiving, acquiring, or purchasing of fish, wildlife, or plants which are taken or possessed contrary to federal or tribal law. *Bourland*, slip op. at 50 (quoting 16 U.S.C. § 3372(a)(1)).

254. *Bourland*, slip op. at 34-35, 38, 52.

255. *Id.* at 52.

256. *Id.*

257. *Id.* at 53.

258. *Id.* at 13-15.

259. *Id.* at 13.

260. *Id.* at 17-18.

261. *Id.*

Thus, the district court concluded that the tribe had no basis upon which to exercise regulatory authority over hunting and fishing by nonmembers on either the taken or fee lands.<sup>262</sup> The court was careful to point out that it had not reached an opinion on the issues of whether *the state* could assert regulatory jurisdiction over the taken or fee lands or to what extent the tribe could assert jurisdiction over non-member hunting and fishing on *trust* lands.<sup>263</sup>

### C. EIGHTH CIRCUIT OPINION

On appeal to the United States Court of Appeals for the Eighth Circuit, the tribe raised the following issues: (1) whether the district court had erred in addressing the issue of the tribe's authority over nonmember Indians and (2) whether the district court had erred in determining the tribe's authority over the taken lands—the land acquired by the federal government in order to build the Oahe Dam and Reservoir.<sup>264</sup> The tribe did *not* appeal the district court's ruling concerning the tribe's authority over activities of nonmembers on fee lands.<sup>265</sup>

The Eighth Circuit ruled that the district court should have confined itself to the issue of whether the tribe had jurisdiction over "non-Indians," as requested by the state in its complaint, and that the district court should not have reached the issue of the tribe's authority over "nonmembers."<sup>266</sup> The Eighth Circuit then addressed itself to the remaining question of whether the tribe had the authority to regulate the hunting and fishing of "non-Indians" on the taken land.<sup>267</sup>

The Eighth Circuit distinguished the portion of the taken lands that had previously been held in trust ("former trust lands"), from the 18,000 acres of the taken area that had previously been held in fee by non-Indians ("former fee lands").<sup>268</sup> As to the former trust lands, the court said it must follow the rule that "tribal rights are abrogated only if Congress 'has clearly expressed its intent to do so,' keeping in mind that 'doubtful expressions of intent must be resolved in favor of the

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262. *Id.* at 55-56.

263. *Id.* at 56. The district court also decided that the boundaries of the Cheyenne River Sioux Tribe's reservation had not been altered when the taken lands passed to the federal government. *Id.* at 55.

264. *Bourland*, 949 F.2d at 988.

265. *Id.* at 989 n.11. Although the tribe did not appeal this issue, the Eighth Circuit appears to address it anyway in holding that the tribe had lost its power to regulate hunting and fishing of non-Indians on fee lands through the alienation of these lands pursuant to the Allotment Acts. *Id.* at 990 (citing *Montana*, 450 U.S. at 559).

266. *Id.* at 990.

267. *Id.*

268. *Id.* at 994-95.

Indians."<sup>269</sup> Proceeding on the traditional presumption requiring congressional intent to be express, the Eighth Circuit examined the Flood Control Act of 1944, the Act of 1950, and the Cheyenne River Act and found no express congressional intent to divest the tribe of jurisdiction over the taken lands.<sup>270</sup> Although both the district court and the Eighth Circuit found legislative intent on the issue of tribal jurisdiction to be ambiguous, the district court had applied the *Montana* presumption under which an express congressional *delegation* was required in order to find tribal jurisdiction, whereas the Eighth Circuit applied the presumption under which an express congressional *divestiture* was required in order to find that the tribe's jurisdiction had been taken away.<sup>271</sup>

The Eighth Circuit explained that it found *Montana* to be inapplicable because the purpose of the Cheyenne River Act, unlike the purpose of the Allotment Acts described in *Montana*, was not to destroy tribal government, but was to acquire land on which to build the Oahe Dam and Reservoir.<sup>272</sup> Given the different purpose of the legislation in *Bourland*, the Eighth Circuit concluded that the proper presumption to apply was that the tribe had civil jurisdiction over the former trust lands unless Congress explicitly divested the tribe of that jurisdiction.<sup>273</sup> The Eighth Circuit distinguished *Montana* based on the additional ground that *Montana* involved fee land while the taken land in *Bourland* was characterized by the court as a sort of hybrid of trust land and fee land.<sup>274</sup> Thus, the court seems to have limited the *Montana* decision to the facts of that case.<sup>275</sup> Although the Eighth Circuit did not clarify whether it was evaluating the tribe's treaty

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269. *Id.* (quoting *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 827 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979), *modified on other grounds sub nom.*, *Washington v. United States*, 444 U.S. 816 (1979); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985)).

270. *Id.* at 991-94. The Eighth Circuit referred to the Act of 1950 as "Public Law 870." *Id.* at 992. This is the same statute which the district court referred to as the "Act of 1950." See *Bourland*, slip op. at 47, 49.

271. *Bourland*, 949 F.2d at 993-94.

272. *Id.*

273. *Id.* at 994.

274. *Id.* at 990-91, 993-94.

275. The Eighth Circuit drew support for its limiting of *Montana* from the Supreme Court's decision in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330 (1983). See *Bourland*, 949 F.2d at 994 n.18. The court noted that the decision in *Mescalero Apache Tribe* was unanimous and that the Court in that case had not applied the *Montana* analysis to the hunting and fishing of nonmembers on the 193.85 acres of fee land on the tribe's reservation. *Id.*

power or its inherent sovereignty, it seems as though the court must have been examining the tribe's treaty rights.<sup>276</sup>

The final issue addressed by the Eighth Circuit was the tribe's regulatory authority over the former fee lands.<sup>277</sup> The court noted that the record was silent as to how this land came to be held in fee by entities other than the tribe or tribal members.<sup>278</sup> If the land had come to be held in fee by operation of the Allotment Acts, then the *Montana* presumption against tribal jurisdiction would apply, as would the two *Montana* exceptions.<sup>279</sup> Although the district court had already found that neither *Montana* exception applied to the taken area as a whole, the Eighth Circuit noted that that finding had been made before the Eighth Circuit had determined that the tribe *did* have jurisdiction over the former trust lands.<sup>280</sup> Therefore, the Eighth Circuit surmised that the district court's conclusions pertaining to the two *Montana* exceptions regarding the former fee lands might be affected by the Eighth Circuit's reversal on the issue of former trust lands.<sup>281</sup> Accordingly, the Eighth Circuit remanded for further fact finding regarding the applicability of the two *Montana* exceptions to the former fee lands.<sup>282</sup>

#### D. SUPREME COURT OPINION

##### 1. *The Opinion of the Court*

The Supreme Court granted certiorari to determine whether the tribe had the authority to enforce its regulations against non-Indians on the taken lands, including taken land that had formerly been trust land and taken land that had formerly been fee land.<sup>283</sup> As to the tribe's asserted treaty rights, the Court applied *Montana* and found that the Flood Control Act of 1944 and the Cheyenne River Act did not affirmatively grant the tribe authority over the taken lands.<sup>284</sup> The Court then concluded that *Montana* and *Brendale v. Confederated Tribes & Bands of the Yakima* required the conclusion that the tribe's

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276. *Id.* at 994. The court stated that "[w]e do not have here the essential '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.* (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)).

277. *Bourland*, 949 F.2d at 995.

278. *Id.* at 995, 995 n.19.

279. *Id.* at 995.

280. *Id.*

281. *Id.*

282. *Id.*

283. 113 S. Ct. at 2313, 2315 n.8. The majority opinion was written by Justice Thomas. Chief Justice Rehnquist and Justices White, Stevens, O'Connor, Scalia, and Kennedy joined in the opinion. *Id.* at 2312.

284. *Bourland*, 113 S. Ct. at 2317-18.

treaty rights to exclude had been abrogated when the tribe alienated the land.<sup>285</sup> The Court suggested that, "at least in the context of the type of area at issue in this case," the loss of the right to exclude as a practical matter dictated the conclusion that the tribe's concomitant power to regulate was necessarily reduced because "the power to regulate is of diminished practical use if it does not include the power to exclude: regulatory authority goes hand in hand with the power to exclude."<sup>286</sup>

The Court rejected the Eighth Circuit's attempt to distinguish *Montana* based on the different purposes of the Allotment Acts and of the Cheyenne River Act.<sup>287</sup> The Court stated that "regardless of [the purpose for which Congress allowed the alienation of Indian land], when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control."<sup>288</sup> The Court explicitly held that the *Montana* analysis of tribal treaty rights is not limited to alienation of tribal land pursuant to the Allotment Acts, but applied also to the transfer of tribal land to the federal government in the *Bourland* case.<sup>289</sup>

The Court argued that its approach was consistent with *United States v. Dion*,<sup>290</sup> which the Eighth Circuit had relied upon in limiting *Montana*.<sup>291</sup> In *Dion*, the Court had examined federal legislation that prohibited the killing of bald and golden eagles, but which made a narrow exception for such Indian religious killings as the Secretary of the Interior chose to permit.<sup>292</sup> The *Dion* Court had held that the federal legislation abrogated the tribe's exclusive hunting rights guaranteed by treaty.<sup>293</sup> The Court explained that the holding in *Dion* was based on the premise that when Congress reserves limited rights to Indian tribes, this reservation "suggests that the Indians would otherwise be treated like the public at large."<sup>294</sup> Analogizing from *Dion* to the *Bourland* case, the Court held that the reservation to the tribe in the Cheyenne River Act of certain limited rights of use and occupation over the taken land could not be explained except as a reflection of

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285. *Id.* at 2316. The Court was careful to note that the district court in *Bourland* had found that the taken area was not "a 'closed' or pristine area" and that the Eighth Circuit did not overturn this finding. *Id.* at 2316 n.9. The Court agreed that the taken area was open to the general public and thus declined to reach the issue of what the tribe's regulatory authority would be in some other context. *Id.*

286. *Bourland*, 113 S. Ct. at 2316, 2317 n.11.

287. *Id.* at 2318.

288. *Id.*

289. *Id.*

290. 476 U.S. 734 (1986).

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

292. *Id.* at 2319.

293. *Id.*

294. *Id.*

congressional intent that the tribe's former treaty right of exclusive occupation of the taken land had been abrogated.<sup>295</sup>

The Court next considered whether the tribe had retained inherent sovereignty over the regulation of hunting and fishing on the taken land. The Court held that the *Montana* presumption against tribal authority was applicable to all portions of the taken land, both former trust land and former fee land.<sup>296</sup> In so holding, the Court stated that it accepted the characterization found in *Montana* of relations between a tribe and nonmembers on land not owned by the tribe as being outside of the scope of a tribe's inherent sovereignty.<sup>297</sup> The Court concluded that the tribe did not have inherent authority unless one of the two *Montana* exceptions applied.<sup>298</sup> The Court remanded to the Eighth Circuit on these issues.<sup>299</sup>

As did the district court, the Supreme Court emphasized that it did not reach the question of whether *South Dakota* could enforce its regulations in the taken area because the state's complaint sought a ruling on only the issue of whether *the tribe* could assert jurisdiction.<sup>300</sup>

## 2. Justice Blackmun's Dissent

Justice Blackmun reiterated his position put forward in *Brendale* that the presumption against tribal authority over nonmembers established in *Montana* was wrong and contrary to 150 years of federal Indian jurisprudence.<sup>301</sup> Justice Blackmun stated that a tribe's inherent sovereignty can be implicitly abrogated only when the exercise of tribal authority over an area is "inconsistent with the overriding interests of the National Government."<sup>302</sup> A tribe's treaty rights can only be abrogated by clear and plain language evidencing a congressional intent to abrogate those rights.<sup>303</sup>

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295. *Id.* The Cheyenne River Act reserved to the tribe the right to hunt and fish on taken lands and the right to lease unflooded portions of the taken lands, including those taken lands which had formerly been fee lands. *Bourland*, 949 F.2d at 988.

296. *Bourland*, 113 S. Ct. at 2319-20.

297. *Id.* at 2320 n.15.

298. *Id.* at 2319. The Court apparently found that there was no express congressional delegation. *Id.* at 2319-20. The United States as *amicus curiae* had raised the argument that the Army Corps of Engineers, to which Congress had delegated regulatory authority over the taken area, had in turn delegated its authority to the tribe. *Id.* at 2320-21. Because this argument was not raised before the lower courts, the Court declined to reach this "undeveloped" argument. *Id.* at 2321.

299. *Bourland*, 113 S. Ct. at 2320.

300. *Id.* at 2318 n.12.

301. *Id.* at 2322 n.2 (Blackmun, J., dissenting). Justice Souter joined Justice Blackmun's dissent.

302. *Bourland*, 113 S. Ct. at 2321-22 (Blackmun, J., dissenting).

303. *Id.* at 2324 (Blackmun, J., dissenting).

Justice Blackmun disagreed with the Court's conclusion that the Cheyenne River Act abrogated the tribe's treaty rights because there was no explicitly expressed congressional purpose to that effect.<sup>304</sup> However, even if the tribe's treaty rights were abrogated by subsequent legislation, Justice Blackmun argued that the tribe had the inherent sovereign power to regulate nonmember hunting and fishing in the taken area.<sup>305</sup>

Justice Blackmun argued that the *Montana* inherent sovereignty analysis should not apply in this case because *Montana* involved fee land conveyed to non-Indians pursuant to the Allotment Acts, the purpose of which had been the eventual destruction of reservations and the assimilation of Indians into mainstream society.<sup>306</sup> Even applying *Montana*, however, Justice Blackmun argued that that case did not eschew an analysis of congressional purpose behind the legislation.<sup>307</sup> Rather, the Court in *Montana* merely specified that courts should focus on the legislative purpose "at the time the Indian land is alienated."<sup>308</sup>

Under the facts of *Bourland*, Justice Blackmun stated that the legislative purpose at the time the Cheyenne River Sioux Tribe alienated its land to the federal government was only to acquire land on which to build a dam and to allow non-Indians to use the area for recreational purposes.<sup>309</sup> Justice Blackmun found that this purpose was not inconsistent with the retention by the tribe of the power to regulate hunting and fishing in the area:

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.<sup>310</sup>

Thus, Justice Blackmun would hold that the tribe had the authority to enforce hunting and fishing regulations in the whole of the taken area.<sup>311</sup>

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304. *Id.* at 2323 (Blackmun, J., dissenting).

305. *Id.* (Blackmun, J., dissenting).

306. *Id.* (Blackmun, J., dissenting).

307. *Id.* (Blackmun, J., dissenting).

308. *Id.* (Blackmun, J., dissenting) (emphasis supplied).

309. *Id.* at 2323-34 (Blackmun, J., dissenting).

310. *Id.* See also *id.* at 2324 n.3 (stating that the majority's conclusion that the Cheyenne River Act abrogates the tribe's right to exclude unwanted persons from the taken area is correct, but it does not necessarily follow that the loss of the right to exclude leads to the conclusion that the tribe also lost the right to regulate).

311. *Id.* at 2321. On remand to the Eighth Circuit, the appellate court issued an unpublished opinion on November 10, 1993, in which the court accepted the district court's findings and affirmed the district court's order enjoining the tribal defendants

## ANALYSIS

## A. WHAT ANALYSIS SHOULD DISTRICT COURTS FOLLOW NOW?

Following the United States Supreme Court's decision in *South Dakota v. Bourland*,<sup>312</sup> much of the analysis that district (and appellate) courts should apply to the assertion of regulatory authority by Indian tribes over non-Indians has been settled. Although the *Bourland* Court upheld *Montana v. United States*,<sup>313</sup> the *Bourland* analysis is distinct from *Montana* in many ways. And although the *Bourland* analysis borrows from all three opinions entered in *Brendale v. Confederated Tribes and Bands of the Yakima*,<sup>314</sup> the *Bourland* analysis is not the reincarnation of any one view expressed in *Brendale*.

1. *Inherent Sovereignty*

When an Indian tribe invokes its inherent sovereignty as the basis of its authority over non-Indians on non-Indian fee lands, there is a presumption against tribal authority.<sup>315</sup> This aspect of a tribe's inherent sovereignty over non-Indians within a tribe's territory is considered an aspect of a tribe's "external relations" that is divested by necessary implication because of the tribe's dependent status.

A tribe can only succeed in asserting inherent sovereignty over activities of non-Indians on land not owned by the tribe (1) where Congress has expressly delegated such power to the tribe; (2) where the first *Montana* exception applies, under which the non-Indians have entered consensual relations with the tribe or tribal members; or (3) where the second *Montana* exception applies, under which activities of non-Indians threaten the political integrity, economic security, or health and welfare of the tribe.<sup>316</sup> This analysis from *Montana* emerged relatively unscathed after *Bourland*.

2. *Treaty Rights*

Where the tribe seeks to assert regulatory authority over land that has been alienated to non-Indians, the legislation under which the alienation took place is of paramount importance. Although trea-

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from enforcing tribal hunting and fishing regulations against non-Indians on the taken land. See *South Dakota v. Bourland*, No. 90-5486, 90-5515, slip op. at 2 (8th Cir. Nov. 10, 1993) (per curiam) (unpublished). However, the panel that issued this decision has granted a request for a rehearing before the panel. The court has yet to issue its decision based upon the rehearing.

312. 113 S. Ct. 2309 (1993).

313. 450 U.S. 544 (1981).

314. 492 U.S. 408 (1989).

315. *South Dakota v. Bourland*, 113 S. Ct. 2309, 2319-20 (1993).

316. *Id.*

ties negotiated with Indian tribes almost always granted the tribes the right to exclusive occupation of their reservation and the right to exclude unwanted persons, the legislation under which the alienation was accomplished must be scoured to determine if this right of exclusive occupation is diminished or taken away.<sup>317</sup> Where, as under the Allotment Acts and the Cheyenne River Act, Congress has expressly provided that others besides the tribe shall have the right to occupy or use land within the reservation, the tribe's former treaty right to exclusive use will have been abrogated by the statute.<sup>318</sup> The Court in *Bourland* also emphasized that its holding that the Cheyenne River Act "broadly" opened up reservation lands supported the Court's conclusion that the legislation abrogated the tribe's treaty right to exclusive occupation.<sup>319</sup>

However, whether the tribe's loss of its right to exclude necessarily entails the tribe's loss of its right to regulate is less clear. The *Bourland* Court was cautious in stating that the loss of the Cheyenne River Sioux Tribe's right to exclude meant that the tribe also had lost the right to regulate, "at least in the context of the type of area at issue in this case."<sup>320</sup> The Court also stated that the right to exclude diminished the practical importance of the right to regulate.<sup>321</sup> The Court did *not* hold that the right to regulate was completely abrogated.<sup>322</sup>

These cautious statements probably should be interpreted as leaving room for a different conclusion under different circumstances. Thus, if the legislation allowing the alienation did not "broadly" open up reservation lands to outsiders, even though the treaty right to exclude has been abrogated, then the right to regulate may not have been abrogated.<sup>323</sup> Similarly, if the type of area surrounding the alienated land is "pristine" or significant to the tribe culturally, religiously, or economically, then the Court might conclude that the loss of the tribe's treaty right to exclude does not necessarily mean that the right to regulate was also abrogated by the alienation of the land.<sup>324</sup> The danger of projecting one's own perhaps quaint or stereotypical ideas of what "pristine" Indian lands should look like will have to be assiduously guarded against in making these determinations.<sup>325</sup>

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317. *Id.* at 2316-19.

318. *Id.* at 2316.

319. *Id.* at 2316 n.9.

320. *Id.* at 2316.

321. *Id.* at 2317 n.11.

322. *See id.*

323. *Id.* at 2316, 2316 n.9, 2318.

324. *Id.* at 2316 n.9.

325. *See Brendale v. Confederated Tribes and Bands of the Yakima*, 492 U.S. 408, 464-65 (1989).

## B. EVALUATION OF THE *BOURLAND* APPROACH

Although it is undeniable that *Montana* worked a change in settled Indian law jurisprudence, that decision and *Bourland* are nevertheless compatible with much of pre-existing federal Indian law.

### 1. Comparing *Bourland* with Other Case Law

The approach described in *Bourland* is consistent with *Washington v. Confederated Tribes of the Colville Indian Reservation*.<sup>326</sup> *Colville* involved tribal regulation of non-Indians on land held by or in trust for the tribe.<sup>327</sup> The presumption against Indian inherent sovereignty over activities of non-Indians, which *Bourland* affirms, applies only when the activities of non-Indians occurs on alienated land.<sup>328</sup> Furthermore, the *Montana* Court cited *Colville* as an example of the first exception involving consensual relations—the non-Indians in *Colville* were affirmatively seeking out tribal cigarette vendors to purchase cigarettes from because of the tribal vendors' exemption from state taxes.<sup>329</sup> Furthermore, the Court in *Colville* premised the tribe's taxing authority on the fact that the activities of the non-Indians touched on interests significantly involving the tribe or its members.<sup>330</sup> This is not unlike the requirement in *Bourland* that the tribe demonstrate a strong interest before it will be allowed to assert regulatory authority.<sup>331</sup>

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326. 447 U.S. 134 (1980).

327. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 152 (1980).

328. *Bourland*, 113 S. Ct. at 2318-20.

329. *Montana v. United States*, 450 U.S. 544, 565-66 (1981) (citing *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152-54).

330. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152.

331. *Bourland*, 113 S. Ct. at 2320. Although the decision in *Colville* did touch on the subject of an Indian tribe's regulatory authority over non-Indians, the primary issue before the Court was whether the state could enforce its taxes on non-Indians who purchased cigarettes on the tribe's reservation. The Court has from time to time drawn analogies between the two distinct issues of whether the tribe can regulate versus whether the state can regulate. See *Duro v. Reina*, 495 U.S. 676, 687 (1990) (relying on the holding from *Confederated Tribes Colville Indian Reservation*, 447 U.S. at 161 that a state may tax non-Indians as well as nonmember Indians for the proposition that Indian tribes do not retain inherent sovereignty over nonmembers); *Montana*, 450 U.S. at 566 (citing as an example of the second exception *Fisher v. District Court*, 424 U.S. 382, 386 (1976) (holding that a state court was pre-empted from entertaining jurisdiction over an adoption proceeding in which all parties were tribal members and resided on the tribe's reservation)). However, one should be wary of too-literal borrowings between the two areas because the resolution of each issue involves distinct analyses.

The question of whether an Indian tribe may assert regulatory authority over non-Indians depends on an analysis of the tribe's treaty rights, any express congressional delegation or divestiture, and whether the tribe's inherent sovereignty has survived. *Bourland*, 113 S. Ct. at 2315-20. The question of whether a state may assert regulatory authority over non-Indians on a reservation depends on an analysis of the pervasiveness of federal legislation in the area, whether the assertion of state authority will frus-

The Court's decision in *Merrion v. Jicarilla Apache Tribe* likewise involved the assertion of tribal authority over non-Indians on *tribal lands, not fee lands*, and thus is not contrary to the approach in *Bourland*.<sup>332</sup> In addition, the tribe in *Merrion* had arguably retained its right to exclude the non-Indians, as that right could have been reasserted by the tribe at the conclusion of the leases in question by simply not renewing the leases.<sup>333</sup> The *Merrion* decision, like the *Colville* decision, is also an example of the first *Montana* exception under which the tribe would be allowed to assert authority because the non-Indians had executed a lease with the tribe.<sup>334</sup>

The *Bourland* decision is also consistent with the result reached by the plurality of opinions in *Brendale*. The result of the three opinions in *Brendale* was that the tribe was allowed to zone fee lands in the closed area, but not in the open area of the reservation.<sup>335</sup> The Court in *Bourland* specifically left room for a similar result in the future. The *Bourland* Court's finding that tribal treaty rights had been abrogated in that case were associated with the fact that the land was generally open to the public, was not pristine, and the alienation of the lands had "broadly" opened up the reservation to occupancy by outsiders.<sup>336</sup> Thus, the implication is that a different result might be reached if the Court were presented with land and an alienation scheme like that of the closed area in *Brendale*.<sup>337</sup> For the same reason *Bourland* is also consistent with the result in *New Mexico v. Mescalero Apache Tribe*,<sup>338</sup> because the alienated land on the reservation in that case comprised a very small fraction of the total acreage of the reservation.<sup>339</sup>

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trate federal objectives, and whether the assertion of state authority will interfere with a tribe's ability to make its own laws and be governed by them. *See, e.g.*, *White Mt. Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (stating that two barriers exist to the assertion of state regulatory authority on Indian reservations: pre-emption by federal law and the preservation of Indian tribal sovereignty over internal affairs). Thus, although the two issues may involve consideration of similar factors, the analysis of each is nevertheless distinct. A court's holding that a tribe lacks regulatory authority over an area should not be taken as an affirmative indication that the state is vested with such authority and vice versa. *See, e.g.*, *Bourland*, 113 S. Ct. at 2318 n.12 (stating that the Court did not reach the issue of whether South Dakota had the authority to regulate hunting and fishing in the taken area, even though the Court concluded that the tribe lacked such authority).

332. 455 U.S. at 130, 135 (1982).

333. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 135 (1982).

334. *Id.*

335. *Brendale*, 492 U.S. at 432, 444-45, 448-49.

336. *Bourland*, 113 S. Ct. at 2316, 2316 n.9, 2318.

337. *Id.* at 2316 n.9. The Court specifically stated that the area was neither closed nor pristine, and that the Court would not comment on the "tribe's regulatory authority in other contexts." *Id.*

338. 462 U.S. 324 (1983).

339. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 326 (1983).

The *Bourland* presumption against Indian authority over non-Indians on fee lands is in direct contradiction to statements made in *Buster v. Wright*.<sup>340</sup> However, the results of these cases are not necessarily inconsistent. In *Buster*, the non-Indians specifically negotiated with the tribe on the subject of tribal taxation before signing an agreement with the tribe for the land transfer and before establishing businesses on allotted town sites on the reservation.<sup>341</sup> The execution of a contract between the non-Indians and the tribe is clearly within the consensual relations exception identified in *Montana*.<sup>342</sup> Furthermore, the *Buster* court characterized the allotted lands in that case as "isolated lots and tracts."<sup>343</sup> Again, this would be consistent with the sensitivity to the amount of alienated land and the character of surrounding tribal land that the Court expressed in the *Bourland* decision.<sup>344</sup>

Finally, although *Bourland* purports to rely on *United States v. Dion*,<sup>345</sup> there is some question as to whether the two cases are consistent with one another. In *United States v. Dion*, the Court had explained that there must be clear legislative intent to abrogate Indian treaty rights, but Congress need not come out and explicitly state that "treaty rights are abrogated."<sup>346</sup> Congressional intent to abrogate can be found from the face of the statute, the legislative history of the statute, and other surrounding circumstances.<sup>347</sup> In the final analysis, the Court stated that what is necessary is evidence that Congress recognized a conflict between the proposed statute and rights guaranteed by treaty, and chose to abrogate the treaty rights.<sup>348</sup>

In *Dion*, the Court found that tribal treaty rights had been abrogated by the Eagle Protection Act even though the statute contained no express statement to that effect.<sup>349</sup> However, the legislative his-

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340. Compare *Bourland*, 113 S. Ct. at 2319-20 with *Buster v. Wright*, 135 F. 947, 951-52 (8th Cir. 1905), appeal dismissed, 203 U.S. 599, 600 (1906).

341. *Buster*, 135 F. at 954.

342. See *Montana*, 450 U.S. at 565-66 (citing *Buster*, 135 F. at 950, as an example of the consensual relations exception).

343. *Buster*, 135 F. at 952.

344. See *Bourland*, 113 S. Ct. at 2316, 2316 n.9, 2318. Like *Buster*, language in *Morris v. Hitchcock*, 194 U.S. 712 (1904), and language in *Williams v. Lee*, 358 U.S. 217 (1959), seems contrary to the approach taken in *Bourland* finding a presumption against tribal authority when the actions of non-Indians occur on fee land. However, *Morris* is distinguishable because the facts of that case clearly involved taxing of non-Indians on trust lands. *Morris*, 194 U.S. at 384-85, 392. Whether the activities of the non-Indian merchant in *Williams* occurred on trust land or fee land is unclear from the decision. *Williams*, 358 U.S. at 217.

345. 476 U.S. 734 (1986).

346. *United States v. Dion*, 476 U.S. 734, 738-39 (1986).

347. *Id.* at 739.

348. *Id.* at 739-40.

349. *Id.* at 743.

tory and surrounding circumstances were compelling. The original impetus for the Eagle Protection Act was the behavior of Indians in exercising their treaty rights.<sup>350</sup> Also, Congress added a narrow exception to the bill after the Assistant Secretary of the Interior expressed concern that the bill would abrogate all tribal treaty rights and thereby impair Indian religious practices involving eagles.<sup>351</sup>

*Montana* did not acknowledge a departure from the *Dion* analysis.<sup>352</sup> The legislative history of the Allotment Acts discussed in *Montana* were as compelling as the legislative history in *Dion*.<sup>353</sup> In passing the Allotment Acts, Congress had hoped to dissolve Indian tribes as sovereign entities, to absorb tribal reservations, and to assimilate the Indians into the mainstream community.<sup>354</sup> Although, as in *Dion*, there was no express statement that Congress was abrogating treaty rights, both cases rightly concluded that congressional intent to abrogate was clear and plain.

In *Bourland*, the Court did not acknowledge a departure from the *Dion* analysis, but the Court's application of the analysis seems to be different.<sup>355</sup> The Cheyenne River Act discussed in *Bourland* revealed that Congress wanted to purchase the taken land, wanted to give the general public access to the land for recreational purposes, and wanted to reserve certain rights to the tribe, such as the right to hunt and fish on the land, the right to minerals in the land, and the right to lease all of the unsubmerged land—including land that previously had not been owned by the tribe.<sup>356</sup> The Court held, based on no other evidence than the plain terms of the statute, that congressional intent to abrogate the tribe's treaty right to regulate was clear.<sup>357</sup>

The Court analogized to *Dion* and stated that the reservation to the tribe of limited rights implies the abrogation of tribal treaty rights in general.<sup>358</sup> But the Court's conclusion in *Bourland* was not backed up by the strong legislative history that had supported the Court's conclusion in *Dion*. The *Bourland* holding thus raises questions about whether *any* alienation of tribal land will suffice to support the conclusion that Congress, by approving the sale, intended to abrogate tribal treaty rights to exclude and to regulate the alienated lands.<sup>359</sup>

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350. *Id.* at 742 (quoting H.R. REP. NO. 1450, 87th Cong., 2d Sess., 2 (1962)).

351. *Id.* at 740, 742 (citing H.R. REP. NO. 1450, 87th Cong., 2d Sess., 3-5 (1962)).

352. *Montana*, 450 U.S. at 558-61.

353. *Id.* at 559 n.9.

354. *Id.*

355. *Bourland*, 113 S. Ct. at 2315-16.

356. *Id.* at 2314, 2317.

357. *Id.* at 2318.

358. *Id.* at 2319.

359. Further support for this inference is found in the Court's opening analysis of the tribe's treaty rights wherein the Court stated, "Congress has the power to abrogate

## 2. *Is Bourland Good Policy?*

The *Bourland* decision generally establishes a presumption of no inherent tribal sovereignty over the activities of non-Indians that occur on non-Indian fee lands.<sup>360</sup> The *Bourland* decision also provides that treaty rights to exclusive occupation are abrogated when alienation broadly opens up a reservation to ownership by non-Indians.<sup>361</sup> Although the decision is subject to criticism for not demonstrating overwhelming solicitude toward Indian tribes, the approach defined by the *Bourland* Court is supported by many important policy considerations.

One of the most important considerations is that non-Indians have no voice in tribal government. They are not eligible to become members of the tribe and, as nonmembers, they lack the right to sit on tribal juries, to hold tribal offices, and to vote in tribal elections.<sup>362</sup> Allowing broad regulation over non-Indians by a society in which the non-Indian is in many ways mute and powerless would result in just the type of taxation without representation against which our ancestors rebelled.

Furthermore, essentially no remedy is available to non-Indians for arbitrary tribal governmental action affecting their property rights. The Bill of Rights is not applicable to the actions of tribal governments.<sup>363</sup> The Indian Civil Rights Act requires Indian tribes to provide many procedural protections in their courts, but these protections are not equal to the protections found in the Bill of Rights.<sup>364</sup> Even provisions in the Indian Civil Rights Act that are similar to Bill of Rights provisions are often interpreted much differently.<sup>365</sup> Perhaps most importantly, though, is the fact that there is no review in federal court of tribal court actions for violation of the Indian Civil

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Indians' treaty rights, . . . though we *usually* insist that Congress clearly express its intent to do so." *Id.* at 2315-16 (citations omitted) (emphasis supplied). This implies that the Court may not be following the usual rule. If the Court did not follow the usual rule regarding abrogation of treaty rights, then the question is raised as to what circumstances justified the Court's departure therefrom.

360. *Bourland*, 113 S. Ct. at 2318-20.

361. *Id.*

362. See *Brendale*, 492 U.S. at 445-46; *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978). In this vein, Justice Stevens finds significance in whether the tribal regulations are discriminatory. See *Brendale*, 492 U.S. at 443.

363. *Oliphant*, 435 U.S. at 194 n.3 (citing *Talton v. Mayes*, 163 U.S. 376 (1896)).

364. *Id.* at 194; 25 U.S.C. § 1302.

365. *Id.* at 194; 25 U.S.C. § 1302; COHEN, *supra* note 22, at 663. The Cohen treatise is one of the most authoritative sources on federal Indian law. That treatise states that "[t]he cultural norms embodied in the Bill of Rights are in many ways alien to the original social structures of Indian tribes, and these protections apparently have not yet been put to extensive use." *Id.*

Rights Act unless the petitioner is being held in tribal custody.<sup>366</sup> That means that tribal courts are the sole arbiters of their own governmental actions when "mere" property rights of non-Indians are involved.<sup>367</sup>

The argument that the *Bourland* decision does not adequately protect tribal interests is not well taken. Merely because there is a presumption against tribal inherent sovereignty over activities of non-Indians on fee lands does not mean that all assertion of tribal sovereignty is precluded. The two *Montana* exceptions cover broad categories of tribal interests and provide a method by which those interests can be protected.<sup>368</sup> Requiring the tribe to rebut a presumption against tribal authority rather than assuming the tribe has the authority in the first instance is eminently reasonable in view of the disadvantageous position non-Indians occupy in relation to tribal government.

The Court's reliance in *Bourland* on decisions concerning tribal criminal jurisdiction, such as *United States v. Wheeler*<sup>369</sup> and *Oliphant v. Suquamish Indian Tribe*,<sup>370</sup> is somewhat questionable. By relying on those decisions to decide a case involving Indian *civil* jurisdiction, the Court arguably has not adequately taken into account the fact that Indian tribes have generally been allowed broader authority in the civil area than in the criminal area.<sup>371</sup> However, the *Bourland* decision *does* recognize and respect the distinction between Indian au-

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366. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69-70, 72 (1978); COHEN, *supra* note 22, at 668 (stating that federal court review under the Indian Civil Rights Act is limited to entertaining petitions for writs of habeas corpus).

367. COHEN, *supra* note 22, at 669 (stating that the "interpretation and application of the [provisions of the Indian Civil Rights] Act are largely a matter for tribal institutions alone."). The deprivation of property rights can be every bit as devastating as the deprivation of liberty interests: The power to tax is the power to destroy. Some tribal licensing schemes contemplate the ability to deny non-Indians the right to conduct business at all, even if the non-Indians comply with the requirements of the licensing scheme. See, e.g., Cheyenne River Sioux Tribal Ordinance 48, §§ 3-1-7, 3-1-8, and 3-1-9, published at 57 Fed. Reg. 21554, 21556 (1992) (granting broad discretion to tribal liquor licensing board to grant or deny liquor licenses to applicants who nevertheless comply with licensing requirements).

Of course, once a non-Indian has litigated a dispute with the tribe in tribal court, he may seek review in federal court of the limited issue of whether the tribal court had jurisdiction over the non-Indian and the dispute. See *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 16 n.8, 19-20 (1987); *National Farmer's Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 852-53, 856-57 (1985). However, if the federal court determines that the tribal court had jurisdiction, there is no federal review of the merits of the dispute.

368. See *Montana*, 450 U.S. at 565-66.

369. 435 U.S. 313 (1978).

370. 435 U.S. 191 (1978).

371. *Duro v. Reina*, 495 U.S. 676, 687-88 (1990) (stating that "our decisions recognize broader retained tribal powers outside the criminal context"). The Court's reliance on *Wheeler* is objectionable for the further reason that it misinterprets what the Court in

thority over civil as opposed to criminal areas. The *Bourland* decision merely condones a presumption against tribal sovereignty over non-Indians on non-Indian fee land, which presumption can be overcome by demonstrating a significant tribal interest or consent on the part of the non-Indians.<sup>372</sup> In the area of tribal criminal jurisdiction, tribes cannot exercise any authority over non-Indians regardless of the tribal interests implicated.<sup>373</sup> Thus, tribal civil authority over non-Indians is considerably broader than tribal criminal authority over non-Indians.

The *Bourland* decision can be criticized for its conclusion that the loss of the power to exclude also entails the loss of the right to regulate.<sup>374</sup> Although the Court qualified its conclusion by saying that the conclusion applied "at least in the context of the type of area at issue in this case," the conclusion is probably not even supportable under the facts of *Bourland*.<sup>375</sup> An example will help to illustrate the argument.

Most states enforce hunting and fishing regulations, yet those states do not routinely act to exclude violators of such regulations from state public lands. How then is the state effective in enforcing its laws? Largely through the enforcement of criminal penalties. If a state citizen violates hunting regulations, then the state may fine the citizen and revoke the citizen's hunting license. If the citizen persists in hunting without the license or refuses to pay the fine, then the state

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*Wheeler* said. Having established that retained tribal sovereignty did not encompass criminal jurisdiction over nonmembers, the Court in *Wheeler* said the following:

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve only the relations among members of a tribe. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

*Wheeler*, 435 U.S. at 326.

Read closely, what the above passage stands for is the proposition that relations between a tribe and its members are in the category of internal relations over which tribal sovereignty is preserved. The passage does not establish the converse, i.e., that relations between a tribe and non-members are necessarily in the category of "external relations" over which tribal sovereignty is implicitly divested by reason of the dependent status of Indian tribes. The Court in *Montana* was the first to misinterpret the *Wheeler* passage, a fault that appears to have been carried on in *Bourland*. See *Bourland*, 113 S. Ct. at 2319; *Montana*, 450 U.S. at 563-64.

372. See *Bourland*, 113 S. Ct. at 2319-20.

373. *Oliphant*, 435 U.S. at 210.

374. *Bourland*, 113 S. Ct. at 2318 (stating that "when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control.") (emphasis supplied). See also *id.* at 2316, 2317 n.11.

375. *Bourland*, 113 S. Ct. at 2316.

may impose criminal penalties. Indian tribes, on the other hand, cannot exercise criminal jurisdiction over non-Indians.

Assume a tribe does as Justice Blackmun suggested in his dissent in *Bourland* and fines non-Indian violators.<sup>376</sup> If non-Indians refuse to pay the fines, what then? A tribe can neither prosecute the violators nor expel them from fee lands. The premise behind the *Bourland* Court's conclusion appears to have been that, without the threat of criminal sanctions to back them up, a tribe's levying of fines on non-Indians is a hollow act.<sup>377</sup> Therefore, if the tribe cannot exclude the violators and cannot enforce criminal sanctions, the right to regulate, even if it exists, is a nullity.<sup>378</sup>

However, there is a whole range of civil enforcement tools at the tribe's disposal. The tribe could enforce its regulations by confiscating property such as firearms, fish, and game used or obtained through the violation of tribal laws. These would be effective *civil* enforcement tools, and in fact are of a kind typically used by states in enforcing fish and wildlife regulations. Enforcement would probably be dependent on the tribe's patrolling the areas covered by tribal regulations in order to effectively discover violators. Although tribal patrolling could be problematic on non-Indian fee lands with only private roads traversing them, such patrols would not be a problem in areas like the taken area in *Bourland* that was already open for public access. Inasmuch as the issue before the *Bourland* Court concerned only the taken area, the Court's conclusion that the loss of the tribe's power to exclude diminished the practical importance of the power to regulate seems flawed.<sup>379</sup>

### C. QUESTIONS RAISED AND UNANSWERED

Although the *Bourland* decision did much to settle ambiguities in the area of the assertion of tribal authority over non-Indians, there are still some unanswered questions. These fall into roughly three categories: (1) the role legislation and legislative history should play in the analysis under *Bourland*, (2) the distinction between non-Indians and nonmember Indians in the area of tribal civil authority, and (3) the facts necessary to satisfy the two *Montana* exceptions.

#### 1. *The Role of Legislation and Legislative History*

Because Congress has plenary power over Indians, specific legislative enactments will always be important in determining whether

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376. *Id.* at 2323 (Blackmun, J., dissenting).

377. *Id.* at 2316, 2317 n.11, 2318.

378. *Id.*

379. *Id.* at 2313.

Congress has expressly delegated some authority to a tribe or explicitly divested some power from a tribe.<sup>380</sup> However, where the legislation and its history are ambiguous or not determinative, the importance of Congressional purpose is unclear.

a. Inherent Sovereignty

In the context of a tribe's inherent sovereignty, the absence of clear legislation gives rise to the presumption against tribal authority over non-Indians on non-Indian fee land.<sup>381</sup> Even so, it would be unwise for courts to ignore totally the backdrop of legislation surrounding the subject matter.

The example provided by *Duro v. Reina*<sup>382</sup> is instructive. The Court in *Duro* found that there was no clear delegation of authority to Indian tribes to assert criminal jurisdiction over nonmember Indians.<sup>383</sup> However, as the dissent and eventually Congress itself pointed out, a long history of federal statutes implied that Congress assumed that tribes had retained this aspect of sovereignty.<sup>384</sup> Had the Court in *Duro* attached more significance to this historical legislative data, it might have reached a different conclusion. In determining questions of inherent tribal sovereignty, courts should not forget that treaties and legislation "form the backdrop for the intricate web of judicially made Indian law."<sup>385</sup>

b. Treaty Rights

In refusing to follow the Court's analysis in *Montana* of tribal treaty rights, the Eighth Circuit in *Bourland* relied on the fact that the legislative purposes of the Cheyenne River Act and of the Allotment Acts were different.<sup>386</sup> In response, the Court in *Bourland* stated that "[t]o focus on [legislative] purpose is to misread *Montana*."<sup>387</sup> The Court went on to say that "what is relevant . . . is the effect of the land alienation occasioned by [the allotment] policy on Indian treaty rights tied to Indian use and occupation of reservation land."<sup>388</sup> These statements by the Court may be interpreted to mean

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380. *Buster*, 135 F. at 950 (stating that Congress could act to divest Indian tribes of all power if Congress wanted to do so).

381. *Montana*, 450 U.S. at 565.

382. 495 U.S. 676 (1990).

383. *Id.* at 686-96.

384. *Id.* at 701-03 (Brennan, J., dissenting); Criminal Jurisdiction Over Indians, Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301(2), (4)).

385. *Oliphant*, 435 U.S. at 206.

386. *Bourland*, 949 F.2d at 993.

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

388. *Id.* (emphasis in original) (citations omitted).

that legislative purpose is irrelevant to the determination of whether Indian treaty rights have been abrogated.<sup>389</sup>

However, the statements should probably not be stretched as far as that. For example, if legislative history revealed that Congress made an affirmative effort *not* to affect tribal treaty rights, then surely this would be relevant—especially in view of Congress' plenary power over Indian tribes. Further evidence that the Court does not espouse turning a blind eye to congressional purpose is the Court's citation to *Dion*.<sup>390</sup> The Court in *Dion* advocated looking for "clear and plain" congressional intent to abrogate treaty rights not only from the face of a statute, but also from its legislative history and other surrounding circumstances.<sup>391</sup>

One should keep in mind that the Court in *Bourland* made the above-quoted statements in the context of rejecting the Eighth Circuit's purpose-oriented distinction of *Montana*.<sup>392</sup> In this context, the Court's statements should probably be interpreted to mean that merely because a statute has a purpose different from the purpose of the Allotment Acts discussed in *Montana*, this fact does not render the *Montana* analysis inapplicable.<sup>393</sup>

## 2. *Distinction Between non-Indians and nonmember Indians*

Whether a distinction should be drawn between non-Indians and nonmember Indians in the area of tribal civil authority is a question that remains unanswered after *Bourland*. Although the decision in *Montana* used the terms "non-Indian" and "nonmember" apparently interchangeably, the Court decided *Montana* before it decided *Duro v. Reina*.<sup>394</sup> It was in *Duro* that the Court for the first time addressed the possible distinction between tribal authority over non-Indians and nonmember Indians.<sup>395</sup> Thus, the statements in *Montana* should not be interpreted as authority for the proposition that tribal authority over non-Indians and nonmembers is to be analyzed in the same way. This conclusion is further supported by the fact that the district court in *Bourland* lumped the two groups together, but the Eighth Circuit

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389. *Id.*

390. *Id.* at 2319.

391. *Dion*, 476 U.S. at 739.

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

393. *Id.*

394. See *Montana*, 450 U.S. at 558, 565 (using "nonmember" and "non-Indian" apparently interchangeably). *Montana* was decided in 1981 and *Duro* was not decided until 1990.

395. See *Duro*, 495 U.S. at 685 (recognizing as an issue of first impression the question whether an Indian tribe may assert criminal authority over "nonmember Indians" as opposed to "non-Indians").

and the Supreme Court were careful to address only the issue of the tribe's authority over "non-Indians."<sup>396</sup>

Because non-Indians and nonmember Indians share the same relation to tribal government, an argument can be made for treating the two groups the same. Neither group can vote in tribal elections, sit on tribal juries, or hold tribal office.<sup>397</sup> Furthermore, a nonmember Indian who is tried criminally in tribal court can seek federal judicial review, while a non-Indian whose mere property rights are affected cannot.<sup>398</sup>

However, the Court's experience with *Duro* should perhaps inform the analysis to a certain extent. Congress quickly overruled *Duro* and indicated that tribes have always retained sovereign criminal authority over nonmember Indians.<sup>399</sup> If Congress believes that Indian tribes have retained their sovereignty in the serious area of criminal jurisdiction over nonmember Indians, perhaps Congress has proceeded with the same belief in some areas of civil jurisdiction. Close scrutiny of the history of congressional enactments and treaties is important to the determination of this question.

### 3. Montana Exceptions

Because it was uncertain whether the *Montana* exceptions remained viable in the last twelve years, there are not many decisions from the Court interpreting those exceptions. Justice White in *Brendale* proposed a crabbed interpretation, particularly of the second *Montana* exception.<sup>400</sup> Justice White held that even if a tribe demonstrates that its political integrity, economic security, or health or welfare were directly threatened by actions of non-Indians on non-Indian fee lands, a tribe still may not be allowed to assert jurisdiction, "depend[ing] on the circumstances."<sup>401</sup> In the context of zoning authority, Justice White argued that the presence of facts supporting the second *Montana* exception merely gave rise to a duty on the part of states to respect tribal interests.<sup>402</sup> The tribe's only remedy was to

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396. See *Bourland*, 113 S. Ct. at 2313; *South Dakota v. Bourland*, 949 F.2d 984, 990 (8th Cir. 1991); and *South Dakota v. Bourland*, No. 88-3049, slip op. at 2, 2 n.1 (D.S.D. Aug. 21, 1990) (unpublished).

397. See *Duro*, 495 U.S. at 688; *Brendale*, 492 U.S. at 445-45; and *Oliphant*, 435 U.S. at 194.

398. See 25 U.S.C. § 1302; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 69-70, 72 (1978); COHEN, *supra* note 22, at 668-69.

399. See *Criminal Jurisdiction Over Indians*, Pub. L. No. 102-137, § 1, 105 Stat. 646 (1991) (codified at 25 U.S.C. § 1301(2), (4)).

400. See *Brendale*, 492 U.S. at 428-31.

401. *Id.* at 429.

402. *Id.* at 430-31.

seek an injunction in federal court if states did not respect tribal rights in executing state authority.<sup>403</sup>

Justice White's interpretation is surely not what the *Montana* decision means. The *Montana* decision speaks of "jurisdiction" and "authority" in connection with the exceptions described, which are incompatible with Justice White's interpretation.<sup>404</sup>

Justice Blackmun argued in *Brendale* that the second *Montana* exception should be interpreted broadly and from the tribe's perspective.<sup>405</sup> Justice Blackmun would *not* inquire into whether the individual activities of non-Indians will have an effect on the tribe's political integrity, economic security, or health or welfare.<sup>406</sup> Rather, Justice Blackmun would inquire into whether depriving the tribe of the broad category of authority it seeks to assert would have a deleterious effect on the tribe.<sup>407</sup> Justice Blackmun's approach may have been appropriate in the unique context of zoning authority, but it may not be appropriate in the context of, for example, hunting and fishing regulation over the taken area as described in *Bourland*.

The district court's findings in *Bourland* addressed the second *Montana* exception by analyzing both the effect of the non-Indians' activities and the categorical effect that denying the tribe the authority would have.<sup>408</sup> The court examined the effect that hunting and fishing by non-Indians would have on the tribe.<sup>409</sup> The court also examined what the effect would be if the tribe were categorically denied the regulatory authority it sought to assert.<sup>410</sup> Perhaps the district court in *Bourland* provided the answer to how courts should fashion their findings under the second *Montana* exception.

As to the first *Montana* exception, *Montana* itself cited *Confederated Tribes of the Colville Indian Reservation* as an example of "consensual relations."<sup>411</sup> In *Colville*, the non-Indians' consensual relationship consisted of buying cigarettes from tribal vendors.<sup>412</sup> If this is all that is required under the first *Montana* exception, then the presumption against tribal authority over non-Indians is turned on its head. The better interpretation is that, in *Colville*, the cigarette sales

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403. *Id.*

404. *Montana*, 450 U.S. at 565-66.

405. *Brendale*, 492 U.S. at 456, 459-60.

406. *See id.* at 459-60.

407. *Id.*

408. *Bourland*, slip op. at 9-18.

409. *Id.* at 10-13.

410. *Id.* at 13-18.

411. *Montana*, 450 U.S. at 565-66 (citing *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152-54).

412. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 144-45, 152.

occurred on *tribal trust lands*.<sup>413</sup> However, the possibility remains that facts such those in *Colville* might be held to satisfy the first *Montana* exception even when the non-Indian activities occur on non-Indian fee lands.

The *Montana* Court's citation to *Colville* raises another interesting question. The Court cited *Colville* as an example of the consensual relations exception, yet the activities of the non-Indians in *Colville* occurred on trust lands.<sup>414</sup> Does this mean that the *Montana* presumption against tribal sovereignty over non-Indians applies when the activities of non-Indians occur on *trust lands*? *Montana* and *Bourland* involved only activities of non-Indians on non-Indian fee land.<sup>415</sup>

Although the *Montana* Court's citation to *Colville* in this context creates some ambiguity, it is undisputed that Indian tribes still retain the power to exclude non-Indians from land owned by or in trust for the tribe.<sup>416</sup> Included in this power to exclude is the tribe's power to condition entry upon compliance with tribal regulations.<sup>417</sup> Therefore, notwithstanding the Court's citation in *Montana* to *Colville* as an example of the consensual relations exception, the *Montana* presumption against tribal authority over non-Indians should not apply to actions of non-Indians on trust lands.

## CONCLUSION

Criticism of *South Dakota v. Bourland*<sup>418</sup> is likely to be leveled at the Court's failure in *Bourland* to follow precedent established prior to *United States v. Montana*.<sup>419</sup> However, this criticism is somewhat academic because it is clear that *Montana* worked a fundamental change in the analysis of civil tribal authority over non-Indians.

The *Montana* decision, and the *Bourland* decision because it embraces *Montana*, mark a shift in how non-Indians residing on Indian reservations are viewed. They are no longer viewed, as in *Buster v. Wright*,<sup>420</sup> as rank newcomers who have entered tribal reservations at their own risk and must accept circumstances as they find them.

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413. *Id.*

414. *Montana*, 450 U.S. at 566; *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. at 152-54.

415. See *Bourland*, 113 S. Ct. at 2313; *Montana*, 450 U.S. at 548-49.

416. *Brendale*, 492 U.S. at 442, 460-61. The facts recited by Justice Stevens in *Brendale* point out an exception to this general statement: Indian tribes cannot exclude non-Indians from roads within tribal trust lands which are constructed and maintained by the Bureau of Indian Affairs (BIA). *Id.* at 439-40. This is because the general public has a right to use roads like the BIA roads, which are funded at public expense. *Id.*

417. *Bourland*, 113 S. Ct. at 2316; *Montana*, 450 U.S. at 558-59.

418. 113 S. Ct. 2309 (1993).

419. 450 U.S. 544 (1981).

420. 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906).

Rather, non-Indians are viewed in a more accurate modern light as persons who have resided on tribal reservations for generations and whose property may have been inherited from ancestors rather than acquired directly from an Indian.

The peaceful coexistence of non-Indians and Indians on tribal reservations requires a delicate balancing of the interests of both parties. To maintain that delicate balance, it was necessary to recognize that non-Indians on Indian reservations are no longer recent intruders and are entitled to some protections against tribal governments. However, should the balance tip too far in favor of non-Indians, the peaceful coexistence of Indians and non-Indians on tribal reservations may be threatened. The Court's decision in *Bourland* may be best understood as an attempt to strike an appropriate balance between the interests of Indians and the interests of non-Indians who reside on tribal reservations.

