




10-1980

Montana v. United States

Lewis F. Powell Jr.

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No need
to hold
for Confidential
Tribes

PRELIMINARY-MEMORANDUM

April 11, 1980 Conference
List 1, Sheet 1

No. 79-1128
MONTANA, ET AL.

Cert to CA9 (Sneed, Anderson,
D. Williams [DJ])

v.

UNITED STATES, ET AL. Federal/Civil Timely per extn.

1. SUMMARY: The questions are: (A) Who owns the stretch of the Big Horn River that flows within the boundaries of the Crow Indian Reservation? (B) What law defines the boundaries of privately owned lands riparian to that part of the river? (C) May the Crow Tribe prohibit non-member hunting and fishing within the Reservation?

2. FACTS: The Crow Tribe occupies a Reservation in Montana comprising 2,282,764 acres. These lands are part of a

Deny. Ellen

large area (some 38 million acres) that was defined as Crow "territory" in the First Treaty of Fort Laramie in 1851. In 1868, the Crow Tribe ceded about 30 million acres of this territory to the United States in a treaty which provided that the rest of the 1851 territory was "set apart for [the Crow Tribe's] absolute and undisturbed use and occupation" as their "permanent home." Second Treaty of Fort Laramie, Art. 2, 4. The United States "solemnly agree[d] that no persons [other than authorized government agents] shall ever be permitted to pass over, settle upon, or reside in the territory described" Art. 2. The 1868 Reservation was bounded in part by the "mid-channel of the Yellowstone [River]." The Big Horn ran within the boundaries of the Reservation from the Montana-Wyoming border to its mouth at the Yellowstone. Both rivers are navigable streams.

Although large chunks of land have been ceded to the United States since 1868, a major stretch of the Big Horn still runs through the center of the Reservation. Under the Allotment Acts of 1887 and 1920, the United States has issued patents granting title to certain Reservation land to individual Indians. Some of these lands were conveyed to non-Indians, and about 30% of the Reservation is now owned by non-Indians in fee. 43% of Reservation residents are non-Indians.

In 1973, the Crow Tribal Council adopted a resolution, No. 74-05, prohibiting all hunting and fishing on the Reservation except by members of the Tribe. Montana continued to issue hunting and fishing licenses purportedly valid on Crow lands, and to declare open seasons in areas closed to such activities by the

Tribe. In 1974, the United States prosecuted a non-Indian for violating 18 U.S.C. § 1165* by fishing in the Big Horn while standing on state-owned riparian land within the Reservation. The DC dismissed the complaint on the ground that Montana owned the Big Horn. The CA9 reversed, United States v. Finch, 548 F.2d 822, but this Court vacated on double jeopardy grounds, remanding the case with directions that the appeal be dismissed, 433 U.S. 677.

3. PROCEEDINGS BELOW: The present action was initiated by the United States in 1975 to parallel the Finch litigation. The Crow Tribe intervened. The complaints sought to quiet title to the Big Horn in the United States; to enjoin the State from regulating non-Indian hunting and fishing within the Reservation; and a declaration that the authority to regulate hunting and fishing is vested solely in the Tribe and the United States. The DC (Battin, D.Mont.) agreed substantially with Montana, holding (1) that the State owned the Big Horn to the high-water mark; (2) that the State has exclusive authority to regulate non-Indian hunting and fishing on the river and on non-Indian fee lands; (3) that the United States has concurrent authority to regulate non-Indian hunting and fishing on tribal or Indian lands under 18 U.S.C. § 1165; and (4) that the Tribe has can only bar non-Indians from those lands described in § 1165.

* 18 U.S.C. § 1165 provides: "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe . . . and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping or fishing thereon, . . . shall be [subject to criminal penalties]."

The CA9 reversed. Based on its Finch opinion, the CA held that the United States holds trust title to the bed and banks of the Big Horn river to the high-water mark. The CA held that Resolution 74-05 was "a valid exercise of tribal power," except insofar as it barred non-member residents from hunting and fishing on their own lands. The CA also held that Montana has concurrent authority to regulate non-Indian hunting and fishing within the Reservation for proper conservation and management purposes, as long as it neither regulates Tribe members' hunting and fishing nor impedes proper tribal regulations.

4. CONTENTIONS: (A) Montana first assails the CA's conclusion that the bed of the Big Horn belongs to the Tribe. This is said to violate the Equal Footing Doctrine, under which new States receive title to the beds of navigable rivers within their territories upon admission to the Union. During the territorial phase, the United States holds title in trust for the future State. Montana concedes that the United States may grant title away before statehood,* but contends that the treaties with the Crow were not "plain" enough, United States v. Holt State Bank, 270 U.S. 49, 55 (1926), to show an intention to convey title. Montana distinguishes Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970), in which the Court found a grant.

Washington and Idaho have filed an amicus brief, relying on Puyallup Tribe v. Washington Game Department, 433 U.S. 165

* Montana quotes from Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372-374 (1977), in which the Court used language suggesting that the United States could not convey title at all. But Montana does not seriously challenge the rule that the United States may do so "in case of some international duty or public exigency . . ." Shively v. Bowlby, 152 U.S. 1, 49-50.

(1977), which held that the Puyallup Tribe lost its right to use the Puyallup River fishing grounds for its "exclusive use" when it alienated almost its entire reservation. If all of the riparian lands are privately owned, the rule of trust status for the river bed creates a "legal Cheshire cat" - although the cat is gone, the smile remains. Amici ask why the smile of the Cheshire Cat remains hanging over the Big Horn River when it ceases to hang over the Puyallup.

The SG responds that this issue turns on the treaties and history of each case. The SG also defends the CA's conclusion that a grant was intended. First, the river runs through the center of a "permanent" reservation from which all non-members are excluded. Second, the 1868 Treaty defined the Reservation as including half of the navigable Yellowstone River. Finally, the Crow Reservation was carved out of aboriginal Crow land. Thus, the river bed is retained by the Crow unless ceded by them.

(B) Montana next contends that the CA erred in fixing the boundary between the river and the riparian lands at the high-water mark pursuant to the federal common law rule, ignoring contrary Montana law. Montana argues that federal law should borrow the state rule in this case under Wilson v. Omaha Tribe of Indians, Nos. 78-160 & 161, June 29, 1979, because a uniform rule is unnecessary. The CA9 held that state law would frustrate the "federal policy and functions" involved in determining the boundary between a river that is held in trust for Indians and riparian lands originally allotted solely to individual Indians. The SG adds that even streams owned by the States must be bounded

according to uniform federal standards in order to preserve the "equal footing" of the States that own them.

(C) Montana renews her challenge to the validity of Resolution No. 74-05. The CA9 construed the Treaties to grant the Tribe a right to control hunting and fishing. This Court has said that the Tribe is more than a private owner, possessing "attributes of sovereignty over both their members and their territory" United States v. Wheeler 435 U.S. 313, 323 (1978). The sovereignty does not embrace criminal jurisdiction over non-Indians, Oliphant v. Sugamish Indian Tribe, 435 U.S. 191 (1979), but the CA thought it sufficient to permit reasonable civil regulation of non-Indians on Reservation land.

Montana argues that Indian sovereignty does not extend to lands owned by non-Indians in fee under Oliphant and 18 U.S.C. § 1165. Congress is said to have enacted § 1165 in part because Indians did not have the protection of any law which gave them control over their lands. The SG responds that Oliphant dealt solely with criminal cases, and that this Court has upheld the right of reservation Indians to engage in civil regulation. See Williams v. Lee, 358 U.S. 217, 223 (1959). The CA invalidated the Regulation as applied to residents hunting and fishing on their own land, and specifically preserved the State's power to regulate non-Indian hunting and fishing on the reservation. This was a reasonable accommodation.

Montana also contends that the Regulation is so arbitrary as to "shock the conscience" and to constitute a taking under the Fifth Amendment; and that it deprives non-Indian non-residents of

equal protection in violation of the Indian Civil Rights Act, 25 U.S.C. § 1302(8). Resp Crow Tribe answers that people who choose to live on a reservation must be prepared to accept a reasonable Indian regulation. Moreover, the CA9 concluded in Fisher that the Regulation was a reasonable response to serious depletion of fish and game. Finally, Montana says that the CA ignored the DC's findings of fact in violation of Fed. R. Civ. P. 52(a). Montana does not, however, identify specifically any such findings.

5. DISCUSSION: The question of river bed ownership is a close call. The difficulty raised by amici Washington and Idaho regarding the "Cheshire Cat's smile" is particularly puzzling. The CA9 appears to have applied the governing law correctly, however, and its ruling turns on the construction of particular treaties. The questions raised by reservations where the majority of the land has lost its trust status and all that remains is the "smile" would be better addressed in a case that presents it.

The other questions appear to have been resolved correctly. North-Carolina-Wildlife-Resources-Comm'n-v.-Eastern Band-of-Cherokee, No. 78-1653, which is presently being held for No. 78-630, Confederated-Tribes, raises related issues regarding concurrent state and Indian fishing regulations. The CA9 distinguished the North-Carolina case, however, and no disposition of that case seems likely to affect the result in this one. Nor is the Court's decision in Confederated-Tribes likely shed any light on these issues. It does not seem necessary to hold this case.

There are two responses.

3/26/80

Richey

Opns. and Treaties in petn. app.

No. 79-1128

[illegible]

jpb 12/2/80

BENCH MEMORANDUM

TO: Mr. Justice Powell
FROM: Peter Byrne
DATE: December 2, 1980
RE: No. 79-1128, Montana v. United States

Questions Presented

1) Did the United States by treaty convey to the Crow Tribe the bed of a navigable river which runs through the reservation established by the treaties?

2) Does state or federal law determine the riparian rights on a navigable river?

3) May an Indian tribe regulate hunting and fishing by non-Indians on fee patented lands held by non-Indians within the external borders of the reservation?

I.

This case arises out of a dispute between the Crow Tribe and the state over the extent to which non-Indians may hunt and fish within the external borders of the Crow

reservation. The Crows' claim to their reservation dates from The First Treaty fo Fort Laramie of 1851, which confirmed to them some 38 million acres of land, including the entire watershed of the Big Horn River. The growth of settlement in the west led to the Second Treaty of Fort Laramie in 1868, by which the Tribe ceded all but 8 million acres, formally set apart as their "permanent home." The Treaty guaranteed the Crow the "absolute and undisturbed use and occupation" of the land, and the United States promised to permit no persons other than government agents or the Tribe's invitees "to pass over, settle upon, or reside in" the reservation. Subsequent legislation reduced the size of the reservation to 2.3 million acres. Pursuant to two "Allotment Acts", 28% of the land within was patented and conveyed to non-Indian individuals.

28%
conveyed
to non-
Indian

A large stretch of the Big Horn River, a navigable river, flows through the reservation. In the 1950's the United States built the Yellowtail Dam on the southerly portion of the Big Horn River, condemning reservation lands. This action led the creation of thriving trout fishery in the river. This in turn led to an influx of fishermen, the great majority of which ^{whom} were non-Indian. Concerned, the Tribe passed a resolution forbidding non-Indians to hunt or fish on the reservation.

This case was initiated by the United States, which filed an action in the DC seeking a declaratory judgment that it holds title to the bed and banks of the Big Horn River within the reservation for the benefit of the Crow, and that the Tribe enjoys exclusive authority to regulate hunting and the Tribe enjoys exclusive authority to regulate hunting and

U.S.
claims it
holds
for
benefit
of Crow

Resolution

fishing within the reservation. Simultaneously, a criminal action under 18 U.S.C. §1165 (trespass on Indian property) was filed in the same DC against a fisherman who allegedly had trespassed in the Big Horn, United States v. Finch, 395 F.Supp. 205 (D.Mont. 1975). The DC dismissed the prosecution because it ruled that the bed of the Big Horn belonged to the state. CA9 reversed, holding that the bed of the Big Horn belonged to the U.S. in trust for the Tribe. 548 F.2d 822 (1976). This Court reversed summarily on double jeopardy grounds without reaching the question of who owned the River. This present case then proceeded.

The DC held again that the state owned the riverbed and banks. It also held that the State had exclusive jurisdiction to regulate hunting and fishing on the non-Indian lands within the reservation, that the Crow's exclusive right to hunt and fish is confined to Indian lands within the reservation, and their right to regulate hunting and fishing on the reservation is limited to the right to prohibit non-Indians from trespassing on Indian lands. DC

The CA reversed in part. It adhered to its earlier ruling that the Crow were the beneficial owners of the riverbed. The court held that the Tribe can prohibit all non-Indian hunting and fishing on "Indian lands" within the reservation. But the Tribe cannot prohibit non-Indians from hunting and fishing on their own fee lands within the reservation, although they can subject them to reasonable, nondiscriminatory conservation measures. Finally, the court CA #9

*non-Indian
may fish
on own
land*

held that the state may regulate, concurrently with the Tribe, non-Indian hunting and fishing on Indian lands, so long as state regulation do not interfere with tribal regulations. The CA's opinion is marked by a pragmatic concern with securing appropriate rights and duties for all concerned.

II

The first issue presented is who owns the beneficial interest in the bed of the Big Horn River. Unless the United States conveyed the bed to the Tribe before Montana was admitted as a state to the union, the bed passed from the U.S. to the state under the Equal Footing doctrine. Congress could have ceded the bed of the navigable river to the Tribe before the state was admitted. Chocktaw Nation v. Oklahoma, 397 U.S. 620 (1970). Petr's contrary argument has no merit. The question is whether Congress intended to convey the riverbed to the Tribe. Id. at 633. The treaties involved are unclear, they do not refer the river explicitly except when describing boundaries. Fathoming the intent behind these treaties involves gauging the application of traditional canons of construction in this area.

On the one hand, "disposals by the United States during the territorial period are not to be lightly inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." United States v. Holt State Bank, 270 U.S. 49, 55 (1926). In that case, the Court held that the U.S. had not conveyed a navigable

Q #1

Peter
Hunke

the Crow
acquired
ownership

by the
Treaties.

But this
still

leaves

Q whether

by selling

all but 40

acres of

riparian

land, the Crow

continued to

own bed?

lake to a tribe, finding nothing in the relevant treaties relating to the lake nor even confirming Indian ownership of reservation land. Also significant, perhaps, was the fact that at the time of the litigation, the tribe had sold off all the land in the vicinity of the lake, so that it could no longer be part of the Indian domain. Cf. Puyallup Tribe v. Wash. Game Dep't, 433 U.S. 165, 173-74 (1977) (when reservation diminished to 22 acres, none of it riparian, implausible that tribe ever had exclusive right to fish in river). In any event, the SG presses this latter argument in an attempt to distinguish Holt.

On the other hand, Choctaw Nation evinces a much more sympathetic approach to examining intent to convey riverbeds. This attitude stems from the rules that Indian treaties are to be interpreted in light of how the Indians would have understood its provisions, and that ambiguities are to be resolved in favor of the Indians. Choctaw Nation involved a treaty between the U.S. and various tribes, by which the tribes resettled on land in Oklahoma in exchange for quitting their lands farther east. The Court held that Congress had conveyed to the tribe the bed of the Arkansas River that passed through the reservation, notwithstanding the fact that the treaties did not mention the river except as regards boundaries. The Court thought that when the treaty conveyed land to the tribes, it should also be understood to include the beds of rivers therein, when the riverbeds were not expressly excluded. Moreover, the Court thought that retention of the bed conflicted with promises in the treaty that the Indians would

have "virtually complete sovereignty" over the reservation and, that the reservation would never be embraced within a state. Finally, description of the boundaries of the reservation spoke of drawing the line down the center of the main channel of the river, implying that at the boundary the tribes would receive half the bed. The dissent in that case adhered to the older rule of Holt that since ownership of the beds of navigable rivers is an incident of sovereignty, conveyance should not be implied absent strong evidence.

In applying these principles to this case, CA9 admitted that the question was close, the facts falling somewhere between Holt and Choctaw Nation. U.S. v. Finch, supra. The court noted that negotiations between the U.S. and the Crow were conducted as an affair of state to end hostilities. It recognized that it had been held that the 1951 Treaty had confirmed the Indians as owners of the reservation land, based primarily on assurances given to the Crow that the territory was "your country" and "your land". Crow Tribe v. United States, 284 F.2d 361 (Ct.Cl. 1960). The court also looked to the solemn assurance given the Tribe in the 1868 Treaty that invited outsiders would be excluded and that the land was for the "absolute and undisturbed use and occupation" of the Tribe. The court thus concluded that that the Big Horn was within the metes and bounds of granted land and went to the Tribe with the land. It should be noted that this holding follows the Choctaw Nation analysis that if a navigable river is within the boundaries of land granted to a tribe in a

treaty, then it will be presumed that the riverbed was also granted. As mentioned above, the issue presented turns on the vitality of this presumption.

In my view, this analysis is correct. An Indian treaty is an undertaking with a political entity. The rule against implying grants of navigable waterways rests on the principle that ownership of such waterways is an attribute of sovereignty, and that conveyance of them to private individuals is so unusual that a court should not presume that this has occurred. However, when the United States provided Indians with a homeland, they were giving a mixture of property rights and jurisdictional rights. There seems nothing untoward in believing that beneficial ownership of riverbeds is consistent with the status of an Indian tribe. Use of the water and its other resources could be important for the life of the tribe. When these facts are viewed in light of the rule that treaties are to be read as the Indians would have understood them, the presumption created in Choctaw Nation makes sense. Thus, I would hold that Crow received beneficial ownership of the bed of the Big Horn River.

The strongest argument against this holding is that the Crow Treaties never promised that the territory given would never be embraced within a state. This promise implies the United States would not give a riverbed away to a future state. Here, no similar promise was made. I discount this factor, however, because the Choctaw Nation Court made little out of

Peter
would
hold

Crow
originally
acquired
the bed

this promise, but concentrated on whether the riverbed was contained within the metes and bounds of the granted territory.

But The question remains whether the Crow still own the riverbed. In Puyallup, the Court considered an Indian claim to be able to fish free of state control in a non-navigable river within the reservation, based upon a Treaty clause granting them exclusive right to use the reservation. The Court rejected the claim in that case because the tribe had alienated all but 22 acres of its extensive reservation and all its riparian land, indicating that the claim to exclusive use of the river had no factual basis. 433 U.S. at 174. In a footnote, the Court rejected the suggestion that the tribe retained trust ownership of the riverbed as unsupported by the record. Id. n.12. Here, although the tribe retains 70% of the reservation, it has alienated all but 40 acres of its riparian land. Amicus the State of Washington argue on the strength of Puyallup that the Crow sale of adjacent riparian land extinguished their claim to the riverbed. Petrs argue that the sales show that the Tribe never owned the riverbed. The Crow answer that Puyallup contains little analysis and that the question of ownership of the riverbed in that case was not before the Court. Moreover, in that case there was a question of whether the reservation was still in existence, which is emphatically not the case here. Finally, the Allotment Act reserves to the Tribe any unallotted lands chiefly valuable for water power, a description obviously encompassing the Big Horn.

*But
does
Crow
still
own
riverbed?*

*Tribe
has
alienated
all but
40 acres
of
riparian
land!*

I find this question extremely difficult. Puyallup states the problem, but is not helpful in its resolution. It seems to have viewed the subsequent sales as negating the idea that the tribe ever had the exclusive right it claimed. There is no other law cited. The CA did not discuss this issue. Tentatively, I would hold that so long as the Tribe's reservation retains substantial territorial integrity and ~~and~~ it still contains some riparian land, then ownership of the riverbed is not dissolved. I view ownership of the bed of a navigable river as a special category of property tied to the tribe's quasi-sovereign status, so that dismemberment of the reservation or mass sale of riparian land would dissolve the ownership right. Here, however, the Tribe continues to function on the reservation and retains access to the river.

III

The parties also argue over whether the riparian owners take upland to the highwater or lowwater marks of the Big Horn. The dispute is over the banks of the river. Petr argues that the state rule, providing that the lowwater mark bounds riparian ownership, should govern under Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979). Wilson held state law of avulsion and accretion should be borrowed as federal law to determine riparian boundaries between private land and an Indian reservation after the boundary river had changed course. The Court held that under United States v. Kimball Foods, Inc., 440 U.S. 715 (1979), there was no reason not to adopt the state

State rule - low water bounds riparian rights

rule as the federal law. The application of this principle to navigable waters depends on State Land Board v. Corvallis Land & Gravel Co., 440 U.S. 363 (1977), where the Court held that the State's ownership of the bed of a navigable water supported the application of state law to determine the extent of riparian holdings.

The SG argues that neither Wilson nor Corvallis is applicable here, where the bed of the navigable river never went to the state, and the question is over the initial boundary of the riparian land without any movement of the river. He argues that federal interest is greater in land and a river contained wholly within an Indian reservation than it is is land bordering a reservation. I find his first argument persuasive. The initial grant of the riverbed by the United States included the banks. Pollard's Lessee v. Hagan, 3 How. 212 (1845). If the state never owned the riverbed, I don't see how its law can apply to limit the extent of the Tribe's holding of the river. As the Court held below, applying state law would frustrate the interest of the United States in granting the riverbed in the first instance. Please note that it is decided that the state does own the riverbed, then it is plain that state law governs riparian holdings.

SG says state never owned the river

IV

The final issue is the validity of the tribe's rule banning non-members from hunting and fishing on the reservation. The Tribe and the SG do not now dispute the CA's

holding that the Tribe must permit non-Indian residents of the reservation to hunt on their own property. The dispute centers on the Tribe's rule that non-Indians cannot hunt or fish on any part of the reservation not their own. The CA held that the Tribe and the State have concurrent jurisdiction over non-member hunting on the reservation; the non-member must obey the more restrictive of the two rules. This in effect allows the Crow to exclude non-member hunting and fishing entirely.

Without extensively rehearsing the positions of the parties, I would agree with the CA that the tribe retains the authority to regulate hunting and fishing by non-members. In Washington v. Confederated Tribes of Colville, 100 S.Ct. 2069 (1980), the Court held that the tribe there retained the power to tax non-members for transactions occurring on trust lands as "a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status." Regulating hunting and fishing are even more central to the interests of the tribe than taxing, as is indicated by the hunting rights granted them under the 1868 Treaty. Cf. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (Indian tribes have no criminal jurisdiction over non-members). The only question that remains is the power of the Tribe to regulate non-member hunting and fishing on lands within the reservation, but owned by non-members.

Petr argue that in relinquishing ownership of fee land, the Tribe surrendered jurisdiction over activities on that land. Petr attempts to distinguish Colville on this

There is
conceded.

But
Crow
don't
want

non-Indian
to hunt
or fish

on any

Indian

lands.

CA 9
agreed.

Peter

tends
to

agree

with

Crow

also.

ground, but Colville is ambiguous on this point. It approves taxing transactions that occur on trust lands, but also approves economic regulation of nonmembers "entering the reservation." Id. at 2081. The SG argues that regulation of hunting is not an attribute of land ownership, but one of sovereignty. The question is whether the tribe relinquished its hunting and fishing rights over the land when it conveyed the fee. The Montana Supreme Court has held that Indian tribes retain this right over alienated lands within the reservation. State v. McClure, 127 Mont. 534, 268 P.2d 629 (1954). The Attorney General of the United States has ruled similarly. 23 Ops. Atty Gen. 214, 217 (1900) ("the legal right to purchase land within an Indian reservation gives to the purchaser no right of exemption from the laws of such nation").

In my view, the Tribe may regulate hunting and fishing by non-residents within the reservation without regard to who owns the land within the reservation. This seems most consistent with the notion of a limited Indian sovereignty and allows the Tribe to protect its most precious group asset, its natural resources.^{*} I would, however, reserve the question of how extensively the Tribe may restrict hunting by resident non-members or their non-commercial invitees. It seems to me that such regulation ought not to be so unreasonable that it destroys enjoyment of the ownership.

*but fish
are all
stocked by
state.

79-1128 MONTANA V. U.S.

Argued 12/3/80

Special ant
Roth (AG of Mont.)

43% of population - non-Indian
30% owned by " "

State stocks river with fish.

Crow owns only 40 acres of riparian land.

Mont. ~~at~~ own some riparian land

- that is open to public.

CA9 held that non-Indians who own ^{& live on} land on river may fish but are subject to Tribal regulation so long as it is non-discriminatory. But a non-Indian owning land - whether riparian or not - who does not live on Reservation, may not hunt or fish (even a pond he has stocked) on his own land.

Territory of Mont. had been established by 1868 - with Counties laid out, a territorial capital, etc.

Argues relevance of "equal footing" doctrine. Relies primarily on this.

Non-Indians have hunted & fished the Big Horn since time of century.

Treaty conferred no exclusive right to hunt & fish to Tribes.

Argues that prior to Treaty, the U.S. held the Crow in trust for the Territory & that Treaty could not - & did not. divert this.

Roth (cont.)

Regulatory issue: Indian auth. stops at boundary of Reservation, with respect to non-residents.

Severin Court. Qs are raised by Reg 74-05. Tribe is not seeking, as in ~~Puyallup~~ Puyallup, right to share in fishery. Rather, Tribe is claiming power of tribal governance over hunting & fishing.

Claiborne (SG)

Fed govt has a ~~navigation~~ navigation statute that allows public to boat on river - but not to fish or hunt if Tribe owns the bed.

WHR asked how Corvallis case can be distinguished? Claiborne answered there is some language in Corvallis that supports Tribe's view of equal footing doctrine.

But other cases settle that ~~Cong~~ U.S. may reserve ~~any~~ whatever rights it wishes.

Clairborne (cont).

Only live controversy is with respect to hunting & fishing etc on River.

There is no claim that riparian owner also own any interest in river bed. State claims it owns the bed.

The real "bone of contention" relates to the land on the River, within the Res., now owned by the State. Thousands of non-residents ~~off~~ ^{at} Reservation now come from all over State & other States to obtain access to River across this land for hunting & fishing ~~points~~ purposes.

Lynagh (Crow Tribe)

River is not a commercial fishery.

Prior to this case, State stocked the River. Since CAG, Tribe & U.S. have stocked. There would be no fishery absent stocking.

→ { BRW challenged assumption that owner of bed controls right to fish. BRW asked if any case so holds? (no specific case was cited)

by naugh (cont.)

→

Conceder that because of Fed. Govt's navigation servitude, the public may boat on River - but not fish w/o Tribe's consent.

B RW notes it makes large difference, ~~as to~~ in how one fishes a River, if some one who owned bed objects to any trespass. Can't get out of boat.

Tribe has exclusive prop. right to hunt & fish w/in Res. Only exception is where non-Indian ~~lives~~ owns & lives on land within Res.

Supports the "balance" ~~is~~ approved by CA9's opinion.

See p 86 of Vol II for Tribe's concern as to influx of non-Indians.

→

But Roth (for Mont) - in rebuttal - said at trial no witnesses supported the letter at p 86

On River Bed -
On Regulation -

Reverse 5-4
" 7/80 2
Conf. 12/5/80

The Chief Justice

Reverse

Mont. has right to regulate fishing
~~but~~ so long as don't interfere with
Ind. rights

State owns river bed

Mr. Justice Brennan

Agree

Agree with CA 9's op.

Mr. Justice Stewart

Reverse

Bed of nar. stream is held in
trust by U.S., but ~~this doesn't~~ &
under normal "equal footing" rule
Mont. owns bed. But this doesn't
decide case.

Tribe has power to regulate
hunting & fishing, but it cannot
exclude non-Indians who own land
on Reservation - whether owners live
on Reservation. Tribe's exclusion has
exclusive right over Indians & Indian land

Cherokee is clear
but can be distinguished

Mr. Justice White

Reverie

State owns river bed, & hence it
controls who fishes there.

Tribal Tribe has exclusive jurisd.
as to Indian & Indian property.

State can set bag limits &
seasons ^{for Indians & whites} for fishing & hunting on
river - (PS doesn't agree) because
State owns bed to high water mark.
State controls river.

Mr. Justice Marshall

Affirm

State does ^{not} own river
bottom.

CAG is right.

Mr. Justice Blackmun

Affirm (tentative)

Not at rest.

Agree with SG as to
Indian owning bed.

74-05 may go a bit
too far.

Mr. Justice Powell

Reverie (tentative)

I am persuaded by P.S., B.R.W. & W.H.R. that State own bed of River.

As to hunting & fishing rights, I'll have to see something written out. I cannot agree with CHQ that a non-Indian owner on River can't fish.

Reg 74-05 goes too far

Mr. Justice Rehnquist

Reverie

State own river bed.

Haven't worked out details of regulations

Mr. Justice Stevens

Affirm

Indians own River bed but have gone too far on Reg.

Cherokee is difficult to distinguish, but can be persuaded

The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

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SUPREME COURT OF THE UNITED STATES

No. 79-1128

State of Montana, et al.,
Petitioners,
v.
United States, et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

[February —, 1981]

JUSTICE STEWART delivered the opinion of the Court.

This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation, and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by non-members of the Tribe on non-Indian property within reservation boundaries. We granted certiorari, — U. S. —, to review a decision of the United States Court of Appeals for the Ninth Circuit that substantially upheld this claim.

I

The Crow Indians originated in Canada, but some three centuries ago they migrated to what is now southern Montana. In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, 11 Stat. 749, in which the signatory tribes acknowledged various designated lands as their respective territories. The treaty identified approximately 38.5 million acres as Crow territory and, in Article 5, specified that, by making the treaty, the tribes did not "surrender the privilege of hunting, fishing, or pass-

*Reviewed
LFB*

*See my
letter*

of 2/11

to Potter

*I'll
probably*

join

ing over" any of the lands in dispute. In 1868, the Second Treaty of Fort Laramie established a Crow reservation of roughly 8 million acres, including land through which the Big Horn River flows. 15 Stat. 649. By Article 2 of the treaty, the United States agreed that the reservation "shall be set apart for the absolute and undisturbed use and occupation" of the Crow Tribe, and that no non-Indians except agents of the Government "shall ever be permitted to pass over, settle upon, or reside in" the reservation.

Several subsequent Acts of Congress reduced the reservation to slightly fewer than 2.3 million acres. See 22 Stat. 42 (1882); 26 Stat. 1039-40; 33 Stat. 352 (1904); 50 Stat. 884 (1937). In addition, the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751, authorized the issuance of patents in fee to individual Indian allottees within the reservation. Under these Acts, an allottee could alienate his land to a non-Indian after holding it for 25 years. Today, roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent.

Since the 1920's, the State of Montana has stocked the waters of the reservation with fish, and the construction of a dam by the United States made trout fishing in the Big Horn River possible. The reservation also contains game, some of it stocked by the State. Since the 1950's, the Crow Tribal Council has passed several resolutions respecting hunting and fishing on the reservation, including Resolution No. 74-05, the occasion for this lawsuit. That resolution prohibits hunting and fishing within the reservation by anyone who is not a member of the Tribe. The State of Montana, however, has continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation.

On October 9, 1975, proceeding in its own right and as fiduciary for the Tribe, the United States endeavored to resolve the conflict between the Tribe and the State by filing the present lawsuit. The plaintiff sought (1) a declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Tribe, (2) a declaratory judgment establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and (3) an injunction requiring Montana to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation.

The District Court denied the relief sought. *United States v. Montana*, 457 F. Supp. 599. In determining the ownership of the river, the court invoked the presumption that the United States does not intend to divest itself of its sovereign rights in navigable waters and reasoned that here, as in *United States v. Holt State Bank*, 270 U. S. 49, the language and circumstances of the relevant treaties were insufficient to rebut the presumption. The court thus concluded that the bed and banks of the river had remained in the ownership of the United States until they passed to Montana on its admission to the Union. As to the dispute over the regulation of hunting and fishing, the court found that "[i]mplicit in the Supreme Court's decision in *Oliphant* [*v. Suquamish Indian Tribe*, 435 U. S. 191,] is the recognition that Indian tribes do not have the power, nor do they have the authority, to regulate non-Indians unless so granted by an Act of Congress." 457 F. Supp. at 609. Because no treaty or Act of Congress gave the Tribe authority to regulate hunting or fishing by non-Indians, the court held that the Tribe could not exercise such authority except by granting or withholding authority to trespass on tribal or Indian land. All other authority to regulate non-Indian hunting and fishing resided concurrently in the State of Montana and, under 18 U. S. C. § 1165 (which makes it a federal offense to tres-

pass on Indian land to hunt or fish without permission), the United States.

The Court of Appeals reversed the judgment of the District Court. 604 F. 2d 1162. Relying on its opinion in *United States v. Finch*, 548 F. 2d 822, *vacated on other grounds*, 433 U. S. 676, the appellate court held that, pursuant to the treaty of 1868, the bed and banks of the river were held by the United States in trust for the Tribe. Relying on the treaties of 1851 and 1868, the court held that the Tribe could regulate hunting and fishing within the reservation by non-members, although the court noted that the Tribe could not impose criminal sanctions on those non-members. The court also held, however, that the two Allotment Acts implicitly deprived the Tribe of the authority to prohibit hunting and fishing on fee lands by resident non-member owners of those lands. Finally, the court held that non-members permitted by the Tribe to hunt or fish within the reservation remained subject to Montana's fish and game laws.

II

The respondents seek to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River.¹ The question is whether the United States

¹ According to the respondents, the Crow Tribe's interest in restricting hunting and fishing on the reservation focuses almost entirely on sports fishing and duck hunting in the waters and on the surface of the Big Horn River. The parties, the District Court, and the Court of Appeals have all assumed that ownership of the riverbed will largely determine the power to control these activities. The link between ownership of the bed and control over fishing finds some implicit support in early decisions of this Court. *E. g.*, *Shively v. Bowlby*, 152 U. S. 1, 17, 49; *Martin v. Waddell*, 41 U. S. 367, 408-410. Moreover, as a matter of common law, casting a fishing line and lure from the riverbank is a trespass on the riverbed. W. Prosser, *Handbook of the Law of Torts*, § 13, at 69.

Although the complaint in this case sought to quiet title only to the bed of the Big Horn River, we note the concession of the United States that

conveyed beneficial ownership of the riverbed to the Crow Tribe by the Treaties of 1851 or 1868, and therefore continues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union. *Choctaw Nation v. Oklahoma*, 397 U. S. 620, 627-628.

Though the owners of land riparian to *non-navigable* streams may own the adjacent riverbed, conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed. *Packer v. Bird*, 137 U. S. 661, 672; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 289; 33 U. S. C. § 10; 43 U. S. C. § 931. Rather, the ownership of land under navigable waters is an incident of sovereignty. *Martin v. Waddell*, 41 U. S. 367, 409-411. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. *Pollard's Lessee v. Hagan*, 44 U. S. 212, 222-223, 229. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. *United States v. Oregon*, 295 U. S. 1, 14. It is now established, however, that Congress may sometimes convey lands below the high water mark of a navigable water,

and so defeat the title of a new State, in order to perform international obligations, or to effect an improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes for which the United States hold the Territory.

if the bed of the river passed to Montana upon its admission to the Union, the State at the same time acquired ownership of the banks of the river as well.

Shively v. Bowlby, 152 U. S. 1, 48. But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon*, *supra*, 295 U. S., at 14, it will not be held that the United States has conveyed such land "except because of some special duty or exigency." *United States v. Holt State Bank*, *supra*, 270 U. S., at 55. See also *Shively v. Bowlby*, *supra*, 152 U. S., at 48. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, *United States v. Oregon*, *supra*, 295 U. S., at 14, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank*, *supra*, 270 U. S., at 55, or was rendered "in clear and special words," *Martin v. Waddell*, *supra*, 41 U. S., at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird*, *supra*, 137 U. S., at 672.²

In *United States v. Holt State Bank*, *supra*, this Court applied these principles to reject an Indian tribe's claim of title to the bed of a navigable lake. The lake lay wholly within the boundaries of the Red Lake Indian reservation, which had been created by treaties entered into before Minnesota joined the Union. In these treaties the United States promised to "set apart and withheld from sale, for the use of" the Chippewas, a large tract of land, Treaty of Sept. 30, 1854, 10 Stat. 1109, and to convey "a sufficient quantity of land for the permanent homes" of the Indians, Treaty of Feb. 22, 1855, 10 Stat. 1165. See *Minnesota v. Hitchcock*, 185 U. S. 373, 389.³ The Court concluded that there was nothing in

² Congress was, of course, aware of this presumption once it was established by this Court. See *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 588.

³ The *Hitchcock* decision expressly stated that the Red Lake reservation was "a reservation within the accepted meaning of that term." *Minnesota v. Hitchcock*, 185 U. S. 373, 389.

MONTANA v. UNITED STATES

7

the treaties "which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy * * * of treating such lands as held for the benefit of the future State." *United States v. Holt State Bank, supra*, 270 U. S., at 58-59. Rather, "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Id.*, at 58.

The Crow treaties in this case, like the Chippewa treaties in *Holt State Bank*, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty. The 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories. Treaty of Fort Laramie, 1851, 11 Stat. 749, Art. 5. It referred to hunting and fishing only insofar as it said that the Crow Indians "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described," a statement that had no bearing on ownership of the riverbed. By contrast, the 1868 treaty did expressly convey land to the Crow Tribe. Article 2 of the treaty described the reservation land in detail⁴ and stated that such land would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named. . . ." Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, Art. 2. The treaty then stated:

⁴"[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning. . . ." Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, Art. 2.

. . . the United States now solemnly agrees that no persons, except those herein designated and authorized to do so, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians. . . .

Ibid. Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. The treaty in no way expressly referred to the riverbed, *Packer v. Bird, supra*, 137 U. S., at 672, nor was an intention to convey the riverbed expressed in "clear and special words," *Martin v. Waddell, supra*, 41 U. S., at 411, or "definitely declared or otherwise made plain," *United States v. Holt State Bank, supra*, 270 U. S., at 55. Rather, as in *Holt*, "the effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Ibid.*

Though Article 2 gave the Crow Indians the sole right to use and occupy the reserved land, and implicitly, the power to exclude others from it, the respondents' reliance on that provision simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches. The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance. In the Court of Appeals' *Finch* decision, on which recognition of the Crow Tribe's title to the riverbed rested in this case, that court construed the language of exclusively in the 1868 treaty as granting to the Indians all the lands, including the riverbed, within the described boundaries. *United States v. Finch, supra*, 548 F. 2d,

at 829. Such a construction, however, cannot survive examination. As the Court of Appeals recognized, *ibid.*, and as the respondents concede, the United States retains a navigational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases in the 1868 treaty as "absolute and undisturbed use and occupation" and "no persons except those designated herein . . . shall ever be permitted," whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. Thus, even if exclusivity were the same as ownership, the treaty language establishing this "right of exclusivity" could not have the meaning that the Court of Appeals ascribed to it.⁵

⁵ In one recent case, *Choctaw Nation v. Oklahoma*, *supra*, this Court did construe a reservation grant as including the bed of a navigable water, and the respondents argue that this case resembles *Choctaw Nation* more than it resembles the established line of cases to which *Choctaw Nation* is a singular exception. But the finding of a conveyance of the riverbed in *Choctaw Nation* was based on very peculiar circumstances not present in this case.

Those circumstances arose from the unusual history of the treaties there at issue, a history which formed an important basis of the decision. *Choctaw Nation v. Oklahoma*, *supra*, 397 U. S., at 622-628. Immediately after the Revolutionary War, the United States had signed treaties of peace and protection with the Cherokee and Choctaw tribes, reserving them lands in Georgia and Mississippi. In succeeding years, the United States bought large areas of land from the Indians to make room for white settlers who were encroaching on tribal lands, but the Government signed new treaties guaranteeing that the Indians could live in peace on those lands not ceded. The United States soon betrayed that promise. It proposed that the tribes be relocated in a newly acquired part of the Arkansas Territory, but the new territory was soon overrun by white settlers, and through a series of new cession agreements the Indians were forced to relocate farther and farther west. Ultimately, most of the tribes' members refused to leave their eastern lands, doubting the reliability of the government's promises of the new western land, but Georgia and Mississippi, anxious for the relocation westward so they could assert jurisdiction over the Indian lands, purported to abolish the tribes and

Moreover, even though the establishment of an Indian tribe can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby*, *supra*, 152 U. S., at 48, justifying a congressional conveyance of a riverbed, see, *e. g.*, *Alaska Pacific Fisheries v. United States*, 248 U. S., 85, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. See *Shively v. Bowlby*, *supra*, 152 U. S., at 48. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life. JA 74. Cf., *Alaska Pacific Fisheries v. United States*, *supra*, at 88; *Skokomish Indian Tribe v. France*, 320 F. 2d 295, 212 (CA9). Finally, the United States has been fully able to carry out

distribute the tribal lands. The Choctaws and Cherokees finally signed new treaties with the United States aimed at rectifying their past suffering at the hands of the Federal Government and the States.

Under the Choctaw treaty, the United States promised to convey new lands west of the Arkansas territory in fee simple, and also pledged that "no Territory or government shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 17, 1830, 7 Stat. 333-334, quoted in *Choctaw Nation v. Oklahoma*, *supra*, 397 U. S., at 625. In 1835, the Cherokees signed a treaty containing similar provisions granting reservation lands in fee simple and promising that the tribal lands would not become part of any State or Territory. *Id.*, at 626. In concluding that the United States had intended to convey the riverbed to the tribes before the admission of Oklahoma to the Union, the *Choctaw* court relied on these circumstances surrounding the treaties and placed special emphasis on the government's promise that the reserved lands would never become part of any State. *Id.*, at 634-635. Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow Treaties of 1851 and 1868.

all its important fiduciary duties toward the Crow Tribe, including those related to the river, without asserting a conveyance to the Tribe of title to the riverbed.⁶

For these reasons, we conclude that title to the bed of the Big Horn River passed to the State of Montana upon its admission into the Union, and that the Court of Appeals was in error in holding otherwise.

III

Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us is a narrow one. The Court of Appeals held that the Tribe may prohibit non-members from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, 604 F. 2d, at 1165-1166, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits non-members to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. *Ibid.* What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by non-members of the Tribe. The Court of Appeals held that, with respect to fee-patented lands, the Tribe may regulate, but may not prohibit, hunting and fishing by non-member resident owners or by those, such as tenants or employees, whose occupancy is authorized by the owners. *Id.*, at 1169. The court further held that the Tribe may totally prohibit hunting and fishing on lands within the reservation owned by non-Indians who do not occupy that land. *Ibid.*

⁶ The Crows may navigate the river, *Illinois v. Ill. Cent. R. R. Co.*, 146 U. S. 387; 33 U. S. C. § 10, fish in its waters, *United States v. Winans*, 198 U. S. 371, dock out to navigable water, *United States v. Holt State Bank*, *supra*, 270 U. S., at 59, use water for irrigation, *Winters v. United States*, 207 U. S. 564, and own all valuable sites for power, Crow Allotment Act of June 4, 1920, 41 Stat. 751, ¶ 10.

The Court of Appeals found two sources for this tribal regulatory power: the Crow treaties, "augmented" by 18 U. S. C. § 1165, and "inherent" Indian sovereignty. We believe that neither source supports the court's conclusion.

A

The purposes of the 1851 Treaty were to assure safe passage for settlers across the lands of various Indian tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber and forage; to delineate tribal boundaries; to promote inter-tribal peace; and to establish a way of identifying Indians who committed depredations against non-Indians. As noted earlier, the Treaty did not even create a reservation, although it did designate tribal lands. See *Crow Tribe v. United States*, 284 F. 2d 361, 364, 366, 368 (Ct. Cl.). Only Article 5 of that Treaty referred to hunting and fishing, and it merely provided that the 8 signatory tribes "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 11 Stat. 749.⁷ The Treaty nowhere suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by non-members on non-member lands. Indeed, the Court of Appeals acknowledged that after the Treaty was signed non-Indians, as well as members of other Indians tribes, undoubtedly hunted and fished within the treaty-designated territory of the Crows. 604 F. 2d, at 1167.

The 1868 Fort Laramie Treaty, 15 Stat. 649, reduced the size of the Crow territory designated by the 1851 Treaty. Article 2 of the Treaty established a reservation for the Crow Tribe, and provided that it be "set apart for the *absolute and undisturbed use and occupation* of the Indians herein named and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . .," (emphasis

⁷ The complaint in this case did not allege that non-Indian hunting and fishing on reservation lands has impaired this privilege.

added) and that "the United States now solemnly agrees that no persons, except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon or reside in the territory described in this article for the use of said Indians. . . ." The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands.⁸ But that authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation." And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. § 331 *et seq.*, and the Crow Allotment Act of 1920, 41 Stat. 751.⁹ If the 1868 Treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.¹⁰

⁸ Article IV of the Treaty addressed hunting rights specifically. But that Article referred only to "unoccupied lands of the United States," *viz.*, lands outside the reservation boundaries, and is accordingly not relevant here.

⁹ The 1920 Crow Allotment Act was one of the special allotment acts Congress passed from time to time pursuant to the policy underlying the General Allotment Act. See S. Rep. No. 219, 66th Cong., 1st Sess., at 5 (1919). The Senate Committee Report on the Crow Allotment bill stated that it "is in accordance with the policy to which Congress gave its adherence many years ago, and which found expression in the [General Allotment Act]." *Id.*, at 5.

¹⁰ The Court of Appeals discussed the effect of the Allotment Acts as follows:

"While neither of these Acts, nor any other to which our attention has been called, explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow Tribe from hunting and

In *Puyallup Tribe v. Washington Game Department*, 433 U. S. 165 (*Puyallup III*), the relevant treaty included language virtually identical to that in the 1868 Treaty of Fort Laramie. The Puyallup Reservation was to be "set apart,

fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts." 604 F. 2d, at 1168 (footnote omitted).

But nothing in the Allotment Acts supports the view of the Court of Appeals that the Tribe could nevertheless bar hunting and fishing by non-resident fee owners. The policy of the Acts was the eventual assimilation of the Indian population, *Organized Village of Kake v. Egan*, 369 U. S. 60, 72, and the "gradual extinction of Indian reservations and Indian titles." *Draper v. United States*, 164 U. S. 241, 246. The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations. See, e. g., Report of the Secretary of the Interior (1885), pp. 25-28; Report of the Secretary of the Interior (1886), p. 4; Report of the Commissioner of Indian Affairs (1887), pp. IV-X; Report of the Secretary of the Interior (1888), pp. XXIX-XXXII; Report of the Commissioner of Indian Affairs (1889), pp. 3-4; Report of the Commissioner of Indian Affairs (1890), pp. VI, XXXIX; Report of the Commissioner of Indian Affairs (1891), pp. 3-9, 26; Report of the Commissioner of Indian Affairs (1892), p. 5; Report of the Secretary of the Interior (1894), p. IV. And throughout the Congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian population was to be accomplished, in part, by the dissolution of tribal relations. See, e. g., XI Cong. Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783-784 (Sen. Saunders), 85 (Senators Morgan and Hoar), 881 (Sen. Brown), 906 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar),

There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the Congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. See, e. g., XI Cong. Rec. 785 (Sen. Morgan), 875 (Sen. Hoar), 876 (Sen. Morgan), 878 (Senators Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Senators Edmunds and Williams). It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate

and, so far as necessary, surveyed and marked out for their exclusive use . . . [and no] White man [was to] be permitted to reside upon the same without permission of the tribe. . . ." See *id.*, at 174. The Puyallup Tribe argued that those words amounted to a grant of authority to fish free of State interference. But this Court rejected that argument, finding, in part, that it "clashes[d] with the subsequent history of the reservation . . .," *ibid.*, notably two acts of Congress under which the Puyallups alienated, in fee simple, the great majority of the lands in the reservation, including all the land abutting the Puyallup River. Thus, "[n]either the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive' use." *Ibid.* *Puyallup III* indicates, therefore, that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 Treaty provides no support for tribal authority to regulate hunting and fishing on land owned by non-Indians.

The Court of Appeals also held that the federal trespass statute, 18 U. S. C. § 1165, somehow "augmented" the Tribe's regulatory powers over non-Indian land. 604 F. 2d, at 1167. If anything, however, that statute suggests the absence of such authority, since Congress deliberately excluded fee-patented lands from the statute's scope. The statute provides:

Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs

destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if fee-holders could be excluded from fishing or hunting on their acquired property.

The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984 (current version at 25 U. S. C. § 461 *et seq.*). But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.

to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom shall be fined . . .

The statute is thus limited to lands owned by Indians, held in trust by the United States for Indians, or reserved for use by Indians.¹¹ If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in § 1165 the definition of "Indian country" in 18 U. S. C. § 1151: "all land within the limits of any Indian reservation under the jurisdiction of the United States government notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." Indeed, a subcommittee of the House Committee on the Judiciary proposed that this be done. But the Department of Interior recommended against doing so in a letter dated May 23, 1958. The Department pointed out that a previous congressional report, H. Rep. No. 2593, 85th Cong., 2d Sess.,¹² had made clear that the bill contained no implica-

¹¹ See *United States v. Bouchard*, 464 F. Supp. 1316, 1336 (WD Wis.); *United States v. Pollnan*, 364 F. Supp. 995 (Mont.).

¹² House Report 2593 stated that the purpose of the bill that became 18 U. S. C. § 1165 was to make it unlawful to enter Indian land to hunt, trap, or fish without the consent of the individual Indian or tribe:

"Indian property owners should have the same protection as other property owners, [*sic*], for example, a private hunting club may keep non-members off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity.

Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further, there are no Federal laws which can be invoked against trespassers." H. R. 2593, 85th Cong., 2d Sess. (emphasis added).

tion that it would apply to land other than that held or controlled by Indians or the United States.¹³ The Committee on the Judiciary then adopted the present language, which does not reach fee-patented lands within the boundaries of an Indian reservation.

IV

Beyond relying on the Crow Treaties and 18 U. S. C. § 1165 as source for the Tribe's power to regulate non-Indian hunting and fishing on non-Indian lands within the reservation, the Court of Appeals also identified that power as an incident of the inherent sovereignty of the Tribe over the entire Crow reservation. *United States v. Montana*, *supra*, 604 F. 2d, at 1170. But "inherent sovereignty" is not so broad as to support the application of Resolution No. 74-05 to non-Indian lands.

This Court most recently reviewed the principles of inherent sovereignty in *United States v. Wheeler*, 435 U. S. 313.

¹³ Subsequent reports in the House and Senate, H. Rep. 625, 86th Cong., 1st Sess., S. Rep. 1686, 86th Cong., 2d Sess., also refer to "Indian lands" and "Indian property owners" rather than "Indian country." In *Oliphant*, *supra*, this Court referred to S. Rep. 1686, which stated that "the legislation [28 U. S. C. § 1165] will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of *their property*." 435 U. S., at 206. (Emphasis added.)

Before the Court of Appeals decision, several other courts interpreted § 1165 to be confined to lands owned by Indians, or held in trust for their benefit. *State v. Baker*, 464 F. Supp. 1377 (WD Wis.); *United States v. Bouchard*, 464 F. Supp. 1316 (WD Wis.); *United States v. Pollman*, 364 F. Supp. 995 (Mont.); *Donahue v. California Justice Court*, 93 Cal. App. 310. Cf. *United States v. Sanford*, 547 F. 2d 1085, 1089 (CA9) (holding that § 1165 was designed to prevent encroachments on Indian lands, rejecting the argument that § 1165 makes illegal the unauthorized killing of wildlife on an Indian reservation, and noting that "the application of Montana game laws to the activities of non-Indians on Indian reservations does not interference with tribal self-government on reservations").

In that case, noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," *id.*, at 323, the Court upheld the power of a tribe to punish tribal members who violate tribal criminal laws. But the Court was careful to note that, through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. *Id.*, at 326. The Court distinguished between those inherent powers retained by the tribes and those divested:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe. . . .*

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

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *Id.*, at 322, n. 18. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation. *Mescalero Apache Tribe v. United States*, 411 U. S. 145, 148; *Williams v. Lee*, 358 U. S. 217, 219-220; *United States v. Kagama*, 118 U. S. 375, 381-382; see *Mc-*

Clanahan v. Arizona State Tax Comm'n, 411 U. S. 164, 171. Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations,¹⁴ the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05.

The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher v. Peck*, Cranch 87—the first Indian case to reach this Court—that the Indian tribes have lost “any right of governing every person within their limits except themselves.” *Id.*, at 147, *Oliphant v. Suquamish Indian Tribe*, *supra*, 435 U. S., at 209. Though *Oliphant* only determined inherent tribal authority in criminal matters,¹⁵ the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers

¹⁴ Any argument that Resolution No. 74-05 is necessary to Crow tribal self-government is refuted by the findings of the District Court that the State of Montana has traditionally exercised “near exclusive” jurisdiction over hunting and fishing on fee lands within the reservation, and that the parties to this case had accommodated themselves to the state regulation. *United States v. Montana*, *supra*, 457 F. Supp., at 610. The Court of Appeals left these findings unaltered and indeed implicitly reaffirmed them, adding that the record reveals no attempts by the Tribe at the time of the Crow Allotment Act to forbid non-Indian hunting and fishing on reservation lands. *United States v. Montana*, *supra*, 604 F. 2d 1168 and n. 11a.

¹⁵ By denying the Suquamish Tribe criminal jurisdiction over non-Indians, however, the *Oliphant* case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen. Moreover, a tribe would not be able to rely for enforcement on the federal criminal trespass statute, 18 U. S. C. § 1165, since that statute does not apply to fee patented lands. See text and notes at pp. — — —, *supra*.

of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, 358 U. S. 217, 223; *Morris v. Hitchcock*, 194 U. S. 384; *Buster v. Wright*, 135 F. 2d 947, 950 (CA8); see *Washington v. Confederated Tribes of the Colville Indian Reservation*, — U. S. —, —. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity or the property or economic security of the tribe. See *Fisher v. District Court*, 424 U. S. 382, 386; *Williams v. Lee*, 358 U. S. 217, 220; *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 128-129; *Thomas v. Gay*, 169 U. S. 264, 273.¹⁶

No such circumstances, however, are involved in this case. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such non-Indian hunting and fishing so threatens the Tribe's political or economic security as to justify tribal regulation. The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperils the subsistence or welfare of the Tribe.¹⁷ Furthermore, the District Court made express find-

¹⁶ As a corollary, this Court has held that the Indian tribes retain rights to river waters necessary to make their reservations economically productive. *Winters v. United States*, 207 U. S. 564, 576.

¹⁷ Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife or has established its season, bag, or creel limits in such a way as to impair the Crow Indians' treaty rights to fish or hunt. Cf. *United States v. Wash-*

ings, left unaltered by the Court of Appeals, that the Crow Tribe has traditionally accommodated itself to the State's "near exclusive" regulation of hunting and fishing on fee lands within the reservation. *United States v. Montana, supra*, 457 F. Supp., at 609-610. And the District Court found that Montana's statutory and regulatory scheme does not prevent the Crow Tribe from limiting or forbidding non-Indian hunting and fishing on lands still owned by or held in trust for the Tribe or its members. *Id.*, at 609.

For the reasons stated in this opinion, the judgment of the Court of Appeals is set aside, and the case is remanded to that court for further proceedings.


It is so ordered.

ington, 384 F. Supp. 312, 410-411 (WD Wash.), aff'd, 520 F. 2d 676 (CA9).

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 5, 1981

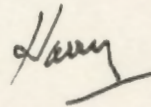


Re: No. 79-1128 - Montana v. United States

Dear Potter:

In due course, I shall attempt a dissent in this case.

Sincerely,



Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 5, 1981

Re: No. 79-1128 - State of Montana v. U.S.

Dear Potter:

I await the dissent.

Sincerely,

J.M.

T.M.

Justice Stewart

cc: The Conference

lfp/ss 2/6/81

79-1128 Montana v. United States

JUSTICE POWELL, concurring.

I join the Court's opinion, and add a few words
to emphasize the state's responsibility to protect and
manage wildlife *even handedly.* As the Court points out, there is no
allegation in this case that state regulation has in any
way limited or impaired the Crow Indian's treaty rights to
fish or hunt, n. 17, supra. Nor is there any suggestion
that the state's regulation of hunting and fishing on fee
lands within the reservation differs ~~in any way~~ from its
regulation of these activities throughout the state on
lands outside of Indian reservations. In other words,
apparently the state has been even handed - as it should
be - with respect to such regulations whether the sporting
activity takes place on non-Indian lands within or without
reservations.

File

not used.
See my
letter
to P.S.

5

10

15

February 6, 1981

79-1128 Montana v. United States

Dear Potter:

I think your opinion in this case is excellent,
and will join it.

I may file a brief concurring statement along the
lines enclosed, although I believe by adding somewhat
similar language to your note 17 you could make clear that
state regulation must be nondiscriminatory. It is possible,
though unlikely, that sportsmen might persuade the state to
allow larger bag limits within an Indian reservation (where
game might be more plentiful) than the limits applicable
elsewhere.

Sincerely,

Mr. Justice Stewart

lfp/ss

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

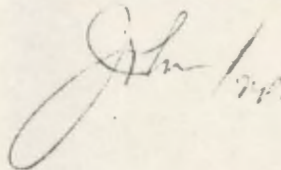
February 11, 1981

Re: 79-1128 - Montana v. United States

Dear Potter:

Because I had some doubts about this case at the time of Conference, I will await the dissent. However, after reading your persuasive opinion, I think I may well end up by joining you.

Respectfully,



Justice Stewart

Copies to the Conference

February 11, 1981

79-1128 Montana v. United States

Dear Potter:

I think your opinion in this case is excellent. I do raise a couple of points that perhaps you can clarify by relatively modest changes or additions.

First, is it not desirable to make clear that the regulation of hunting and fishing must be nondiscriminatory. It is possible, I suppose, that influential sportsmen might persuade the state to allow larger bag limits within an Indian reservation than the limits applicable at reasonably comparable locations elsewhere.

I wonder also whether your opinion might be construed as preventing a tribal government from enacting nondiscriminatory land use or zoning laws that might prohibit altogether hunting or the use of firearms. For example, it is illegal, I believe, to fire even an air rifle in the city limits of Richmond, Virginia. I am inclined to think a tribe would be able to impose prohibitions of this kind on all the residents of a reservation.

I have never been clear as to the extent of a tribe's civil jurisdiction within a reservation with respect to use of land owned by non-Indians. A tribe certainly needs some powers to further its collective welfare, but on some reservations a majority of the land is owned by non-Indians. I assume your opinion does not go beyond anything we have said in the past with respect to a tribe's general civil jurisdiction.

I expect to join your opinion, but would like to know what you think about the foregoing.

Sincerely,

Mr. Justice Stewart

lfp/ss

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

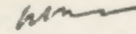
February 13, 1981

Re: No. 79-1128 Montana v. United States

Dear Potter,

Please join me.

Sincerely,



Justice Stewart

Copies to the Conference

*See pp. 4, 10, 20
+ pgs. renumbered
after 5*

By: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____

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Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-1128

State of Montana, et al.,
Petitioners,
v.
United States, et al. } On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit.

[February —, 1981]

JUSTICE STEWART delivered the opinion of the Court.

This case concerns the sources and scope of the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians. Relying on its purported ownership of the bed of the Big Horn River, on the treaties which created its reservation, and on its inherent power as a sovereign, the Crow Tribe of Montana claims the authority to prohibit all hunting and fishing by non-members of the Tribe on non-Indian property within reservation boundaries. We granted certiorari, — U. S. —, to review a decision of the United States Court of Appeals for the Ninth Circuit that substantially upheld this claim.

I

The Crow Indians originated in Canada, but some three centuries ago they migrated to what is now southern Montana. In the 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, 11 Stat. 749, in which the signatory tribes acknowledged various designated lands as their respective territories. The treaty identified approximately 38.5 million acres as Crow territory and, in Article 5, specified that, by making the treaty, the tribes did not "surrender the privilege of hunting, fishing, or pass-

*J. Stewart's
changes*

meet

*my concerns
(see my
letter)*

*Join
2/17*

ing over" any of the lands in dispute. In 1868, the Second Treaty of Fort Laramie established a Crow reservation of roughly 8 million acres, including land through which the Big Horn River flows. 15 Stat. 649. By Article 2 of the treaty, the United States agreed that the reservation "shall be set apart for the absolute and undisturbed use and occupation" of the Crow Tribe, and that no non-Indians except agents of the Government "shall ever be permitted to pass over, settle upon, or reside in" the reservation.

Several subsequent Acts of Congress reduced the reservation to slightly fewer than 2.3 million acres. See 22 Stat. 42 (1882); 26 Stat. 1039-40; 33 Stat. 352 (1904); 50 Stat. 884 (1937). In addition, the General Allotment Act of 1887, ch. 119, 24 Stat. 388, and the Crow Allotment Act of 1920, ch. 224, 41 Stat. 751, authorized the issuance of patents in fee to individual Indian allottees within the reservation. Under these Acts, an allottee could alienate his land to a non-Indian after holding it for 25 years. Today, roughly 52 percent of the reservation is allotted to members of the Tribe and held by the United States in trust for them, 17 percent is held in trust for the Tribe itself, and approximately 28 percent is held in fee by non-Indians. The State of Montana owns in fee simple 2 percent of the reservation, the United States less than 1 percent.

Since the 1920's, the State of Montana has stocked the waters of the reservation with fish, and the construction of a dam by the United States made trout fishing in the Big Horn River possible. The reservation also contains game, some of it stocked by the State. Since the 1950's, the Crow Tribal Council has passed several resolutions respecting hunting and fishing on the reservation, including Resolution No. 74-05, the occasion for this lawsuit. That resolution prohibits hunting and fishing within the reservation by anyone who is not a member of the Tribe. The State of Montana, however, has continued to assert its authority to regulate hunting and fishing by non-Indians within the reservation.

On October 9, 1975, proceeding in its own right and as fiduciary for the Tribe, the United States endeavored to resolve the conflict between the Tribe and the State by filing the present lawsuit. The plaintiff sought (1) a declaratory judgment quieting title to the bed of the Big Horn River in the United States as trustee for the Tribe, (2) a declaratory judgment establishing that the Tribe and the United States have sole authority to regulate hunting and fishing within the reservation, and (3) an injunction requiring Montana to secure the permission of the Tribe before issuing hunting or fishing licenses for use within the reservation.

The District Court denied the relief sought. *United States v. Montana*, 457 F. Supp. 599. In determining the ownership of the river, the court invoked the presumption that the United States does not intend to divest itself of its sovereign rights in navigable waters and reasoned that here, as in *United States v. Holt State Bank*, 270 U. S. 49, the language and circumstances of the relevant treaties were insufficient to rebut the presumption. The court thus concluded that the bed and banks of the river had remained in the ownership of the United States until they passed to Montana on its admission to the Union. As to the dispute over the regulation of hunting and fishing, the court found that "[i]mplicit in the Supreme Court's decision in *Oliphant* [*v. Suquamish Indian Tribe*, 435 U. S. 191,] is the recognition that Indian tribes do not have the power, nor do they have the authority, to regulate non-Indians unless so granted by an Act of Congress." 457 F. Supp. at 609. Because no treaty or Act of Congress gave the Tribe authority to regulate hunting or fishing by non-Indians, the court held that the Tribe could not exercise such authority except by granting or withholding authority to trespass on tribal or Indian land. All other authority to regulate non-Indian hunting and fishing resided concurrently in the State of Montana and, under 18 U. S. C. § 1165 (which makes it a federal offense to tres-

pass on Indian land to hunt or fish without permission), the United States.

The Court of Appeals reversed the judgment of the District Court. 604 F. 2d 1162. Relying on its opinion in *United States v. Finch*, 548 F. 2d 822, *vacated on other grounds*, 433 U. S. 676, the appellate court held that, pursuant to the treaty of 1868, the bed and banks of the river were held by the United States in trust for the Tribe. Relying on the treaties of 1851 and 1868, the court held that the Tribe could regulate hunting and fishing within the reservation by non-members, although the court noted that the Tribe could not impose criminal sanctions on those non-members. The court also held, however, that the two Allotment Acts implicitly deprived the Tribe of the authority to prohibit hunting and fishing on fee lands by resident non-member owners of those lands. Finally, the court held that non-members permitted by the Tribe to hunt or fish within the reservation remained subject to Montana's fish and game laws.

II

The respondents seek to establish a substantial part of their claim of power to control hunting and fishing on the reservation by asking us to recognize their title to the bed of the Big Horn River.¹ The question is whether the United States conveyed beneficial ownership of the riverbed to the Crow Tribe by the Treaties of 1851 or 1868, and therefore con-

¹ According to the respondents, the Crow Tribe's interest in restricting hunting and fishing on the reservation focuses almost entirely on sports fishing and duck hunting in the waters and on the surface of the Big Horn River. The parties, the District Court, and the Court of Appeals have all assumed that ownership of the riverbed will largely determine the power to control these activities. Moreover, although the complaint in this case sought to quiet title only to the bed of the Big Horn River, we note the concession of the United States that if the bed of the river passed to Montana upon its admission to the Union, the State at the same time acquired ownership of the banks of the river as well.

tinues to hold the land in trust for the use and benefit of the Tribe, or whether the United States retained ownership of the riverbed as public land which then passed to the State of Montana upon its admission to the Union. *Choctaw Nation v. Oklahoma*, 397 U. S. 620, 627-628.

Though the owners of land riparian to *non-navigable* streams may own the adjacent riverbed, conveyance by the United States of land riparian to a *navigable* river carries no interest in the riverbed. *Packer v. Bird*, 137 U. S. 661, 672; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 289; 33 U. S. C. § 10; 43 U. S. C. § 931. Rather, the ownership of land under navigable waters is an incident of sovereignty. *Martin v. Waddell*, 41 U. S. 367, 409-411. As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the Union and assume sovereignty on an "equal footing" with the established States. *Pollard's Lessee v. Hagan*, 44 U. S. 212, 222-223, 229. After a State enters the Union, title to the land is governed by state law. The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce. *United States v. Oregon*, 295 U. S. 1, 14. It is now established, however, that Congress may sometimes convey lands below the high water mark of a navigable water,

and so defeat the title of a new State, in order to perform international obligations, or to effect an improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes for which the United States hold the Territory.

Shively v. Bowlby, 152 U. S. 1, 48. But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon*, *supra*, 295 U. S., at 14, it will not be held

that the United States has conveyed such land "except because of some special duty or exigency." *United States v. Holt State Bank, supra*, 270 U. S., at 55. See also *Shively v. Bowlby, supra*, 152 U. S., at 48. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, *United States v. Oregon, supra*, 295 U. S., at 14, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank, supra*, 270 U. S., at 55, or was rendered "in clear and special words," *Martin v. Waddell, supra*, 41 U. S., at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird, supra*, 137 U. S., at 672.²

In *United States v. Holt State Bank, supra*, this Court applied these principles to reject an Indian tribe's claim of title to the bed of a navigable lake. The lake lay wholly within the boundaries of the Red Lake Indian reservation, which had been created by treaties entered into before Minnesota joined the Union. In these treaties the United States promised to "set apart and withheld from sale, for the use of" the Chippewas, a large tract of land, Treaty of Sept. 30, 1854, 10 Stat. 1109, and to convey "a sufficient quantity of land for the permanent homes" of the Indians, Treaty of Feb. 22, 1855, 10 Stat. 1165. See *Minnesota v. Hitchcock*, 185 U. S. 373, 389.³ The Court concluded that there was nothing in the treaties "which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy . . . of treating such lands as held for the benefit of the future State."

² Congress was, of course, aware of this presumption once it was established by this Court. See *Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 588.

³ The *Hitchcock* decision expressly stated that the Red Lake reservation was "a reservation within the accepted meaning of that term." *Minnesota v. Hitchcock*, 185 U. S. 373, 389.

United States v. Holt State Bank, supra, 270 U. S., at 58-59. Rather, "[t]he effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Id.*, at 58.

The Crow treaties in this case, like the Chippewa treaties in *Holt State Bank*, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty. The 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories. Treaty of Fort Laramie, 1851, 11 Stat. 749, Art. 5. It referred to hunting and fishing only insofar as it said that the Crow Indians "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described," a statement that had no bearing on ownership of the riverbed. By contrast, the 1868 treaty did expressly convey land to the Crow Tribe. Article 2 of the treaty described the reservation land in detail^{*} and stated that such land would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named. . . ." Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, Art. 2. The treaty then stated:

. . . the United States now solemnly agrees that no persons, except those herein designated and authorized to do so, and except such officers, agents, and employees

^{*}"[C]ommencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning. . . ." Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649, Art. 2.

of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians. . . .

Ibid. Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed. The treaty in no way expressly referred to the riverbed, *Packer v. Bird*, *supra*, 137 U. S., at 672, nor was an intention to convey the riverbed expressed in "clear and special words," *Martin v. Waddell*, *supra*, 41 U. S., at 411, or "definitely declared or otherwise made plain," *United States v. Holt State Bank*, *supra*, 270 U. S., at 55. Rather, as in *Holt*, "the effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory." *Ibid.*

Though Article 2 gave the Crow Indians the sole right to use and occupy the reserved land, and implicitly, the power to exclude others from it, the respondents' reliance on that provision simply begs the question of the precise extent of the conveyed lands to which this exclusivity attaches. The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance. In the Court of Appeals' *Finch* decision, on which recognition of the Crow Tribe's title to the riverbed rested in this case, that court construed the language of exclusively in the 1868 treaty as granting to the Indians all the lands, including the riverbed, within the described boundaries. *United States v. Finch*, *supra*, 548 F. 2d, at 829. Such a construction, however, cannot survive examination. As the Court of Appeals recognized, *ibid.*, and as the respondents concede, the United States retains a navi-

gational easement in the navigable waters lying within the described boundaries for the benefit of the public, regardless of who owns the riverbed. Therefore, such phrases in the 1868 treaty as "absolute and undisturbed use and occupation" and "no persons except those designated herein . . . shall ever be permitted," whatever they seem to mean literally, do not give the Indians the exclusive right to occupy all the territory within the described boundaries. Thus, even if exclusivity were the same as ownership, the treaty language establishing this "right of exclusivity" could not have the meaning that the Court of Appeals ascribed to it.⁵

⁵ In one recent case, *Choctaw Nation v. Oklahoma*, *supra*, this Court did construe a reservation grant as including the bed of a navigable water, and the respondents argue that this case resembles *Choctaw Nation* more than it resembles the established line of cases to which *Choctaw Nation* is a singular exception. But the finding of a conveyance of the riverbed in *Choctaw Nation* was based on very peculiar circumstances not present in this case.

Those circumstances arose from the unusual history of the treaties there at issue, a history which formed an important basis of the decision. *Choctaw Nation v. Oklahoma*, *supra*, 397 U. S., at 622-628. Immediately after the Revolutionary War, the United States had signed treaties of peace and protection with the Cherokee and Choctaw tribes, reserving them lands in Georgia and Mississippi. In succeeding years, the United States bought large areas of land from the Indians to make room for white settlers who were encroaching on tribal lands, but the Government signed new treaties guaranteeing that the Indians could live in peace on those lands not ceded. The United States soon betrayed that promise. It proposed that the tribes be relocated in a newly acquired part of the Arkansas Territory, but the new territory was soon overrun by white settlers, and through a series of new cession agreements the Indians were forced to relocate farther and farther west. Ultimately, most of the tribes' members refused to leave their eastern lands, doubting the reliability of the government's promises of the new western land, but Georgia and Mississippi, anxious for the relocation westward so they could assert jurisdiction over the Indian lands, purported to abolish the tribes and distribute the tribal lands. The Choctaws and Cherokees finally signed new treaties with the United States aimed at rectifying their past suffering at the hands of the Federal Government and the States.

Moreover, even though the establishment of an Indian tribe can be an "appropriate public purpose" within the meaning of *Shively v. Bowlby*, *supra*, 152 U. S., at 48, justifying a congressional conveyance of a riverbed, see, *e. g.*, *Alaska Pacific Fisheries v. United States*, 248 U. S., 85, the situation of the Crow Indians at the time of the treaties presented no "public exigency" which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for the future States. See *Shively v. Bowlby*, *supra*, 152 U. S., at 48. As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life. JA 74. Cf., *Alaska Pacific Fisheries v. United States*, *supra*, at 88; *Skokomish Indian Tribe v. France*, 320 F. 2d 295, 212 (CA9).

For these reasons, we conclude that title to the bed of the Big Horn River passed to the State of Montana upon its admission into the Union, and that the Court of Appeals was in error in holding otherwise.

Under the Choctaw treaty, the United States promised to convey new lands west of the Arkansas territory in fee simple, and also pledged that "no Territory or government shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." Treaty of Dancing Rabbit Creek, Sept. 17, 1830, 7 Stat. 333-334, quoted in *Choctaw Nation v. Oklahoma*, *supra*, 397 U. S., at 625. In 1835, the Cherokees signed a treaty containing similar provisions granting reservation lands in fee simple and promising that the tribal lands would not become part of any State or Territory. *Id.*, at 626. In concluding that the United States had intended to convey the riverbed to the tribes before the admission of Oklahoma to the Union, the *Choctaw* court relied on these circumstances surrounding the treaties and placed special emphasis on the government's promise that the reserved lands would never become part of any State. *Id.*, at 634-635. Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow Treaties of 1851 and 1868.

III

Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us is a narrow one. The Court of Appeals held that the Tribe may prohibit non-members from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe, 604 F. 2d, at 1165-1166, and with this holding we can readily agree. We also agree with the Court of Appeals that if the Tribe permits non-members to fish or hunt on such lands, it may condition their entry by charging a fee or establishing bag and creel limits. *Ibid.* What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by non-members of the Tribe. The Court of Appeals held that, with respect to fee-patented lands, the Tribe may regulate, but may not prohibit, hunting and fishing by non-member resident owners or by those, such as tenants or employees, whose occupancy is authorized by the owners. *Id.*, at 1169. The court further held that the Tribe may totally prohibit hunting and fishing on lands within the reservation owned by non-Indians who do not occupy that land. *Ibid.*

The Court of Appeals found two sources for this tribal regulatory power: the Crow treaties, "augmented" by 18 U. S. C. § 1165, and "inherent" Indian sovereignty. We believe that neither source supports the court's conclusion.

A

The purposes of the 1851 Treaty were to assure safe passage for settlers across the lands of various Indian tribes; to compensate the Tribes for the loss of buffalo, other game animals, timber and forage; to delineate tribal boundaries; to promote inter-tribal peace; and to establish a way of identifying Indians who committed depredations against non-Indians. As noted earlier, the Treaty did not even create

a reservation, although it did designate tribal lands. See *Crow Tribe v. United States*, 284 F. 2d 361, 364, 366, 368 (Ct. Cl.). Only Article 5 of that Treaty referred to hunting and fishing, and it merely provided that the 8 signatory tribes "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." 11 Stat. 749.⁶ The Treaty nowhere suggested that Congress intended to grant authority to the Crow Tribe to regulate hunting and fishing by non-members on non-member lands. Indeed, the Court of Appeals acknowledged that after the Treaty was signed non-Indians, as well as members of other Indians tribes, undoubtedly hunted and fished within the treaty-designated territory of the Crows. 604 F. 2d, at 1167.

The 1868 Fort Laramie Treaty, 15 Stat. 649, reduced the size of the Crow territory designated by the 1851 Treaty. Article 2 of the Treaty established a reservation for the Crow Tribe, and provided that it be "set apart for the *absolute and undisturbed use and occupation* of the Indians herein named and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . .," (emphasis added) and that "the United States now solemnly agrees that no persons, except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon or reside in the territory described in this article for the use of said Indians. . . ." The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands.⁷

⁶ The complaint in this case did not allege that non-Indian hunting and fishing on reservation lands has impaired this privilege.

⁷ Article IV of the Treaty addressed hunting rights specifically. But that Article referred only to "unoccupied lands of the United States,"

But that authority could only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation." And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, 25 U. S. C. § 331 *et seq.*, and the Crow Allotment Act of 1920, 41 Stat. 751.⁸ If the 1868 Treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.⁹

viz., lands outside the reservation boundaries, and is accordingly not relevant here.

⁸ The 1920 Crow Allotment Act was one of the special allotment acts Congress passed from time to time pursuant to the policy underlying the General Allotment Act. See S. Rep. No. 219, 66th Cong., 1st Sess., at 5 (1919). The Senate Committee Report on the Crow Allotment bill stated that it "is in accordance with the policy to which Congress gave its adherence many years ago, and which found expression in the [General Allotment Act]." *Id.*, at 5.

⁹ The Court of Appeals discussed the effect of the Allotment Acts as follows:

"While neither of these Acts, nor any other to which our attention has been called, explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow Tribe from hunting and fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts." 604 F. 2d, at 1168 (footnote omitted).

But nothing in the Allotment Acts supports the view of the Court of Appeals that the Tribe could nevertheless bar hunting and fishing by non-resident fee owners. The policy of the Acts was the eventual assimilation of the Indian population, *Organized Village of Kake v. Egan*, 369 U. S. 60, 72, and the "gradual extinction of Indian reservations and Indian titles." *Draper v. United States*, 164 U. S. 241, 246. The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations. See, *e. g.*, Report of the Secretary of the Interior (1885), pp.

In *Puyallup Tribe v. Washington Game Department*, 433 U. S. 165 (*Puyallup III*), the relevant treaty included language virtually identical to that in the 1868 Treaty of Fort Laramie. The Puyallup Reservation was to be "set apart, and, so far as necessary, surveyed and marked out for their

25-28; Report of the Secretary of the Interior (1886), p. 4; Report of the Commissioner of Indian Affairs (1887), pp. IV-X; Report of the Secretary of the Interior (1888), pp. XXIX-XXXII; Report of the Commissioner of Indian Affairs (1889), pp. 3-4; Report of the Commissioner of Indian Affairs (1890), pp. VI, XXXIX; Report of the Commissioner of Indian Affairs (1891), pp. 3-9, 26; Report of the Commissioner of Indian Affairs (1892), p. 5; Report of the Secretary of the Interior (1894), p. IV. And throughout the Congressional debates on the subject of allotment, it was assumed that the "civilization" of the Indian population was to be accomplished, in part, by the dissolution of tribal relations. See, *e. g.*, XI Cong. Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783-784 (Sen. Saunders), 85 (Senators Morgan and Hoar), 881 (Sen. Brown), 906 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar),

There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the Congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. See, *e. g.*, XI Cong. Rec. 785 (Sen. Morgan), 875 (Sen. Hoar), 876 (Sen. Morgan), 878 (Senators Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Senators Edmunds and Williams). It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if fee-holders could be excluded from fishing or hunting on their acquired property.

The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act, 48 Stat. 984 (current version at 25 U. S. C. § 461 *et seq.*). But what is relevant in this case is the effect of the land alienation occasioned by that policy on Indian treaty rights tied to Indian use and occupation of reservation land.

exclusive use . . . [and no] White man [was to] be permitted to reside upon the same without permission of the tribe. . . ." See *id.*, at 174. The Puyallup Tribe argued that those words amounted to a grant of authority to fish free of State interference. But this Court rejected that argument, finding, in part, that it "clashes[d] with the subsequent history of the reservation . . .," *ibid.*, notably two acts of Congress under which the Puyallups alienated, in fee simple, the great majority of the lands in the reservation, including all the land abutting the Puyallup River. Thus, "[n]either the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive' use." *Ibid.* *Puyallup III* indicates, therefore, that treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands. Accordingly, the language of the 1868 Treaty provides no support for tribal authority to regulate hunting and fishing on land owned by non-Indians.

The Court of Appeals also held that the federal trespass statute, 18 U. S. C. § 1165, somehow "augmented" the Tribe's regulatory powers over non-Indian land. 604 F. 2d, at 1167. If anything, however, that statute suggests the absence of such authority, since Congress deliberately excluded fee-patented lands from the statute's scope. The statute provides:

Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom shall be fined . . .

The statute is thus limited to lands owned by Indians, held in trust by the United States for Indians, or reserved for use

by Indians.¹⁰ If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians, it could easily have done so by incorporating in § 1165 the definition of "Indian country" in 18 U. S. C. § 1151: "all land within the limits of any Indian reservation under the jurisdiction of the United States government notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." Indeed, a subcommittee of the House Committee on the Judiciary proposed that this be done. But the Department of Interior recommended against doing so in a letter dated May 23, 1958. The Department pointed out that a previous congressional report, H. Rep. No. 2593, 85th Cong., 2d Sess.,¹¹ had made clear that the bill contained no implication that it would apply to land other than that held or controlled by Indians or the United States.¹² The Committee

¹⁰ See *United States v. Bouchard*, 464 F. Supp. 1316, 1336 (WD Wis.); *United States v. Pollnan*, 364 F. Supp. 995 (Mont.).

¹¹ House Report 2593 stated that the purpose of the bill that became 18 U. S. C. § 1165 was to make it unlawful to enter Indian land to hunt, trap, or fish without the consent of the individual Indian or tribe:

"Indian property owners should have the same protection as other property owners, [*sic*], for example, a private hunting club may keep non-members off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under State law but a non-Indian trespasser on an Indian reservation enjoys immunity.

Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further, there are no Federal laws which can be invoked against trespassers." H. R. 2593, 85th Cong., 2d Sess. (emphasis added).

¹² Subsequent reports in the House and Senate, H. Rep. 625, 86th Cong., 1st Sess., S. Rep. 1686, 86th Cong., 2d Sess., also refer to "Indian lands" and "Indian property owners" rather than "Indian country." In *Oliphant*, *supra*, this Court referred to S. Rep. 1686, which stated that "the legislation [28 U. S. C. § 1165] will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of *their property*." 435 U. S., at 206. (Emphasis added.)

Before the Court of Appeals decision, several other courts interpreted

on the Judiciary then adopted the present language, which does not reach fee-patented lands within the boundaries of an Indian reservation.

IV

Beyond relying on the Crow Treaties and 18 U. S. C. § 1165 as source for the Tribe's power to regulate non-Indian hunting and fishing on non-Indian lands within the reservation, the Court of Appeals also identified that power as an incident of the inherent sovereignty of the Tribe over the entire Crow reservation. *United States v. Montana*, *supra*, 604 F. 2d, at 1170. But "inherent sovereignty" is not so broad as to support the application of Resolution No. 74-05 to non-Indian lands.

This Court most recently reviewed the principles of inherent sovereignty in *United States v. Wheeler*, 435 U. S. 313. In that case, noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory," *id.*, at 323, the Court upheld the power of a tribe to punish tribal members who violate tribal criminal laws. But the Court was careful to note that, through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty. *Id.*, at 326. The Court distinguished between those inherent powers retained by the tribes and those divested:

The areas in which such implicit divestiture of sover-

§ 1165 to be confined to lands owned by Indians, or held in trust for their benefit. *State v. Baker*, 464 F. Supp. 1377 (WD Wis.); *United States v. Bouchard*, 464 F. Supp. 1316 (WD Wis.); *United States v. Pollman*, 364 F. Supp. 995 (Mont.); *Donahue v. California Justice Court*, 93 Cal. App. 310. Cf. *United States v. Sanford*, 547 F. 2d 1085, 1089 (CA9) (holding that § 1165 was designed to prevent encroachments on Indian lands, rejecting the argument that § 1165 makes illegal the unauthorized killing of wildlife on an Indian reservation, and noting that "the application of Montana game laws to the activities of non-Indians on Indian reservations does not interference with tribal self-government on reservations).

eignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe. . . .*

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

Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *Id.*, at 322, n. 18. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation. *Mescalero Apache Tribe v. United States*, 411 U. S. 145, 148; *Williams v. Lee*, 358 U. S. 217, 219-220; *United States v. Kagama*, 118 U. S. 375, 381-382; see *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164, 171. Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the Tribe bears no clear relationship to tribal self-government or internal relations,¹³

¹³ Any argument that Resolution No. 74-05 is necessary to Crow tribal self-government is refuted by the findings of the District Court that the State of Montana has traditionally exercised "near exclusive" jurisdiction over hunting and fishing on fee lands within the reservation, and that the parties to this case had accommodated themselves to the state regulation. *United States v. Montana*, *supra*, 457 F. Supp., at 610. The Court of Appeals left these findings unaltered and indeed implicitly reaffirmed them, adding that the record reveals no attempts by the Tribe at the time of the

the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt Resolution No. 74-05.

The Court recently applied these general principles in *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *Fletcher v. Peck*, Cranch 87—the first Indian case to reach this Court—that the Indian tribes have lost “any right of governing every person within their limits except themselves.” *Id.*, at 147, *Oliphant v. Suquamish Indian Tribe*, *supra*, 435 U. S., at 209. Though *Oliphant* only determined inherent tribal authority in criminal matters,¹⁴ the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee*, 358 U. S. 217, 223; *Morris v. Hitchcock*, 194 U. S. 384; *Buster v. Wright*, 135 F. 2d 947, 950 (CA8); see *Washington v. Confederated Tribes of the Colville Indian*

Crow Allotment Act to forbid non-Indian hunting and fishing on reservation lands. *United States v. Montana*, *supra*, 604 F. 2d 1168 and n. 11a.

¹⁴ By denying the Suquamish Tribe criminal jurisdiction over non-Indians, however, the *Oliphant* case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen. Moreover, a tribe would not be able to rely for enforcement on the federal criminal trespass statute, 18 U. S. C. § 1165, since that statute does not apply to fee patented lands. See text and notes at pp. — — —, *supra*.

Reservation, — U. S. —, —. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court*, 424 U. S. 382, 386; *Williams v. Lee*, 358 U. S. 217, 220; *Montana Catholic Missions v. Missoula County*, 200 U. S. 118, 128–129; *Thomas v. Gay*, 169 U. S. 264, 273.¹⁵

No such circumstances, however, are involved in this case. Non-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction. And nothing in this case suggests that such non-Indian hunting and fishing so threatens the Tribe's political or economic security as to justify tribal regulation. The complaint in the District Court did not allege that non-Indian hunting and fishing on fee lands imperils the subsistence or welfare of the Tribe.¹⁶ Furthermore, the District Court made express findings, left unaltered by the Court of Appeals, that the Crow Tribe has traditionally accommodated itself to the State's "near exclusive" regulation of hunting and fishing on fee lands within the reservation. *United States v. Montana*, *supra*, 457 F. Supp., at 609–610. And the District Court found that Montana's statutory and regulatory scheme does not prevent the Crow Tribe from limiting or forbidding non-

¹⁵ As a corollary, this Court has held that the Indian tribes retain rights to river waters necessary to make their reservations livable. *Arizona v. California*, 373 U. S. 545, 599.

¹⁶ Similarly, the complaint did not allege that the State has abdicated or abused its responsibility for protecting and managing wildlife, has established its season, bag, or creel limits in such a way as to impair the Crow Indians' treaty rights to fish or hunt, or has imposed less stringent hunting and Fishing regulations within the reservation than in other parts of the State. Cf. *United States v. Washington*, 384 F. Supp. 312, 410–411 (WD Wash.), *aff'd*, 520 F. 2d 676 (CA9).

Indian hunting and fishing on lands still owned by or held in trust for the Tribe or its members. *Id.*, at 609.

For the reasons stated in this opinion, the judgment of the Court of Appeals is set aside, and the case is remanded to that court for further proceedings.

It is so ordered.

February 17, 1981

79-1128 Montana v. United States

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

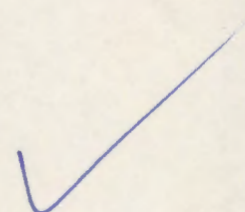
lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1981

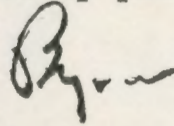


Re: 79-1128 - State of Montana
v. United States

Dear Potter,

Please join me in your 2/17/81
circulation.

Sincerely yours,



Mr. Justice Stewart
Copies to the Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

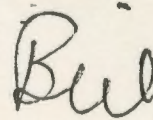
February 26, 1981

RE: No. 79-1128 Montana v. United States

Dear Potter:

I'll await the dissent.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bill", written in dark ink.

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

February 26, 1981

RE: No. 79-1128 Montana v. United States

Dear Potter:

I'll await the dissent.

Sincerely,

Bill

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

✓

March 13, 1981

Re: No. 79-1128 - Montana v. United States

Dear Harry:

Please join me in your dissent.

Sincerely,

T.M.
T.M.

Justice Blackmun

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
		12/13/80						
Join PS 3/17/81	await dissent 2/26/81	1st draft 2/5/81	Join PS 2/17/81	await dissent 2/15/81	will dissent 2/15/81	Join PS 2/17/81	Join PS 2/12/81	await dissent 2/11/81
	Join HAB 3/16/81	2nd draft 2/17/81 3rd draft 3/19/81		Join HAB 3/13/81	1st draft dissenting in part 2/12/81			Typed draft Concurring opinion 3/17/81 1st printed draft 3/19/81