

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SOUTH DAKOTA, Petitioner v. GREGG BOURLAND,

ETC., ET AL.

CASE NO: 91-2051

PLACE: Washington, D.C.

DATE: Tuesday, March 2, 1993

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1 PROCEEDINGS

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 91-2051, South Dakota v. Gregg Bourland.

5 General Barnett.

6 ORAL ARGUMENT OF MARK BARNETT

7 ON BEHALF OF THE PETITIONER

8 MR. BARNETT: Mr. Chief Justice, and may it
9 please the Court:

10 In 1944, Congress recognized that there was a
11 need to bring the massive Missouri River under control.
12 They passed the Flood Control Act at that time which was
13 to authorize the construction of reservoirs and dams and
14 to convert that river to public beneficial uses.

15 By 1954, that scheme had resulted in the entry
16 into an agreement between the Cheyenne River Sioux Tribe
17 and the Government that for a sum certain, all lands,
18 interests, claims, demands, et cetera, in the affected
19 property would be conveyed in fee simple or in fee title
20 to the United States subject, however, to certain
21 conditions, quote, hereinafter set forth, end quote.

22 The treaty underlying this dispute is the Treaty
23 of 1868 which, for all intents and purposes, is
24 indistinguishable from the treaty that this Court
25 considered in Montana v. U.S. some 12 years ago.

1 The issue before the Court today is whether, in
2 light of that alienation of land under the act, whether or
3 not the Cheyenne River Sioux Tribe somehow retained
4 regulatory authority over nonmembers on what was now and
5 is now public land.

6 To answer that question --

7 QUESTION: But what used to -- did it used to be
8 part of the Cheyenne River Indian Reservation?

9 MR. BARNETT: Yes, it did, Your Honor, and the
10 -- I should say the eastern boundary of the reservation
11 jutted out into the mid-channel, quote, unquote, of the
12 river, and that reservation boundary is still there at
13 this time out into the water somewhere. The reservation
14 is approximately 2 million --

15 QUESTION: Does that mean -- just so I -- does
16 that mean that the area in dispute is now within the
17 reservation?

18 MR. BARNETT: There is -- the issue -- we have
19 not brought the issue before the Court today of
20 diminishment, and --

21 QUESTION: You haven't brought it here, but it
22 was decided below that there was no diminishment.

23 MR. BARNETT: That's --

24 QUESTION: There's no appeal. Ergo, we have to
25 accept the case as coming to us with this territory being

1 within the reservation.

2 MR. BARNETT: I think that's a fair statement,
3 Your Honor.

4 I should state, as a way of factual background,
5 that there are some 2,800,000 acres in this reservation.
6 Approximately 1,400,000, or half of the reservation, has
7 been alienated out to non-Indian fee ownership. And it's
8 particularly important in this analysis that the Court
9 keep in mind that the strip of take land that was along
10 that western side of the Missouri River and on the eastern
11 edge of the reservation included not only 100,000 --
12 104,000 acres of tribal land, but also 18,000 acres of
13 non-Indian fee land.

14 QUESTION: Is that a checkerboard situation on
15 the reservation where the holdings of fee land and
16 reservation are kind of like a checkerboard?

17 MR. BARNETT: It is interspersed. I think it
18 would be accurate to say that the majority of the fee land
19 on the reservation is towards the northwest corner, or
20 away from the river. However, again, as I mentioned, the
21 other portion of fee land that had taken place in this
22 reservation prior to the taking was along that river, some
23 18,000 acres. And so, there's really two areas where fee
24 land had come into being, and then between those, slightly
25 removed from the river and in many places directly along

1 the river, was still fee land. So, yes, there was
2 interspersing.

3 Since the gates of this dam have closed and the
4 water has arisen, the tribe has not sustained --

5 QUESTION: So, does this case involve the -- any
6 of the fee land except the area taken by the United
7 States?

8 MR. BARNETT: It does not anymore. It did
9 originally. The courts below have found and the tribe has
10 basically conceded that as to the fee lands not in the
11 take area, that they were no longer claiming jurisdiction.
12 However, they had originally in the declaration in '88
13 that caused us to go to court.

14 The tribe has not sustained, quote, an
15 independent and vigorous scheme of wildlife management on
16 this reservation, and I quote from the Government's brief
17 at page 6. The district court found -- and I quote -- the
18 tribe, meanwhile, does very little game management. End
19 quote.

20 The tribe admitted through its Game, Fish, and
21 Park Director at trial -- this is in your joint appendix
22 at 379 -- that the tribe does not do any management on the
23 Missouri River and does not even have a plan for fishery
24 management. And that is at 381.

25 QUESTION: How does that bear on the legal

1 issues involved in this case, General Barnett?

2 MR. BARNETT: The tribe has -- for a period of
3 some 30 years, Your Honor, the State of South Dakota has
4 vigorously managed all of this public property and assumed
5 jurisdiction over all of this area, both the take land,
6 whether it was previously Indian land or whether it was
7 previously fee land by non-Indians, as well as all the
8 waters. We have asserted and maintained and exercised
9 jurisdiction and management of that asset, and the tribe
10 has not.

11 QUESTION: But does that bear because of some
12 statute or some case from this Court? I mean, how do you
13 tie that fact into the established law regulating this
14 subject?

15 MR. BARNETT: I think that it is the most
16 compelling evidence of how all of the parties to this
17 entire transaction have construed the '54 act. The '54
18 act made it quite clear that all interests, all lands were
19 to be conveyed to the public, to the government, and that
20 is in section I, except for such conditions are set forth
21 in the act.

22 Section II again suggests all interests, not
23 just the land, but the interests, were being conveyed to
24 the public.

25 And last, but not least, section X, which was

1 drafted by the tribe itself and adopted by Congress in the
2 form submitted by the tribe, the tribe was -- treaty
3 rights were to be limited in the future to access.
4 Whereas before, but for the navigational servitude, they
5 might have claimed that they had control under section X,
6 they were reduced to a position of access -- and I quote
7 -- subject, however, to regulations governing the use by
8 other citizens of the United States.

9 And so, our position is, Your Honor, that for 30
10 years, we have read that act to say just what it -- to
11 mean just what it says, that the tribe had lost the power
12 to exclude.

13 And I might point out in that contention that
14 the tribe lost the power to exclude that section 4 of the
15 '44 act, which authorized the entire process, specifically
16 said that no use of these areas shall be allowed which is
17 inconsistent with the game and fish laws of the State in
18 which the area is situated. We read that to mean just
19 what it sounds like it says, that the State game laws will
20 be in control in these areas.

21 QUESTION: General Barnett, am I correct that
22 you have taken or you have represented to us that the only
23 regulation to which the State has consented in the past,
24 basically by agreement I guess, has been regulation of
25 Indians on the reservation lands, as distinguished from

1 nontribal members?

2 MR. BARNETT: We have conceded and we do concede
3 today that the tribe is in charge of game problems, game
4 management, and so forth even as to nonmembers on tribal
5 trust lands, the lands that they still have the power to
6 exclude from. But we have contended that as to those
7 areas, that they cannot exclude. They have lost the power
8 to regulate.

9 I might add that -- and I would suggest that
10 it's in deference to the citizens who are tribal members
11 -- we also are not contending today that -- or rather, we
12 are conceding that the tribe can regulate that activity of
13 its own members out on this public property. We're not
14 even arguing that point, but only that we are regulating
15 the activity of nonmembers on this public property.

16 We -- I should point out that, just so you -- if
17 I may cover briefly what the State has done in the way of
18 exercising that jurisdiction. We have what the district
19 court found was a pervasive law enforcement, end quote,
20 presence on all of these public properties. We have
21 initiated a comprehensive and substantial wildlife and
22 fishery management program. We've stocked 72 million fish
23 out in this asset, including stocking fish along the area
24 that once was tribal land. We've monitored, managed. We
25 have an endangered species plan. We have what the Court

1 basically recognized. We have developed, and I might add
2 we've developed in partnership with the Federal
3 Government. We have developed what is now, in the words
4 of the district court, a nationally recognized fishery
5 with regard to certain game fishes.

6 You might ask -- and I think it's a fair
7 question -- if the State has exercised jurisdiction for 30
8 years, and the tribe has not, which is clearly what the
9 district court found, then how did we get to this dispute?

10 In 1988, the State attempted to enter into an
11 agreement with the tribe with regard to the taking of
12 deer, not just on the public property and not just on the
13 reservation, but in effect, a joint opportunity for
14 hunters to buy one license, split the revenue between the
15 entities, and allow the hunter to go where the game is
16 without respect to jurisdictional boundaries. That --
17 those negotiations broke down when the tribe insisted that
18 before nonmembers could hunt on that public property, they
19 would have to have tribal permission. We could not accede
20 to that demand, and so at that time, negotiations broke
21 off.

22 And the tribe then publicly announced -- and
23 I'll quote the tribe's brief. Quote, the tribe announced
24 its intentions to enforce tribal hunting and fishing
25 regulations on the taken area. That's at page 14. And

1 the announcement that they used was, quote, all hunters
2 must now hold a tribal hunting license to hunt on any and
3 all lands within the exterior boundaries of the
4 reservation. The State license will no longer be honored.
5 End quote.

6 And yet, the tribe comes before you today and
7 suggests that they've had jurisdiction and exercised
8 jurisdiction for all those years. And I would submit to
9 this Court that if they have, why did they need to go with
10 a public announcement suggesting that now you must have a
11 tribal license to hunt on these public lands?

12 I would submit to the Court as well --

13 QUESTION: General Barnett, they could have had
14 -- thought they had jurisdiction before, but simply
15 decided that, as a matter of comity, they would honor the
16 State hunting license.

17 MR. BARNETT: I think that the best evidence of
18 what the tribe thought was the fact that for some 30 years
19 they had not made any actual -- they had had a regulation
20 in I believe the '30's under the Indian Reorganization Act
21 that suggested or that they claimed gave them jurisdiction
22 over these nonmember activities. However, no enforcement
23 efforts at any time -- and I refer the Court to the
24 tribe's brief, footnote 17, where they say in the single
25 tribal court action on record against a nonmember, one

1 action in all those years. And that's a reference to a
2 1990 case after this litigation began.

3 QUESTION: General Barnett, where does the State
4 acquire the authority to issue hunting licenses for this
5 land?

6 MR. BARNETT: I would submit first under Rosebud
7 v. Kneip, the principle that this Court suggested, another
8 case coming out of South Dakota, that when the State has
9 exercised jurisdiction for so many years, without
10 objection through those years from the Government or the
11 tribe, that this can create jurisdictional expectations
12 and that it also is good evidence of how the parties
13 construe the law.

14 QUESTION: Could the Corps of Engineer -- Corps
15 of Engineers say anybody can hunt and fish without a State
16 license or we'll issue a Corps of Engineers licence
17 instead?

18 MR. BARNETT: I would submit that the -- there
19 isn't any question that the Federal Government has the
20 right to regulate this property, and probably the answer
21 to that question is yes. But it's also -- I think it's
22 also pertinent that the Corps has worked with us through
23 all these years.

24 QUESTION: Well, I thought maybe your authority
25 came from the Corps' regulations which say that all other

1 Federal, State, and local laws and regulations remain in
2 full force and effect, where applicable, to these water
3 resource development projects.

4 MR. BARNETT: I think that's an additional
5 source, and I think a source even earlier than that is
6 section 4 of the '44 act, which made it clear this was to
7 be opened up to the public for boating, recreation,
8 fishing, and so forth.

9 QUESTION: Oh, I have no doubt about that, but I
10 just wonder whether -- you know, why it is that the State
11 gets the right to exclude anybody --

12 MR. BARNETT: I think there's also --

13 QUESTION: -- Federal land.

14 MR. BARNETT: -- a principle that runs through
15 the cases of this Court that the powers not exercised by
16 the Federal Government, and particularly with regard to
17 navigable waterways, are reserved to the State.

18 QUESTION: Well, I thought you thought that the
19 analysis in Montana would -- in the Montana case would
20 control this case.

21 MR. BARNETT: I would submit that that is the
22 case, Your Honor.

23 QUESTION: And the court below thought
24 otherwise.

25 MR. BARNETT: The court below thought otherwise.

1 I would refer you to the district court comment in its
2 decision where it said this case is indistinguishable from
3 Montana v. U.S.

4 QUESTION: Well, where did Montana say the State
5 got the authority to regulate on fee land?

6 MR. BARNETT: I think it was a recognition of
7 the concept that jurisdiction over these waterways, to the
8 extent not used by the Federal Government, should remain
9 in the States. And in fact, during the discussion of the
10 ownership of the bed, the Court noted the equal footing
11 doctrine, which made it very clear in that case that
12 Montana owned the bed and that there were certain inherent
13 sovereignty sorts of rights that reserved to the State for
14 the management of that water.

15 QUESTION: Is it clear and conceded by everyone
16 that this property that the United States took is open to
17 the public?

18 MR. BARNETT: I don't think there's any dispute
19 about that, Your Honor, although perhaps the other side
20 would --

21 QUESTION: So, even though it's in the -- inside
22 the reservation, do -- does the public have a right to
23 come and go to that property despite what the tribe wants
24 to do? Could the tribe exclude the public from this --

25 MR. BARNETT: We --

1 QUESTION: -- entirely from this property?

2 MR. BARNETT: We contend that they can neither
3 exclude from this property nor regulate the nonmembers
4 that come on this property, and that is what the Montana
5 --

6 QUESTION: Well, let's just stick with
7 exclusion. Can they --

8 MR. BARNETT: No, they cannot.

9 QUESTION: Have they claimed that they can?

10 MR. BARNETT: There was testimony by the tribal
11 chairman that, yes, if they wanted to, they could exclude
12 nonmembers from this public property. However, they have
13 not made the effort -- as the district court found, they
14 have not at any time in the last 30 years either attempted
15 to monitor nonmember access to this property, nor have
16 they made any effort to exclude.

17 QUESTION: What's the shape of the property,
18 General Barnett? Is it a kind of a long, narrow tract
19 running along the river?

20 MR. BARNETT: It is -- the river is, according
21 to the U.S. Geological Survey, 2.16 miles wide on average,
22 and something over 200 miles long. And so, if you were to
23 analogize to -- because it is a navigable waterway -- to
24 analogize it to highways, it would be a 2-mile wide
25 highway, something like 200 miles long.

1 QUESTION: You say -- you said that the river is
2 2.16 miles wide. Is that what you meant to say?

3 MR. BARNETT: Yes. The river is on average 2
4 miles wide. The original jurisdictional line of the
5 reservation juts out into the mid-channel somewhere. So
6 --

7 QUESTION: So, we're talking about duck hunting
8 or -- I mean, are we talking about hunting from dry land
9 or from in the river?

10 MR. BARNETT: All of the above. There's dry
11 land hunting for deer and game birds. The land --

12 QUESTION: How much of a land is there, say,
13 from the regular bank-full level of the river to the edge
14 of the condemned property?

15 MR. BARNETT: I would call it a narrow strip.
16 It basically is that amount of land that the Corps wanted
17 to reserve so that if there were several years of heavy
18 rain, that they would not go above the take --

19 QUESTION: So, are we talking about several
20 hundred feet, several hundred yards, a --

21 MR. BARNETT: It varies anywhere from a couple
22 hundred feet to several hundreds of yards.

23 QUESTION: And it extends for a long distance
24 along the river channel.

25 MR. BARNETT: All along the edge of the

1 reservation, as I say, some of which was fee land and some
2 of which was not.

3 QUESTION: But the tribe isn't asserting any
4 claim to regulate hunting on what used to be fee land, is
5 it?

6 MR. BARNETT: Yes, they are.

7 QUESTION: They are?

8 MR. BARNETT: Yes, they are.

9 Now --

10 QUESTION: Is that claim before us?

11 MR. BARNETT: Yes, it is. And the -- when I say
12 fee land --

13 QUESTION: That claim was subject to the remand
14 order, wasn't it, below?

15 MR. BARNETT: Yes.

16 QUESTION: Okay.

17 MR. BARNETT: When I say the fee land, I am
18 referring specifically to the fee land which was fee land
19 before the take, in other words, the non-Indian property
20 that was along that edge of the river that was taken along
21 with the Indians' land along the edge. The fee land off
22 in other parts of the reservation, the 50 percent, they
23 are not at this time any longer --

24 QUESTION: Well --

25 MR. BARNETT: -- contending jurisdiction.

1 QUESTION: Well, then before the United States
2 took this fee land for this project, the -- did the
3 Indians claim authority to regulate the owners of that
4 particular fee land that the Government took?

5 MR. BARNETT: They had passed regulations. They
6 had not ever enforced, and in fact, as early as 1952, as
7 exhibit 213 reflects, the State was exerting jurisdiction.

8 QUESTION: You mean they treated this -- the --
9 before -- in the time before the project was taken, did
10 the Indian tribe treat the fee land that was taken
11 differently from the fee land in other parts of the
12 reservation?

13 MR. BARNETT: Not that I'm aware of. And I
14 think that the fairest way to categorize that is that --

15 QUESTION: If the project had never been taken,
16 if the United States had never taken the land, would the
17 Indians today claim that they had the authority to
18 regulate hunting and fishing on the fee land that the
19 Government did take?

20 MR. BARNETT: They're not making that claim as
21 to the fee land. As to the take area, which included some
22 fee land, yes, they were contending and do contend today
23 that they have jurisdiction over that.

24 And I would submit, Your Honor, that had there
25 never been a 1954 act to come along and to expressly

1 remove all interests of the tribe as to this property,
2 even then, under the navigational servitude that this
3 Court has talked about in Montana and in other cases,
4 would suggest that they have lost the power to exclude
5 these nonmembers. And these nonmembers, once the power to
6 exclude them is lost, the Court in Montana and in Brendale
7 has made clear that the tribe also loses with it the right
8 to regulate those --

9 QUESTION: Wasn't Montana dealing only with fee
10 land? In other words, there's some broad language in
11 Montana, but the issue in Montana only concerned fee land,
12 didn't it?

13 MR. BARNETT: It -- that's correct. It is fee
14 land that was in that dispute.

15 And that turns to the tribe and the Government's
16 argument I suspect that Montana and Brendale, Montana in
17 particular, can be distinguished from this case on the
18 ground that the decision on -- in Montana turned upon the
19 intent of the allotment acts. And I would submit to you
20 that that is an excessively broad reading of footnote 9.
21 I think that their case hinges upon their understanding of
22 footnote 9, which talked about the Allotment Act intent of
23 disestablishing these reservations, and that that intent
24 was opposite to the concept of exclusivity and regulation.

25 I would submit, however -- and I would -- in

1 fact, I would quote the final sentence in footnote 9 in
2 the Montana case. But what is relevant in this case is
3 the effect of the land alienation occasioned by that
4 policy.

5 In other words, what the Court was saying is
6 that whatever the intent of the Allotment Act, or in this
7 case under the Cheyenne River Act to open it up to the
8 public, whatever the intent, the effect is what's
9 important. Even though the Indian Reorganization Act
10 repudiated the intent of the Allotment Act, nonetheless,
11 the effect was still the same. This land had gone out of
12 the Indian domain. They had lost the power to exclude.

13 And so, our contention is that just the same
14 under the '54 act, not to mention navigational servitudes,
15 under the '54 act, they lost that power to exclude. And
16 so it is, as the district court said, indistinguishable.

17 I don't think it matters who owns, whether in
18 Montana the State owned the bed, or in this case, although
19 it's not entirely clear perhaps, probably the Federal
20 Government owns the bed in this case. In either event,
21 what's important is that the tribe does not, and as a --

22 QUESTION: What -- I didn't mean to interrupt
23 you.

24 MR. BARNETT: And as a consequence of not owning
25 that property and not being able to exclude, they also

1 can't control it.

2 QUESTION: You mentioned a moment ago the text
3 of the '54 act. What's the -- in addition to the text,
4 what's the best indication that it was within the
5 contemplation of Congress that it was sort of buying out
6 the regulatory authority?

7 MR. BARNETT: The regulatory authority of the
8 tribe stems from its treaty rights under the same
9 identical -- basically identical treaty of 1868. And in
10 the discussion on those treaty rights, I would refer you
11 to the Congressional Record, 15609, where Representative
12 Case -- and this is in our briefs -- said -- and I quote
13 -- hunting and fishing rights were also a part of the
14 rights recognized by treaty, and to the extent these may
15 be impaired or destroyed, the tribe is entitled to
16 compensation apart from settlement with the allottees
17 holding individual tracts of land.

18 QUESTION: Do we know that they got it?

19 MR. BARNETT: Pardon?

20 QUESTION: Do we know that they got that
21 compensation?

22 MR. BARNETT: Yes, we do. There was a payment
23 of something over a million dollars for the loss of all
24 wildlife. And there was testimony by a Mr. LeBeau on
25 behalf of the tribe, and his comment was -- and I quote -

1 -the value of this loss of wildlife resources was placed
2 at 74,300 annually. Because of the fact that we are
3 losing these resources forever, we have capitalized that
4 sum at 4 percent.

5 And then he was asked by one of the Members of
6 Congress do you really think you're going to lose all the
7 wildlife forever, and he affirmed yes. So --

8 QUESTION: Yes, but isn't it one thing to lose
9 wildlife, which you can't take for its economic value, and
10 quite a different thing to lose the authority to exclude
11 others who may, subject to your regulatory authority, come
12 in and hunt and fish for the wildlife? And to lose the
13 wildlife, I mean, you know, a deer cannot live on
14 submerged land. We understand that, but that's a
15 different thing from losing the regulatory authority over
16 that land or even over the water that takes its place.

17 MR. BARNETT: If I understand your question, I
18 would respond that clearly Montana suggested that when
19 that power to exclude is gone, so is the power to
20 regulate. And I don't know if that answers your question.

21 QUESTION: But does Montana make it clear that
22 that power to exclude is lost with respect to anything
23 other than fee land?

24 MR. BARNETT: It was with regard to fee land.
25 That is correct. What we are submitting is that whether

1 it's a fee that's held by the Government or a fee that's
2 held by nonmembers, in either case, the result is the
3 same. It has gone out of the power to exclude. They stem
4 from the treaty. And in this case, there is ample
5 congressional history that they knew they were dealing
6 with treaty rights, treaty hunting and fishing rights, as
7 I've said, with Representative Case.

8 And also I think it's noteworthy that the tribe
9 insisted in the negotiations -- they were paid by Congress
10 to negotiate, including attorney fees, as appears in
11 section XIII. And in those negotiations, the tribe
12 demanded that the 1868 treaty requirement that any acts
13 affecting their reservation be approved by three-quarters
14 of the adult population -- they insisted that the Congress
15 adhere to that, and the Congress did adhere to that. And
16 this whole sale, if you will, went out to the members in
17 1955 and was approved by --

18 QUESTION: What were the -- did the terms of the
19 ballot refer in any way to the extinction of regulatory
20 rights?

21 MR. BARNETT: They did not expressly talk about
22 extinction of regulatory power even though no such
23 regulatory power was being asserted at that time. What
24 the ballot did say, if I can find it in my notes, the
25 ballot said the Indians may graze livestock on the part of

1 the land not flooded and may hunt and fish in the taken
2 area without charge.

3 I think that that suggests that they read it
4 just the way we read section X of the 1954 act. They have
5 access to hunt and fish. And in fact, what they are
6 seeking today is not access to the fish, but access to the
7 fishers.

8 With that, Your Honor, I would like to reserve
9 the balance of my time.

10 QUESTION: Very well, General Barnett.

11 Mr. Koukoutchos, is that the correct
12 pronunciation of your name?

13 MR. KOUKOUTCHOS: Yes, it is, Mr. Chief Justice.

14 QUESTION: You may proceed.

15 ORAL ARGUMENT OF BRIAN S. KOUKOUTCHOS

16 ON BEHALF OF THE RESPONDENTS

17 MR. KOUKOUTCHOS: Mr. Chief Justice, and may it
18 please the Court:

19 I would like to initially clear up a couple of
20 issues that came up during oral argument by General
21 Barnett.

22 First of all, although the -- an interest in the
23 issue is understandable, the State's jurisdiction over the
24 taken lands in question here, be they fee lands --
25 formerly fee lands or formerly tribal trust lands, is not

1 at issue. The district court denied the State of South
2 Dakota a ruling on that issue because they failed to plead
3 it in their complaint or to put on a case, and the Eighth
4 Circuit affirmed that that issue is not before the Court.
5 I'm not suggesting the Court should not think about the
6 issue, but it's clear that the Court need not decide that
7 issue today because it's not presented here.

8 QUESTION: Again, what issue is it you say that
9 is not before us?

10 MR. KOUKOUTCHOS: The issue of whether or not
11 the State has concurrent jurisdiction over the taken areas
12 in question.

13 QUESTION: If the State had concurrent
14 jurisdiction, would that mean that the tribe would have to
15 recognize a State hunting license?

16 MR. KOUKOUTCHOS: I'm not sure that it would,
17 Mr. Chief Justice. I think that the issue of concurrent
18 jurisdiction raises a number of issues. It should be
19 clear in this case that the district court found that the
20 State made no showing that its interests are hurt by
21 exclusive tribal jurisdiction.

22 The district court also found that the shared
23 jurisdiction of the taken strip of land would not impair
24 the State's wildlife management. In the past --

25 QUESTION: Shared jurisdiction between the State

1 and the tribe?

2 MR. KOUKOUTCHOS: In the State and the tribe.
3 That is correct. Contrary --

4 QUESTION: It would not impair the State's --

5 MR. KOUKOUTCHOS: Wildlife management program.

6 QUESTION: So, that was, in the view of the
7 district court, something that would argue in favor of
8 shared jurisdiction?

9 MR. KOUKOUTCHOS: What was at issue was -- when
10 the district court made those findings was, in addition to
11 the -- it was reaffirming its decision not to reach the
12 issue of State jurisdiction.

13 I think what those things prove is that
14 concurrent jurisdiction will work. The court was --
15 although it was not addressing exclusive jurisdiction by
16 the State or even whether or not the State had concurrent
17 jurisdiction, it recognized that one cannot really think
18 about the issue of tribal jurisdiction over this land
19 without at least thinking about whether or not the State
20 would have some jurisdiction. So, it made those findings
21 that tribal jurisdiction over this territory would not
22 interfere with the State's wildlife program and that
23 shared jurisdiction was likewise workable.

24 It further made a finding that despite even the
25 litigation in this case, the actual people who do this

1 sort of management, the tribal game wardens and the
2 State's game wardens, enjoy an amicable relationship.

3 QUESTION: Was any part of those findings of the
4 district court reversed by the Eighth Circuit?

5 MR. KOUKOUTCHOS: Absolutely none.

6 QUESTION: Counsel, does the tribe take the
7 position that it has the right to exclude all nontribal
8 members from access to the lake and the adjacent property?

9 MR. KOUKOUTCHOS: No, Justice O'Connor, the
10 tribe does not. We believe that the 1954 taking act,
11 which is the relevant legislation, in section X, requires
12 that the -- or rather gives the Federal Government the
13 power to regulate corresponding use. That is, it reserves
14 hunting and fishing rights to the tribe, and the Army
15 Corps of Engineers, as the operator of the reservoir area,
16 has the right to issue regulations governing corresponding
17 use. The tribe has never tried since it became a taken
18 area by the Federal Government to exclude others from it.

19 I should say, however --

20 QUESTION: Well, that's a separate question,
21 whether they've actually tried. I'm asking whether --

22 MR. KOUKOUTCHOS: No.

23 QUESTION: -- they want to assert the right to
24 exclude.

25 MR. KOUKOUTCHOS: No. The tribe does not assert

1 the right to exclude, but I should make clear that in this
2 case that does not mean that the public has necessarily a
3 right of access to it.

4 See, the point of the taking was it is no longer
5 tribal trust land, or rather Federal land held in trust
6 for the tribe. It's now Federal land held for the
7 reservoir project. What that means is that the Army Corps
8 of Engineers has control over it, and although section 4
9 --

10 QUESTION: Well, does the tribe assert that it
11 can exclude people from coming through the reservation to
12 reach the area in question?

13 MR. KOUKOUTCHOS: Given that this is Federal
14 lands and that one normally understands that there's a
15 right of access to Federal lands, the tribe does not
16 believe it has a right to exclude people to deny them
17 essentially passage across the reservation. That would be
18 a difficult matter to police in any event since there is a
19 Federal highway, among other things, that goes across
20 tribal trust land through the reservation to the taken
21 area. So, the tribe is not making an effort to exclude
22 people from that area.

23 QUESTION: Isn't more than just that general
24 proposition which makes the point? Don't the statutes
25 provide that the water areas of all Corps of Engineer

1 products shall be open to public use generally for
2 boating, swimming, bathing, fishing, and other
3 recreational purposes and ready access to and exit from
4 such areas along the shores of such product shall be
5 maintained for general public use? I mean, there's a
6 specific law that --

7 MR. KOUKOUTCHOS: Yes, Justice Scalia. Section
8 4 of the Flood Control Act does require that. However,
9 that does not -- and therefore, the tribe believes it does
10 not have the power to exclude. What I wish to point out,
11 though, is that does not necessarily mean that --

12 QUESTION: -- I assume because it says it shall
13 be, you know, for boating, swimming, bathing, fishing, and
14 other recreational purposes.

15 MR. KOUKOUTCHOS: Should the Corps of Engineers
16 decide to make that portion of Lake Oahe open for public
17 use, which is an issue in the discretion of the Corps of
18 Engineers, then the tribe does not believe it has the
19 power to exclude people from it. We assert here only the
20 limited power to license hunting and fishing on that area
21 as within the rest of the reservation, tribal trust land.

22 QUESTION: How can you have the power to license
23 -- let's talk about fishing first -- when the statute
24 specifically says that they shall be open to public use
25 for fishing?

1 MR. KOUKOUTCHOS: Well, that doesn't -- but I
2 don't think that answers the question as to whether or not
3 they shall be free of all fees to license -- I mean, to -
4 - you know, don't have to pay a license fee to hunt and
5 fish.

6 QUESTION: I don't understand. The basis for
7 your license fee is you can't fish unless you pay me the
8 license fee. You mean, you have a right to charge a
9 license fee even though you don't have a right to prevent
10 them from fishing?

11 MR. KOUKOUTCHOS: We do not believe we have the
12 right necessarily to exclude people from the area.
13 However, the tribe has -- the tribe is of the opinion that
14 there was no divestiture of the power to regulate hunting
15 and fishing in the area. I don't think that necessarily
16 --

17 QUESTION: Well, let's not call it regulate.
18 You assert the right to prevent people from fishing in the
19 area, don't you? To prevent people from fishing, you
20 assert the --

21 MR. KOUKOUTCHOS: To require that they have a
22 tribal fishing license.

23 QUESTION: And prevent them from fishing if they
24 do not have that license.

25 MR. KOUKOUTCHOS: If they do not have the

1 license. Correct.

2 QUESTION: I don't understand why that does not
3 fly directly in the face of that statute.

4 MR. KOUKOUTCHOS: Well, to begin with, section 4
5 of the Flood Control Act of 1944 is most directly relevant
6 to the 18,000 acres of land within this swatch of
7 territory which was taken from fee simple owners. We do
8 not know how that land came to be held in fee. There is
9 nothing in the record to indicate it was an allotment act
10 or what. We simply know that it was held in fee by
11 nonmembers of the tribe.

12 That land was taken by the Government through
13 eminent domain pursuant to the Flood Control Act. However
14 --

15 QUESTION: Taken in fee?

16 MR. KOUKOUTCHOS: Yes. Yes, the United States
17 took it in fee.

18 However, section 4 of the Flood Control Act is
19 not the only section of the act that is relevant. Section
20 9 of that act says that with reference to the irrigation
21 and taking of Indian lands, that those will be in accord
22 with Indian law.

23 Section 4 of the Flood Control Act of '44 merely
24 set up the framework during which the entire Missouri
25 River project would take place. Section 9, which this

1 Court interpreted in the ETSI Pipeline case a few years
2 ago, was understood to be that which harmonizes the Flood
3 Control Act with the remaining corpus of Federal law.
4 Part of that Federal law is Indian law, which says that
5 you cannot take Indian land pursuant -- except pursuant to
6 certain understandings.

7 That is why the 1950 act was passed to try and
8 enable the tribe and the Federal Government to come to a
9 negotiation. When negotiations failed to reach a
10 satisfactory conclusion, the 1954 Cheyenne River Act was
11 passed. That is the act pursuant to which the 104,000
12 acres of former tribal trust lands were taken.

13 QUESTION: But doesn't the tribe claim the right
14 to exclude without a license from the previously fee lands
15 that were taken, the private lands?

16 MR. KOUKOUTCHOS: Yes, it does, Justice
17 Rehnquist.

18 QUESTION: What is the basis for that claim
19 since the Government has taken a fee there?

20 MR. KOUKOUTCHOS: Well, I think, Mr. Chief
21 Justice, the basis for that is precisely because the
22 Government has taken it. This is now land owned by the
23 Federal Government for the purposes of a Federal water
24 project.

25 QUESTION: So, why does that give the tribe a

1 right to demand a fishing license on it?

2 MR. KOUKOUTCHOS: Well, the Federal Government
3 ceded to the tribe substantial rights over this entire
4 areas, rights --

5 QUESTION: Including the lands taken in fee from
6 the private owners?

7 MR. KOUKOUTCHOS: Yes, Mr. Chief Justice. The
8 tribe has the power to -- had the power before the gates
9 of the dam closed to condemn or salvage any of the
10 improvements. It had absolute right to take all the
11 timber regardless of what property it was on, and it to
12 this day now reserves all -- was reserved to this tribe
13 the power to graze all of this land or to permit other
14 people to graze it without regard to whether or not it was
15 the original 18,000 acres or the 104,000 acres.

16 Since it is all Federal land, the fee land that
17 was there has now been submerged in the larger Federal
18 corpus, and the tribe exercises authority over it with
19 respect to mineral rights, grazing, and timber without
20 regard to whether or not it was originally fee land or
21 tribal trust land.

22 QUESTION: You mean exclusive rights for
23 grazing?

24 MR. KOUKOUTCHOS: Yes, that was reserved in
25 section, I believe, X of the Flood Control -- of the

1 Cheyenne River Act of 1954.

2 QUESTION: But I suppose the United States could
3 always license somebody else to graze under its authority.

4 MR. KOUKOUTCHOS: I'm not sure that that's
5 clear, Justice White, because the statute reserves the
6 right to license and permit to the tribe. That does not
7 mean that the Federal Government does not have a presence
8 here in this case because, for example, the tribal grazing
9 code is --

10 QUESTION: Well, I thought you said a while ago
11 that if the Corps of Engineers wanted to permit people to
12 fish without a tribal license, they could.

13 MR. KOUKOUTCHOS: Yes. That is because the
14 Corps of Engineers controls the public access to the water
15 projects. The -- with reference to the land in this case,
16 that was reserved expressly -- the grazing rights on the
17 land were reserved expressly to the tribe, and there was a
18 Comptroller General opinion I believe in 1977 which said
19 that the tribe has exclusive authority to permit grazing
20 on this land without regard to whether or not it
21 originally had been taken from fee owner or whether or not
22 taken in trust from the tribe.

23 QUESTION: Can I take you back to Justice
24 Scalia's question, and as I understand his question, it
25 doesn't depend, it doesn't implicate any of these

1 reservations of rights that you have been describing here.
2 It implicates simply the general provisions for the
3 governance of lands taken in fee by the Corps or by the
4 United States for Corps of Engineers projects, and it
5 guarantees public access.

6 And his question is -- for fishing. As I
7 understand it, his question is if the public has access
8 for fishing, where do you get the authority to charge a
9 fee in the absence of which you can exclude them?

10 MR. KOUKOUTCHOS: Well, in every instance,
11 somebody has to regulate the hunting and fishing in these
12 circumstances. The State of South Dakota certainly has no
13 authority to exclude anyone from the taken area or from
14 any other Federal project.

15 QUESTION: Well, let me ask you. Let me ask you
16 a variant on the question, which doesn't perhaps go to its
17 point, but may be suggestive. Is it -- do you know
18 whether, in fact, in other project areas which would be
19 subject to this same statute, but not involving tribal
20 lands, whether the States involved have or at least
21 exercise a regulatory authority over it so that they
22 would, in effect, find someone for fishing on a Corps of
23 Engineers lake without a State hunting license?

24 MR. KOUKOUTCHOS: Yes, that is the
25 understanding.

1 QUESTION: And so, your claim is that the tribe
2 in this case is doing no more than the States would
3 normally do under their hunting and fishing regulatory
4 authority.

5 MR. KOUKOUTCHOS: Yes. We do not think that the
6 taking of the Federal -- by the Federal Government in this
7 case displaces the preexisting regulatory authority.
8 Granted, the Corps of Engineers reserves the right to
9 regulate corresponding use, but the practice of the Corps
10 has been to allow the regulation that existed theretofore.
11 If it's on Federal land and -- that used to be State land,
12 the State exercises it in cooperation with --

13 QUESTION: Okay, but if you just looked --

14 MR. KOUKOUTCHOS: -- the fish and game wardens.

15 QUESTION: Excuse me. But if you just looked at
16 the text of the statute and not -- and made no reference
17 to this State practice, it would be a legitimate question
18 then as to whether there would be any basis on Corps
19 project lands and waters for any authority, at least other
20 than the United States, to -- well, no, strike the
21 proviso. There would be a serious question as to whether
22 any authority could preclude anyone from fishing subject
23 to the payment of a fee.

24 MR. KOUKOUTCHOS: I think there are two answers
25 to that. The first is found within section 4 of the Flood

1 Control Act itself, which in its last line says that
2 nothing in this will -- and it's essentially an anti-
3 preemption clause. Nothing in this will preempt otherwise
4 applicable State laws for the management or conservation
5 of fish and game.

6 QUESTION: Okay.

7 MR. KOUKOUTCHOS: It is the understanding of the
8 Federal -- and there's also the provision in --

9 QUESTION: But that won't help you.

10 MR. KOUKOUTCHOS: Well, that applies with
11 respect to the example that anybody would have authority.

12 Our position is that given that the tribe
13 enjoyed authority to regulate this land beforehand, that
14 the Federal Government took it for its own purposes with
15 the reservation of substantial authority to the tribe,
16 that there is nothing in the Cheyenne River Act --

17 QUESTION: But you have express reservations of
18 grazing rights and timber rights and so on, but you have
19 no express reservation of this regulatory authority.

20 MR. KOUKOUTCHOS: There is an express
21 reservation of a right to hunt and fish, which is not
22 exclusive. Other people are -- you know, can enjoy that
23 as well. However, it is a right to hunt and fish which is
24 not the same as merely the public's right of access.
25 Otherwise, there would have been no need to preserve it.

1 QUESTION: Don't you think that's unusual to
2 say, you know, this fee that we've taken is so total --
3 we've taken everything away from you -- that we feel we
4 have to give you back the right to hunt and fish, but we
5 don't have to mention anything about your right to
6 continue to govern the land to the extent of excluding
7 other people? I mean, it would seem to me that if it was
8 necessary to mention that the Indians continue to have the
9 right to hunt and fish or otherwise they wouldn't have it,
10 surely it would have been necessary to mention and they
11 have the right to prevent others from hunting and fishing.

12 MR. KOUKOUTCHOS: The issue of jurisdiction
13 simply didn't come up. Both the district court and the
14 Eighth Circuit found that there was nothing in either the
15 statute or in the legislative history which addressed the
16 issue of jurisdiction in this case. Congress was dealing
17 exclusively with the property rights. It is the basic
18 understanding under Federal law, when they take pursuant
19 to title 40, section 255, that the preexisting
20 jurisdiction over that land is not disturbed.

21 In this case, there is one reference in the
22 legislative history and one reference in the statute which
23 seems to indicate that the tribe preserves regulatory
24 power, and that is that in section X it reserves the right
25 to hunt and fish not just to members of the tribe and to

1 the tribe, but to the tribal council and members of said
2 tribe. Everywhere else in the Cheyenne River Act where
3 the Congress used the phrase tribal council, it refers to
4 the tribal council as a governing body. Therefore,
5 something must be meant in section X beyond a mere right
6 to hunt and fish by reserving this power to the tribal
7 council.

8 If we are to read it, as this Court advised last
9 week in McGonsett v. Samuels, so that every word and
10 clause of the statute has meaning, then tribal council
11 must mean something more than the mere right to hunt and
12 fish because every member of the tribal council enjoyed
13 that already by virtue of the general reference to a
14 reservation of powers to hunt and fish.

15 In light of that, the one place in the
16 legislative history that addresses the right to
17 jurisdiction actually occurred in a colloquy between the
18 tribe's representative and Representative Berry, the
19 sponsor of the legislation, the day after the conversation
20 that General Barnett referred to. And in that instance,
21 the tribe said that it read section X, which was now
22 before it and was adopted in that forum, to reserve to the
23 tribe the power to hunt and fish and to regulate the
24 taking of hunting and fish. He said specifically no white
25 person can go on this land without a license to hunt and

1 fish. Nothing was said from the committee or anyplace
2 else to disturb that notion.

3 Now, that isn't a whole lot on which to go on,
4 but certainly the only thing in the statute that addresses
5 the issue of jurisdiction is something that indicates that
6 the tribal council was to retain some power, and it can't
7 be merely the right to go hunt and fish en masse. It must
8 mean some form of regulatory power.

9 Moreover --

10 QUESTION: Maybe it was regulatory power over
11 tribal members.

12 MR. KOUKOUTCHOS: I beg your pardon?

13 QUESTION: May be it was just regulatory power
14 over tribal members.

15 MR. KOUKOUTCHOS: That the tribe would --
16 council would have in any event by virtue of the Indian
17 Reorganization Act and the tribal constitution, and that
18 would have been, again, an unnecessary reservation of
19 right. The tribe council always has powers over its
20 members because it is a sovereign, at least in that
21 limited sense.

22 If I could address just for a moment the basic
23 aspect of the Cheyenne River Act, what distinguishes it
24 and what distinguishes this case from the Montana case,
25 which is the most relevant on point, and that is this

1 Court, when it addressed the similarly narrow regulatory
2 issue of tribal power over nonmember fee land in Montana,
3 said that one must look at tribal power over land in light
4 of the subsequent alienation of that land.

5 In this case, the land was not alienated to
6 private landowners, to homesteaders in fee simple. It was
7 alienated to the Federal Government with a reservation of
8 substantial rights to the tribe, and that is the second
9 issue. That is the scope of the alienation. Nothing was
10 retained in Montana. It was fee simple. Here the tribe
11 retained all the rights that we have discussed including,
12 importantly, the right to graze livestock on this area or
13 to license the grazing of livestock, which is important
14 because that is where this litigation arose.

15 The tribe was concerned about hunters coming
16 onto reservation land because this area is Indian
17 landlocked -- it is between Indian land exclusively on one
18 side and the lake on the other -- and disturbing the herds
19 that were there, leaving open the fences, disturbing the
20 buffalo herd and so on.

21 QUESTION: Why did the tribe do nothing for 30
22 years if it had these concerns?

23 MR. KOUKOUTCHOS: In fact, Mr. Chief Justice,
24 the tribe did not do nothing. Contrary to what the State
25 of South Dakota has told you, the district court found --

1 and these findings are at joint appendix, page 65 -- that
2 the tribe has always asserted jurisdiction over this taken
3 area both before it was taken and since 1954. It has
4 never acquiesced in State jurisdiction, and that the
5 jurisdictional matrix which has, in fact, ensued is that
6 the tribe enforces its tribal fishing and hunting
7 regulations against all, including nonmembers, on the
8 taken land; whereas the State of South Dakota has limited
9 its enforcement to nonmembers. Those are the findings of
10 the district court and they are not disturbed.

11 In -- moreover, if I can get back to -- strictly
12 with respect to the grazing, it gave the grazing, which is
13 the most important aspect of this land. Because it is
14 done pursuant to the tribal grazing code, the district
15 court found that it gives the tribal land a distinct
16 Indian flavor because it is criss-crossed by fences
17 setting up these areas. That code is enforced by the
18 Bureau of Indian Affairs, and in fact, the entire area has
19 a pervasive Federal presence. The tribal regulation is
20 subject to oversight by the Corps of Engineers, but not by
21 the State. The enforcement of tribal regulations in
22 accord with Tribal Ordinance No. 3 have always included
23 the availability of Federal enforcement. All tribal
24 fishing and hunting regulations and ordinances are
25 initially approved by the Secretary of the Interior.

1 QUESTION: Thank you, Mr. Koukoutchos.
2 Mr. Feldman, we'll hear from you.

3 ORAL ARGUMENT OF JAMES A. FELDMAN

4 ON BEHALF OF THE UNITED STATES,

5 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

6 MR. FELDMAN: Mr. Chief Justice, and may it
7 please the Court:

8 I'd like to address -- first, to make it clear
9 the land that we're talking about. There are about
10 104,000 acres of land here that were taken in 1954 by the
11 Federal Government that formerly had been trust lands.
12 What happened, when the land was taken, was the land
13 continued in -- title continued in the United States as it
14 had been held before, but whereas before it was held for
15 the beneficial use of the Indians, after 1954, the bundle
16 of sticks was divided up a little bit differently.

17 After 1954, the Federal Government got title to
18 that land and got all the uses of the land that were
19 essential for its purposes of flood control and irrigation
20 and for the secondary purposes for which the Corps of
21 Engineers runs these projects.

22 QUESTION: Like what?

23 MR. FELDMAN: Like swimming, picnicking, camping

24 --

25 QUESTION: Fishing?

1 MR. FELDMAN: Fishing. It's true, hunting, all
2 sorts of other purposes that once the Federal Government
3 has the land, it sets it aside for the purposes of.

4 However, significant -- and, in fact, all of the
5 other economically viable uses of the land that remained
6 were in the Indians. And I think it's a mistake to look
7 at what happened here as the Indians being left with only
8 a bear vestige or a very minor amount of rights in these
9 lands. As has been pointed out, they have a right to
10 graze cattle on all of the land. They have the right to
11 remove timber. They have mineral rights not only in the
12 land, but also --

13 QUESTION: Exclusive rights.

14 MR. FELDMAN: Exclusive rights to graze cattle.
15 That's right. They have exclusive rights to remove the
16 timber up till this day. They have the mineral rights,
17 both in the land and under the water.

18 I think that those circumstances distinguish
19 this case from Montana to a great extent. In Montana, the
20 Court held that the continued exercise of tribal
21 jurisdiction depends on the -- must be seen in light of
22 the subsequent alienation of the land. In Montana, the
23 purpose of the --

24 QUESTION: But, Mr. Feldman, it is clear I
25 suppose that under the act the tribe did not retain the

1 power to exclude people from public uses of the park area
2 and the river --

3 MR. FELDMAN: That's right.

4 QUESTION: -- and the reservoir.

5 MR. FELDMAN: That's right.

6 QUESTION: They can camp and fish and use it
7 presumably.

8 MR. FELDMAN: That's right.

9 QUESTION: Can the tribe exclude people from
10 coming onto that property?

11 MR. FELDMAN: What I would say about exclusion
12 is the --

13 QUESTION: In your view.

14 MR. FELDMAN: They can't keep people off
15 altogether, but to impose a licensing fee basically for
16 the benefits that the people are getting from using the
17 facilities on the land is different from excluding them
18 altogether. And I think what the court of appeals held in
19 this case --

20 QUESTION: Well, it's pretty close to it. If
21 you don't have a license, you can't use it --

22 MR. FELDMAN: Right, and if the licensing fee
23 were prohibitively high or unusual in some way in which I
24 don't think it is in this case, or if other tribal
25 regulations in some way essentially force nonmembers not

1 to use the land, then I think those would be preempted by
2 the Flood Control Act and by the Federal -- the fact that
3 the Federal Government --

4 QUESTION: Since the act was so specific, isn't
5 it rather odd that it didn't cover this aspect?

6 MR. FELDMAN: The 1954 act?

7 QUESTION: Yes.

8 MR. FELDMAN: I don't think it is. I think the
9 1954 act was a division of the property rights in the
10 land, of the bundle of sticks of ownership of that land as
11 to who got what uses after that. I don't think that
12 anyone -- and I think this is what the district court and
13 the court of appeals said. I don't think anyone was
14 thinking about continuing regulatory authority over the
15 land.

16 QUESTION: Well, do you say that the Federal
17 Government would have the right to require hunting and
18 fishing licenses from people?

19 MR. FELDMAN: I think that -- actually, I think
20 that with -- it may be a little bit of a complex answer.
21 I think with respect to the water areas, I think the Corps
22 would have a hard time trying to force people to obtain,
23 say, some kind of Federal license to go fishing in light
24 of the language that says that people shall be able to do
25 that without charge. I think that was directed at the

1 Corps' authority as to the -- what it was supposed to do
2 with this land and how it was supposed to make it open for
3 recreational purposes.

4 QUESTION: So, you don't take the position that
5 the Federal Government could require licensing.

6 MR. FELDMAN: Well, but I do think outside -- I
7 think aside from that one proviso, I think with respect to
8 the rest of the land area and with respect to other sorts
9 of regulation of the land, I think the Corps does have
10 authority to do what it deems necessary. It is given the
11 authority in the Flood Control Act to operate recreational
12 --

13 QUESTION: Well, what's the meaning of the
14 language giving the States whatever regulatory authority
15 --

16 MR. FELDMAN: I think the State may have also
17 have regulatory authority over the land. At least the
18 State may also have the authority to regulate the hunting
19 and fishing on the land.

20 QUESTION: This is an incredibly muddled
21 situation that your answer suggests.

22 MR. FELDMAN: Well, I guess -- let me try to
23 clarify it for you.

24 I think with respect to this land, essentially
25 the Corps doesn't -- has -- never has tried to impose

1 hunting or fishing licenses on the land, and under Corps
2 regulations, State and local regulations, which would
3 include both State and tribal regulations in this case,
4 would apply to this land. And if someone --

5 QUESTION: How do we know it would include
6 tribal? I was interested in that. Is the regulation that
7 says all other Federal, State, and local laws and
8 regulations remain in full force and effect where
9 applicable -- does that include tribal laws?

10 MR. FELDMAN: Yes, I would take the word local
11 to mean --

12 QUESTION: You would take it. Would the Corps
13 of Engineers take it?

14 MR. FELDMAN: Yes.

15 QUESTION: I notice that they're not on your
16 brief. The Department of Interior is, but not the Corps
17 of Engineers. Is that significant in any respect?

18 MR. FELDMAN: I wouldn't attribute significance
19 to that. I think --

20 QUESTION: Can I assume that everything you
21 argue is agreed to by the Corps?

22 MR. FELDMAN: Yes. Yes, you can. And, in fact,
23 although I think the Corps over the years has wondered
24 about this in part because it was unclear for some time
25 whether this land was part of the reservation at all, and

1 at the time that it was thought that it might not be, then
2 different rules apply, of course. But I think once that
3 got clarified in this case, the Federal Government has a
4 single position here that all -- that it's the Federal
5 Government's position.

6 QUESTION: Well, that's an easy case then. If
7 the regulation -- I mean, what are we going through all
8 this trouble for? It's clear that the Corps has the
9 authority to issue these regulations and if the sentence
10 in the regulations, all other Federal, State, and local
11 laws and regulations remain in full force and effect,
12 where applicable, to those water resource development
13 projects, that's an -- this is an easy case. Why hasn't
14 that argument been made? As far as I know, it has not
15 been made.

16 MR. FELDMAN: I believe that respondents make
17 that argument in their brief.

18 QUESTION: Make the argument that this
19 regulation, local laws under this regulation --

20 MR. FELDMAN: Yes. I believe they recognize
21 that.

22 But, in any event, I think that the important is
23 that --

24 QUESTION: I don't get it.

25 MR. FELDMAN: -- unlike in Montana, this land is

1 ultimately governed by the Federal Government, and the
2 Federal Government not only does not see anything
3 inconsistent in permitting tribal regulation of hunting
4 and fishing on this land, especially in light of the
5 checkerboard nature of the area being surrounded by lands
6 on which the tribe undoubtedly has jurisdiction.

7 QUESTION: And you say it is the interpretation
8 of the Corps of Engineers that local laws in section 327.0
9 of their rules and regulations governing public use of
10 water resource development includes tribal laws.

11 MR. FELDMAN: Yes. The intent of the Corps was
12 to have other laws that govern fish and game apply so that
13 the Corps doesn't have to adopt a specific Federal code to
14 govern those kinds of matters on Corps land. The Corps --

15 QUESTION: Yes, but how can that all survive the
16 provision in section 4 that the water areas shall be open
17 to public use generally without charge for boating,
18 swimming, bathing, fishing, and so forth?

19 MR. FELDMAN: I think that, first of all, that
20 without -- I think that that is directed toward the Corps,
21 and that was Congress' prescription to the Corps that it
22 should not make charges for access to these areas.
23 Congress specifically indicated that it wanted to continue
24 regulation of hunting and fishing. Indeed, regulation of
25 -- some regulation of hunting and fishing is necessary in

1 order to preserve the stock of fish and game on the land.
2 Really, some system with certain seasons and certain types
3 of animals and fish being taken at certain times is
4 required or you won't have any fishing or any hunting --

5 QUESTION: Well, and -- I'm sorry.

6 QUESTION: I just assume it means without charge
7 by the Federal Government.

8 MR. FELDMAN: Yes.

9 QUESTION: Anyway, Mr. Feldman, that sentence
10 goes on to say as -- shall be maintained when such use is
11 determined by the Secretary of the Army not to be contrary
12 to the public interest, all under such rules and
13 regulations as the Secretary of the Army may deem
14 necessary, which is why I think that provision of C.F.R.
15 is so crucial here.

16 MR. FELDMAN: That's right.

17 QUESTION: They don't really have to allow any
18 fishing at all if they don't think it's in the public
19 interest.

20 MR. FELDMAN: That's correct, and generally
21 speaking, if the Corps, for instance, felt that the flood
22 control or irrigation purposes of this project would be
23 disserved by permitting people on some area of it or on
24 the whole thing, then they could prohibit any hunting and
25 fishing on the project.

1 QUESTION: But you can't tell from that
2 regulation whether State and local laws -- whether it
3 gives the nod to the State or the tribe because both
4 hunting laws are covered by those -- that regulation.

5 MR. FELDMAN: I don't think it's -- yes. And I
6 think that not unlike many other circumstances, it may
7 well be, although the issue of State jurisdiction isn't
8 really -- wasn't really decided below, but it may well be
9 that both the State and the tribe can impose requirements
10 on people who want to hunt on this land.

11 They have a history before this dispute arose.
12 The district court found that they had a history of
13 cooperative control. And, indeed, given the fact that the
14 game moved back and forth from tribal to trust to State
15 lands and so on, that kind of cooperation is going to be
16 necessary in these circumstances anyway.

17 QUESTION: And so, the Federal Government is
18 quite willing to see that -- see both of them exact a
19 license so far as the Federal interest is concerned.

20 MR. FELDMAN: That's right. If there were some
21 -- if that caused some undue problem, the Corps could
22 always remedy that by adopting its own regulations and
23 preempting both of them.

24 QUESTION: Thank you, Mr. Feldman.

25 MR. FELDMAN: Thank you.

1 QUESTION: General Barnett, you have 3 minutes
2 remaining.

3 REBUTTAL ARGUMENT OF MARK BARNETT

4 ON BEHALF OF THE PETITIONER

5 MR. BARNETT: Thank you, Your Honor, and may it
6 please the Court, Mr. Chief Justice.

7 I am not sure what part of the record that
8 counsel for the Government is referring to in regard to a
9 Corps interpretation, but I will say that the record does
10 reflect in 1976 a letter from the Corps to the Lower Brule
11 Tribe, which is on the same river just down river,
12 suggesting that their ordinances did not have effect over
13 the take area.

14 I would submit the -- a letter of September of
15 1986 from the Corps to our Game, Fish and Parks
16 Department, which is at joint appendix 288. Quote, the
17 position of the Corps has always been that the regulation
18 of hunting and fishing on Corps land is a matter of State
19 law. This was clearly the intent of section 4 of the
20 Flood Control Act. And again, as we have said, section 4
21 of the Flood Control Act says no use of these properties
22 will be permitted which is inconsistent with State game
23 laws.

24 QUESTION: General, I don't find section 327.0,
25 which is the regulation I was reading -- I don't find that

1 cited in either the brief for the Government or the brief
2 for the tribe in this case. At least if their index is
3 correct, it's -- it hasn't been cited.

4 MR. BARNETT: There is a cite to .8, which is in
5 the tribal brief, and we do not agree with the
6 interpretation that State or local regulations would
7 include tribal. As this Court has said in a variety of
8 cases, the attempt by a tribe to exercise jurisdiction
9 over nonmembers on -- non-Indians on non-Indian land will
10 be viewed narrowly. In contrast, the Court has also had a
11 line of cases that expressed the concept of the State
12 sovereignty which exists to the extent not taken up or
13 preempted by Federal law.

14 QUESTION: Well, General Barnett, if the Corps
15 of Engineer regulation were very specific and expressly
16 said State and tribal regulation, would they have the
17 authority to permit joint regulation then?

18 MR. BARNETT: They might, although I would
19 submit that would be in conflict with section 4 of the act
20 which clearly contemplates --

21 QUESTION: Well, they might -- it's feasible
22 that the tribe and the State may be able to charge a fee,
23 but once you get into other regulations, it would really
24 be a -- it would really be -- the Indians might have one
25 notion of take limits and the State might have another.

1 You can't live up to them both.

2 MR. BARNETT: And that is the problem with
3 shared jurisdiction, and I might add that the findings
4 that were referred to by the tribe in the district court,
5 those findings about shared jurisdiction were in the --
6 were in a ruling on the preliminary injunction with regard
7 to the question of whether or not the State could show
8 irreparable injury pending litigation.

9 I -- my time is up, Your Honor. Thank you.

10 CHIEF JUSTICE REHNQUIST: Thank you, General
11 Barnett.

12 The case is submitted.

13 (Whereupon, at 12:02 p.m., the case in the
14 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

South Dakota, Petitioner v. Gregg Bourland, Etc., Et Al

Case No. 91-2051.

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BY *Lona M. May*

(REPORTER)