10-1984

Montana v. Blackfeet Tribe of Indians

Lewis F. Powell Jr.

Views of SG

9/22

This is an important case as to Indian Tribes & to States affected by the 1924 & 1938 Acts of Congress with respect to allotments of land to Indians. Mont. statutes were invalidated. There may be a ripeness problem that probably SG will clarify.

Preliminary Memo

September 24, 1984 Conference
Summer List 17, Sheet 3

No. 83-2161

MONTANA, et al. (or)

v.

BLACKFEET INDIANS

Cert to CA9 (en banc) (Goodwin, Fletcher, Farris, Pregerson, Canby, Boochever, Norris, Reinhardt; Anderson, Wallace, Kennedy conc & diss) 8-3

Federal/Civil

Timely

1. SUMMARY: CA9 ~~struck down~~ invalidated state taxes on production from tribal mineral leases.

2. FACTS AND DECISION BELOW: In 1887, Congress enacted the General Allotment Act. Designed to facilitate speedy assimilation, the Act allotted parcels of land to individual Indians. The parcels were to be held in trust for a time -- during which the tribal system would disintegrate -- and then the

CVSG

-Dan

I feel the absence of a cross-petition and the lack of finality, though not a jurisdictional bar, argue against taking the case. A CVSG is appropriate, I believe, in order to determine whether the questions are so important

Indian would become the owner in fee. The Act was amended in 1891 to permit short term leases of unallotted lands and lands allotted to aged and disabled allottees. Provisions for leasing were gradually liberalized over the years, culminating in the Act of May 29, 1924. That Act allowed oil and gas production leases for "as long as oil or gas shall be found in paying quantities," authorized the Secretary of the Interior to extend previous leases, and, most important, authorized state taxation of mineral production. Proceeds from the leases were paid to the Secretary and disbursed by congressional appropriation for the benefit of the Indians.[1]

In the mid-30s, Congress decided that the whole allotment approach had been wronghead. The Indian Reorganization Act (IRA), passed in 1934, prohibited further allotment, returned to the Tribes some of the land that had passed into non-Indian ownership, and made provisions for tribal autonomy and authority

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[1]The Act provided:

> [U]nallotted land on Indian reservations ... may be leased at public auction by the Secretary of the Interior, with the consent of the council speaking for such Indians, for oil and gas mining purposes for a period of not to exceed ten years, and as much longer thereafter as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other mineral on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is hereby authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands.

over tribal lands. After several years of further debate, Congress passed the Act of May 11, 1938, to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act." The 1938 Act put in place a comprehemsive scheme for mineral leasing of unallotted lands. (All of resp's minerals are technically "unallotted lands" because the minerals were reserved to the United States for the benefit of the Tribe when the reservation land was allotted.) The Act provided for leases to be sold at auction to the highest bidder by the Indians themselves, though with the approval of the Secretary and under regulations issued by him. The 1938 Act did not mention taxation; it did repeal "all Acts or parts of Acts inconsistent herewith."

Resp (Blackfeet Indians) has entered into 125 leases with non-Indian oil and gas producers. Twelve of the leases were made under the authority of the 1924 Act, the remainder pursuant to the 1938 Act. Petr (State of Montana) levies a variety of taxes on oil and gas produced under the leases. The taxes are actually paid by the lessees, who reduce their royalty payments to resp accordingly. There is some dispute over what portion, if any, of the legal incidence of the taxes falls on the Tribe.

The Montana taxes were first challenged, and eventually upheld, in British-American Oil Producing Co. v. Bd. of Equalization, 299 U.S. 159 (1936) (involving only the 1924 Act). Thereafter, the taxes were regularly assessed and paid by the lessees until 1977. In that year the Solicitor of the Department of the Interior issued an opinion stating that the 1938 Act had

"replaced" the 1924 Act, and so withdrawn the authority to tax the mineral leases.

Resp brought this suit challenging the Montana taxes insofar as they fell upon the Tribe. In its answer, petr argued that the 1924 authorization applied to leases under the 1938 Act, and that in any event the sole legal incidence of the tax falls upon the non-Indian producers, so the Tribe is not being taxed. The DC (Hatfield, D. Montana) upheld the taxes on the first of these grounds. State taxation of Indians requires congressional consent; that is provided by the 1924 Act. The only question was whether the 1938 Act repealed that authorization. While the 1938 Act was a comprehensive revision of the existing law, it did not address the issue of state taxation. There is no discussion of the matter in the legislative history. Something more than silence is necessary to support a repeal by implication. Moreover, from 1938 until 1977, Interior had consistently viewed with approval state taxation of the production of oil and gas on Indian lands. Its 1977 opinion ran counter to 40 years of prior administrative practice and congressional acquiescence. Greater weight was due the consistent past practice than this recent and sudden reversal.

A panel of CA9 (Sneed, Anderson, Reinhardt (concurring in the result but not participating in the preparation or approval of the opinion)) affirmed. The necessary congressional consent was plainly given in the 1924 Act, and the 1938 Act did not work an implicit repeal. The two statutes are capable of easy coexistence. The legislative history does not provide the

necessary showing of intent to repeal. Perhaps most importantly, there has been a longstanding administrative interpretation upholding the right of States to tax oil and gas production. Since the two statutes have "concurrent, cumulative, and compatible effect," the State's power to tax extends equally to leases entered into under the 1924 Act and those entered into under the 1938 Act.

CA9 then reheard the case en banc and reversed. It concluded that while the 1938 Act did not repeal the 1924 Act, it did completely supersede it. Leases entered into pursuant to the earlier Act were still subject to taxation. The 1924 Act had no relevance to leases entered into pursuant to the 1938 Act, however, and production under such leases could not be taxed because there was no congressional authorization. The CA rejected petr's argument that if the 1938 Act did not repeal the 1924 Act, it must have incorporated it. In the absence of any evidence in the legislative history, the court refused to believe "that Congress intended that part of one sentence in one of the statutes otherwise totally superseded by the 1938 Act be incorporated into the 1938 Act, and that Congress manifested its intention through silence." State taxation would also conflict with the purpose of the IRA, which was to promote "a significant increase in tribal autonomy and authority and the extension to the tribes of 'an opportunity to take over the control of their own resources.'" The court gave little weight to the prior position of the Interior Department, since it had been expressed

only in two unpublished memoranda, not contemporaneous with the Act itself, and had since been repudiated.

The dissenters agreed that the 1938 Act did not repeal the 1924 Act: repeals by implication are disfavored, the two Acts are not inconsistent, the 1938 Act was not comprehensive, and for 40 years the Department of the Interior thought there had been no repeal. Absent a repeal, the two statutes should be read together and full effect given to both. Since it is still in effect, the 1924 Act must be construed to have some force. While the 1938 Act replaced the leasing provisions of the 1924 Act, the taxing authorization was left intact. No express incorporation was required; the taxing authorization applies under its own terms. If Congress meant to abrogate the authority to tax, it surely would have made that intent clear.

3. CONTENTIONS: Petr -- This is a question of increasing importance that should be resolved by this Court. Ninety-six separate actions are now pending in Montana and are stayed pending the outcome of this case; $5 million in taxes have been paid under protest. Similar cases, involving $25 million, are pending in Arizona and New Mexico.

CA9 erred on the merits. Occasional references in opinions by this Court suggest that it views the 1924 authorization as still in effect. It is. Congress could have repealed the taxing authority but did not do so. The CA relied too heavily on its view of the general purposes of the IRA to inform its reading of the 1938 Act; the IRA really has little to do with this question. Other courts, including this one, have refused to look to the

general policies underlying the IRA in construing other statutes. The CA should have deferred to the longstanding administrative interpretation.

Resp -- The case is not ripe for review. The CA did not actually hold any Montana tax invalid, but remanded for a determination of where the legal incidence of the taxes fell. Most of the money at issue in Montana, and in the cases pending in other States, involves taxes on producers, not on the Indians, and therefore a decision by this Court would not affect the primary issue in those cases.

The 1924 Act authorizes taxation of mineral production "on such lands." Those are simply the lands leased under the 1924 statute. Solely as a matter of statutory construction, apart from questions of repeal, the decision below was correct because the 1924 authority does not extend to post-1938 leases. The first administrative opinion actually to consider the relationship between the 1924 and 1938 Acts was the one issued in 1977. That is the only administrative decision on point and deserves deference. The CA properly looked to the purposes of the IRA for general guidance.

By virtue of its express repealer provision, repealing "all Acts or parts of Acts inconsistent herewith," the 1938 Act did repeal the 1924 Act. The tax consent substantially conflicts with the policies of the 1938 Act and the IRA.

Amici (Arizona, Idaho, Nevada, N. Dakota) -- Amici point out their "vital interest" in resolution of this question, decry the

uncertainty created by the CA's decision, and repeat some of the arguments made on the merits by petr.

4. DISCUSSION: This petn raises issues that are significant and becoming more so. Although litigation has not thus far been extensive, the issue has cropped up occasionally and the interest of amici indicates that it will arise more frequently. The issue is important to the States and the Indians, even if the amount of money at stake ahs been exagerated by petrs. On the merits, the case is difficult. See Price & Clinton, Law & The American Indian 804-806 (1983) (noting that the "special problems" caused by the two Acts are not "definitively resolved," though a "strong argument" can be made that the 1938 Act repealed that of 1924); Cohen's Handbook of Federal Indian Law 409 (1982) (pretty much treating the 1938 Act as a repeal on the basis of the opinion from Interior). None of the arguments anyone has offered are entirely convincing. General canons of statutory construction are not much help, and there is little legislative history. Where one would ordinarily look to plain words, there is a vacuum --"plain silence." The question is whether one would expect Congress to have spoken up if it meant for the States to be able to tax, or if it meant for them not to.

The posture of the case argues against granting cert in two ways. First, while resp does argue that the 1938 Act effected a complete repeal of the 1924 Act, it has not filed a cross-petn. The CA held that the 1924 Act had not been repealed and that petr could tax the 12 pre-1938 leases. Technically, the failure to

cross-petn forecloses a finding that there had been complete repeal, which would expand the relief granted below. The Court remains free, however, to determine what the taxing authority under the 1938 Act is, and that is the heart of the dispute.

Second, there is the question of ripeness. On remand the DC might decide that the legal indidence of the tax does not fall on the tribe, which would moot the question whether petr can tax the resp directly. The taxes might still be invalid if they excessively impair resp's ability to govern by depriving it of potential revenues; thus the taxes might yet be struck down on other grounds. Any lack of finality is not a jurisdictional obstacle, however, and the legal issue is squarely presented, has been finally determined, and requires no factual development. I think the case is ripe enough.

In light of the federal interest, the importance of the 1977 Interior Department opinion, and the possibility that Interior's views have changed with the new administration, the views of the Solicitor General would be helpful.

5. RECOMMENDATION: I recommend CVSG, with a view toward granting.

There is a response and an amicus brief.

August 17, 1984 Herz Opinion in petn

Montana v. Blackfeet Tribe of Indians

No. 83-2161

This case is here on writ of certiorari to the Court of Appeals for the Ninth Circuit. The respondents, the Blackfeet Indian Tribe, filed suit challenging the application of ~~several~~ Montana taxes to the Tribe's royalty interests in oil and gas leases issued pursuant to the Indian Mineral Leasing Act of 1938.

The District Court granted summary judgment for the State, holding that the taxes were authorized by a 1924 statute. It held that the 1938 Act, under which these leases were issued, did not repeal or supersede the ~~1924 statute~~.

~~The~~ en banc Court of Appeals reversed the District Court. Although it agreed that the 1924 Act had not been repealed by the passage of the ~~1938~~ Act, the Court of Appeals determined that the 1924 statute did not apply to leases executed pursuant to the ~~1938~~ Act.

We agree with the Court of Appeals. Indian tribes and ~~individual Indians~~ are exempt from state taxation within their own territory, unless Congress authorizes the imposition of such taxes. Our cases establish that congressional consent to state taxation of Indians must be explicitly clear, and that statutes are to be construed liberally in

favor of the Indians. The authorization in the 1924 Act was explicit, but this authority was omitted entirely from the 1938 Act. Thus, the later ~~1938~~ Act contains no authorization to tax the Tribe.

Accordingly, we hold that Montana may not tax the Blackfeet's interests in ~~these~~ leases issued under the 1938 Act, ~~and we~~ affirm the judgment of the Court of Appeals.

Justice White has filed a dissenting opinion in which Justices Rehnquist and Stevens have joined.

Court ..... Voted on....., 19...

Argued ....., 19... Assigned ....., 19... No. 83-2161

Submitted ....., 19... Announced ....., 19...

MONTANA

vs.

BLACKFEET TRIBE OF INDIANS

Important Indian case. SG will participate.

Grant

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.	Viewster	✓											
Powell, J.		✓		w/ SG									
Rehnquist, J.		✓											
Stevens, J.		✓											
O'Connor, J.		✓											

lgs 03/26/85 Reviewed - An exceptionally fine memo.

Linda, agreeing with SG, would affirm CA 9's en banc decision. See p 6, 7, 10

I am inclined to agree Linda's summary is helpful

BENCH MEMORANDUM

To: Mr. Justice Powell March 26, 1985

From: Lynda

No. 83-2161 Montana v. Blackfeet Tribe (CA 9 en banc)

Argued January 15, 1985 (~~Reargued~~ Reargued 4/23)

QUESTION PRESENTED

Whether the State of Montana may tax the Blackfeet Tribe's royalty interest under oil and gas leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g?

I. BACKGROUND

A. Statutory Background

The relevant statutory history of this case begins with the Act of February 28, 1891 (the "1891 Act"), codified at 25 U.S.C. §397, which was the first Congressional authorization of mineral leases involving Indian lands. That act authorized mineral leases for terms not to exceed ten years on lands "bought and paid for" by the Indians. The 1891 Act was amended by the Act of May 29, 1924 (the "1924 Act"), codified at 25 U.S.C. §398, which provided that

> Unallotted land . . . subject to lease for mining purposes for a period of ten years under §397 . . . may be leased . . . by the Secretary of the Interior, with the consent of the [Indian council], for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

The 1924 Act was enacted primarily to lengthen the terms of oil and gas leases, which had been fixed at ten years by the 1891 Act. F. Cohen, Handbook of Federal Indian Law 534 (1982). Its noteworthy feature for purposes of this case is

the proviso, underlined in red, above, that permitted the State to tax income received by the Indians from mineral leases. Other statutes were enacted in the 1920's authorizing mineral leases on other types of Indian land not covered by the 1891 Act; these created a patchwork quilt of mineral leasing rules that left the law governing leases on tribal land in a state of confusion. Id.

The Act of May 11, 1938 (the "1938 Act"), codified at 25 U.S.C. §§ 396a-396g, was enacted to remedy the confusion by creating comprehensive legislation governing mineral leases on Indian land. The House and Senate Reports reflect the intent of the legislation to "obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); H.R. Rep. No. 1872, 75th Cong. 3d Sess. 1 (1938). The reports also stated the hope that the legislation "would be a more satisfactory law for the leasing of Indian lands for general mining purposes. It will bring all mineral-leasing matters in harmony with the Indian Reorganization Act . . . ." S. Rep. No. 985, at 3; H.R. Rep. No. 1872, at 3.

Section 1 of the 1938 Act closely tracked the language of the 1924 Act, in permitting mineral leasing on unallotted lands with the approval of the Secretary for a period not to exceed ten years and as long thereafter as minerals in paying quantities were produced. Other sections provided uniform procedures for leasing land and protecting

the rights of the Indians, and for the exemption of some reservations; the 1938 Act did not, however, contain a taxing provision like the 1924 Act did. Section 7 of the 1938 Act provided that "[a]ll Act [sic] or parts of Acts inconsistent herewith are hereby repealed." This case revolves around whether, as to leases executed after the enactment of the 1938 Act, the taxing provision of the 1924 Act remained in force.

B. Relevant Court Decisions and Administrative Interpretations

This Court in British-American Oil Producing Co. v. Montana Board of Equalization, 299 U.S. 156 (1936), decided that the Blackfeet reservation was created by legislation, not by executive order, and therefore, that the taxing provision of the 1924 Act applied to Blackfeet land. No decision of this Court has addressed the interrelationship between the 1924 and 1938 Acts.

Several opinions of the Department of Interior are relevant. A 1943 opinion dealing with leases executed pursuant to the 1891 Act relied without qualification on British-American to hold that the Blackfeet were liable for state taxes on royalty interests in oil and gas mining leases. The opinion makes no mention of the 1938 Act. (Petn App., at 232.) A 1954 opinion also relies directly on British-American and the 1943 Dept. of Interior opinion to hold that the taxability question is settled. This

opinion does not, however, state when the leases in question were executed, nor does it give any indication that the solicitor who wrote the opinion knew the 1938 Act existed. (Petn App., at 248.) To the same effect is a 1955 opinion of the Department. (Petn App., at 258.)

In 1956, the Department wrote an opinion finally acknowledging the existence of the 1938 Act. It ruled that the 1938 Act had no effect on the taxing provision of the 1924 Act. It held that §7 of the 1938 Act repealed only those acts or parts of acts inconsistent with the 1938 Act; because that Act contained no taxing provision nor any mention of one, the 1924 taxing provision was not inconsistent and therefore remained in force. (Petn App., at 263, 265.) A 1966 opinion relied on the 1956 decision.

Finally, in 1977, the Department issued a long and detailed opinion that overruled its earlier determination that the 1938 Act did not affect the taxability of Indian mineral leases. It concluded that British-American was inapposite since it was decided before 1938, and the parties there had stipulated that the lease involved was authorized under the 1891 Act and therefore, that the 1924 Act applied. British-American therefore had no relevance to leases executed after the 1938 Act was enacted. The Department ruled that the failure of the 1938 Act to mention taxation created an ambiguity; applying the well-established rule of construction that such ambiguities are to be construed liberally in favor of the Indian, the Department concluded

None of the first three opinions referred to Act of 1938 But 1956 opinion did address 1938 Act, & said the taxing provision of 1924 was not inconsistent.

But in 1977, all prior opinions were overruled.

~~State~~ States no right to tax

Proviso was not included in 1938 Act

that leases executed pursuant to the 1938 Act were not subject to state taxation.

C. Facts and Decisions Below

After the favorable 1977 Department of Interior opinion, resps filed this suit in DC challenging the application of several Montana taxes to the Tribe's royalty interest in oil and gas produced on unallotted lands on the Tribe's reservation. The state taxes assessed against the Tribe's royalty interest have been paid by the lessees, who then deduct the amount from the Tribe's royalty payments. The DC granted summary judgment in favor of the State, ruling that the 1938 Act had not mentioned taxation, and repeals by implication were disfavored. The DC gave little weight to the 1977 Department of Interior opinion, citing what it considered to be the longstanding contrary admininstrative interpretation that the taxes were valid.

A panel of CA9 (Sneed, Anderson, & Reinhardt) affirmed. On rehearing en banc, the court (Fletcher, J.) reversed in part and remanded for further proceedings. It concluded that the taxing provision had not been repealed by the 1938 Act, but remained in effect for leases executed pursuant to the 1891 and 1924 Acts. It also concluded, however, that the 1938 Act did not incorporate the taxing provision, and therefore, that it did not apply to leases executed after the 1938 Act was enacted. The en banc court ruled that although the taxing provision was consistent with

that leases executed pursuant to the 1938 Act were not subject to state taxation.

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DC held for State

Panel of CA9 aff'med, but en banc, CA9 reversed in part

CA9 en banc p 6 - SG agrees p 7

CA9

the allotment policy in effect in 1924, it was inconsistent with the policies of the Indian Reorganization Act of 1934 ("IRA") to foster tribal sovereignty and economic growth. Therefore, the court ruled that Congress could not have intended the taxing provision to carry over to the 1938 Act, since that Act was specifically intended to harmonize with the IRA. The court remanded to the DC for a determination of where the legal incidence of the taxes fell; if it fell on the oil and gas producers, the DC was directed to determine whether the taxes were preempted. These remand questions are not presented in this Court.

The dissent (Anderson, Wallace, & Kennedy) concurred in the majority's holding that the 1938 Act had not impliedly repealed the 1924 Act. The dissenters disagreed with the ruling that the 1924 Act's taxing provision was inapplicable to leases entered into pursuant to the 1938 Act. They argued that (i) if the 1924 Act were still in effect for the pre-1938 leases, as the majority contended, how could it have no force for leases executed thereafter; (ii) the longstanding administrative interpretation prior to 1977 should be heeded; and (iii) if Congress had intended to abrogate its prior grant of taxing authority to the States, it would have made such an intent clear.

Reasoning of dissent

In this Court, resp does not attack CA9's ruling that it must continue to pay taxes under the 1924 Act on

royalties from leases executed prior to the enactment of the 1938 Act.

D. Conference Votes

At Conference, the CHIEF originally voted to affirm, as did JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE O'CONNOR. JUSTICES WHITE, REHNQUIST, and STEVENS voted to reverse. The CHIEF then changed his vote to pass; according to his clerk, he did so because he was unhappy about not voting with JUSTICE REHNQUIST on this case. As far as I know, the CHIEF has not cast his vote, although he has put it on the list with the other tied cases and has left it unassigned. You may draw your own conclusions from this. Your vote aside, I suppose the case has the potential for not being tied, but the CHIEF's treatment of the case may indicate that he is leaning toward voting to reverse.

4 votes to affirm

II. DISCUSSION

This is one of those cases in which no clear answer exists. The 1938 Act and its legislative history are silent on the question of taxation: they neither expressly provide for taxation nor expressly prohibit it, nor do they acknowledge the existence of the taxing provision in the 1924 Act. Section 7 of the 1938 Act, which repeals "all Acts or parts of Acts inconsistent herewith," is ambiguous

as to whether it repeals the taxing provision. Facially, that provision is not inconsistent with the 1938 Act because there is no clause relating to taxes in that Act with which to conflict. On the other hand, the legislative history makes clear that the purpose of the 1938 Act was to create a uniform set of rules governing mineral leasing of Indian lands that would be in harmony with the IRA. Retaining the taxation provision from the 1924 Act arguably would be inconsistent with this purpose, since (i) the 1924 Act applied only to certain kinds of Indian lands, and (ii) the IRA was intended to restore Indian sovereignty and self-sufficiency, which would be hindered by requiring the Indians to pay state taxes on their royalty income Neither way of reading the 1938 Act works smoothly. Thus, both sides have resorted to various canons of statutory construction in aid of their interpretations.

The State contends that the 1924 Act's taxing provision was not repealed and therefore, must still be intact. It cites old cases by this Court holding that a clause repealing only inconsistent acts "implies very strongly that there may be acts on the same subject which are not thereby repealed," Hess v. Reynolds, 113 U.S. 73, 79 (1885), and that such a repealer clause indicates Congress's intent "to leave in force some portions of former acts relative to the same subject matter," United States v. Henderson, 78 U.S. (11 Wall.) 652, 656 (1870). Congress knew how to repeal the taxing provision, but did not do so.

There is a strong presumption against repeals by implication, e.g., United States v. Borden Co., 308 U.S. 188, 198 (1939), especially an implied repeal of a specific statute by a general one, Morton v. Mancari, 417 U.S. 535, 550-551 (1974). Therefore, the State argues, the provision must be read as applicable to leases under the 1938 Act.

SG agrees with Indians

The SG and resp argue to the contrary that other rules of interpretation govern. First, resp argues that the taxing proviso was not repealed, but replaced by the 1938 Act for leases executed after the later act's enactment. Thus the canons of construction cited by the State are inapplicable here. Second, the SG observes that it is well established that Congress's consent to the state taxation of Indians will be found only if manifested by the clearest intent. E.g., Bryan v. Itasca County, 426 U.S. 373, 392-393 (1976). Congress has never given a blanket authorization for taxation of Indians' income--even from unallotted lands; the 1924 Act, for instance, permitted taxation of income from land leased for mining, but not for grazing purposes. The 1937 Quapaw Act, which contains an explicit and limited consent to tax, demonstrates that the same Congress that enacted the 1938 Act knew such consents must be affirmatively and clearly stated to be effective. Exemption from taxation has long been regarded as a principal aspect of Indian sovereignty; any departure from this principle would be a radical one, and such a result should not be inferred from Congress's silence. At the very least, the

state tax on Indians not favored

1938 Act is ambiguous as to whether the taxing provision carries over. This Court has long held that ambiguities such as these are to be resolved in favor of the Indian, Carpenter v. Shaw, 280 U.S. 363, 367 (1930), and, the SG contends, that principle applies here.

Moreover, the SG argues, the way the 1938 Act was drafted indicates that Congress intended to eliminate the taxing provision. The Act was intended to be comprehensive concerning the leasing of unallotted lands, as reflected by the fact that §1 refers to what shall "hereafter" be permitted. Sections 1 and 2 replaced the substantive leasing provisions of the 1924 Act; the tax clause had been only a proviso to the substantive provision, and Congress did not include it. Likewise, the new §§1 and 2 in the 1938 Act were closely patterned after the language of the 1924 Act and incorporated several aspects of that Act, yet the taxing provision was eliminated. These factors strongly suggest that Congress knowingly replaced the 1924 Act with the 1938 Act and deliberately omitted the tax consent.

Both sides, of course, advance other arguments in favor of their positions. The State contends that CA9 erred in overlooking the longstanding administrative interpretation that the taxing provision remained in force. The State contends that the Department of Interior had a "consistent practice of over forty years" of authorizing States to collect the taxes in question, and the Department's 1977 opinion was a "bolt out of the blue" that

should be given no deference. There was no change in the statute that would prompt such a change in viewpoint. Moreover, the State has been collecting the applicable taxes throughout the years, and neither the Indians nor the oil and gas producers challenged them until 1976.

As CA9 and resp point out, however, the administrative record is not so strongly consistent as the State contends. The opinions prior to 1956 made no mention of the 1938 Act or to leases executed pursuant thereto. The most that can be said about these opinions is that they did not address the issue presented by this case, but assumed that the 1924 Act and this Court's decision in British-American applied. The 1956 opinion of the Department of Interior, however, did address the question whether the taxing provision had been repealed by the 1938 Act and held that it had not. A 1966 opinion relied on the 1956 issuance. In 1977, the Department reconsidered the issue carefully and in more detail than it had in 1956, and reversed its prior decision. It is hard, therefore, to say that the Department had a consistent 40-year practice, although it unquestionably reversed itself with the 1977 opinion. The 1977 opinion deserves some weight, however, because it appears to have been much more thorough and carefully considered than the 1956 opinion.

The State considers that CA9 erred in looking to trends, policies, and legislative goals relating to the IRA, instead of to the statute and how it had been consistently

applied and interpreted. CA9's use of the policies underlying the IRA to interpret the 1938 Act was error, the State argues, because the IRA does not deal with the taxation of minerals or royalty income. CA9 exercised functions reserved to legislators, as questions of tax immunities--especially concerning Indians--are "essentially legislative in nature." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 150 (1973). The State contends that CA9's only correct statement about the IRA was that it was intended to eliminate the allotment system and provide for reacquisition of lands by the tribes. CA9's inference that the taxing provisions of the 1924 Act should therefore fall is nothing but unfounded speculation unsupported either by the language of the IRA or its legislative history. In fact, Congress had rejected earlier versions of the IRA that provided for broad immunities for the Indians from state and local taxes. This supports instead the inference that Congress intended for the 1924 Act provision to stand.

The State is correct that much of CA9's reliance on perceived goals of the IRA and how those goals affected Congress's intent as to the 1938 Act is pure speculation. On the other hand, the House and Senate Reports, as quoted supra, Part I.A., at 3, do state that Congress wished to bring the mineral leasing laws in harmony with the purposes of the IRA. The SG persuasively points out that statutes permitting state taxation of Indian income from mineral leasing were an integral part of the allotment policy

repudiated by the IRA. The allotment policy was intended to assimilate the Indians into American society; this was to be accomplished by the eventual passage of unallotted Indian land into non-Indian hands and under the full taxing jurisdiction of the State. The taxing provision of the 1924 Act and similar acts of that time was intended to make the revenue available to the State during the transition period. At the same time, taxing power was not given over allotted lands leased for mining purposes, because these lands were intended to remain in Indian hands, and thus, forever beyond the taxing power of the State. This allotment policy was repudiated by the IRA in 1934, removing the expectation that the unallotted lands would pass into non-Indian hands. The justification for allowing States to tax unallotted lands was also thereby eliminated, and thus, having no taxing provision in the 1938 Act was consistent with IRA policy. This is reflected by §5 of the IRA, which provides that lands acquired by the United States in trust for the Indians "shall be exempt from state and local taxation." The SG also argues that retaining the taxing provision would have been inconsistent with the IRA's goal of rehabilitating the Indians' economic life and giving them control over their own affairs and property. See Mescalero Apache Tribe v. Jones, supra, 411 U.S., at 152-153.

The sum total of all of this is that the statute and the legislative history do not address the problem. I

found the SG's brief most persuasive, and am inclined to recommend that you vote to affirm. This Court's cases are clear that Congress's intent to permit taxation of Indians must be clear, and that ambiguities must be resolved in favor of the Indians. Given the ambiguity in the statute here and the lack of evidence in the legislative history, I believe that those well-established principles of Indian law should govern, notwithstanding the fact that the practice of collecting taxes from the Indians continued for years after the 1938 Act was passed. I therefore recommend that you vote to affirm.

(Reargued) 4/2.

83-2186 Montana v. Blackfeet

Affirm

CA9 en banc held that the proviso in 1924 Act [allowing States to tax Indian Tribes] royalties had not been repealed by 1938 Act. It therefore remained in effect but only for mineral leases executed pursuant to 1891 & 1924 Acts prior to 1938.

But since tax provision was not included in 1938 Act, it does not apply to leases executed after '38.

Purpose of '38 Act was to create uniform rules as to leasing of mineral rights on Indian lands.

State taxation of Indians ~~cannot be~~ is not favored. Must be explicitly authorized.

Inclined to Affirm, as SG urges.

SG's Br. supporting affirmance is persuasive

4/18 L.T.S

83-2161 Montana v. Blackfeet Tribe (CA9 en banc)
Inclined to Affirm as SG urges

The Question: Whether Montana may tax Tribe's royalties from oil & gas leases on Tribal land after adoption of the Indian Mineral Leasing Act of 1938?

Three statutes are relevant.

A proviso in Acts of 1891 & 1924 with respect to these leases expressly authorized States to tax royalty interest of the lessee.

The 1938 Act, adopted to provide uniform regulation of mineral leases on Indian land, did not include the Proviso or any express auth. to tax the royalties. Except for absence of Proviso, 1938 Act tracked 1924 Act. Leg. history not helpful.

Administration of 1938 Act by Interior Dept

Until 1977, it permitted Montana to continue to tax on theory the Proviso had not been repealed.

Prior opinions were overruled in 1977. The Dept. found 1938 "ambiguous". Ambiguities are to be construed liberally in favor of Indians.

The Question: Whether Montana may tax Tribe's royalties from oil & gas leases on Tribal land after adoption of the Indian Mineral Leasing Act of 1938?

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The 1938 Act, adopted to provide uniform regulation of mineral leases on Indian land, did not include the Proviso or any express auth. to tax the royalties. Except for absence of Proviso, 1938 Act tracked 1924 Act. Leg. history not helpful.

Administration of 1938 Act by Interior Dept

Until 1977, Ct permitted Montana to continue to tax on theory the Proviso had not been repealed.

Prior opinions were over-ruled in 1977. The Dept. found 1938 "ambiguous". Ambiguities are to be construed liberally in favor of Indians.

Exemption from State taxation long regarded a principal aspect of Indian sovereignty.

Lynda

83-2161 MONTANA v. BLACKFEET INDIANS Reargued 4/23/85

(Reargued)

Mrs Boggs (asst AG Montana)

Adm. understanding from 1938 to 1977 is compelling. Prior to the Solicitor's 1977 op. the Fed govt only once had intimated that States couldn't continue to tax lease royalties.

U.S. audit reports accepted the adm. understanding.

35 years of construction in reliance to detriment.

No Regs under 1938 Acts — indicating no understanding of any change in right to tax.

Mr. Whitening (Rep)

In early years after 1938 there is no record of any taxes being pd. to State. No record whatever that taxes were paid on royalties from 1938 to 1955. Only ev. is to years subsequent to 1955 in 1977 Special Report saying that taxes had been pd on some lease royalties but not all (See Br. 2)

? { Refers to a case decided by this Court recently

Mr. Whitening (cont.)

(Does not know what states were taxing royalty interests in 1938. She thinks Montana is only state now claiming right to tax.)

There was oil & gas production ~~on~~ on Tribal land in 1938.

State has no interest in these leases.

Kneedler (SG - for Tribe)

Informal op of 1956 was first op by Interior. This was not contemporaneous interpretation - 18 yrs later

In practice, Secretary permitted lessee to deduct the tax from the royalty due Tribe, & pay tax to State.

Refer to Prof. Cohen

1938 Act was comprehensive, & new Regs were adopted. Neither referred to the proviso in 1924 act.

Kneedler referred to Act of 1926 & was interested 9.P.S.

Boggs (Reply) - '38 act was a remedial act dealing with Indian land. The Act did not address leasing provisions at all.

aff'm 6-3 4 7P

No. 83-2161, Montana v. Blackfeet Tribe (CA 9) Conf. 4/26/85
(Reargued)

The Chief Justice

Ambiguous language should be resolved in favor of Indians.

Admn. hist. is not clear - Interior largely did nothing

Not at rest.

x x x

After discussion voted to Aff'm

Justice Brennan Aff'm

Case is a mess. Crucial Q is whether '24 proviso survived the '38 act.

Must rely on rule that State taxation is not favored

Justice White Rev.

Not persuaded any extent to repeal right of States to tax.

Interior had their views until 1977

Justice Marshall Affirm

Justice Blackmun Aff'm
Difficult case

Justice Powell Aff'm

Agree generally with CA 9 re lease and SG. It held that the proviso in 1924 Act that allowed States to tax lease royalties had not been repealed by 1938 Act. The proviso therefore remained in effect as to leases executed prior to 1938

But since proviso was omitted from 1938 (that ~~re~~-enacted the remainder of 1924 Act), States have no auth. to tax Indian lease royalties on leases executed after 1938

Justice Rehnquist Reverse

Presumption against implied repeal suggests no intention to eliminate right to ~~tax~~ tax,

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Justice Stevens Rev

Statute not comprehensive

Case turns on describing carefully the basis to tax

Adm. construction is persuasive

SG made almost a dishonest argument. (?)

Justice O'Connor Affirm (tentatively)

L.F.P.
5/4

Minor editing only. After cite checking, go to a Chambers Draft.

Montana v. Blackfeet Tribe of Indians

No. 83-2161

First Draft

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the State of Montana may tax the Blackfeet Tribe's royalty interests under oil and gas leases issued to non-Indian lessees

pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U.S.C. §396a et seq.

I

Respondent Blackfeet Tribe filed this suit in the United States District Court for the District of Montana challenging the application of several Montana taxes[1] to the Tribe's royalty interest in oil and gas produced under leases issued by the Tribe. The leases involved unallotted lands on the Tribe's reservations and were granted to non-Indian lessees in accordance with the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347,

Summarize. Are there several reservations?

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[1]At issue are the taxes adopted in the following statutes: the Oil and Gas Severance Tax, Mont. Code Ann. §§15-36-101 et seq. (1983); the Oil and Gas Net Proceeds Tax, Mont. Code Ann. §§15-23-601 et seq.; the Oil and Gas Conservation Tax, Mont. Code Ann. §§82-11-101 et seq.; and the Resource Indemnity Trust Tax, Mont. Code Ann. §§15-38-101 et seq.

25 U.S.C. §396a et seq. ~~hereafter,~~ [the 1938 Act]. The taxes at issue were paid to the State by the lessees and then deducted by the lessees from the royalty payments made to the Tribe. The Blackfeet sought declaratory and injunctive relief against enforcement of the state tax statutes.[2] The Tribe argued to the District Court that the 1938 Act did not authorize the State to tax tribal royalty interests and thus that the taxes were unlawful.

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[2]The Blackfeet properly invoked the jurisdiction of the district court pursuant to 28 U.S.C. §1362, which provides:

> "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recongized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

As we held in Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976), a suit by an Indian tribe to enjoin the enforcement of state tax laws is cognizable in the district court under §1362 despite the general ~~bar on tax injunction suits~~ in 28 U.S.C. §1341. See ~~id.,~~ at 474-475.

~~federal courts injunctions of state tax such laws~~

425 U.S.,

in 28 USC §1341

despite the general ban against seeking federal injunctions of such laws.

The District Court rejected this claim and granted the State's motion for summary judgment. The court held that the state taxes were authorized by a 1924 statute, Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U.S.C. §398 [hereafter, the 1924 Act], and that the 1938 Act, under which the leases in question were issued, did not repeal this authorization. The District Court was not persuaded by a 1977 opinion of the Department of the Interior supporting the Blackfeet's position, citing contrary views taken earlier by the Executive Branch.

A panel of the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. On rehearing en banc, the Court of Appeals reversed in part and remanded the case for further proceedings. 729 F.2d 1192 (1984). The court held that the tax

authorization in the 1924 Act was not repealed by the 1938 Act and thus remained in effect for leases executed pursuant to the 1924 Act. The court also held, however, that the 1938 Act did not incorporate the tax authorization provision of the 1924 Act, and therefore that its authorization did not apply to leases executed after the enactment of the 1938 Act. The court reasoned that the taxing provision of the 1924 Act was inconsistent with the policies of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. §461 et seq. [hereafter, the IRA]. Since the 1938 Act was adopted specifically to harmonize Indian leasing laws with the IRA, Congress could not have intended it to apply to leases issued under the 1938 Act. The court remanded the case to the District Court to determine where the legal

incidence of the taxes fell, and directed the court to consider whether, if the taxes fell on the oil and gas producers instead of the Indians, the taxes were preempted by federal law. We granted the State's petition for certiorari to resolve whether Montana may tax Indian royalty interests arising out of leases executed after the adoption of the 1938 Act. ___ U.S. ___ (1984). We affirm the decision of the en banc Court of Appeals that it may not.

II

Congress first authorized mineral leasing of Indian lands in the Act of Feb. 28, 1891, ch. 383, 26 Stat. 795, codified at 25 U.S.C. §397 [hereafter, the 1891 Act]. The Act authorized leases for terms not to exceed ten years on lands "bought

and paid for" by the Indians. The 1891 Act was amended in 1924. The amendment provided in pertinent part:

> Unallotted land . . . subject to lease for mining purposes for a period of ten years under §397 . . . may be leased . . . by the Secretary of the Interior, with the consent of the [Indian council], for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: Provided, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: Provided, however, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner. Act of May 29, 1924, codified at 25 U.S.C. §398.

Montana relies on the first proviso in the 1924 Act in claiming the authority to tax the Blackfeet's royalty payments.

In 1938, Congress adopted comprehensive legislation in an effort to "obtain uniformity so far as

practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess. (1938). Like the 1924 Act, the 1938 Act permitted, subject to the approval of the Secretary of the Interior, mineral leasing of unallotted lands for a period not to exceed ten years and as long thereafter as minerals in paying quantities were produced. The Act also detailed uniform leasing procedures designed to protect the Indians. See 25 U.S.C. §§396b-396g. The 1938 Act did not contain a provision authorizing state taxation; nor did it repeal specifically the authorization in the 1924 Act. A general repealer clause was provided in section 7 of the Act: "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed." The question presented by this case is whether the 1924 Act's proviso that authorizes

state taxation was repealed by the 1938 Act, or if left intact, applies to leases executed under the 1938 Act.

III

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl.3; see Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 670 (1974), citing Worcester v. Georgia, 6 Pet. 515, 561 (1832). As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory. In The Kansas Indians, 5 Wall. 737, 755 (1866), for example, the Court held that lands held by Indians in common as well as those held in severalty were exempt from state taxation.

It explained that "[i]f the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' . . . separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union." Id., at 755. Likewise, in The New York Indians, 5 Wall. 761, 770, 771 (1866), the Court characterized the State's attempt to tax Indian reservation land as "extraordinary," an "illegal" exercise of state power, and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations." id., at 770, id., at 771. As the Solicitor General points out, this Court has never waivered from the views expressed in these cases. See, e. g., Bryan v. Itasca County, 426 U.S. 373, 375-378, 392-393 (1976); Moe

v. Confederated Salish & Kootenai Tribes, 425 U.S., 463, 475-476; (1976); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, however, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so absolutely clear. E. g., Bryan v. Itasca County, supra, at 392-393; Carpenter v. Shaw, 280 U.S. 363, 366-367 (1930). The 1924 Act contains such an explicit authorization. As a result, in British-American Oil Production Co. v. Board of Equalization, 299 U.S. 159 (1936), the Court held that the State of Montana could tax

oil and gas produced under leases executed under the 1924 Act.[3]

The State urges us that the taxing authorization provided in the 1924 Act applies to leases executed under the 1938 Act as well. It argues that nothing in the 1938 Act is inconsistent with the 1924 taxing provision and thus that the provision was not repealed by the 1938 Act. It cites decisions of this Court that a clause repealing only inconsistent acts "implies very strongly that there may be acts on the same subject which are not thereby repealed," Hess v. Reynolds, 113 U.S. 73, 79 (1885), and

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[3] In British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), the Court interpreted the statutory leasing authority over lands "bought and acquired by the Indians" to include land reserved for the Indians in exchange for their cession or surrender of other lands or rights, as well as that acquired by Indians for money.

that such a clause indicates Congress' intent "to leave in force some portions of former acts relative to the same subject-matter," United States v. Henderson, 11 Wall. 652, 656 (1870). The State also notes that there is a strong presumption against repeals by implication, e. g., United States v. Borden Co., 308 U.S. 188, 198 (1939), especially an implied repeal of a specific statute by a general one. Morton v. Mancari, 417 U.S. 535, 550-551 (1974). Thus, in the State's view, sound principles of statutory construction lead to the conclusion that its taxing authority under the 1924 Act remains intact.

The State fails to appreciate, however, that the standard ~~tools~~ principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction

applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." Oneida County, New York v. Oneida Indian Nation, ___ U.S. ___, ___ (1985). Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, e. g., Bryan v. Itasca County, 426 U.S. at 393; second, statutes are to be liberally construed in favor of the Indians, with ambiguous provisions interpreted to their benefit, e. g., McClanahan v. Arizona State Tax Commn., 411 U.S. 164, 174 (1973); Choate v. Trapp, 224 U.S. 665, 675 (1912).[4] When the 1924 and 1938 Acts are

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[4] Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, in "the Government's dealings with the Indians, the rule is exactly the contrary. The construction, instead of being strict, is liberal. . . ." Choate v. Trapp, 224 U.S. 665, 675 (1912).

considered
~~evaluated~~ in light of these principles, it is clear that the 1924 Act does not authorize Montana to enforce its tax statutes with respect to leases issued under the 1938 Act.

IV

Nothing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act. The statute contains no explicit consent to state taxation. Nor is there any indication that Congress intended to incorporate implicitly in the 1938 Act the taxing authority of the 1924 Act.[5] Contrary to the State's suggestion, under the

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[5] In fact, the legislative history suggests that Congress intended to replace the 1924 Act's leasing scheme with that of the 1938 Act. As the Court of Appeals recognized, Congress had three major goals in adopting the 1938 Act: (1) to achieve "uniformity so far as practicable

Footnote continued on next page.

applicable principles of statutory construction, the general repealer clause of the 1938 Act cannot be taken to incorporate consistent provisions of earlier laws. The clause surely does not satisfy the requirement that Congress clearly consent to state taxation. Nor would the State's interpretation satisfy the rule requiring that statutes be contrued liberally in favor of the Indians.

Moreover, the language of the taxing provision of the 1924 Act belies any suggestion ~~that by its own terms,~~ that it carries over to the 1938 Act.[6] The tax proviso in the

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of the law relating to the leasing of tribal lands for mining purposes," S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); ~~(2)~~ to "bring all mineral leasing matters in harmony with the Indian Reorganization Act," ~~[Act of June 18, 1934, 25 U.S.C. §461 et seq.],~~ S. Rep. No. 985, supra, at 3; H.R. Rep. No. 1872, ~~at 2,~~ and ~~(3)~~ to ensure that Indians receive "the greatest return from their property." S. Rep. 985, supra, at 2; H.R. Rep. 1872, supra, at 2. As the Court of Appeals ~~explained,~~ suggested these purposes would be undermined if the 1938 Act were

Footnote continued on next page.

Footnote(s) 6 will appear on following pages.

(ii) (iii)

75th Cong., 3d Sess. 3 (1938);

1924 Act states that "the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located . . . ." 25 U.S.C. §398. Even applying ordinary principles of statutory construction, "such lands" refers to "unallotted land . . . subject to lease for mining purposes . . . under §397 [the 1891 Act]." Ibid. When the statute is "liberally construed . . . in favor of the Indians," Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918), it is clear that if the tax proviso survives at all, it reaches

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interpreted to incorporate the taxation proviso of the 1924 Act. See 729 F.2d 1193, 1196-1198 (9th Cir. 1984).

[6]The Court of Appeals held that the 1938 Act did not repeal implicitly the 1924 consent to state taxation and thus that this consent continues in force with respect to leases issued under the 1924 or 1891 Acts. 729 F.2d, at 1200. Because the Blackfeet have not sought review on this question, we need not decide whether the Court of Appeals was correct. We assume, for purposes of this case that the 1924 Act's authorization remains in effect for leases executed pursuant to that statute.

only those leases executed under the 1891 Act and its 1924 amendment.[7]

V

In the absence of clear congressional consent to

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[7] We are likewise unpersuaded by the State's contention that we should defer to the longstanding administrative interpretation that the 1924 taxing proviso applies to leases executed under the 1938 Act. The State relies on various opinions of the Department of the Interior in making this argument. As the Court of Appeals pointed out, however, the administrative record is not so strongly consistent as the State contends. 729 F.2d, at 1202-1203. The opinions issued prior to 1956 did not mention the 1938 Act or leases executed pursuant thereto. Thus, at best, they did not address the issue presented by this case, but simply assumed that the 1924 Act and this Court's decision in British-American Oil Producing Co. v. Board of Equalization, 299 U.S. 159 (1936), applied to leases executed under the 1938 Act. It was not until its 1956 opinion that the Department of Interior considered the relationship between the 1938 and 1924 Acts. The Department then held that the taxing provision had not been repealed by the 1938 Act. This 1956 opinion was unpublished and did not analyze whether Congress intended the 1924 provision to apply to leases entered under the 1938 Act. A 1966 opinion relied on the 1956 issuance. In 1977, the Department reconsidered the issue carefully and in far more detail than it had in 1956, and reversed its prior decision. See 729 F.2d, at 1202-1203. On this record, it is hard to accept the premise of the State's argument for deference to agency interpretation, that is, that the Department had a consistent 40-year practice.

taxation, we hold that the State may not tax Indian royalty income from leases issued pursuant to the 1938 Act. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Annmarie: CA 9 remanded for consideration of two other questions. Should we, limit affirmance to the ~~to~~ right to ~~to~~ tax issue. Have we made clear that other questions ~~were~~ not appealed? We could add a note on ~~p~~ p 6 making clear that the CA's ruling ~~on~~ & remand on the other issues was not appealed

05/07

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

L 7 P. 5/8

Summarize - This appears to be OK to circulate unless you or a co-clerk suggest a change. The stylistic changes I suggest (pp 2 ~~3~~ 8) can be made in a 2nd Draft.

From: **Justice Powell**

Circulated: _____

Recirculated: _____

~~1st~~ DRAFT

2 4 8

SUPREME COURT OF THE UNITED STATES

No. 83-2161

MONTANA, ET AL., PETITIONERS *v.*
BLACKFEET TRIBE OF INDIANS

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

[May ——, 1985]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the State of Montana may tax the Blackfeet Tribe's royalty interests under oil and gas leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U. S. C. § 396a *et seq.*

I

Respondent Blackfeet Tribe filed this suit in the United States District Court for the District of Montana challenging the application of several Montana taxes[1] to the Tribe's royalty interest in oil and gas produced under leases issued by the Tribe. The leases involved unallotted lands on the Tribe's reservations and were granted to non-Indian lessees in accordance with the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U. S. C. § 396a *et seq.* (the 1938 Act). The taxes at issue were paid to the State by the lessees and then deducted by the lessees from the royalty payments made to the Tribe. The Blackfeet sought declaratory and in-

[1] At issue are the taxes adopted in the following statutes: the Oil and Gas Severance Tax, Mont. Code Ann. §§ 15–36–101 *et seq.* (1983); the Oil and Gas Net Proceeds Tax, Mont. Code Ann. §§ 15–23–601 *et seq.* (1983); the Oil and Gas Conservation Tax, Mont. Code Ann. §§ 82–11–101 *et seq.*; and the Resource Indemnity Trust Tax, Mont. Code Ann. §§ 15–38–101 *et seq.* (1983).

junctive relief against enforcement of the state tax statutes.[2] The Tribe argued to the District Court that the 1938 Act did not authorize the State to tax tribal royalty interests and thus that the taxes were unlawful. The District Court rejected this claim and granted the State's motion for summary judgment. The court held that the state taxes were authorized by a 1924 statute, Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U. S. C. § 398 (the 1924 Act), and that the 1938 Act, under which the leases in question were issued, did not repeal this authorization. The District Court was not persuaded by a 1977 opinion of the Department of the Interior supporting the Blackfeet's position, citing contrary views taken earlier by the Executive Branch.

A panel of the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. On rehearing *en banc*, the Court of Appeals reversed in part and remanded the case for further proceedings. 729 F. 2d 1192 (1984). The court held that the tax authorization in the 1924 Act was not repealed by the 1938 Act and thus remained in effect for leases executed pursuant to the 1924 Act. The court also held, however, that the 1938 Act did not incorporate the tax provision of the 1924 Act, and therefore that its authorization did not apply to leases executed after the enactment of the 1938 Act. The court reasoned that the taxing provision of the 1924 Act was inconsistent with the policies of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984,

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[2] The Blackfeet properly invoked the jurisdiction of the district court pursuant to 28 U. S. C. § 1362, which provides:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recongized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

As we held in *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), a suit by an Indian tribe to enjoin the enforcement of state tax laws is cognizable in the district court under § 1362 despite the general ban in 28 U. S. C. § 1341 against seeking federal injunctions of such laws. See *id.*, at 474–475.

25 U. S. C. § 461 *et seq.* (the IRA). Since the 1938 Act was adopted specifically to harmonize Indian leasing laws with the IRA, Congress could not have intended it to apply to leases issued under the 1938 Act. The court remanded the case to the District Court to determine where the legal incidence of the taxes fell, and directed the court to consider whether, if the taxes fell on the oil and gas producers instead of the Indians, the taxes were preempted by federal law. We granted the State's petition for certiorari to resolve whether Montana may tax Indian royalty interests arising out of leases executed after the adoption of the 1938 Act. —— U. S. —— (1984). We affirm the decision of the *en banc* Court of Appeals that it may not.

II

Congress first authorized mineral leasing of Indian lands in the Act of Feb. 28, 1891, ch. 383, 26 Stat. 795, codified at 25 U. S. C. § 397 (the 1891 Act). The Act authorized leases for terms not to exceed ten years on lands "bought and paid for" by the Indians. The 1891 Act was amended in 1924. The amendment provided in pertinent part:

> Unallotted land . . . subject to lease for mining purposes for a period of ten years under § 397 . . . may be leased . . . by the Secretary of the Interior, with the consent of the [Indian] council . . . , for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: *Provided*, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the roy-

> alty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner. Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U. S. C. § 398.

Montana relies on the first proviso in the 1924 Act in claiming the authority to tax the Blackfeet's royalty payments.

In 1938, Congress adopted comprehensive legislation in an effort to "obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1938). Like the 1924 Act, the 1938 Act permitted, subject to the approval of the Secretary of the Interior, mineral leasing of unallotted lands for a period not to exceed ten years and as long thereafter as minerals in paying quantities were produced. The Act also detailed uniform leasing procedures designed to protect the Indians. See 25 U. S. C. §§ 396b–396g. The 1938 Act did not contain a provision authorizing state taxation; nor did it repeal specifically the authorization in the 1924 Act. A general repealer clause was provided in section 7 of the Act: "All Act [sic] or parts of Acts inconsistent herewith are hereby repealed." The question presented by this case is whether the 1924 Act's proviso that authorizes state taxation was repealed by the 1938 Act, or if left intact, applies to leases executed under the 1938 Act.

III

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl.3; see *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 670 (1974), citing *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832). As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory. In *The Kansas Indians*, 5 Wall. 737 (1866), for

example, the Court ruled that lands held by Indians in common as well as those held in severalty were exempt from state taxation. It explained that "[i]f the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' . . . separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union." *Id.*, at 755. Likewise, in *The New York Indians*, 5 Wall. 761 (1866), the Court characterized the State's attempt to tax Indian reservation land as extraordinary, an "illegal" exercise of state power, *id.*, at 770, and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations," *id.*, at 771. As the Solicitor General points out, this Court has never waivered from the views expressed in these cases. See, *e. g.*, *Bryan* v. *Itasca County*, 426 U. S. 373, 375–378, 392–393 (1976); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 475–476 (1976); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973).

In keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians. It has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakeably clear. *E. g.*, *Bryan* v. *Itasca County*, *supra*, at 392–393; *Carpenter* v. *Shaw*, 280 U. S. 363, 366–367 (1930). The 1924 Act contains such an explicit authorization. As a result, in *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U. S. 159 (1936), the Court held that the State of Montana could tax oil and gas produced under leases executed under the 1924 Act.[3]

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[3] In *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U. S. 159 (1936), the Court interpreted the statutory leasing authority over lands "bought and acquired by the Indians" to include land reserved

The State urges us that the taxing authorization provided in the 1924 Act applies to leases executed under the 1938 Act as well. It argues that nothing in the 1938 Act is inconsistent with the 1924 taxing provision and thus that the provision was not repealed by the 1938 Act. It cites decisions of this Court that a clause repealing only inconsistent acts "implies very strongly that there may be acts on the same subject which are not thereby repealed," *Hess* v. *Reynolds*, 113 U. S. 73, 79 (1885), and that such a clause indicates Congress' intent "to leave in force some portions of former acts relative to the same subject-matter," *United States* v. *Henderson*, 11 Wall. 652, 656 (1870). The State also notes that there is a strong presumption against repeals by implication, *e. g.*, *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939), especially an implied repeal of a specific statute by a general one, *Morton* v. *Mancari*, 417 U. S. 535, 550–551 (1974). Thus, in the State's view, sound principles of statutory construction lead to the conclusion that its taxing authority under the 1924 Act remains intact.

The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County, New York* v. *Oneida Indian Nation*, —— U. S. ——, —— (1985). Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, *e. g.*, *Bryan* v. *Itasca County*, *supra*, at 393; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *e. g.*, *McClanahan* v. *Arizona State Tax Commn.*, 411 U. S. 164, 174 (1973); *Choate* v.

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for the Indians in exchange for their cession or surrender of other lands or rights, as well as that acquired by Indians for money.

Trapp, 224 U. S. 665, 675 (1912).[4] When the 1924 and 1938 Acts are considered in light of these principles, it is clear that the 1924 Act does not authorize Montana to enforce its tax statutes with respect to leases issued under the 1938 Act.

IV

Nothing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act. The statute contains no explicit consent to state taxation. Nor is there any indication that Congress intended to incorporate implicitly in the 1938 Act the taxing authority of the 1924 Act.[5] Contrary to the State's suggestion, under the applicable principles of statutory construction, the general repealer clause of the 1938 Act cannot be taken to incorporate consistent provisions of earlier laws. The clause surely does not satisfy the requirement that Congress clearly consent to state taxation. Nor would the State's interpretation satisfy the rule requiring that statutes be contrued liberally in favor of the Indians.

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[4] Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, in "the Government's dealings with the Indians, the rule is exactly the contrary. The construction, instead of being strict, is liberal . . . ." *Choate* v. *Trapp*, 224 U. S. 665, 675 (1912).

[5] In fact, the legislative history suggests that Congress intended to replace the 1924 Act's leasing scheme with that of the 1938 Act. As the Court of Appeals recognized, Congress had three major goals in adopting the 1938 Act: (i) to achieve "uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes," S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937); H. R. Rep. No. 1872, 75th Cong., 3d Sess. 1 (1938); (ii) to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act," S. Rep. No. 985, *supra*, at 3; H. R. Rep. No. 1872, *supra*, at 3; and (iii) to ensure that Indians receive "the greatest return from their property." S. Rep. 985, *supra*, at 2; H. R. Rep. 1872, *supra*, at 2. As the Court of Appeals suggested, these purposes would be undermined if the 1938 Act were interpreted to incorporate the taxation proviso of the 1924 Act. See 729 F. 2d 1193, 1196–1198 (CA9 1984).

Moreover, the language of the taxing provision of the 1924 Act belies any suggestion that it carries over to the 1938 Act.[6] The tax proviso in the 1924 Act states that "the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located . . . ." 25 U. S. C. § 398. Even applying ordinary principles of statutory construction, "such lands" refers to "[u]nallotted land . . . subject to lease for mining purposes . . . under § 397 [the 1891 Act]." *Ibid.* When the statute is "liberally construed . . . in favor of the Indians," *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918), it is clear that if the tax proviso survives at all, it reaches only those leases executed under the 1891 Act and its 1924 amendment.[7]

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[6] The Court of Appeals held that the 1938 Act did not repeal implicitly the 1924 consent to state taxation and thus that this consent continues in force with respect to leases issued under the 1924 or 1891 Acts. 729 F. 2d, at 1200. Because the Blackfeet have not sought review on this question, we need not decide whether the Court of Appeals was correct. We assume for purposes of this case that the 1924 Act's authorization remains in effect for leases executed pursuant to that statute.

[7] We are likewise unpersuaded by the State's contention that we should defer to the ~~long-standing~~ administrative interpretation that the 1924 taxing proviso applies to leases executed under the 1938 Act. The State relies on ~~various~~ opinions of the Department of the Interior in making this argument. As the Court of Appeals pointed out, however, the administrative record is not as strongly consistent as the State contends. 729 F. 2d, at 1202–1203. The opinions issued prior to 1956 did not mention the 1938 Act or leases executed pursuant thereto. Thus, at best, they did not address the issue presented by this case, but simply assumed that the 1924 Act and this Court's decision in *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U. S. 159 (1936), applied to leases executed under the 1938 Act. It was not until its 1956 opinion that the Department of Interior considered the relationship between the 1938 and 1924 Acts. The Department then held that the taxing provision had not been repealed by the 1938 Act. This 1956 opinion was unpublished and did not analyze whether Congress had intended the 1924 Act's provision to apply to leases entered under the 1938 Act. A 1966 opinion relied on the 1956 opinion. In 1977, the Department reconsidered the issue carefully and in far greater

V

In the absence of clear congressional consent to taxation, we hold that the State may not tax Indian royalty income from leases issued pursuant to the 1938 Act. Accordingly, the judgment of the Court of Appeals is

Affirmed.

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detail than it had in 1956, and reversed its prior decision. See 729 F. 2d, at 1202–1203. On this record, we cannot accept the premise of the State's argument for deference to agency interpretation, that is, that the Department had a *consistent* 40-year practice. This is particularly true where, as here, the language and purpose of the 1938 Act are—for the reasons set forth above—clearly to the contrary.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 9, 1985

No. 83-2161 Montana v. Blackfeet Tribe of Indians

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 9, 1985

No. 83-2161

Montana v. Blackfeet Tribe of Indiana

Dear Lewis,

I agree.

Sincerely,

Bill

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 9, 1985

Re: No. 83-2161-Montana v. Blackfeet Tribe of Indians

Dear Lewis:

Please join me.

Sincerely,

T.M.

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 13, 1985

Re: No. 83-2161, Montana v. Blackfeet Tribe

Dear Lewis:

Please join me.

Sincerely,

Harry

Justice Powell

cc: The Conference

05/14

Style use only

OK to circulate

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: 4

Recirculated: 5/14

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2161

MONTANA, ET AL., PETITIONERS *v.* BLACKFEET TRIBE OF INDIANS

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

[May ——, 1985]

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether the State of Montana may tax the Blackfeet Tribe's royalty interests under oil and gas leases issued to non-Indian lessees pursuant to the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, 25 U. S. C. § 396a *et seq.* (1938 Act).

I

Respondent Blackfeet Tribe filed this suit in the United States District Court for the District of Montana challenging the application of several Montana taxes[1] to the Tribe's royalty interests in oil and gas produced under leases issued by the Tribe. The leases involved unallotted lands on the Tribe's reservation and were granted to non-Indian lessees in accordance with the 1938 Act. The taxes at issue were paid to the State by the lessees and then deducted by the lessees from the royalty payments made to the Tribe. The Blackfeet sought declaratory and injunctive relief against enforce-

[1] At issue are the taxes adopted in the following statutes: the Oil and Gas Severance Tax, Mont. Code Ann. § 15-36-101 *et seq.* (1983); Oil and Gas Net Proceeds, Mont. Code Ann. § 15-23-601 *et seq.* (1983); Oil and Gas Conservation, Mont. Code Ann. § 82-11-101 *et seq.* (1983); and the Resource Indemnity Trust Tax, Mont. Code Ann. § 15-38-101 *et seq.* (1983).

ment of the state tax statutes.[2] The Tribe argued to the District Court that the 1938 Act did not authorize the State to tax tribal royalty interests and thus that the taxes were unlawful. The District Court rejected this claim and granted the State's motion for summary judgment. The court held that the state taxes were authorized by a 1924 statute, Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U. S. C. § 398 (1924 Act), and that the 1938 Act, under which the leases in question were issued, did not repeal this authorization. The District Court was not persuaded by a 1977 opinion of the Department of the Interior supporting the Blackfeet's position, noting that the Department previously had expressed contrary views, 507 F. Supp. 446, 451 (1981).

A panel of the United States Court of Appeals for the Ninth Circuit affirmed the District Court's decision. On rehearing *en banc*, the Court of Appeals reversed in part and remanded the case for further proceedings. 729 F. 2d 1192 (1984). The court held that the tax authorization in the 1924 Act was not repealed by the 1938 Act and thus remained in effect for leases executed pursuant to the 1924 Act. The court also held, however, that the 1938 Act did not incorporate the tax provision of the 1924 Act, and therefore that its authorization did not apply to leases executed after the enactment of the 1938 Act. The court reasoned that the taxing provision of the 1924 Act was inconsistent with the policies of the Indian Reorganization Act of 1934, 48 Stat. 984, 25

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[2] The Blackfeet properly invoked the jurisdiction of the District Court pursuant to 28 U. S. C. § 1362, which provides:

"The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

As we ruled in *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463 (1976), a suit by an Indian tribe to enjoin the enforcement of state tax laws is cognizable in the district court under § 1362 despite the general ban in 28 U. S. C. § 1341 against seeking federal injunctions of such laws. See *id.*, at 474–475.

U. S. C. § 461 *et seq.* (IRA). Since the 1938 Act was adopted specifically to harmonize Indian leasing laws with the IRA, Congress could not have intended the 1924 Act to apply to leases issued under the 1938 Act. The court remanded the case to the District Court to determine where the legal incidence of the taxes fell, and directed the court to consider whether, if the taxes fell on the oil and gas producers instead of the Indians, the taxes were preempted by federal law. We granted the State's petition for certiorari to resolve whether Montana may tax Indian royalty interests arising out of leases executed after the adoption of the 1938 Act. 469 U. S. —— (1984). We affirm the decision of the *en banc* Court of Appeals that it may not.

II

Congress first authorized mineral leasing of Indian lands in the Act of Feb. 28, 1891, 26 Stat. 795, codified at 25 U. S. C. § 397 (the 1891 Act). The Act authorized leases for terms not to exceed 10 years on lands "bought and paid for" by the Indians. The 1891 Act was amended by the 1924 Act. The amendment provided in pertinent part:

> "Unallotted land . . . subject to lease for mining purposes for a period of ten years under section 397 . . . may be leased . . . by the Secretary of the Interior, with the consent of the [Indian] council . . . , for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil or gas shall be found in paying quantities, and the terms of any existing oil and gas mining lease may in like manner be amended by extending the term thereof for as long as oil or gas shall be found in paying quantities: *Provided*, That the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the roy-

> alty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner." Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U. S. C. § 398.

Montana relies on the first proviso in the 1924 Act in claiming the authority to tax the Blackfeet's royalty payments.

In 1938, Congress adopted comprehensive legislation in an effort to "obtain uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes." S. Rep. No. 985, 75th Cong., 1st Sess. 2 (1937) (hereafter Senate Report). Like the 1924 Act, the 1938 Act permitted, subject to the approval of the Secretary of the Interior, mineral leasing of unallotted lands for a period not to exceed 10 years and as long thereafter as minerals in paying quantities were produced. The Act also detailed uniform leasing procedures designed to protect the Indians. See 25 U. S. C. §§ 396b–396g. The 1938 Act did not contain a provision authorizing state taxation; nor did it repeal specifically the authorization in the 1924 Act. A general repealer clause was provided in § 7 of the Act: "All Act *[sic]* or parts of Acts inconsistent herewith are hereby repealed." The question presented by this case is whether the 1924 Act's proviso that authorizes state taxation was repealed by the 1938 Act, or if left intact, applies to leases executed under the 1938 Act.

III

The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; see *Oneida Indian Nation* v. *County of Oneida*, 414 U. S. 661, 670 (1974), citing *Worcester* v. *Georgia*, 6 Pet. 515, 561 (1832). As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory. In *The Kansas Indians*, 5 Wall. 737 (1867), for

example, the Court ruled that lands held by Indians in common as well as those held in severalty were exempt from state taxation. It explained that "[i]f the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' . . . separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union." *Id.*, at 755. Likewise, in *The New York Indians*, 5 Wall. 761 (1867), the Court characterized the State's attempt to tax Indian reservation land as extraordinary, an "illegal" exercise of state power, *id.*, at 770, and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations," *id.*, at 771. As the Solicitor General points out, this Court has never wavered from the views expressed in these cases. See, *e. g.*, *Bryan* v. *Itasca County*, 426 U. S. 373, 375–378, 392–393 (1976); *Moe* v. *Salish & Kootenai Tribes*, 425 U. S. 463, 475–476 (1976); *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 148 (1973).

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[3] In *British-American Oil Producing Co.* v. *Board of Equalization*, the Court interpreted the statutory leasing authority over lands "bought and paid for by the Indians" to include land reserved for the Indians in ex-

The State urges us that the taxing authorization provided in the 1924 Act applies to leases executed under the 1938 Act as well. It argues that nothing in the 1938 Act is inconsistent with the 1924 taxing provision and thus that the provision was not repealed by the 1938 Act. It cites decisions of this Court that a clause repealing only inconsistent acts "implies very strongly that there may be acts on the same subject which are not thereby repealed," *Hess* v. *Reynolds*, 113 U. S. 73, 79 (1885), and that such a clause indicates Congress' intent "to leave in force some portions of former acts relative to the same subject-matter," *Henderson's Tobacco*, 11 Wall. 652, 656 (1871). The State also notes that there is a strong presumption against repeals by implication, *e. g.*, *United States* v. *Borden Co.*, 308 U. S. 188, 198 (1939), especially an implied repeal of a specific statute by a general one, *Morton* v. *Mancari*, 417 U. S. 535, 550–551 (1974). Thus, in the State's view, sound principles of statutory construction lead to the conclusion that its taxing authority under the 1924 Act remains intact.

The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County* v. *Oneida Indian Nation*, 470 U. S. ——, —— (1985). Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation, *e. g.*, *Bryan* v. *Itasca County*, *supra*, at 393; second, statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *e. g.*, *McClanahan* v. *Arizona State Tax Comm'n*, 411 U. S. 164, 174 (1973); *Choate* v. *Trapp*, 224

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change for their cession or surrender of other lands or rights, as well as that acquired by Indians for money.

U. S. 665, 675 (1912).[4] When the 1924 and 1938 Acts are considered in light of these principles, it is clear that the 1924 Act does not authorize Montana to enforce its tax statutes with respect to leases issued under the 1938 Act.

IV

Nothing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act. The statute contains no explicit consent to state taxation. Nor is there any indication that Congress intended to incorporate implicitly in the 1938 Act the taxing authority of the 1924 Act.[5] Contrary to the State's suggestion, under the applicable principles of statutory construction, the general repealer clause of the 1938 Act cannot be taken to incorporate consistent provisions of earlier laws. The clause surely does not satisfy the requirement that Congress clearly consent to state taxation. Nor would the State's interpretation satisfy the rule requiring that statutes be construed liberally in favor of the Indians.

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[4] Indeed, the Court has held that although tax exemptions generally are to be construed narrowly, in "the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal . . . ." *Choate* v. *Trapp*, 224 U. S., at 675.

[5] In fact, the legislative history suggests that Congress intended to replace the 1924 Act's leasing scheme with that of the 1938 Act. As the Court of Appeals recognized, Congress had three major goals in adopting the 1938 Act: (i) to achieve "uniformity so far as practicable of the law relating to the leasing of tribal lands for mining purposes," Senate Report 2; H. R. Rep. No. 1872, 75th Cong., 3d Sess., 1 (1938); (ii) to "bring all mineral-leasing matters in harmony with the Indian Reorganization Act," Senate Report 3; H. R. Rep. No. 1872, *supra*, at 3; and (iii) to ensure that Indians receive "the greatest return from their property." Senate Report 2; H. R. Rep. No. 1872, *supra*, at 2. As the Court of Appeals suggested, these purposes would be undermined if the 1938 Act were interpreted to incorporate the taxation proviso of the 1924 Act. See 729 F. 2d 1192, 1196–1198 (CA9 1984).

Moreover, the language of the taxing provision of the 1924 Act belies any suggestion that it carries over to the 1938 Act.[6] The tax proviso in the 1924 Act states that "the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located . . . ." 25 U. S. C. § 398. Even applying ordinary principles of statutory construction, "such lands" refers to "[u]nallotted land . . . subject to lease for mining purposes . . . under section 397 [the 1891 Act]." When the statute is "liberally construed . . . in favor of the Indians," *Alaska Pacific Fisheries* v. *United States*, 248 U. S. 78, 89 (1918), it is clear that if the tax proviso survives at all, it reaches only those leases executed under the 1891 Act and its 1924 amendment.[7]

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[6] The Court of Appeals held that the 1938 Act did not repeal implicitly the 1924 consent to state taxation and thus that this consent continues in force with respect to leases issued under the 1924 or 1891 Acts. 729 F. 2d, at 1200. Because the Blackfeet have not sought review on this question, we need not decide whether the Court of Appeals was correct. We assume for purposes of this case that the 1924 Act's authorization remains in effect for leases executed pursuant to that statute.

[7] We are likewise unpersuaded by the State's contention that we should defer to the administrative interpretation that the 1924 taxing proviso applies to leases executed under the 1938 Act. The State relies on opinions of the Department of the Interior in making this argument. As the Court of Appeals pointed out, however, the administrative record is not as strongly consistent as the State contends. 729 F. 2d, at 1202–1203. The opinions issued prior to 1956 did not mention the 1938 Act or leases executed pursuant thereto. Thus, at best, they did not address the issue presented by this case, but simply assumed that the 1924 Act and this Court's decision in *British-American Oil Producing Co.* v. *Board of Equalization*, 299 U. S. 159 (1936), applied to leases executed under the 1938 Act. It was not until its 1956 opinion that the Department of Interior considered the relationship between the 1938 and 1924 Acts. The Department then held that the taxing provision had not been repealed by the 1938 Act. This 1956 opinion was unpublished and did not analyze whether Congress had intended the 1924 Act's provision to apply to leases entered pursuant to the 1938 Act. A 1966 opinion relied on the 1956 opinion. In 1977, the Department reconsidered the issue carefully and in far greater detail than

V

In the absence of clear congressional consent to taxation, we hold that the State may not tax Indian royalty income from leases issued pursuant to the 1938 Act. Accordingly, the judgment of the Court of Appeals is

Affirmed.

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it had in 1956, and reversed its prior decision. See 729 F. 2d, at 1202–1203. On this record, we cannot accept the premise of the State's argument for deference to agency interpretation, that is, that the Department had a *consistent* 40-year practice. This is particularly true where, as here, the language and purpose of the 1938 Act are—for the reasons set forth above—clearly to the contrary.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 15, 1985

83-2161 -

Montana v. Blackfeet Tribe of Indians

Dear Lewis,

I due course, I shall circulate a dissent in this case.

Sincerely,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 15, 1985

Re: 83-2161 - Montana v. Blackfeet Tribe of Indians

Dear Lewis:

I shall wait for the dissent in this case.

Respectfully,

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 24, 1985

Re: No. 83-2161 Montana v. Blackfeet Tribe of Indians

Dear Byron,

Please join me in your dissenting opinion.

Sincerely,

WHR

Justice White

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAY 24 1985

Recirculated: _____

Summarize - 9 agree 5/25

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2161

MONTANA, ET AL., PETITIONERS *v.* BLACKFEET TRIBE OF INDIANS

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

[May ——, 1985]

JUSTICE WHITE, dissenting.

The question is whether the proviso to the Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U. S. C. § 398, authorizes a State to tax oil and gas production under leases entered into under the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, codified at 25 U. S. C. § 396a–396g. In my view, the proviso constitutes a sufficiently explicit expression of congressional intent to permit such taxation.

The majority apparently does not rest its contrary holding on the conclusion that the 1938 Act *repealed* the taxing authority contained in the 1924 Act. See *ante*, at 8, and n. 6. Although the majority does not appear to come to rest on the question whether the taxing proviso has been repealed, it is clear to me (as it was to both the majority and the dissent in the Court of Appeals) that the 1938 Act did not repeal the proviso. The 1938 Act repealed only acts inconsistent with its terms, see ch. 198, § 7, 52 Stat. 347, and there is no suggestion that taxation of mineral leases is actually inconsistent with any of the provisions of the 1938 Act. Indeed, given that the 1938 Act and its legislative history are completely silent on the question of taxation, it cannot seriously be suggested that the 1938 Act specifically repealed any taxing authority that might otherwise exist under the 1924 Act.

Lynda + I agree that the dissent does not require a response.

AmL

The question thus boils down to whether the taxing proviso, by its terms, applies to leases under the 1938 Act.* The answer must be sought in the terms of the proviso itself. The majority concludes that the 1924 Act cannot be read to apply to leases under the 1938 Act. I must disagree.

The proviso to the 1924 Act states that "the production of oil and gas and other minerals *on such lands* may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands" (emphasis added). The permission to tax in the proviso depends only on the character of the lands on which production takes place; accordingly, the dispositive question here is whether the lands the Blackfeet have leased under the 1938 Act are "such lands" within the meaning of the proviso.

The phrase "such lands" in the proviso refers to "[u]nallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 [ch. 383, § 3, 26 Stat. 795]." The 1891 Act, now codified at 25 U. S. C. § 397, allowed mineral leasing of "lands . . . occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments." Thus, the proviso by its express terms applies to unallotted lands on Indian reservations "bought and paid for" by the Indians and not needed for agricultural purposes.

The lands that the Blackfeet have leased under the 1938 Act clearly fall within this description: they are unallotted

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reservation lands not needed for agricultural purposes. Moreover, in *British-American Oil Producing Co.* v. *Board of Equalization of the State of Montana*, 299 U. S. 159 (1936), this Court held that the Blackfeet Reservation was "bought and paid for" within the meaning of the proviso—that is, the reservation is the product of an agreement by which the Blackfeet gave up certain rights in exchange for the reservation. See *id.*, at 162–164. Because the leases are located "on such lands" as are described by the 1924 proviso, I can only conclude that the taxation of oil and gas production under the leases is expressly authorized by the proviso and is therefore lawful.

In so concluding, I am mindful of the general rule that statutes are to be liberally construed in favor of Indian tribes. But more to the point, to my way of thinking, is the proposition that this rule is no more than a canon of construction, and "[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent." *Rice* v. *Rehner*, 463 U. S. ——, —— (1983). The proviso to the 1924 Act is a clear expression of congressional intent to allow the States to tax mineral production under leases of lands described in the Act; the proviso has never been repealed; and the lands that the Blackfeet have leased under the 1938 Act fall within the proviso's description of lands on which mineral production is subject to taxation.

Respondents suggest, and the majority seems to agree, see *ante*, at 7, n. 5, that this result is to be avoided because State taxation of mineral production on leaseholds created under the 1938 Act is somehow contrary to the "policy" of the 1938 Act. The relevant policies seem to have been promoting uniformity in the law governing tribal authority to enter into mineral leases, preserving the independence of Indian tribes, and guaranteeing the tribes a fair return on properties leased for mineral production. But it is far from clear that Congress saw State taxation of mineral production to be a threat to ~~either~~ any of these goals; as the majority concedes, the legisla-

tive history is barren of any indication that taxation by the States was one of the evils Congress sought to eradicate through the 1938 Act. This omission is particularly striking given that at the time the statute was under consideration, this Court had just handed down its ruling in *British-American Oil Co.*, *supra*, which held that production on leases located on reservations created by treaty or legislation was subject to State taxation under the proviso to the 1924 Act. To me, the absence of any comment in the legislative history pertaining to State taxation confirms that we should give effect to the express language of the 1924 proviso authorizing the State taxes at issue here.

Finally, I consider it relevant, though not dispositive, that the suggestion that the 1924 Act does not authorize taxation of production on 1938 Act leases is contrary to the interpretation of both acts that apparently prevailed in the Department of the Interior until 1977. Opinions issued by the Office of the Solicitor of the Interior in the years following the passage of the 1938 Act discussed the scope of State authority to tax under the proviso to the 1924 Act with no mention of the possibility that the 1938 Act had had any effect on such authority. See 58 Interior Dec. 535 (1943); Opinion of the Department of Interior, M–36246, Oct. 29, 1954; Opinion of the Department of Interior, M–36310, Oct. 13, 1955. In 1956, the Department issued an opinion explicitly concluding that the 1924 proviso applied to leases under the 1938 Act, and the Department reaffirmed this position in 1966. See Opinion of the Department of Interior, M–36345, May 4, 1956; Letter from Harry R. Anderson, Ass't. Secretary of the Interior, Oct. 27, 1966, reprinted at App. to Pet. for Cert. A–301. Not until 1977 did the Department change its view of the effect of the 1938 Act on the taxation authority contained in the proviso. This history admittedly does not conclusively establish what the Department's position was at the time of the passage of the 1938 Act and in the years immediately following. Still, it is significant that it was not until years after

— first mention of '38 Act

the passage of the 1938 Act that the Department first suggested that the 1924 proviso's explicit authorization of taxation did not extend to leases under the 1938 Act. Had Congress really intended to cut off the State's authority to tax mineral production on all leases entered into after 1938, it would seem odd that no one in the Interior Department was aware of this intention.

Because the proviso to the 1924 Act explicitly authorizes State taxation of mineral production on "such lands" as are concerned in this case, and because nothing in the language of the 1938 Act, its legislative history, its underlying policies, or its administrative construction suggests that the express language of the proviso should not govern this case, I would hold that the State taxes at issue here are authorized by federal law.

I therefore dissent.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAY 24 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2161

MONTANA, ET AL., PETITIONERS *v.* BLACKFEET TRIBE OF INDIANS

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

[May ——, 1985]

JUSTICE WHITE, dissenting.

The question is whether the proviso to the Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U. S. C. §398, authorizes a State to tax oil and gas production under leases entered into under the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, codified at 25 U. S. C. §396a–396g. In my view, the proviso constitutes a sufficiently explicit expression of congressional intent to permit such taxation.

The majority apparently does not rest its contrary holding on the conclusion that the 1938 Act *repealed* the taxing authority contained in the 1924 Act. See *ante*, at 8, and n. 6. Although the majority does not appear to come to rest on the question whether the taxing proviso has been repealed, it is clear to me (as it was to both the majority and the dissent in the Court of Appeals) that the 1938 Act did not repeal the proviso. The 1938 Act repealed only acts inconsistent with its terms, see ch. 198, §7, 52 Stat. 347, and there is no suggestion that taxation of mineral leases is actually inconsistent with any of the provisions of the 1938 Act. Indeed, given that the 1938 Act and its legislative history are completely silent on the question of taxation, it cannot seriously be suggested that the 1938 Act specifically repealed any taxing authority that might otherwise exist under the 1924 Act.

The question thus boils down to whether the taxing proviso, by its terms, applies to leases under the 1938 Act.* The answer must be sought in the terms of the proviso itself. The majority concludes that the 1924 Act cannot be read to apply to leases under the 1938 Act. I must disagree.

The proviso to the 1924 Act states that "the production of oil and gas and other minerals *on such lands* may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands" (emphasis added). The permission to tax in the proviso depends only on the character of the lands on which production takes place; accordingly, the dispositive question here is whether the lands the Blackfeet have leased under the 1938 Act are "such lands" within the meaning of the proviso.

The phrase "such lands" in the proviso refers to "[u]nallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation subject to lease for mining purposes for a period of ten years under the proviso to section 3 of the Act of February 28, 1891 [ch. 383, § 3, 26 Stat. 795]." The 1891 Act, now codified at 25 U. S. C. § 397, allowed mineral leasing of "lands . . . occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments." Thus, the proviso by its express terms applies to unallotted lands on Indian reservations "bought and paid for" by the Indians and not needed for agricultural purposes.

The lands that the Blackfeet have leased under the 1938 Act clearly fall within this description: they are unallotted

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*The majority frames the question as whether the 1938 Act "incorporates" the proviso to the 1924 Act. See *ante*, at 7. To me, the discussion of "incorporation" seems beside the point. The 1924 proviso remains on the books, and it covers leases of a certain description. The question is whether leases under the 1938 Act fit that description. If they do, a specific congressional intent to "incorporate" the proviso into the 1938 Act is unnecessary.

reservation lands not needed for agricultural purposes. Moreover, in *British-American Oil Producing Co.* v. *Board of Equalization of the State of Montana*, 299 U. S. 159 (1936), this Court held that the Blackfeet Reservation was "bought and paid for" within the meaning of the proviso—that is, the reservation is the product of an agreement by which the Blackfeet gave up certain rights in exchange for the reservation. See *id.*, at 162–164. Because the leases are located "on such lands" as are described by the 1924 proviso, I can only conclude that the taxation of oil and gas production under the leases is expressly authorized by the proviso and is therefore lawful.

In so concluding, I am mindful of the general rule that statutes are to be liberally construed in favor of Indian tribes. But more to the point, to my way of thinking, is the proposition that this rule is no more than a canon of construction, and "[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent." *Rice* v. *Rehner*, 463 U. S. ——, —— (1983). The proviso to the 1924 Act is a clear expression of congressional intent to allow the States to tax mineral production under leases of lands described in the Act; the proviso has never been repealed; and the lands that the Blackfeet have leased under the 1938 Act fall within the proviso's description of lands on which mineral production is subject to taxation.

Respondents suggest, and the majority seems to agree, see *ante*, at 7, n. 5, that this result is to be avoided because State taxation of mineral production on leaseholds created under the 1938 Act is somehow contrary to the "policy" of the 1938 Act. The relevant policies seem to have been promoting uniformity in the law governing tribal authority to enter into mineral leases, preserving the independence of Indian tribes, and guaranteeing the tribes a fair return on properties leased for mineral production. But it is far from clear that Congress saw State taxation of mineral production to be a threat to ~~either~~ any of these goals; as the majority concedes, the legisla-

tive history is barren of any indication that taxation by the States was one of the evils Congress sought to eradicate through the 1938 Act. This omission is particularly striking given that at the time the statute was under consideration, this Court had just handed down its ruling in *British-American Oil Co.*, *supra*, which held that production on leases located on reservations created by treaty or legislation was subject to State taxation under the proviso to the 1924 Act. To me, the absence of any comment in the legislative history pertaining to State taxation confirms that we should give effect to the express language of the 1924 proviso authorizing the State taxes at issue here.

Finally, I consider it relevant, though not dispositive, that the suggestion that the 1924 Act does not authorize taxation of production on 1938 Act leases is contrary to the interpretation of both acts that apparently prevailed in the Department of the Interior until 1977. Opinions issued by the Office of the Solicitor of the Interior in the years following the passage of the 1938 Act discussed the scope of State authority to tax under the proviso to the 1924 Act with no mention of the possibility that the 1938 Act had had any effect on such authority. See 58 Interior Dec. 535 (1943); Opinion of the Department of Interior, M–36246, Oct. 29, 1954; Opinion of the Department of Interior, M–36310, Oct. 13, 1955. In 1956, the Department issued an opinion explicitly concluding that the 1924 proviso applied to leases under the 1938 Act, and the Department reaffirmed this position in 1966. See Opinion of the Department of Interior, M–36345, May 4, 1956; Letter from Harry R. Anderson, Ass't. Secretary of the Interior, Oct. 27, 1966, reprinted at App. to Pet. for Cert. A–301. Not until 1977 did the Department change its view of the effect of the 1938 Act on the taxation authority contained in the proviso. This history admittedly does not conclusively establish what the Department's position was at the time of the passage of the 1938 Act and in the years immediately following. Still, it is significant that it was not until years after

the passage of the 1938 Act that the Department first suggested that the 1924 proviso's explicit authorization of taxation did not extend to leases under the 1938 Act. Had Congress really intended to cut off the State's authority to tax mineral production on all leases entered into after 1938, it would seem odd that no one in the Interior Department was aware of this intention.

Because the proviso to the 1924 Act explicitly authorizes State taxation of mineral production on "such lands" as are concerned in this case, and because nothing in the language of the 1938 Act, its legislative history, its underlying policies, or its administrative construction suggests that the express language of the proviso should not govern this case, I would hold that the State taxes at issue here are authorized by federal law.

I therefore dissent.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 24, 1985

Re: No. 83-2161 - Montana v. Blackfeet Tribe

Dear Lewis:

I join.

Regards,

WEB

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 24, 1985

Re: 83-2161 - Montana v. Blackfeet Tribe of Indians

Dear Byron:

Please join me.

Respectfully,

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 28, 1985

83-6607 - Caldwell v. Mississippi

Dear Bill,

Please add my name to your dissent.

Sincerely yours,

Byron

Justice Rehnquist

Copies to the Conference

Justice Powell

Page proof of syllabus as approved.

— Lineup included.
— Lineup still to be added. Please send lineup to me when available.

Another copy of page proof of syllabus as approved to show—

— Lineup, which has now been added.
— Additional changes in syllabus.

HENRY C. LIND
Reporter of Decisions.

NOTE: Where it is ... is being done in connecti... ed. The syllabus constitute... re- pared by the Reporter ... See *United States* v. *Detro*...

SUPREME COURT OF THE UNITED STATES

Syllabus

MONTANA ET AL. *v.* BLACKFEET TRIBE OF INDIANS

CERTIOARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83–2161. Argued January 15, 1985—Reargued April 23, 1985—Decided May ——, 1985

The 1891 Act that first authorized mineral leasing of Indian lands was amended by a 1924 Act that provided that "the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located." The Indian Mineral Leasing Act of 1938, which was enacted to obtain uniformity of Indian mineral leasing laws, also permitted mineral leasing of Indian lands, but contained no provision authorizing state taxation nor did it repeal specifically such authorization in the 1924 Act. A general repealer clause of the 1938 Act, however, provides that "[a]ll Act[s] or parts of Acts inconsistent herewith are hereby repealed." Respondent Indian Tribe filed suit in Federal District Court challenging the application of several Montana taxes to respondent's royalty interests under oil and gas leases issued to non-Indian lessees pursuant to the 1938 Act, and seeking declaratory and injunctive relief. The District Court granted summary judgment for the State, holding that the taxes were authorized by the 1924 Act and that the 1938 Act did not repeal this authorization. The Court of Appeals reversed in pertinent part.

Held: Montana may not tax respondent's royalty interests from leases issued pursuant to the 1938 Act. Pp. 4–9.

(a) Two canons of statutory construction apply to this case: the States may tax Indians only when Congress has manifested clearly its consent to such taxation, and statutes are to be construed liberally in favor of Indians. Pp. 4–7.

(b) When the 1924 and 1938 Acts are considered in light of these principles, it is clear that the 1924 Act does not authorize Montana to impose the taxes in question. Nothing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax

Syllabus

tribal royalty income generated by leases issued pursuant to that Act. The Act contains no explicit consent to state taxation nor is there any indication that it was intended to incorporate implicitly the 1924 Act's taxing authority. The 1938 Act's general repealer clause cannot be taken to incorporate consistent provisions of earlier laws and surely does not satisfy the requirement that Congress clearly consent to state taxation. Moreover, the language of the 1924 Act's taxing provision belies any suggestion that it carries over to the 1938 Act, since the words "such lands" in the taxing provision refer to lands subject to mineral leases under the 1891 Act and its 1924 amendment. Pp. 7–8.

729 F. 2d 1192, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST and STEVENS, JJ., joined.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: MAY 30 1985

p. 1 +stylistic

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2161

MONTANA, ET AL., PETITIONERS *v.* BLACKFEET TRIBE OF INDIANS

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

[May ——, 1985]

JUSTICE WHITE, with whom JUSTICE REHNQUIST and JUSTICE STEVENS join, dissenting.

The question is whether the proviso to the Act of May 29, 1924, ch. 210, 43 Stat. 244, codified at 25 U. S. C. §398, authorizes a State to tax oil and gas production under leases entered into under the Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347, codified at 25 U. S. C. §396a–396g. In my view, the proviso constitutes a sufficiently explicit expression of congressional intent to permit such taxation.

The majority apparently does not rest its contrary holding on the conclusion that the 1938 Act *repealed* the taxing authority contained in the 1924 Act. See *ante*, at 8, and n. 6. Although the majority does not appear to come to rest on the question whether the taxing proviso has been repealed, it is clear to me (as it was to both the majority and the dissent in the Court of Appeals) that the 1938 Act did not repeal the proviso. The 1938 Act repealed only acts inconsistent with its terms, see ch. 198, §7, 52 Stat. 347, and there is no suggestion that taxation of mineral leases is actually inconsistent with any of the provisions of the 1938 Act. Indeed, given that the 1938 Act and its legislative history are completely silent on the question of taxation, it cannot seriously be suggested that the 1938 Act specifically repealed any taxing authority that might otherwise exist under the 1924 Act.

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In so concluding, I am mindful of the general rule that statutes are to be liberally construed in favor of Indian tribes. But more to the point, to my way of thinking, is the proposition that this rule is no more than a canon of construction, and "[a] canon of construction is not a license to disregard clear expressions of . . . congressional intent." *Rice* v. *Rehner*, 463 U. S. 713, 733 (1983). The proviso to the 1924 Act is a clear expression of congressional intent to allow the States to tax mineral production under leases of lands described in the Act; the proviso has never been repealed; and the lands that the Blackfeet have leased under the 1938 Act fall within the proviso's description of lands on which mineral production is subject to taxation.

Respondents suggest, and the majority seems to agree, see *ante*, at 7, n. 5, that this result is to be avoided because State taxation of mineral production on leaseholds created under the 1938 Act is somehow contrary to the "policy" of the 1938 Act. The relevant policies seem to have been promoting uniformity in the law governing tribal authority to enter into mineral leases, preserving the independence of Indian tribes, and guaranteeing the tribes a fair return on properties leased for mineral production. But it is far from clear that Congress saw State taxation of mineral production to be a threat to any of these goals; as the majority concedes, the legislative

history is barren of any indication that taxation by the States was one of the evils Congress sought to eradicate through the 1938 Act. This omission is particularly striking given that at the time the statute was under consideration, this Court had just handed down its ruling in *British-American Oil Co.*, *supra*, which held that production on leases located on reservations created by treaty or legislation was subject to State taxation under the proviso to the 1924 Act. To me, the absence of any comment in the legislative history pertaining to State taxation confirms that we should give effect to the express language of the 1924 proviso authorizing the State taxes at issue here.

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I therefore dissent.

83-2161 Montana v. Blackfeet Tribe (Lee)

LFP for the Court 4/26/85
1st draft 5/8/85
2nd draft 5/14/85
Joined by SOC 5/9/85
WJB 5/9/85
TM 5/9/85
HAB 5/13/85
CJ 5/24/85

BRW dissenting
1st draft 5/24/85
2nd draft 5/30/85
Joined by JPS 5/24/85
WHR 5/24/85
Two copies to Mr. Lind 5/9/85
BRW will dissent 5/15/85
JPS will await dissent 5/15/85