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THE DETERMINATION OF TITLE TO SUBMERGED LANDS ON INDIAN RESERVATIONS

American Indians have long realized that the gap between their theoretical rights and the real world is a larger one than for most Americans.1

The treatment of submerged lands within Indian reservations provides a classic example of the Indian rights gap. Two possible owners may claim such lands under navigable water: the tribe or one of the several states. Substantial legal and economic significance attaches to ownership. The title may determine fishing rights2 as well as potentially lucrative mineral rights to gas and oil deposits.3 When a river is rerouted, the uncovered land may become a valuable recreational or commercial waterfront.4 Title can also determine criminal jurisdiction for acts taking place on the water.5

States rely on the equal footing doctrine to claim title to submerged lands.6 Under this doctrine, as Congress created each state, the state received title to the submerged lands. In most of the western United States, however, Indian reservations predated the states. Title may, therefore, have been transferred to the tribe at the creation of the reservation under theories of Indian treaty construction.7 Even in the absence of preexisting reservations, Indians may claim title to homelands that preceded the formation of the United States itself under the theory of aboriginal title.8

The Supreme Court has been inconsistent in analyzing the issue of title when state and tribal governments present conflicting claims.9 It has not clearly resolved the circumstances in which the presence of a reservation

7. See Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 87 (1922).
8. See infra notes 12–21 and accompanying text.
should create an exception to the equal footing doctrine’s presumption of state ownership of navigable water. As a result, lower courts have been forced to develop jurisprudence without clear guidance. In the process stare decisis has not wielded its usual force.

The clarification of this situation involves examination of the policy issues behind the apparently conflicting theories. First, where aboriginal title is proven, Indian rights should prevail. Where such title is not at issue, the presence of a reservation should nonetheless trigger a presumptive exception to the equal footing doctrine. Not only would this presumption of tribal ownership give clear guidance to lower courts, it would help reduce the gap between the Indians’ theoretical and realized rights.

I. FACTORS IN THE DETERMINATION OF TITLE TO SUBMERGED LANDS

A. Aboriginal Title

Aboriginal title may provide a basis for Indians to assert a claim to submerged lands, premised on a determination that the United States itself never obtained complete title and thus could not pass it to the states. The doctrine of title to ancestral homelands does not involve treaty interpretation, but relies upon the Indians’ original right of occupancy. It is therefore an appropriate ground for Indian ownership only when navigable water beds are located on ancestral tribal homelands.

1. The Evolution of Indian Title

Aboriginal or Indian title is based on the principle that when the white man “discovered” America, the country was already inhabited. The Supreme Court has long recognized the Indians’ preexisting claim to their homelands. In 1832, Chief Justice Marshall indicated that the Indian

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10. See infra notes 35–45, 166–88 and accompanying text.
11. The Supreme Court has not recognized an aboriginal title right to submerged lands. See United States v. Pend Oreille County Pub. Util. Dist. No. 1, 585 F. Supp. 606 (E.D. Wash. 1984); infra notes 39–41 and accompanying text. The concept of aboriginal title, however, has been applied to support claims to other Indian lands. In a unanimous opinion, the Supreme Court confirmed federal jurisdiction on a claim against New York based on aboriginal title. Oneida Indian Nation v. County of Oneida, N.Y., 414 U.S. 661 (1974) (Oneida I). The tribe brought suit for rental value of land ceded to New York in 1795 without federal consent. The district and appellate courts found no federal jurisdiction. The Supreme Court reversed, stating that the case "rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands." Id. at 677. The Court affirmed the federal common law right of aboriginal title in County of Oneida, N.Y. v. Oneida Indian Nation, 105 S. Ct. 1245 (1985) (Oneida II). The Court explicitly held that Indians have a right to sue in federal court to establish their aboriginal title, which could not be terminated without the consent of Congress. Id. at 1247–48.
nations had always been considered as distinct and independent political communities. They retained their original natural rights as "the undisputed possessors of the soil, from time immemorial," subject only to the exclusive right to treaty granted by mutual agreement among the colonizing nations. The task, then, for Marshall and subsequent justices, was to interpret those natural rights in light of the later behavior of the white settlers and the government of the United States. Numerous cases of this type came before the Court in the late 1800's and early 1900's.

The Supreme Court defined the Indian right as the right of occupancy only, but held it to be "as sacred as the fee-simple of the whites." Further, the Court held that the right of occupancy need not necessarily have been recognized in any statute or formal governmental action in order to be enforced. However, the Court held that Congress has absolute power to extinguish the right of occupancy, and has no legal obligation to compensate the tribe. Unless Congress has exercised that power, Indian title takes precedence over federal land grants. The Court also held that if land was subject to Indian title, a grant to other parties from the government would transfer no beneficial interest. Indian title is "[t]he right of perpetual and exclusive occupancy of the land [and] is not less valuable than full title in fee."

2. Prior Supreme Court Cases Involving Submerged Lands

Of the Supreme Court cases involving title to submerged lands on reservations, the Court touched upon the involvement of aboriginal title in only three. In these cases the Court displayed an unwillingness to carefully

13. Worcester, 31 U.S. at 559. The colonizers granted the right to treaty with a tribe to the nation "discovering" the territory inhabited by the tribe.
14. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823) (The white man's "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest . . .").
21. Id. The Court echoed Marshall and Baldwin, see supra notes 14–15 and accompanying text, in declaring Indian title to be as secure and sacred as fee simple absolute for the Indians, who were "undisturbed possessors of the soil from time immemorial." Shoshone Tribe, 304 U.S. at 117.
22. See supra note 9 for the list of reservation submerged lands cases. The other six cases did not involve aboriginal homelands. In Alaska Pac. Fisheries v. United States, 248 U.S. 78, 86 (1918), the reservation had been created by Congress for a Canadian tribe. In Brewer-Elliott Oil & Gas Co. v.
explore Indian rights and to enunciate them clearly. For example, the Court might have decided *United States v. Winans*\(^2\) on the basis of aboriginal title, and reference to the concept was made briefly.\(^2\) The force of the opinion, however, centered upon treaty interpretation.\(^2\) *United States v. Holt State Bank*\(^2\) also indisputably involved aboriginal lands, and *Montana v. United States*\(^2\) apparently did so.\(^2\) Again, the Court did not squarely face the issue.

The fact situation in *Holt Bank* was somewhat unusual. The controversy over title arose only as the federal government was about to divide and sell the last of the tribal land.\(^2\) The opinion did not dwell on the “sacred” tribal right to occupancy defined by the *Mitchel* Court almost a century before,\(^3\) or on the fact that the reservation was the last remnant of the tribe’s aboriginal land. The Court decided the case in favor of the state under the equal footing doctrine.\(^3\)

Similarly, the Supreme Court reversed the lower courts in *Montana*\(^\text{22}\) without specifically mentioning an aboriginal title claim, despite lower court reliance on the doctrine.\(^3\) The Court failed to address the issue,

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\(^2\) *United States*, 260 U.S. 77, 80 n.1 (1922), the Osage tribe resettled in Oklahoma from east of the Mississippi River. The Choctaws, Cherokees, and Chickasaws in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), were also resettled from their aboriginal territory. The opinion did mention the Indian title right surrendered in agreeing to move to Oklahoma, *id.* at 623, but this fact did not affect the outcome of the case. The Indians living on the Hoopa Valley Reservation were not on their traditional homeland as discussed in *Donnelly v. United States*, 228 U.S. 243, 268–69 (1913).


\(^2\) In *Winans*, the characterization of a treaty as a grant of rights from a tribe, and not a grant to it, is a reference to aboriginal title. *Id.* at 381. The Court held that the Yakima tribe had reserved the right to fish in disputed areas, as they had traditionally done, subject to the treaty restrictions. This right was recently affirmed in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979).

\(^2\) *Winans*, 198 U.S. at 377–81.

\(^2\) *Id.* at 377–81.


\(^2\) See *supra* note 6, at 505 (both *Montana* and *Holt Bank* involved aboriginal title land).

\(^2\) *Holt Bank*, 270 U.S. at 52.

\(^3\) See *supra* note 15 and accompanying text.

\(^3\) Political implications probably led to the Court’s position. See *infra* notes 106–16 and accompanying text.

\(^3\) *Montana*, 450 U.S. at 556–57.

\(^3\) *United States v. Finch*, 395 F. Supp. 205, 209 (D. Mont. 1975). The district court in *Montana* had considered aboriginal title an important factor in deciding in favor of tribal ownership. The Indian Claims Commission also considered aboriginal title in its decision for the tribe. *Crow Tribe v. United States*, 3 Indian Claims Comm’n 147, 151 (1954). The *Montana* opinion began: “The Crow Indians originated in Canada, but some three centuries ago they migrated to what is now southern Montana.” 450 U.S. at 544–47. This reference may have been an attempt to deny aboriginal title. See F. C. *Cohen*, *supra* note 6, at 503. Yet two centuries of occupation prior to treaty should have been sufficient to establish title. *Id.*
deciding instead that the equal footing doctrine mandated a decision in favor of the state.\footnote{34}

3. **Recent District Court Opinions: Yankton and Pend Oreille**

Although the Supreme Court has yet to acknowledge the legitimacy of aboriginal title claims to submerged lands, two recent district court opinions directly considered the issue. The first was *Yankton Sioux Tribe of Indians v. Nelson.*\footnote{35} In *Yankton*, a treaty created the reservation, which included Lake Andes, in 1858.\footnote{36} The *Yankton* court first distinguished the earlier Supreme Court decisions that had failed to recognize the aboriginal right as cases in which the Indian right to occupancy had been extinguished prior to the creation of the reservation.\footnote{37} The court then held that the Sioux treaty did not expressly extinguish the tribe's aboriginal title to Lake Andes. Thus, the United States had no title to pass to South Dakota upon its admission to the Union.\footnote{38}

The second district court opinion, *United States v. Pend Oreille County Public Utility District No. 1,*\footnote{39} confronted the question in a context lacking


36. Id. at 464. The treaty recited that the tribe ceded all its land "except four hundred thousand acres." Lake Andes was inside the retained area. Id.

37. Id. at 465. These determinations are questionable. The Indian right had been extinguished in *Choctaw*, 397 U.S. 620; it is not clear that it was extinguished in *Montana*, 450 U.S. 544, or *Holt Bank*, 270 U.S. 49. The statement in *Yankton* that the reservation in *Montana* was conveyed to the tribe is an accurate reflection of the Supreme Court opinion in *Montana*. The evidence that the *Montana* Court cited to show that conveyance, however, was itself dubious. The treaty clause "that such land would be set apart for the . . . use and occupation . . . of the tribe," *Montana*, 450 U.S. at 553, may not connote an unambiguous conveyance from the government to the tribe which extinguished all preexisting rights. It can be read merely as a recognition of the tribe's right to occupancy because of its Indian title to the land in question. The *Yankton* court, in its attempt to reach the aboriginal title issue, also twisted *Holt Bank* in a clearly erroneous way in order to distinguish it. The tribe signed two treaties before the admission of the state to the Union. Treaty with the Chippewas, September 30, 1854, 10 Stat. 1109; Treaty with the Chippewas, February 22, 1855, 10 Stat. 1165. These did not cede all the land to the government as the *Yankton* court claimed. 521 F. Supp. at 466. The Court expressly stated in *Holt Bank* that the effect of these treaties was to reserve in a general way "what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation." 270 U.S. at 58. Justice Douglas in *Choctaw* distinguished *Holt Bank* as involving "only the aboriginal Indian title of use and occupancy." *Choctaw*, 397 U.S. at 639. But see infra note 132 (Stevens in concurrence in *Montana*, stating that Douglas applied *Holt Bank* to *Choctaw*).


a treaty grant to bolster the tribe’s claim. In that case, the United States and
the Kalispel tribe claimed tribal ownership of the Pend Oreille River on the
basis of aboriginal title. The county and state moved for summary
judgment on the ground that because Congress had not expressly conveyed
the submerged lands to the tribe, the title went to the state upon its
admission to the Union. The court noted that this was a question of first
impression. No court had ever squarely addressed the issue of competing
claims by an Indian tribe and a state to the same navigable waters, where
the Indian claim was based on aboriginal title. The court reviewed the line
of cases involving state ownership of navigable water, the “separate and
distinct” line of cases involving aboriginal title, and found that aboriginal
title was not extinguished by the equal footing doctrine. The court denied
the motion for summary judgment, and held that if the tribe could
establish aboriginal title, it would have a current right to occupancy and use
of the bed and banks of the river where it flows through the ancestral
lands. The state would have a fee title to the beds and banks, burdened by
the tribe’s beneficial interests and the United States’ navigable servitude.

4. Future Application

Aboriginal title for most tribal lands has probably been extinguished by
treaty or termination of the tribe. Nonetheless, if a tribe could prove
aboriginal title, and if that proof resolved the issue of land title in favor of
the tribe, many practical advantages would be obtained in any attempt to
further establish title to submerged lands. Aboriginal title avoids the
problem of distinguishing navigable from nonnavigable water. It avoids the
question of dates, since aboriginal title predates the origin of all the states.
In addition, only Congress has authority to extinguish aboriginal title.

40. Id. at 608.
41. Id.
42. Id.
43. Id. The court characterized the equal footing cases as establishing a presumption against
conveyance; however, aboriginal title does not involve a conveyance, but rather “a pre-existing interest
held by the tribes.” Id. at 609. The court indicated that even if the presumption were applicable, a
countervailing presumption existed in the tribe’s favor. Id. at 610.
44. Id. (citing Choctaw, 397 U.S. at 634).
45. Id.
46. Id.
47. See supra note 22.
48. The Ninth Circuit recently held that the Indian Claims Commission did not have jurisdiction to
extinguish aboriginal title. United States v. Dann, 706 F.2d 919 (9th Cir. 1983), rev’d on other grounds,
105 S. Ct. 1058 (1985). This could be a powerful tool for tribes who were given a cash settlement by the
commission for lost aboriginal lands.

1190
Title to Submerged Lands

The Supreme Court has not clearly recognized aboriginal title in this context, and thus the first step in the submerged lands title inquiry has instead been a determination of navigability.

B. Navigability

A threshold issue in determining title to submerged lands is the navigability of the waterway. If the land underlies nonnavigable water, the riparian land owners have title. Tribes, like other riparian owners, own all the beds of nonnavigable waters bounded or surrounded by tribally owned lands. The issue of the equal footing doctrine arises only if the water is navigable.

Under English common law, the sovereign holds the title to navigable waterway beds. When the American colonies declared independence, the rights of the sovereign passed to each state, subject only to the rights subsequently surrendered in the Constitution. The title to beds of navigable waterways thus passed to the individual states.

The English define navigable waterways as those affected by tides. This works quite well for England, because all significant rivers in England are tidal. Since the original states were coastal, most waters were also affected by tides, and the early states easily adopted the English common law definition of navigability. Later states, however, adapted the definition of navigability to conditions in other areas of the United States where many of the significant waterways were not tidal. Through the nineteenth century, each state supreme court defined the elements of navigability for the purpose of determining title to submerged lands within its borders. In the 1920's, the United States Supreme Court decided the Brewer-Holt-Utah trilogy, which established that navigability for the purpose of determining title was a federal question to be decided by federal courts. Under the federal test, if a waterway was usable for commerce at the time the state was

51. Id. at 16. The land was, and is, subject to the restriction by the federal government that waterways remain free for commerce. This restriction is known as the navigational servitude.
52. Id. at 42.
54. United States v. Utah, 283 U.S. 64 (1931); United States v. Holt State Bank, 270 U.S. 49 (1926); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922). See Johnson & Austin, supra note 53, at 8–10 (grouping the three cases as a trilogy).
admitted to the Union, or at the time the reservation was founded, it was navigable in law.  

Determination of navigability is a simple issue for most rivers and lakes. However, since the critical date is the creation of the reservation or the state, usually a nineteenth century event, the condition of navigability may have changed significantly. The court must therefore examine the historical record to determine if the water was or could have been used for commerce at the earlier date. The court will address the issue of state or tribal title only if it determines that the water was navigable at the critical date. Even as to the relatively straightforward subject of navigability, however, the Supreme Court has not issued a clear, consistent line of authority.

Some of the early cases decided on the basis of nonnavigability also included dicta as to how the Court would have decided the case if the water were navigable. Later cases erroneously cited these nonnavigability cases as controlling in opinions concerning navigable water. For example, in Donnelly v. United States, a case involving a reservation on the Klamath River, the Court determined ownership on grounds of nonnavigability. This finding of nonnavigability resolved the question of ownership in favor of the tribe. Subsequent Supreme Court opinions, however, have cited Donnelly as authority in deciding cases involving navigable water, because the Court noted that the description, “a tract of country one mile in width on each side of the Klamath River,” appeared sufficient to include ownership of the river bed. The Court then went on to examine the reservation’s purpose.

56. A full statement of the test is whether the water in its natural and ordinary condition was usable as a highway for commerce by the customary modes of trade or travel on water when the state was admitted to the Union. See Holt Bank, 270 U.S. at 56; Johnson & Austin, supra note 53, at 16.


58. E.g., Brewer, 260 U.S. at 87.

59. E.g., Choctaw Nation v. Oklahoma, 397 U.S. 620, 632–33 (1970); see also id. at 651 (White, J., dissenting) (pointing out error).

60. Donnelly, 228 U.S. 243 (1913).

61. Id. at 259. Since this case preceded the Court’s determination that navigability for title purposes is a federal question, the determination of navigability fell to the state. Thus the Court held that navigability in fact was irrelevant since California had declared that section of the river nonnavigable.

62. Id. at 259.

63. Id. By so doing, the Court appeared to advocate a treaty interpretation approach to submerged lands adjudication. See infra Part I.D. The Court observed:

It seems to us clear that if the United States was the owner of the river bed, a reasonable construction of this language requires that the river be considered as included within the reservation. Indeed, in view of all the circumstances, it would be absurd to treat the order as intended to include the uplands to the width of one mile on each side of the river, and at the same time to exclude the river. As a matter of history it plainly appears that the Klamath Indians established themselves along the river in order to gain a subsistence by fishing.

Id. at 259.

1192
Title to Submerged Lands

In *Brewer-Elliott Oil & Gas Co. v. United States*, the United States sued to quiet title in the United States as trustee for the tribe. Because the district court determined that the Arkansas River was not navigable as a finding of fact, the Supreme Court found that the tribe held the title. The *Brewer* Court decided the case solely on the grounds of nonnavigability; nonetheless, subsequent opinions have cited *Brewer* as controlling for cases involving navigable water. The *Brewer* Court, citing an earlier case, stated that the government could grant title to navigable streams under certain conditions. The Court, however, found it unnecessary to decide whether Congress had granted such a title here.

C. Equal Footing Doctrine

Once a reservation waterway has been declared navigable, the court must determine ownership. If the title rests in the state, it is because of the equal footing doctrine.

The equal footing doctrine required that newly admitted states be accorded the same rights as the original states. Because the original states

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64. *260 U.S. 77* (1922). Congress had granted the Osage tribe its reservation prior to granting statehood to Oklahoma. *Id.* at 80. The reservation boundary description included the words “the main channel of the Arkansas River.” *Id.* at 81 n.1. The Oklahoma Supreme Court had held that the river was navigable and that the title passed to the state. *Id.* at 87. Oklahoma then granted leases for oil and gas development. *Id.* at 79.


66. The district court held that the title was in the tribe, since the river was and always had been nonnavigable. *Id.* at 79–80. The Eighth Circuit affirmed on the basis that the United States had the right to dispose of the river bed and had done so, whether or not the river was navigable. *Id.* at 80. Oklahoma appealed, arguing that the equal footing doctrine prohibited the grant to the tribe, and that therefore the title to the bed passed to the state upon statehood. *Id.* at 83. The Supreme Court stated that, if the river were navigable, the court of appeals position—that the power of the federal government to grant beds of navigable waters was unrestricted—would be before it. If that was not upheld, then a second question—whether the grant would satisfy the “public purpose” restriction of *Shively*—would arise. *Id.* at 86. Having asked the questions, which have yet to be clearly answered, the Court said: “We do not find it necessary to decide either of these questions, in view of the finding as a fact that the Arkansas is and was not navigable at the place where the river bed lots, here in controversy, are.” *Id.*

67. *Id.* at 87.

68. E.g., *Choctaw*, *397 U.S.* at 632–33.

69. *Brewer*, *260 U.S.* at 84–85 (citing *Shively v. Bowlby*, *152 U.S.* 1, 47 (1894)). The court of appeals had taken the position that Congress could grant the land for any reason. The *Brewer* Court recognized that the federal government could grant beds of navigable water prior to statehood for an appropriate “public purpose.” *Brewer*, *260 U.S.* at 85. The Court stated that the issue of whether the reservation was an appropriate public purpose under *Shively* was not reached. See infra notes 70–82 and accompanying text. This question appeared closed after the *Winans* and *Alaska Pacific Fisheries* decisions. See infra notes 146–61 and accompanying text. The Court did not refer to *Alaska Pacific Fisheries*’ statement that the *Shively* public purpose requirement was easily satisfied.

received title to submerged lands, the later states received like benefits. Under the doctrine, the federal government held the land in trust until each state was created, at which time title automatically vested. Since the original colonies held title to submerged lands underlying navigable waterways, the Supreme Court, in the seminal case of *Shively v. Bowlby*, held that new states were also granted title to submerged lands within their boundaries.

In *Shively*, however, the Court also held that, prior to statehood, Congress had the power to grant land underlying navigable waters to entities other than states whenever necessary. The Court enumerated the circumstances under which Congress might make such grants: “in order to perform international obligations, or to effect the 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 appropriate to the objects for which the United States hold [sic] the Territory.” In a later passage the Court appeared to limit “public purposes” to “international duty or public exigency.” The Court indicated that it would begin with a presumption that title vested in the state upon admission. Title did not pass by general law. Later courts interpreted *Shively* as holding that Congress must be explicit about any contrary intent. The *Shively* opinion has given rise to much of the confusion surrounding Indian rights to submerged lands.

First, subsequent opinions disagreed as to whether Indian reservations fell within the *Shively* public purpose exception to the equal footing doctrine. Second, the *Shively* Court spoke of “public exigencies” that would justify a private grant. Later opinions have given different meanings to the phrase “public exigencies” as well. Finally, *Shively* concerned only the comparative rights of individual landowners, state governments, and federal governments. It did not involve the question of land ownership by Indian tribes. This omission has engendered confusion which continues to the present day. If a court rigidly follows the “express intent” gloss on *Shively*, it must find an explicit Congressional grant in the treaty in order

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72. 152 U.S. 1 (1894).
74. Id.
75. Id. at 58.
76. Id. at 26.
77. Id. at 48.
78. See *Holt Bank*, 270 U.S. at 55.
79. See infra notes 101–05 and accompanying text.
81. See supra note 78 and accompanying text.
Title to Submerged Lands

to transfer title to the tribe rather than to the state.\textsuperscript{82} However, since the question of sovereign rights was not before the Court in \textit{Shively}, such rigid adherence is unwarranted without Court confirmation that the \textit{Shively} principles extend to sovereign entities, such as Indian tribes. The Court again has never squarely addressed the question of sovereign rights. As a result, lower courts have been forced to fashion Indian rights theories of their own, and Indians have remained unsure of their legal rights. The two primary elements of \textit{Shively} causing difficulty are the nature of the grant, and the nature of the public purpose or exigency.

1. **Private or Indian Grant?**

   In \textit{Alaska Pacific Fisheries v. United States},\textsuperscript{83} the Supreme Court touched upon the difference between the private grant at issue in \textit{Shively} and a grant to a sovereign tribe. \textit{Alaska Pacific Fisheries} involved submerged lands around a group of islands set aside for a reservation in southwestern Alaska. Navigability was not questioned since the water was tidal. The language of the grant setting the land apart as a reservation was not specific: “the body of lands known as Annette Islands.”\textsuperscript{84} The Court did not hesitate over Congress' power to grant submerged lands, as it might have under \textit{Shively}.\textsuperscript{85} One factor the Court mentioned was that a grant to a tribe was not technically a private grant.\textsuperscript{86} Later Supreme Court cases have not picked up or developed this theme.\textsuperscript{87} Instead, the decisions, including \textit{Alaska Pacific Fisheries} itself, delve into the public purpose/public exigency question.

2. **Public Purpose and Public Exigency**

   a. **The Blanket Exception Approach**

   In developing \textit{Shively}'s “public purpose” or “public exigency” exceptions to the equal footing doctrine, the Supreme Court might have determined that all Indian treaties be deemed Congressional grants of

\textsuperscript{82} See \textit{Holt Bank}, 270 U.S. at 55-59.
\textsuperscript{83} 248 U.S. 78 (1918).
\textsuperscript{84} \textit{Alaska Pac. Fisheries}, 248 U.S. at 86.
\textsuperscript{85} Id. at 87.
\textsuperscript{86} Id. at 88.
\textsuperscript{87} See \textit{Montana v. United States}, 450 U.S. 544 (1981). This presumption against private grants has been noted, however, by the Ninth Circuit. See \textit{Confederated Salish & Kootenai Tribes v. Namen}, 665 F.2d 951, 961 n.27 (9th Cir.), \textit{cert. denied}, 459 U.S. 977 (1982) (characterizing the underlying rationale for the presumption as of “doubtful relevance to a reservation of land by a sovereign Indian tribe,” since it does not technically involve a “grant”).
prestatehood submerged lands. The public exigencies and purposes behind all treaties would be peace, coherence, and settlement of the West. In some cases, the Supreme Court appeared to have taken just such a position. This view appeared as recently as 1970, in *Choctaw Nation v. Oklahoma.*

*Choctaw*'s complex fact situation involved three tribes, and the state of Oklahoma in litigation over three grants, to a portion of the bed of the Arkansas River.

The Court, without elaboration, first determined that the first treaty grant included the section of the river, which was entirely inside the reservation. The treaty had not mentioned this portion of the river. The Court then considered the section of the river which divided the lands of the Cherokee from those of the Choctaw-Chickasaw. These two grants read "up the Arkansas" and "down the Arkansas" in the boundary description. In a holding that apparently established a blanket exception to the equal footing doctrine for reservations, the Court stated that if the United States did not intend to pass the title to the river to the tribe, it was competent to exclude it. Since the United States had not done so, the title went to the tribe. Justice Douglas stated that if the United States intended to retain the river beds for transfer to the state, it should have specifically mentioned that intent. The *Shively* presumption of an intent to grant to the state apparently has been stood on its head. *Choctaw* would instead force Congress to express its intent to follow the equal footing doctrine when the Indian reservation "public purpose" exception arises, to avoid a presumption of an intent to grant to the tribe.

All of the old aboriginal title, navigability, and private/nonprivate grant questions surfaced again in the *Choctaw* Court concurring and dissenting opinions evaluating the majority result. They illustrate the confusion that has resulted from the failure of the Court to construct a proper framework for the entire issue. Justice Douglas, in concurrence, distinguished *United States v. Holt State Bank* as a case involving aboriginal title, and thus not

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90. The disputed portion extended from the Arkansas River's confluence with the Grand River in Oklahoma, where the Arkansas first becomes navigable, to the western border of Arkansas. The Cherokees claimed under a patent granting them the land on both sides of the Arkansas River, from Grand River to its conjunction with the Canadian River. From the Canadian River to the Arkansas border, the Arkansas River divides the Cherokee land from the Choctaw-Chickasaw land. This section of the river was claimed by tribes on both sides. Oklahoma claimed the entire river bed under the equal footing doctrine. *Choctaw,* 397 U.S. at 643–44.

91. *Id.* at 629–30.

92. *Id.* at 631.

93. *Id.*

94. *Id.* at 636–37.
Title to Submerged Lands

applicable to a dispute over patent land. Justice White, on the other hand, in an extensive dissent, reviewed the effect on title of the distinction between navigable and nonnavigable river beds. Justice White expressed concern with putting navigable lands into "private hands," since these rivers were a public resource. Justice White did not find the grant sufficient to overcome the Shively presumption in favor of transferring title to the state. Justice White dismissed Brewer, on which Justice Douglas had relied, as not concerning navigable waters.

The Ninth Circuit foreshadowed Choctaw in 1942 in Montana Power Co. v. Rochester. In Rochester, the Ninth Circuit also implicitly reversed the equal footing doctrine's presumption of state ownership. The Court held that Congress had made no showing in the treaty of an intent to reserve for the state the submerged land under a lake. On the other hand, the treaty explicitly mentioned the lake because the boundary bisected it on an east-west line. The Rochester court found that the lake bed was held in trust for the tribe.

The Supreme Court, as with the other elements of the submerged lands title question, has not adhered to or refined the blanket exception to the equal footing doctrine for Indian treaties. In a separate line of cases, the Court has looked instead for an express grant of the submerged lands as an indication of a Congressional finding that a public purpose existed for the grant. Few treaties have been litigated that specifically contain grants to navigable water beds. When a treaty referred to a specific waterway, as in Rochester, the reference was usually to a reservation boundary.

95. Id. at 638-39 (Douglas, J., concurring).
96. Id. at 644-48 (White, J., joined by Burger, C.J., and Black, J., dissenting). A major flaw in the majority opinion is the superficial discussion of navigability. The United States traditionally retains a navigable servitude on navigable waters. The most recent case on reservation submerged lands, Montana v. United States, 450 U.S. 544 (1981), devotes considerable energy rectifying this oversight, to the detriment of its analysis of the other issues involved. See infra notes 194-203 and accompanying text.
97. Choctaw, 397 U.S. at 652.
98. Id.
99. Id. at 632.
100. Id. at 651.
102. Id. at 190 n.3.
103. Id. at 191 (citing Alaska Pac. Fisheries v. United States, 248 U.S. 78 (1918); Donnelly v. United States, 228 U.S. 243 (1913); Taylor v. United States, 44 F.2d 531 (9th Cir. 1930)). The Court did not cite Holt Bank.
104. For one of the few examples of a specific grant, see United States v. Stotts, 49 F.2d 619, 621 (W.D. Wash. 1930). See infra note 131.
b. Express Grant

*United States v. Holt State Bank* originated the “express purpose” theory. It involved the Mud Lake Indian Reservation, an area exceeding three million acres. This reservation in Minnesota was apparently established by default, a result of all the other Chippewa land having been ceded away. Because of this origin, no formal declaration of Indian rights in the reservation ever arose, and thus the conflict between the equal footing doctrine and “express purpose” treaty construction was not squarely before the Court. Nonetheless, the Court emphatically searched for “express purpose” in express congressional intent. The Court recognized the reservation’s existence, but observed that no evidence overcame the presumption of transfer to the state. The Court noted that the remaining lands had not been formally set apart, no affirmative declaration of the rights of the tribe to the unceded lands had been made, nor had the tribe attempted to exclude others from the use of navigational waters. With no evidence to the contrary, the Court ruled for the state. Here the Court chose not to mention *Alaska Pacific Fisheries*.

Since the tribe’s claim was by aboriginal title, and not by treaty, *Holt Bank* could have been distinguished from earlier cases involving treaties. By not mentioning them, the Court set the stage for later confusion over the continued applicability of these earlier cases. Despite its “no-treaty” fact pattern, *Holt Bank*’s “express purpose” analysis has been cited as controlling precedent in cases involving treaty reservations. If the Supreme

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106. 270 U.S. 49 (1926).


108. In 1890, President Harrison signed a bill authorizing the federal government to dispose of the remaining land, with the proceeds to go to the tribe. *Id.* at 52. An area known as Mud Lake was drained and prepared for sale. The state claimed the land as underlying navigable waters. *Id.* at 54.

109. *Id.* at 58.

110. *Id.*

111. *Id.* at 59. The Court noted that if the bed of Mud Lake had been given to the tribe, 800 square miles, including two large lakes and several navigable streams, would similarly have been granted. This would have substantially complicated the economic situation, since the federal government was in the process of selling all the tribal land. The government would have had to compensate the tribe for the land and then transfer it to the state at great expense. By holding that the state had title, the Court reached the same practical outcome—state ownership—without a substantial payment to the disbanding tribe.

112. *Alaska Pacific Fisheries* had established a blanket exception approach. *See supra* notes 83–87 and accompanying text.


114. Although the *Holt Bank* Court explicitly stated that the reservation was not formally created by treaty, 270 U.S. at 58, later cases have referred to the *Holt Bank* reservation as treaty-created. *E.g.*, *Montana*, 450 U.S. at 552–53. Justice Blackman asserted in dissent that *Holt Bank* did not involve a formal reservation, and therefore it did not control in *Montana*. *Id.* at 580 n.17 (Blackmun, J., dissenting).
Court in *Holt Bank* had clearly stated the relationship between the differing issues in the earlier cases, later courts would not have been forced to reinterpret the issue. As recently as 1980 members of the Supreme Court were still in sharp disagreement over the meaning of the *Holt Bank* opinion.\(^{116}\)

This 1980 case, *Montana v. United States*,\(^{117}\) is the most recent major opinion on the issue of title to submerged lands. It followed the perceived requirement\(^{118}\) for an explicit exception to the equal footing doctrine, as expressed in *Holt Bank*. *Montana* concerned ownership of the Big Horn River.\(^{119}\) The Big Horn flows through the reservation but was not mentioned in the treaty. This fact pattern essentially paralleled the situation in *Choctaw*, where the treaty had not specifically mentioned the Arkansas River.\(^{120}\) The *Choctaw* Court had easily disposed of the title question in one paragraph, holding that the title was in the tribe.\(^{121}\)

The *Montana* Court, however, held that navigability created a strong presumption against transference to anyone other than the state.\(^{122}\) The treaty stipulation that no one "shall ever be permitted to pass over, settle upon, or reside in" the reservation was not strong enough to overcome the presumption against the sovereign's conveyance of the river bed to the state.\(^{123}\) Since no language in the treaty explicitly conveyed the river bed, the treaty did not defeat the presumption of the equal footing doctrine; therefore title went to the state.\(^{124}\)

Although the *Montana* Court admitted that establishing a reservation could be a public purpose sufficient to satisfy the *Shively* requirement, the

\(^{115}\) Those cases included *Donnelly, Alaska Pacific Fisheries, Brewer*, and *United States v. Winans*, 198 U.S. 371 (1905), which is explored infra, notes 146–54 and accompanying text.

\(^{116}\) Compare *Montana*, 450 U.S. at 552–53 (*Holt Bank* applies to treaty reservation) with *id.* at 580–81 (Blackman, J., dissenting in part) (*Holt Bank* does not apply to treaty reservation); and *Choctaw*, 397 U.S. at 634 (*Holt Bank* does not preclude treaty interpretation) with *id.* at 639 (Douglas, J., concurring) (*Holt Bank* only applies to aboriginal title) and with *id.* at 647–48 (White, J., dissenting) (*Holt Bank* applies to treaty tribes and does not allow a general exception to the equal footing doctrine for tribes).

\(^{117}\) 450 U.S. 544 (1980).

\(^{118}\) See supra notes 108–11 and accompanying text.

\(^{119}\) *Montana*, 450 U.S. at 553. The Yellowstone River was mentioned in the treaty, but the rights to it were not at issue.

\(^{120}\) *Id.* at 575 (Blackman, J., dissenting) (pointing out the similarity to *Choctaw*).

\(^{121}\) *Choctaw*, 397 U.S. at 628. In *Choctaw*, the Court apparently thought that the question of title in these circumstances was settled.

\(^{122}\) *Montana*, 450 U.S. at 552–53.

\(^{123}\) *Id.* at 553–54.

\(^{124}\) *Id.* at 556–57. In a footnote, the *Montana* Court distinguished *Choctaw* as based on "very peculiar circumstances," and as a "singular exception" to the established line of cases. *Id.* at 555 n.5.
Court distinguished *Alaska Pacific Fisheries* as presenting a “public exigency” not present in the instant case. What exactly that “public exigency” was, and how the situation in *Montana* was different, the Court did not make clear.

The concurring and dissenting opinions typify the Court’s lingering inability to handle the precedent. Justice Stevens noted in concurrence that the dissent read *Choctaw* as establishing for Indian reservations a blanket exception to the requirement for clear language to rebut a presumption in favor of the state. Stevens, however, interpreted *Holt Bank* as “unanimously and unequivocally” holding that the state title presumption applies to reservation land, negating any blanket exception. He failed, however, to note that *Holt Bank* did not involve a treaty-created reservation.

Justice Blackmun argued in the *Montana* dissent that *Choctaw* should control, because the state claim in *Montana* was almost identical to that in *Choctaw*. The dissent rejected the *Montana* majority’s characterization of *Choctaw*’s “peculiar circumstances.” Instead, the dissent described *Holt Bank* as the “singular exception” to the established line of cases, distinguishing it as a case not involving a formal treaty. Although the

125. Id. at 556.
126. The *Alaska Pacific Fisheries* Court held that the signing of the treaty to make a reservation was sufficient to satisfy Shively. *Alaska Pac. Fisheries*, 248 U.S. at 88. Treaty signing would then give rise to a blanket exception for public exigency.
127. *Montana*, 450 U.S. at 567–68. Justice Stevens noted that only four justices, including Justice Douglas, joined the majority opinion in *Choctaw*, and stated that he did not know how he would have voted or whether that case would have influenced his role in the present opinion, had he been on the *Choctaw* Court. Id. at 568–69.
128. Id. at 568. Although Justice Stevens indicated that the reference to *Holt Bank* in the Court’s opinion in *Choctaw* could hardly be characterized as “enthusiastic,” he also noted that the *Choctaw* opinion did not purport to abandon or modify *Holt Bank*’s rule. Id. In an apparent misreading, Stevens described Douglas’ concurring opinion in *Choctaw* as concluding that *Choctaw* met the “exceptional circumstances” required by *Holt Bank*. Id. Justice Douglas, in *Choctaw*, clearly distinguished *Holt Bank* as involving aboriginal title. See *Choctaw*, 397 U.S. at 639.
130. Id. at 574 n.9.
131. Id. at 581 n.17. For a case finding sufficient express language, see United States v. Stotts, 49 F.2d 619 (W.D. Wash. 1930). There the district court ruled on a treaty with the Lummi Indians that described the reservation as extending to the low tide line of the Gulf of Georgia. Id. at 620. Since the water was tidal, navigability was not in dispute. The court held that the plain language included the tide lands in the reservation, thus overcoming a presumption in favor of a grant to the state. Id. at 621. This is one of the few documents that explicitly refers to navigable water within a reservation. Perhaps the language occurred because the reservation included water that was navigable according to the English common law definition: water affected by tides. *See generally supra* Part I.B. The *Stotts* court, like the Supreme Court, engaged in a selective use of precedent. The court distinguished *Taylor v. United States*, 44 F.2d 531 (9th Cir. 1930), cert. denied, 283 U.S. 820 (1931), and *Holt Bank* as lacking language specific enough to overcome the presumption in favor of the state. *Stotts*, 49 F.2d at 621. *Winans* and *Alaska Pacific Fisheries*, which would have supported the court’s holding, albeit not under the “express purpose” doctrine, were not mentioned. *See infra note* 170 for further discussion of *Taylor*. 

1200
Title to Submerged Lands

Montana majority appeared to require express language from Congress in the treaties to show that the Shively “public purpose” requirement had been considered, it also reflected hints of yet a third approach to the issue. Where a court discerns no language of express grant in the treaty, it may nonetheless go one step further to discover congressional intent: the court may search for an implicit reading of the treaty parties’ understanding. The Montana Court expressly found that the Crows were nomadic, dependent on buffalo, and that fishing was not important to their way of life. The Court apparently utilized these facts to evaluate whether Congress intended to grant the disputed submerged lands. The facts failed to raise the inference of a grant, since the waterways did not appear to be central to the tribe. It is by means of this approach that equal footing doctrine analysis touches a separate doctrinal subject: Indian treaty construction.

D. Treaty Construction

The interpretation of treaties is a fundamental aspect of Indian law. The canons of construction direct that Indian treaties be interpreted in a way that the Indians would have understood them, all doubt be resolved in favor of the tribes, and doubts be resolved in a manner that furthers the purpose of the creation of reservations. The government is held to a very high standard of dealing. The underlying rationale is that the treaty process was not arm’s-length bargaining between equals; it was instead similar to an adhesion contract imposed on the tribe, which often had no choice but to accept the terms. Consequently, treaties are to be construed in the manner that the Indians, who usually were English-illiterate, would have understood them. Courts first reconstruct the manner in which the

132. The first approach the Court articulated was the “blanket exception” doctrine of Alaska Pacific Fisheries. See infra notes 155–61 and accompanying text. The second was the “express language” doctrine necessary to infer “express purpose” derived from Holt Bank. See supra notes 106–16 and accompanying text.

133. Montana, 450 U.S. at 556. The Ninth Circuit had held below that the intent of the parties and the circumstances surrounding the signing of the treaty were sufficient to grant the Big Horn River to the tribe. United States v. Montana, 604 F.2d 1162, 1166–67 (9th Cir. 1979).


135. Choctaw, 397 U.S. at 631.

136. Id.

137. See Alaska Pac. Fisheries, 248 U.S. at 89.

138. See F. COHEN, supra note 6, at 220 (the trust relationship involves fiduciary duties).


tribes lived at the time of the treaty, and then attempt to determine the intent of both the tribe and the government at the treaty signing.\(^{141}\) The treaty is often viewed not as a grant of rights from the government to the tribe, but rather as a reservation of rights already possessed and not granted away.\(^{142}\) The canons have been extensively used to determine the existence of water rights.\(^{143}\) When a court determines such rights, the critical element is the tribe’s relationship to the water resource, both prior to the treaty and as intended after the signing.\(^{144}\)

Determinations of title to submerged lands represent further examples of rights inadequately stated in treaties. Courts may also employ the canons of Indian treaty construction to evaluate those rights. Shively, however, appears to require a “suitable public purpose” and an explicit congressional intent to defeat a state claim to title under the equal footing doctrine. Express grant language has not been required in other areas involving Indian rights, because the Indians were unable to comprehend the treaty language. The presence of submerged lands does not alter this rationale. If a tribe reasonably thought that it was given the title, or the treaty indicated the tribe’s intent to use the water, then the title passed to the tribe at the treaty-signing.

The aim of the Supreme Court, in the line of reservation submerged lands title cases, should have been to clearly articulate whether Shively’s “express purpose” requirement, when applied to treaties,\(^{145}\) could be satisfied through interpretation of the treaty as a whole, and whether congressional intent could be determined under the canons of Indian treaty construction by reference to the tribe’s understanding. Again, the Court has manifested inconsistency and confusion on these questions.

The Supreme Court’s first decision concerning the effect of a treaty conflicting with the equal footing doctrine was *United States v. Winans.*\(^{146}\) This case did not involve title to submerged lands, but rather the right to use the waterways. In *Winans,* the treaty stated that the Yakima tribe had “the right of taking fish at all usual and accustomed places, in common with citizens of the Territory.”\(^{147}\) The lower court held that this gave the Indians only the same rights as other citizens.\(^{148}\) The Supreme Court reversed,

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142. *Winans,* 198 U.S. at 381; accord *Fishing Vessel Ass'n,* 443 U.S. at 675.
143. *See F. Cohen,* supra note 6, at 575–604.
144. *See Alaska Pac. Fisheries,* 248 U.S. at 88–89.
145. Note that many of these treaties were signed long before *Shively* was decided. *See infra* notes 178–81 and accompanying text.
146. 198 U.S. 371 (1905).
finding that the treaty granted the Indians a permanent servitude.\(^{149}\)

A significant portion of the opinion dealt with the Yakima tribe's understanding of what the treaty meant,\(^{150}\) in keeping with the canons of Indian treaty construction. The Court observed that, at the time of the treaty, the Yakimas' right to fish was "not much less necessary . . . than the atmosphere they breathed."\(^{151}\) Stating that treaties will be construed as reason and justice demand, the Court held that no other conclusion would give effect to the treaty.\(^{152}\) The Court found that the grant met Shively's public purpose requirement, since the treaty extinguished the Indian title and opened the land for settlement.\(^{153}\) The treaty imposed a servitude on the territory against the United States and its grantees, and against the state and its grantees.\(^{154}\)

The Court in *Alaska Pacific Fisheries*\(^{155}\) also sought proper resolution of title through treaty construction.\(^{156}\) Congressional intent was to be determined by examining the circumstances surrounding the reservation's creation.\(^{157}\) The reservation's purpose was essential for assessing whether or not the grant included the navigable water.\(^{158}\) The Court held that establishing the reservation for "safe-guarding and advancing a dependent Indian people dwelling within the United States" met the Shively test for recognized public purpose.\(^{159}\) Much of the opinion is a description of the lifestyle of the Indians.\(^{160}\) Since the submerged lands were essential to the Indians' lifestyle, and hence the reservation's purpose, the Court concluded that

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149. *Winans*, 198 U.S. at 381. The river banks and bed in question were not on the reservation, hence the tribe was given a servitude, not the title. Although the non-Indian owner of the land in question had a clear patent title from the United States government, and the *locus in quo* was on the bank of a navigable river, the Court held the grant to the Yakima tribe to be superior. *Id.* at 380–82.

150. *Id.*

151. *Id.* at 381.

152. *Id.*

153. *Id.* at 384. This early application of Shively and the equal footing doctrine should have been controlling in later cases that considered the same issue. For the most part *Winans* was not even cited, much less followed. *See supra* notes 83–100, 106–33 and accompanying text; *infra* notes 155–65 and accompanying text.


155. 248 U.S. 78 (1918).

156. *Alaska Pac. Fisheries*, 248 U.S. at 87. The Court was willing to concede a blanket Shively public purpose exception to treaty grants if in fact Congress intended to include the waterbeds in the treaty.

157. *Id.*

158. *Id.* at 89.

159. *Id.* at 88.

160. *See id.* at 88–89.
Congress intended to include the submerged lands in the grant to the tribe.\textsuperscript{161}

Similarly, citing \textit{Alaska Pacific Fisheries}, Justice Marshall said in \textit{Choctaw}\textsuperscript{162} that the question was one of treaty interpretation.\textsuperscript{163} \textit{Choctaw} is perhaps the high-water mark of the Court’s consideration of both the circumstances surrounding a signing and the intent of the signers of the treaty. The Court found persuasive the clause “no part of the land granted to them shall ever be embraced in any Territory.”\textsuperscript{164} Justice Douglas’ concurrence was an extensive review of the conditions surrounding the making of the treaty and the signers’ intent.\textsuperscript{165}

The Ninth Circuit adheres to broad treaty construction principles as well. In \textit{Moore v. United States},\textsuperscript{166} no explicit language granted the river bed to the tribe. Nonetheless, the court decided that the treaty did award control of the bed of the Quillayute River and tidelands to the tribe.\textsuperscript{167} The court found that Congress intended tribal ownership, citing the \textit{Alaska Pacific Fisheries} opinion.\textsuperscript{168} Determinative factors were the fishing practices of the tribe at the time of the treaty and intended future commercial development.\textsuperscript{169} The court found it necessary to distinguish \textit{Holt Bank’s} factual evidence.\textsuperscript{170}

\textsuperscript{161} Id. at 89–90. A possible distinguishing characteristic of this case is that the territory had not yet been granted statehood at the time of the opinion. The Court does mention that this was not “a private grant, but simply a setting apart, ‘until otherwise provided by law,’ . . . for a recognized public purpose”; i.e., the advancement of the Indian people. \textit{Id.} at 88. The Court did not dwell upon pre-statehood status, and this factor has not been used to distinguish the case in subsequent decisions.

\textsuperscript{162} 397 U.S. 620 (1970).

\textsuperscript{163} \textit{Choctaw}, 397 U.S. at 631 (citing \textit{Alaska Pac. Fisheries}, 248 U.S. at 89).

\textsuperscript{164} \textit{Choctaw}, 397 U.S. at 635.

\textsuperscript{165} \textit{Id.} at 636–43 (Douglas, J., concurring). The dissent in \textit{Montana v. United States}, 450 U.S. 544 (1980), also focused on circumstances at the time of the treaty, the intent of the treaty signers, and the Indians’ understanding of the treaty’s meaning. \textit{Id.} at 569–79 (Blackmun, J., dissenting). Justice Blackmun concluded by saying that the majority opinion had blinded itself to the circumstances of the grant in determining the intent of the grantor. \textit{Id.} at 580.

\textsuperscript{166} 157 F.2d 760 (9th Cir. 1946), \textit{cert. denied}, 330 U.S. 827 (1947).

\textsuperscript{167} \textit{Moore}, 157 F.2d at 765.

\textsuperscript{168} \textit{Id.} at 762.

\textsuperscript{169} \textit{Id.} One-fourth of the opinion was an historical review of the dependency of the Quillayute on fish, both for food and commercial use. See \textit{Id.} at 762–63.

\textsuperscript{170} The \textit{Moore} court distinguished \textit{Holt Bank}, where the absence of a treaty had defeated tribal ownership, as lacking evidence of the tribe’s use of the navigable waters. \textit{Id.} at 765. In acknowledging the conflict between \textit{Alaska Pacific Fisheries} and \textit{Holt Bank}, the court stated that \textit{Alaska Pacific Fisheries} was not mentioned in the \textit{Holt Bank} opinion and “we cannot regard it as overruled \textit{sub silentio}.” \textit{Id.}

The Ninth Circuit had first examined the treaty creating the Quillayute tribe reservation in \textit{Taylor v. United States}, 44 F.2d 531 (9th Cir. 1930), \textit{cert. denied}, 283 U.S. 820 (1931). The treaty did not mention the Quillayute River, even though the reservation’s boundaries included the river. \textit{Id.} at 532. The United States sued on behalf of the tribe to stop barge owners from using the river. \textit{Id.} at 531. The Ninth Circuit held that the land had been granted to the state before the reservation was founded. \textit{Id.} at 535. \textit{Moore} found this finding to be factually incorrect. \textit{Moore}, 157 F.2d at 764 n.3.
Title to Submerged Lands

In a 1963 case, *Skokomish Indian Tribe v. France,* the Ninth Circuit again used treaty construction principles to affirm a district court ruling that the title to tidelands was in the state, not the tribe. The treaty described the eastern boundary of the reservation as “along” Hood Canal. The tribe claimed ownership extending to the low tide line. Despite the ambiguous language which may have included the tidelands, the district court held that the treaty parties did not show any intent to pass title to the tidelands. The appellate court independently reviewed the lifestyle of the tribe at the time of the treaty and determined that the tribe did not use the tidelands and had no expectation of using them. Here the court felt compelled to distinguish *Alaska Pacific Fisheries.*

Again in 1982, in *Confederated Salish & Kootenai Tribes v. Namen,* the court noted the Supreme Court’s frequent admonitions to construe treaties as the Indians would have. The court agreed that *Montana* established that the Supreme Court did not recognize a blanket exception to the presumption against grants of navigable waters to reservations. The court indicated, however, that the pro-Indian rule of construction should “weaken” that presumption, especially where, as in the instant case, the controlling treaty was negotiated and ratified long before the presumption arose. The court noted that one of the Flathead tribes depended on fishing. The court also observed that the Office of Indian Affairs’ urgency in getting the Senate to ratify the Flathead reservation treaty indicated that the opening of land to settlers was perceived as a “public

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171. 320 F.2d 205 (9th Cir. 1963), cert. denied, 376 U.S. 943 (1964).
172. *Skokomish,* 320 F.2d at 210.
173. Id. at 207.
174. Id. at 210.
175. Id. at 210–12.
176. Id.
177. The court distinguished *Alaska Pacific Fisheries,* since the tidelands there were essential to the purpose of the treaty, and therefore Congress must have intended to include them. *Id.* at 212. Citing *Holt Bank,* the court in *Skokomish* found that the documents and historical background material did not manifest an intention of the treatymakers to include the tideland in the grant. *Id.* at 213. An interesting ground for distinguishing this case from *Moore and Montana Power Co. v. Rochester,* 127 F.2d 189 (9th Cir. 1942), is that the water in *Skokomish* was tidal, and thus navigable under the traditional English common law definition of navigability. See supra notes 52–53 and accompanying text.
178. 665 F.2d 951 (9th Cir.), cert. denied, 459 U.S. 977 (1982).
179. *Confederated Salish,* 665 F.2d at 962 (citing five Supreme Court opinions, all decided in the 1970’s).
180. *Id.* at 962 n.29.
181. *Id.*
182. *Id.* at 962.
exigency” in the 1850’s. Thus the Shively requirement for a private grant was satisfied.

The Ninth Circuit continued to regard the interpretation of treaty circumstances as of primary importance in *Puyallup Indian Tribe v. Port of Tacoma*. *Puyallup* involved land that was uncovered when a river was rerouted. The State of Washington took possession and built waterfront facilities on some of the land, selling the rest for private development. The tribe sued to quiet title. Despite the fact that the Puyallup River was not specifically mentioned in the creation of the reservation, the court, applying *Montana*, held that the tribe had title to the bed of the river. The court concluded that if the government was plainly aware of the importance of submerged lands to the tribe at the time of the treaty, then the plain meaning requirement of *Holt Bank* was satisfied. The court gave weight to the fact that *Choctaw*’s receptive attitude to treaty interpretation had not been rejected in *Montana*.

These cases show the process by which the canons of Indian treaty construction may be incorporated into the process of equal footing doctrine analysis. Once again, however, the cases are not uniform or clear on the point.

The historical sticking point continues to be the *Holt Bank* “express purpose” requirement. Wherever political expediency or factual complexity make a decision in favor of Indian rights undesirable, the courts tend to reach back to *Holt Bank* and ignore the *Winans-Chocktaw* line of cases. *Montana*, as the currently controlling reservation submerged lands decision, relied heavily on *Holt Bank* in approaching the treaty in dispute with an eye to language of express grant. Yet *Montana* did not overrule *Choctaw*. Nor did it totally ignore treaty conditions at the time of making. As a result, the extent to which treaty construction remains a viable tool to prove congressional intent remains in doubt.

183. *Id.*
186. Although not explicitly stated by the court, the absence of language to that effect can be inferred from the court’s analysis of the issue. *Puyallup*, 717 F.2d at 1256-61.
187. *Id.* at 1262.
188. *Id.* at 1258.
189. *Id.* at 1257.
190. 270 U.S. 49 (1926). *See supra* notes 106–11 and accompanying text.
193. *See supra* note 133 and accompanying text.
Title to Submerged Lands

II. INDIAN RIGHTS TO SUBMERGED LANDS: MODERN ANALYSIS

A. Critique of the Montana Decision

Where does the issue of title to submerged lands stand? If the body of water over the submerged lands was specifically mentioned in the treaty, which appears to have happened only when the waterway was a boundary or was outside the reservation,\textsuperscript{194} the tribe can claim title under the express grant theory. However, actual mention in the treaty may not always be necessary.\textsuperscript{195} The language requirement after Montana is not clear. Neither Montana nor the earlier Choctaw decision specifically overruled or adequately reconciled the contrary precedent.

In its rush to reaffirm the existence of a distinction based on navigability, the Montana Court neglected the basic tenets of Indian treaty construction.\textsuperscript{196} The Court ignored Winans and Alaska Pacific Fisheries,\textsuperscript{197} in which it had considered the same issues. It also inadequately distinguished Choctaw, in which almost identical issues were considered only ten years before.\textsuperscript{198}

The Montana Court’s reliance on Holt Bank as controlling precedent was also misplaced.\textsuperscript{199} To insist that Holt Bank established a clear language requirement for grants to tribes exceeds the case’s precedential value. Holt Bank is the only submerged lands case in which the reservation was not explicitly recognized by treaty.\textsuperscript{200}

To now require, as Montana apparently does, that treaties must contain language showing intent to reserve the beds in order for the tribes to have

\textsuperscript{194} See infra note 201.
\textsuperscript{195} This was the case in Puyallup, 717 F.2d 1251 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984). See supra note 186 and accompanying text.
\textsuperscript{196} See supra notes 134–44 and accompanying text.
\textsuperscript{197} See supra notes 146–61 and accompanying text.
\textsuperscript{198} See supra notes 89–100 and accompanying text.
\textsuperscript{199} In Holt Bank, the government never explicitly agreed to the reservation. The land in question was in the process of sale to private buyers. See supra notes 111–14 and accompanying text.
\textsuperscript{200} See supra notes 106–16 and accompanying text. The Montana dissent’s use of precedent was also flawed. The dissent’s reliance on Brewer, Donnelly, Alaska Pacific Fisheries, and Choctaw was not as solid as the dissent believed. Alaska Pacific Fisheries did not involve a conflict between a state and a reservation, and thus can be read as leaving the state’s rights question open. See supra note 161. Brewer and Donnelly were nonnavigability cases. See supra notes 61, 66 and accompanying text. Although the two opinions may contain relevant dicta, these cases should not be cited as controlling in situations that do involve navigable waters. Finally, Choctaw itself did not adequately address the issue of navigability. See supra note 96. In this respect it presents unreliable precedent. The navigability distinction has been important in water law and deservedly so. The public has an interest in navigable waterways that should be protected.
title is disingenuous at best, given the Indians’ unequal bargaining position and congressional ignorance of requirements that would materialize decades later. If the Montana Court intended to create an “express purpose” exception to the “surrounding circumstances” rule of treaty interpretation for navigable water, the Court should have been more explicit. A more likely explanation, however, is that Montana is simply another Indian law case that was decided on its own facts and exigencies, without full treatment of lines of precedent necessary to shape future decisions.

B. Reconciliation

The history of title rights to beds of navigable waters on Indian lands is the story of two distinct doctrines, the proper blending of which the Court has never quite adequately achieved. Donnelly and Brewer were decided on the issue of nonnavigability. Winans, Alaska Pacific Fisheries, and Choctaw were decided on the basis of an implicit treaty grant, using Indian law principles of interpretation. Holt Bank and Montana were decided on the basis of explicit intent requirements of the equal footing doctrine of water law. The Court has not dealt with the possible contradictions of Indian law and water law in determination of title to submerged lands on reservations. Consequently no clear “law” on the issue has emerged. The reconciliation of water law and Indian law derives from exploring the underlying policy reasons of each doctrine. If the rationale behind the equal footing doctrine is understood, and the unique position of Indian tribes is kept in mind, the two doctrines are easily reconciled. The purpose of the clear language exception to the equal footing doctrine set forth in Shively is to insure that navigable waterways remain in the control of a sovereign

201. See Montana, 450 U.S. at 577. The result is also absurd in practice. For example, in Montana the Big Horn River, flowing through the middle of the reservation, was not specifically mentioned in the treaty, so the court held that the tribe did not have title. On the other hand, the Yellowstone River was mentioned, merely because the boundary of the reservation was the “mid-channel of the Yellowstone River.” Id. at 553 n.4. Under the Montana rationale, the tribe must have title to half the bed.


203. This tendency has been noted in other areas of Indian law. See Barsh, Review of Recent Indian Law, 59 WASH. L. REV. 863, 863–64 (1984). Barsh, in analyzing the Court’s 1982 term, said that “it is doubtful whether the recent judicial record concerning Indian affairs merits categorization as ‘law.’” Id. at 863.

204. See supra notes 60–69.

205. See supra notes 50–68.

206. See supra notes 101–33.

207. See supra note 203.
Title to Submerged Lands

entity; if not the federal government, then the state government. Shively set out the purpose behind the navigable waters doctrine almost a century ago:

Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore the title and the control of them are vested in the sovereign for the benefit of the whole people.\footnote{208}

Indian tribes, however, are also sovereign entities.\footnote{209} The Court has long upheld this sovereignty, beginning with \textit{Worcester v. Georgia} in 1832.\footnote{210} Tribes’ special sovereign status has been the basis of many exceptions to laws which would otherwise be applicable.\footnote{211} Montana’s requirement, that the same standard for passing title to a private individual should also be applied to a sovereign tribe, ignores both the purpose of the equal footing doctrine and the unique status of the tribal entities. This requirement also disregards the reality under which the treaties were made. It is doubtful that any tribe understood the necessity of specifically including the beds of navigable waters in their treaties, particularly since most reservations predate the \textit{Shively} decision.

In light of the tribes’ sovereignty, the presence of a reservation should be sufficient to justify an exception to the equal footing doctrine. In creating the reservations, Congress set aside federally protected areas for the Indians to live free from state interference.\footnote{212} The federal trust relationship is the core of Indian law. To allow the states to have jurisdiction over beds of water inside a reservation violates that principle.\footnote{213} Given that reservations are controlled by sovereign tribal governments, and that the land is held in trust by the federal government for the tribe, in the majority of cases, the policy reasons expressed in \textit{Shively} would be met by allowing the tribes to retain the traditional Indian title. Location of submerged lands within a reservation should create a rebuttable presumption of tribal title, as the Ninth Circuit held in \textit{Rochester}.\footnote{214}

\footnotesize
\begin{itemize}
  \item \footnote{208}{Shively v. Bowlby, 152 U.S. 1, 57 (1894).}
  \item \footnote{209}{Thus, the grant is not “private.” \textit{See supra} note 87.}
  \item \footnote{210}{31 U.S. (6 Pet.) 515 (1832). \textit{ Accord} United States v. Mazurie, 419 U.S. 544 (1975) (upholding sovereignty status).}
  \item \footnote{211}{\textit{See F. COHEN}, \textit{supra} note 6, at 246–57 and 324–28.}
  \item \footnote{212}{The earliest cases on Indian law concern state interference. \textit{Worcester} v. \textit{Georgia}, 31 U.S. (6 Pet.) 515 (1832); \textit{Cherokee Nation} v. \textit{Georgia}, 30 U.S. (5 Pet.) 1 (1831).}
  \item \footnote{213}{Nor is the policy underlying the special status of navigable waters furthered by denying Indian jurisdiction. Most tribes can prudently manage that resource. \textit{See generally} \textit{F. COHEN}, \textit{supra} note 6.}
  \item \footnote{214}{\textit{See supra} notes 101–05 and accompanying text. The presumption could be rebutted with evidence that, as per the canons of treaty construction, the Indians did not need or intend for the water
\end{itemize}
interest in navigable waterways would be further protected, since in a majority of cases the tribe would only be granted the right of occupancy title; the fee would still be held in trust by the federal government.\textsuperscript{215} Thus, in rare situations such as \textit{Holt Bank}, where the reservation land base is sold or granted to private ownership, the federal government could transfer the title of the submerged lands to the state.\textsuperscript{216}

To recognize a rebuttable presumption in favor of grants to reservations based on implicit treaty intent would satisfy the purposes of both the equal footing doctrine—keeping title to navigable water out of private hands—and federal Indian treaties—protecting Indian tribes from state interference. The recognition of a presumption in favor of tribal ownership would accomplish a number of other objectives as well: (1) by reconciling the prior cases, it would give clear guidance to lower courts; (2) it would establish “law” for this question; and (3) not inconsequently, it would also be more reasonable, fair, and just, thus helping reduce the gap between Indians’ theoretical and practical rights.

III. CONCLUSION

A fundamental characteristic of law is that it provides a clear, predictable, analytical path to resolve a dispute. The courts have not provided a clear, predictable analysis in determining questions of title for submerged lands on Indian reservations. Once the issues and cases involved are explored, it is possible to lay out a framework in which questions of title to submerged lands can be clearly, fairly and predictably answered.

The first question to be resolved is whether the tribe has a claim based on aboriginal title. If the tribe can show aboriginal title, the equal footing doctrine is inapplicable, and the federal government never had use title to grant or withhold from the state. In addition, the question of navigability does not arise, since the navigation distinction does not exist with aboriginal title. The only issue is whether the land is within the traditional use area of the tribe. If aboriginal use is shown, as appeared to be the case in \textit{Montana}\textsuperscript{217} and \textit{Holt Bank},\textsuperscript{218} the tribe retains use title, as “sacred as fee simple.”\textsuperscript{219} If, however, as is often the case, the aboriginal title has been extinguished by treaty or migration, then the court must continue its analysis.

\begin{footnotes}
\footnotetext[215]{The federal government would, of course, retain the navigable servitude.}
\footnotetext[216]{\textit{Tee-Hit-Ton}, 348 U.S. 272 (1955) notwithstanding, such transfer should be contingent on the tribe being compensated for its holdings.}
\footnotetext[217]{See supra notes 30–32 and accompanying text.}
\footnotetext[218]{See supra notes 27–29 and accompanying text.}
\footnotetext[219]{See supra note 15 and accompanying text.}
\end{footnotes}
Title to Submerged Lands

If the tribe cannot show aboriginal title, the next issue to be examined is navigability. If the water was not navigable at the time of creation of the reservation, the title passed to the tribe. This result has been well-defined in water law. The Indian law cases, for the most part, have analyzed the issue responsibly.

If the water was navigable, the rules of Indian treaty interpretation should apply. This would, in effect, create a presumption of ownership in the tribe. The state can overcome the presumption by showing that the treaty signers did not expect the tribe to take title. This is a heavy burden. It is not an impossible one, however.\textsuperscript{220} This analysis is fair as well as logical, since before the Europeans came, the Indians had use of all the land. Having convinced the Indians to trade away the vast majority of the land in return for "reservations," the United States can well afford to cede the title to beds of navigable waters within these reservations. In the words of Justice Black, "[g]reat nations, like great men, should keep their word."\textsuperscript{221}

Although the Supreme Court has yet to recognize aboriginal title in determining title to submerged lands, the lower courts are beginning to do so. If considered in conjunction with the suggested resolution of the conflict between the equal footing doctrine and treaty interpretation, aboriginal title rights would significantly reduce the gap between Indians' theoretical rights and those actually recognized.

\textit{Rick Best}

\textsuperscript{220} If a coastal tribe claimed the seabed, for example, or if a tribe on Puget Sound in Washington State sued to quiet title to subtidal land in the Sound, the state could undoubtedly meet its burden. See supra notes 171–77 and accompanying text.