Not on Claims Alone: Determining Indian Title to Intertidal Lands—United States v. Aam, 887 F.2d 190 (9th Cir. 1989)

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NOT ON CLAMS ALONE: DETERMINING INDIAN TITLE TO INTERTIDAL LANDS—United States v. Aam, 887 F.2d 190 (9th Cir. 1989)

Abstract: The equal footing doctrine creates a presumption against conveyance of the beds of navigable waters by the United States prior to statehood. Where submerged lands lie within the boundaries of an Indian reservation, the presumption may conflict with the canons of construction applicable in Indian law. In United States v. Aam, the Ninth Circuit attempted to resolve this conflict by establishing a per se test to determine when the presumption is rebutted. This Note examines the Ninth Circuit's opinion and concludes that in light of the respective policies underlying the conflicting doctrines, the court's test gives insufficient weight to the canons of construction.

United States v. Aam is one of a number of cases brought in recent years to determine Indian title to submerged lands. Collectively, these cases have involved hundreds of citizens and title to millions of dollars' worth of land. Tribal concerns triggering such actions have included interests in mineral rights, the assertion of regulatory jurisdiction over hunting and fishing on the reservation, the environmental impact of shoreline development on established fisheries, and the preservation of traditional uses.

The equal footing doctrine creates a presumption against conveyance of the beds of navigable waters to private parties by the United States prior to statehood. When the beds of navigable waters within the boundaries of Indian reservations were not expressly conveyed to a tribe in the instrument creating the reservation, the presumption conflicts with the canons of construction, which require that Indian treaties be construed as the Indians would have understood them. In

7. Id.
8. See infra notes 14–16 and accompanying text.
*Aam*, the Ninth Circuit resolved this conflict by establishing a per se test to determine when the presumption is successfully rebutted. This Note concludes that in light of the respective policies underlying the conflicting doctrines, the court's test gives insufficient weight to the canons of construction. Rather than clarifying the pertinent analytical framework, the court further confused the role that the canons of construction play in rebutting the presumption against conveyance.

I. THE SUBMERGED LANDS CONFLICT—EQUAL FOOTING AND THE CANONS OF CONSTRUCTION

This section discusses the nature of the conflict between the presumption against conveyance and the canons of construction. The focus then turns to judicial approaches to its resolution, with particular emphasis on the Ninth Circuit’s decision in *Aam*.

A. The Conflict Between the Equal Footing Doctrine and the Canons of Construction

1. Equal Footing Doctrine—The Presumption Against Conveyance

Under the equal footing doctrine, the federal government holds title to the beds of navigable waters in trust for future states. Title passes to states when they enter the Union and assume sovereignty on an "equal footing" with established states. Congress retains the power to convey lands beneath navigable waters prior to statehood to carry out public purposes appropriate to the objectives for which the United States holds the territory. One such appropriate public purpose is the establishment of an Indian reservation.

Although retaining the power to convey submerged lands, Congress has refrained from granting away the beds of navigable waters except in the face of an international duty or public exigency. Courts therefore have established a presumption against conveyance of submerged

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12. *Shively v. Bowlby*, 152 U.S. 1, 48 (1894). Congress may also grant lands under navigable waters 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." *Id.*
14. *Shively*, 152 U.S. at 50. The existence of a public exigency is not a constitutional requirement; the only constitutional stricture is that the disposition of submerged lands be appropriate to the purposes for which the United States holds the property. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 200–01 (1987).
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lands to entities other than future states. The policy underlying this presumption is to prevent piecemeal grants of submerged lands to individual proprietors in derogation of public rights.

Courts applying the presumption have found congressional intent to convey beds of navigable waters only if that intent was "definitely declared or otherwise made very plain." In circumstances where the federal government acted with reference to a contemporaneous public exigency in establishing a reservation, the government's intention to convey submerged lands has been regarded as "very plain." Thus, where the instrument establishing the reservation did not expressly convey the submerged lands within it, resolution of disputes regarding title to those lands has turned on whether the public exigency exception to the equal footing doctrine applied.

The public exigency requirement can be met in several ways. Courts have concluded that public exigencies existed where a tribe resorted to violence to assure access to the disputed resource, where there was an urgent need to open an area to settlement, or where the Indians depended on the disputed area for their diet or way of life. Therefore, court determination that a tribe depended on submerged lands warrants concluding that those lands were conveyed to the tribe.

15. See, e.g., Montana, 450 U.S. at 552.
16. Shively, 152 U.S. at 50. A grant to a private party is distinguishable from a grant to a sovereign body such as an Indian tribe. Alaska Pac., 248 U.S. at 88 (a reservation is not in the nature of a private grant).
19. Reservations were established by treaties, agreements, executive orders, and statutes. See generally F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 127-28 (1982 ed.). Mid-19th century treaties seldom expressly referred to navigable waters, reflecting that the Court did not articulate the doctrine requiring express reference in order to reserve those waters until 1894. See Namen, 665 F.2d at 961, n.27.
20. See, e.g., Namen, 665 F.2d at 962. Note the distinction between the public purpose exception and the public exigency requirement: public purpose speaks to congressional power to convey submerged lands; public exigency speaks to congressional policy to refrain from conveying away submerged lands.
22. See Choctaw Nation v. Oklahoma, 397 U.S. 620, 626-27 (1970); Namen, 665 F.2d at 962 (specifically applying this exception to Washington Territory).
24. See, e.g., Namen, 665 F.2d at 962 (citing Montana, 450 U.S. at 556).
2. The Canons of Construction—Rebutting the Presumption Against Conveyance

Long-established canons of Indian treaty construction require that (1) treaties be construed as the Indians understood them, and (2) doubtful expressions be resolved in the Indians’ favor. Courts apply the canons of construction to compensate for the disadvantage in bargaining power the treaty process placed upon Indians and to discharge the federal trust responsibility. Because the canons stem in part from the special trust relationship between the United States and Indian tribes, they have been extended to provide for liberal construction of executive orders, statutes, and agreements in favor of the Indians. An additional purpose of the canons is to further the policies underlying the establishment of Indian reservations, such as preserving a means of livelihood for the tribes.

In applying the canons of construction to title disputes over beds of navigable waters, courts consider the relationship of the tribe to the disputed resource at the time the reservation was established. Where Indians depended on a disputed resource, courts have concluded that the resource was reserved, because a tribe would not have acceded to an agreement that denied it access to a needed resource.

3. Balancing the Equal Footing Doctrine and the Canons of Construction

When a tribe claims an interest in submerged lands not expressly conveyed in the instrument establishing the reservation, the equal footing doctrine may conflict with the canons of construction. The

25. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832); see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 675–76 (1979) (because the treaties were recorded in English, the United States has a responsibility not to take advantage of its superior knowledge of the language).


27. F. COHEN, supra note 19, at 221. “It cannot be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government . . . .” Winters v. United States, 207 U.S. 564, 577 (1908).


31. See Winans, 198 U.S. at 380–81.

canons do not nullify the presumption against conveyance of submerged lands; the canons, however, serve to ease the burden of rebutting the presumption. The few courts faced with the task of resolving this conflict have balanced the two doctrines on a case-by-case basis.35

The presumption against conveyance requires the tribe to show that the government intended to depart from its usual policy of reserving lands beneath navigable waters for future states.36 If a tribe can demonstrate that a public exigency existed and that the government was aware of that exigency, it has met its burden of showing the government's intent.37

A tribe's dependence on a disputed resource is one indicator of a public exigency, as well as a way of determining Indian understanding of the terms of the agreement governing the resource.38 Therefore, dependence is indicative of both government intent and Indian understanding.39 Generally, when a tribe has shown some degree of dependence on the disputed resource, the courts affirm Indian claim to title.40 In contrast, when proof of dependence is lacking, the courts reject the Indian claim.41

B. Judicial Analysis of the Submerged Lands Conflict

1. The Supreme Court's Approach—Inconsistent Guidance

The Supreme Court has addressed the question whether Congress impliedly conveyed submerged lands to Indian tribes in four major cases.43 The Court, however, has not given consistent guidance on the

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33. Montana, 450 U.S. at 567-68 (Stevens, J., concurring).
34. Confederated Salish and Kootenai Tribes v. Namen, 665 F.2d 951, 962 n.29 (9th Cir.) (pro-Indian rules of construction should at least weaken the presumption against conveyance, especially where the controlling treaty was negotiated and ratified long before the presumption crystallized), cert. denied, 459 U.S. 977 (1982).
35. See infra notes 44-54 and accompanying text.
36. See supra note 17 and accompanying text.
40. Id.; see also United States v. Aam, 887 F.2d 190, 194 (9th Cir. 1989) (tribe's dependence on a water's resources is a key factor in determining whether the United States intended to retain beneficial title on behalf of the tribe).
41. See, e.g., Alaska Pac. 248 U.S. at 89-90.
42. See, e.g., Montana, 450 U.S. at 556.
extent to which the canons of construction should serve to rebut the presumption against conveyance.

In *Alaska Pacific Fisheries v. United States* and *Choctaw Nation v. State of Oklahoma*, the Court relied on the canons of construction to find that title to submerged lands had vested in the Indians. In both cases, the Court looked to the circumstances surrounding the reservation's establishment to construe the pertinent language of the instrument creating the reservation. In *Alaska Pacific*, the Court held that Congress reserved the waters adjacent to the reservation for the Indians because the Indians depended on the waters for both economic development and subsistence. In *Choctaw Nation*, the principles of Indian treaty construction required that title to the riverbed be vested in the tribe because the treaty establishing the reservation promised the Indians virtually complete sovereignty over the reserved lands.

In contrast, in *United States v. Holt State Bank* and *Montana v. United States*, the Court relied on the equal footing doctrine to hold that submerged lands were not reserved for the Indians. In *Holt State Bank*, the Court concluded that in the absence of an instrument specifically referring to or reserving the disputed area, nothing could be construed as indicating congressional intent. The Court likewise relied on the equal footing doctrine in *Montana v. United States* to hold that the United States had retained title to the bed of the Big Horn River for the future state. The Court reasoned that no public exigency existed because the Crow Tribe depended on buffalo, and fishing was not important to the Crows' diet or way of life.

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44. 248 U.S. at 87, 88–89.
45. 397 U.S. at 634–36.
46. *Choctaw Nation*, 397 U.S. at 634–36; *Alaska Pac.*, 248 U.S. at 87 (relevant circumstances included the character and location of the reservation, the needs of the Indians, and the object to be attained by the agreement).
47. *Id.* at 89 (because Congress intended to assure the economic development and self-sufficiency of the Indian community, and because the Indians could not have sustained their community on the upland alone, congressional intent to convey the submerged lands could be inferred). *Alaska Pacific* was not strictly an equal footing case, because Alaska was not yet a state at the time. However, the fact that *Montana* cited *Alaska Pacific* with approval indicates that its holding is applicable to equal footing cases. *See infra* note 54.
51. *Holt State Bank* involved a section of the Chippewa Tribe's aboriginal territory which, though never formally set apart as such, had come to be recognized as a reservation. 270 U.S. at 58. *See also* Minnesota v. Hitchcock, 185 U.S. 373, 389 (1902).
54. *Id.* at 556 (citing *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 88 (1918)). *Note that Montana* also did not overrule *Choctaw Nation*. *Id.* at 555 n.5.
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Court thus implied that had fishing been important to the Crows' diet or way of life, a public exigency justifying conveyance of the submerged lands might have existed.

Montana, the Supreme Court's most recent decision, did not apply the canons of construction. However, even where the Court did not refer to the canons of construction, the Court regarded a tribe's dependence on a disputed resource as indicative of both federal and tribal intent. Lower courts have concluded, therefore, that even after Montana, the presumption against conveyance must be balanced against the canons of construction.

2. United States v. Aam—The Ninth Circuit's Per Se Test

The Ninth Circuit's approach to determining Indian title to submerged lands in United States v. Aam drew upon its decision in Puyallup Indian Tribe v. Port of Tacoma. In Puyallup, the Puyallup Tribe sued to quiet title to submerged lands exposed when the Army Corps of Engineers redirected the course of a navigable river. In deciding the question of title to the exposed riverbed, the Ninth Circuit weighed the equal footing doctrine against the canons of construction. The Puyallup court held that the government's intent to convey title to the bed of a navigable body of water is "made very plain" and must be construed to include the submerged lands when

55. The Montana Court, citing Holt State Bank, appeared to conclude that it need not consider the canons of construction in its analysis. However, the Montana majority's reliance on Holt State Bank was based on a misreading of the relevant facts. The reservation in Holt State Bank was not, as the Montana decision suggested, created by treaty. Holt State Bank did not apply the canons of Indian treaty construction because the reserved lands had never been the subject of any treaty, executive order, or act of Congress. See Holt State Bank, 270 U.S. at 58; cf. Montana, 450 U.S. at 552. The Court's misreading of Holt State Bank thus should undermine the conclusion that Montana obviates the need to consider Indian understanding where the equal footing doctrine is concerned. See Montana, 450 U.S. at 581 n.17 (Blackmun, J., dissenting).

56. See Montana, 450 U.S. at 569 (Blackmun, J., dissenting) (majority disregarded the rule that treaties be construed as naturally understood by the Indians) (citing Washington v. Washington State Commercial Fishing Vessel Ass'n, 443 U.S. 658, 676 (1979)).


59. 887 F.2d 190 (9th Cir. 1989).
60. 717 F.2d 1251 (9th Cir. 1983).
61. Id. at 1253.
62. Id. at 1257 (expressing concern with giving both principles "appropriate weight"); see also United States v. Aam, 887 F.2d 190, 194 (9th Cir. 1989).
[a] grant of real property to an Indian tribe includes within its boundaries a navigable water and the grant is made to a tribe dependent on the fishery resource in that water for survival, . . . [and] the Government was plainly aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant.63

The court explained that its holding illustrated only one set of circumstances where it is particularly clear that a grant of submerged lands was made.64

a. Facts and Procedural Background—United States v. Aam

The Port Madison Indian Reservation was established by the 1855 Treaty of Point Elliott65 and was enlarged by order of the Secretary of Interior in October 1864.66 As enlarged, the reservation included approximately eleven miles of coastline along Puget Sound.67 During the 1880s, much of the land within the reservation was allotted68 to individual Indians and eventually transferred to non-Indians, many of whom subsequently obtained deeds to the abutting tidelands from the State of Washington.69

After non-Indian landowners took steps to prevent tribe members' use of the tidelands, the United States and the Suquamish Tribe brought actions to quiet title to the tidelands adjacent to the reservation.70 The plaintiffs argued that the treaty reserved the tidelands for

63. Puyallup, 717 F.2d at 1258 (citing 450 U.S. 544, 552 (1981)). The government's intent to convey the riverbed was "very plain" because the reservation was enlarged specifically to include a segment of the river. 717 F.2d at 1261.
64. Id. at 1258 n.7; see also Muckleshoot Indian Tribe v. Trans-Can. Enters., 713 F.2d 455, 457 n.2 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984).
65. Treaty with the Duwamish [and Suquamish] Indians (Treaty of Point Elliott), Jan. 22, 1855, 12 Stat. 927 [hereinafter Treaty of Point Elliott]. The reservation was located with specific reference to tidelands and to a major Suquamish village located close to the shore. Report from Michael T. Simmons, Special Indian Agent to Edward R. Geary, Superintendent of Indian Affairs (July 1, 1860) (need to locate reservation along beach providing good landing, free from drift, and well-adapted to hauling the seine), quoted in Memorandum Decision, supra note 65, at 8.
66. United States v. Aam, 887 F.2d 190, 192 (9th Cir. 1989); see also Letter from William P. Dole, Commissioner of Indian Affairs, to W. P. Otto, Acting Secretary of the Interior (Sept. 12, 1864) (calling to his attention the need for immediate action to enlarge the reservation), quoted in Memorandum Decision, supra note 65, at 8.
67. Memorandum Decision, supra note 65, at 8.
68. Treaty of Point Elliott, art. VII, supra note 65, at 929 (providing for distribution of reservation lands to individual tribe members).
69. Aam, 887 F.2d at 192.
70. The two actions were subsequently consolidated. Memorandum Decision, supra note 65, at 2.
the tribe's exclusive use.\textsuperscript{71} The State of Washington and private land-owners countered that title passed to the state on its admission to the Union in 1889 pursuant to the equal footing doctrine.\textsuperscript{72} Because neither the treaty nor the executive order enlarging the reservation expressly referred to the tidelands, resolution of the case turned on whether the tidelands were impliedly included within the expanded reservation.\textsuperscript{73}

\textbf{b. The District Court's Analysis}

The district court made a number of findings favorable to the tribe. The court concluded that the Suquamish depended on resources obtained from tidelands for their survival, that the tidelands adjacent to the reservation comprised a significant portion of the tribe's most important tideland resource procurement sites, and that the tribe would have regarded the disputed tidelands as reserved for their exclusive use.\textsuperscript{74} Nevertheless, the district court concluded that the United States did not convey the disputed tidelands to the Suquamish Tribe.\textsuperscript{75} The court held that the tribe failed to show that the tidelands lay within the boundaries of the reservation established by the treaty and the secretarial order.\textsuperscript{76} The court also was unconvinced that a public exigency existed, or that the United States was plainly aware that the tidelands contained resources important to the tribe.\textsuperscript{77}

\textbf{c. The Ninth Circuit's Decision}

In affirming the district court's decision,\textsuperscript{78} the Ninth Circuit recast the \textit{Puyallup} factors into a test requiring that (1) the reservation grant included the navigable waters within its boundaries; (2) the tribe depended on the fishery resource in that water for survival; and, (3) the government was "plainly aware" of the importance of the disputed resource to the tribe at the time of the grant.\textsuperscript{79} The court questioned

\begin{itemize}
  \item 71. \textit{Aam}, 887 F.2d at 192.
  \item 72. \textit{Id}.
  \item 73. \textit{Id}.
  \item 74. Memorandum Decision, \textit{supra} note 65 at 28. The court also found that the tidelands adjacent to the reservation were particularly important to the tribe in times of crisis, and that shellfish such as those found in the tidelands were a staple in the tribe's diet, second in importance only to the salmon that they caught in nearby waters. \textit{Id.} at 14–15.
  \item 75. \textit{Id.} at 29 (ostensibly following \textit{Puyallup}).
  \item 76. \textit{Id.} at 28–29.
  \item 77. \textit{Id}.
  \item 78. United States v. Aam, 887 F.2d 190, 196 (9th Cir. 1989).
  \item 79. \textit{Id.} at 194.
\end{itemize}
the district court’s conclusion that the tidelands were not part of the reservation.\footnote{Id. at 195-96 (because the Indians might have understood that the tidelands were included within reservation boundaries, the question whether they were actually included turned on whether the tribe depended on the tidelands).} The court, however, affirmed the lower court’s decision because the tribe failed to show either that it depended on the disputed tidelands for survival, or that the government was plainly aware of the importance of the tidelands to the tribe.\footnote{Id. at 198. The court also held that because the tribe did not show that it depended on the disputed tidelands, an inference that the government was plainly aware of the importance of that resource to the tribe was unwarranted. Id. at 196-97.} The court reasoned that the tribe did not establish “dependence” because it did not show it depended on the particular tidelands in dispute for the majority\footnote{The court later modified this part of its finding. See infra notes 85-86 and accompanying text.} of its subsistence needs.\footnote{Aam, 887 F.2d at 196-97.} The court suggested that the tribe’s treaty rights of access to off-reservation food resources negated any contention that the tribe relied on the tidelands for the majority of its subsistence needs.\footnote{Id.}

On January 16, 1990, the panel denied a petition for rehearing filed by the Suquamish Tribe and amended its opinion, deleting the word “majority” and replacing it with “a significant portion.”\footnote{United States v. Aam, Nos. 88-3549, 88-3594 (9th Cir. Jan. 16, 1990) (Order Amending Opinion and Denying Rehearing).} The amended opinion reads that because the Suquamish did not depend on the disputed tidelands for “a significant portion” of their subsistence needs, title to the tidelands vested in Washington State upon its admission to the Union.\footnote{Id.} The court’s prior opinion otherwise was unchanged.

II. THE AAM COURT’S ILL-CONSIDERED TEST

The Aam court misused the Puyallup analysis by converting the Puyallup factors into a per se test, and by giving insufficient weight to the importance of the tidelands to the Indians’ way of life. The Aam court also confused the separate questions of the existence of a public exigency and government awareness of an exigency. Finally, the court failed to apply the mandatory canons of construction to the title issue. The court should have looked to the policies underlying the canons of construction and the presumption against conveyance to determine their respective weight.

80. Id. at 195-96 (because the Indians might have understood that the tidelands were included within reservation boundaries, the question whether they were actually included turned on whether the tribe depended on the tidelands).

81. Id. at 198. The court also held that because the tribe did not show that it depended on the disputed tidelands, an inference that the government was plainly aware of the importance of that resource to the tribe was unwarranted. Id. at 196-97.

82. The court later modified this part of its finding. See infra notes 85-86 and accompanying text.

83. Aam, 887 F.2d at 196-97.

84. Id.


86. Id.
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A. The “Puyallup Test”

The *Aam* court mistakenly applied the *Puyallup* analysis as a test. *Puyallup* simply established one clear set of circumstances under which submerged lands were conveyed.\(^87\) Prior to *Aam*, the conditions present in *Puyallup* were sufficient but not necessary to establish a conveyance. The *Aam* court converted circumstances sufficing to establish conveyance into conditions necessary to establish conveyance. The court thus abandoned the case-by-case balancing of the conflicting doctrines and established a per se rule. The establishment of a per se test unduly restricts the scope of the pertinent analysis.

An example of the potential for inequitable results inherent in this narrowing of the inquiry lies in the *Aam* court’s failure to clearly distinguish the question whether the government was plainly aware of the tribe’s dependence from whether there was an alternate basis for finding that a public exigency existed.\(^88\) In distinguishing *Puyallup* and *Muckleshoot*, the court intimated that the hostilities threatened or feared in those cases\(^89\) demonstrated the government’s awareness of the tribes’ dependence on the disputed resource.\(^90\) The court thereby conflated separate questions of the existence of a public exigency and government awareness of the public exigency.

Because the *Aam* court confused these two separate inquiries, the tribe might have failed the *Aam* test even if it had shown that it depended on the disputed resource.\(^91\) In effect, the court required the tribe to show not just one, but two public exigencies: first, that the tribe depended on the tidelands, and second, that an additional public exigency, such as threatened hostilities, existed.\(^92\) Such a result


\(^{88}\) *See Aam*, 887 F.2d at 197.

\(^{89}\) No precedent requires that a “public exigency” be linked to actual or threatened violence. Such a requirement would penalize peaceful tribes that could be counted on to resolve any dissatisfaction through negotiation rather than hostilities.

\(^{90}\) *Puyallup*, 717 F.2d at 1251; *Muckleshoot*, 713 F.2d at 457. The circumstances in *Puyallup* provided not one but two separate grounds for finding that a public exigency existed. In *Puyallup*, the court could have concluded that a public exigency existed based on either its finding that the Puyallup Tribe depended on the disputed resource or on the fact that hostilities had occurred. *See supra* notes 21–24 and accompanying text.

\(^{91}\) *See Aam*, 887 F.2d at 197. Confusing these inquiries creates a test that begs the question it purports to answer (whether a public exigency exists depends on whether a public exigency exists).

\(^{92}\) The circumstances in *Aam* satisfied even the requirement that there be two demonstrable bases for finding a public exigency existed. One public exigency existed to the extent that the Suquamish depended on the disputed tidelands for their diet or way of life. *See infra* notes 101–14 and accompanying text. A second existed because of the generally perceived, urgent need
directly contravenes established precedent,\(^{93}\) and demonstrates the potential for inequities inherent in the *Aam* court's per se test.

The *Aam* court also overlooked the fact that the third prong of its test is subsumed within the second prong. The requirement that the United States was "plainly aware" of the tribe's dependence on the disputed resource is only implied and not required by precedent.\(^{94}\) Precedent requires only that the government knew the Indians depended on certain resources and located the reservation to give them access to those resources.\(^{95}\) By making "government awareness" a separate prong of its test, the court overlooked that dependence itself is indicative of the government's intent where a tribe depended on a resource and the government acted to preserve the Indians' means of access to that resource.\(^{96}\)

**B. Dependence—The Aam Court Ignored the Tribe's Way of Life**

The *Aam* court improperly analyzed the issue of tribal dependence on the tidelands. First, the *Aam* court's suggestion that a tribe be required to show it depended on the disputed resource for the "majority" of its subsistence needs was unprecedented.\(^{97}\) That the tidelands abutting the Port Madison Reservation constituted a significant portion of the tribe's most important tideland procurement sites brought the facts of *Aam* well within previously established standards.\(^{98}\) In amending its opinion, the court appeared to recognize that its equation of "dependence" with "majority" was unjustified.

Notwithstanding the revision of the original opinion, the *Aam* decision is difficult to explain. The opinion now reads that although the

to open the aboriginal territory of the Northwest Indians to non-Indian settlement at the time the reservation was created. See supra notes 21–24 and accompanying text.

93. *See supra* notes 21–24 and accompanying text; *see also* United States v. Aranson, 696 F.2d 654, 664 (9th Cir.) (a court may infer congressional intent to convey the beds of navigable waters if the Indians can show they depended heavily on that body of water), cert. denied, 464 U.S. 982 (1983).

94. In previous cases, courts have inferred the government's awareness of a public exigency by looking to such factors as the purpose of the reservation, the nature of the area set aside, the Indians' understanding of the promises made, and the Indians' way of life. See, e.g., Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918); *compare* Montana v. United States, 450 U.S. 544, 556 (1981).

95. Thus, the *Aam* court could have found that the government was "plainly aware" of the importance of the disputed tidelands to the tribe based on the fact that the reservation was located with reference to the tidelands. See, e.g., Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984).

96. *See supra* notes 38–40 and accompanying text.

97. *See, e.g.,* Puyallup, 717 F.2d at 1259 (enough that the tribe depended on the kind of resources found in the lands at issue).

98. *Id.*
tidelands at issue constituted "a significant [sic], although less than a majority," of the tribe's most important tideland resource procurement sites, the disputed tidelands did not supply "a significant portion" of the tribe's subsistence needs.\(^9\) If "significant" does not mean "significant," what constitutes dependence becomes an elusive question indeed.\(^{10}\)

Second, the *Aam* court mistakenly limited its analysis of "dependence" to bare subsistence requirements. In evaluating dependence, courts have considered the broader economic importance of the resource to the tribe,\(^{101}\) as well as the importance of the resource to the Indians' way of life.\(^{102}\) The Indians of the Northwest relied on fish and shellfish obtained from rivers and tidelands not only for sustenance but for trade with other tribes.\(^{103}\) At the time the treaty with the Suquamish was signed, the United States was concerned with minimizing the amount of its financial assistance to the tribe.\(^{104}\) Thus, both the government and the tribe must have intended that the tribe continue to trade for what it could not procure directly.\(^{105}\)

The disputed tidelands in *Aam* also were important to the tribe as a means of access to other fishing and food gathering sites on which the tribe depended for its physical and economic survival.\(^{106}\) Had access to the waters of Puget Sound beyond the intertidal lands not been

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\(^9\) See United States v. *Aam*, 887 F.2d 190, 196 (9th Cir. 1989).

\(^{10}\) The court might have reasoned that even though the tribe depended on the disputed tidelands for a significant portion of its tideland needs, the tribe did not depend on the tidelands for a significant portion of its overall needs because of its access to off-reservation procurement sites. But see infra notes 115–19 and accompanying text. This line of reasoning also ignores both the seasonal obstruction of access to off-reservation resources and the seasonal nature of the resources themselves.

\(^{101}\) See Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918). The question is fairly raised whether, in an affluent society like the United States, limiting the analysis of dependence to bare survival does not merely perpetuate racist stereotypes about Indians that fail to account for the sophistication and complexity of the cultures and communities that actually existed.


\(^{104}\) Memorandum Decision, *supra* note 65, at 12.

\(^{105}\) A resource also may be important precisely because it can be relied on when access to other sources is obstructed. To hold that resources of such critical importance are not significant contravenes the plain meaning of "dependence." See *Montana*, 450 U.S. at 570 (Blackmun, J., dissenting) (that the Crow ate fish as a supplement to their buffalo diet and as a substitute for meat in times of scarcity should have been enough to show the tribe depended on the resource).

\(^{106}\) United States v. *Aam*, 887 F.2d 190, 197 (9th Cir. 1989) (regarding this fact as "obvious"). Defendants argued that title is not necessary to guarantee access; however, the right of access does not give the tribe regulatory authority to, for example, limit dredging and filling that would eliminate those tidelands or the right to build weirs and fishtraps on the intertidal lands. Conversation with John Sledd, *supra* note 6.
assured, the tribe could have been cut off from the salmon and other fishery resources in those waters.\(^\text{107}\) The tidelands thus were vital to the tribe not only as a procurement site but as a place of guaranteed access to off-reservation procurement sites.

The *Aam* court also failed to consider the importance of the tideland resources to the Indians' way of life.\(^\text{108}\) *Montana* permits a court to infer governmental intent to convey lands beneath navigable waters if the Indians can show they depended on the disputed resource for "their diet or way of life."\(^\text{109}\) Although the *Aam* court cited precisely this language from the *Montana* decision,\(^\text{110}\) the court ignored the question whether the disputed tidelands were important to the Suquamish way of life.\(^\text{111}\) This question should have been critical to the *Aam* court's analysis.\(^\text{112}\)

Precedent requires that the evaluation of dependence be expanded beyond subsistence requirements and economic considerations. The Ninth Circuit has relied on the fact that Indians depended on a disputed watercourse not only for food and materials, but in their manner of self-identification, language, and religious practices, to hold that a disputed riverbed was conveyed to the tribe.\(^\text{113}\) Earlier cases analyzing both Indian and government understanding of treaty terms have given

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107. Legally, access is probably assured by the Article V rights; practically, however, the fact that lands have passed into private ownership may impede access.

108. Memorandum Decision, *supra* note 65, at 14 (the tribe caught salmon, flatfish, herring, and waterfowl by erecting weirs and fishtraps on the tidelands); *Aam*, 887 F.2d at 192. The Suquamish have no rivers large enough to support anadromous fish runs of any size on the Port Madison Reservation. FishPro, Inc., *Assessment of the Floral and Faunal Resources Within the Port Madison Indian Reservation Intertidal and Subtidal Areas* 81 (April 1985) (copy on file with the *Washington Law Review*). Tideland food resources include clams, oysters, cockles, mussels, geoduck, crab, shrimp, squid, and octopus. *Id.* at 31-34. The tribe cured shellfish for winter stores and sale, and used them for bait, utensils, implements, ornaments, and currency. Tribal Request for Determination and Declaratory and Injunctive Relief Re Shellfish, United States v. Washington, Civil No. 9213-Phase 1, subproceeding No. 89-3 (filed May 19, 1989) at 4.


110. *Aam*, 887 F.2d at 193.


substantial weight to a reservation’s location with reference to the wants and habits of the Indian signatories.\textsuperscript{114}

Finally, the Ninth Circuit’s suggestion that access to off-reservation fishing and gathering sites somehow negated the Suquamish Tribe’s dependence on the tidelands was both unjustified and unprecedented. Article V of the treaty provides that, in addition to reserving specified areas for their exclusive use, the Suquamish reserve the right to fish off the reservation in common with the citizens of the state.\textsuperscript{115} Every previous decision\textsuperscript{116} in which the Ninth Circuit upheld a tribe’s claim to submerged lands involved treaties with similar provisions.\textsuperscript{117} Neither the treaty nor previous case law suggests that one right should supplant the other. Rather, such off-reservation procurement rights were intended to complement a life defined by permanent homes.\textsuperscript{118} If anything, the inclusion of clauses providing for continued access to off-reservation fishing sites underscores the importance of the tidelands to the tribes.\textsuperscript{119}

\textsuperscript{114} Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918); Moore v. United States, 157 F.2d 760 (9th Cir. 1946), (reserving to the Indians a "tract sufficient for their wants"), \textit{cert. denied}, 330 U.S. 827 (1947). Governor Stevens intended that the location and extent of the reservations should be adapted to the peculiar wants and habits of the different tribes. Report from Governor Stevens to George W. Manypenny, Commissioner of Indian Affairs (Sept. 16, 1854), \textit{cited in Memorandum Decision, supra note 65, at 18.}

\textsuperscript{115} Treaty of Point Elliott, art. V, \textit{supra note 65, at 928}. The scope of the Article V rights was not at issue in this case. United States v. Aam, 887 F.2d 190, 195 (9th Cir. 1989). The Suquamish Tribe has since brought suit to determine the scope of its Article V shellfish gathering rights. Tribal Request for Determination and Declaratory and Injunctive Relief Re Shellfish, United States v. Washington, Civil No. 9213-Phase 1, subproceeding No. 89-3 (filed May 19, 1989) at 4.

\textsuperscript{116} See, e.g., \textit{Muckleshoot}, 713 F.2d at 456 (the Muckleshoots were parties to both the Medicine Creek Treaty and Treaty of Point Elliott.)

\textsuperscript{117} See, e.g., Treaty with the Nisquallys (Medicine Creek Treaty), Dec. 26, 1854, art. III, 10 Stat. 1132; Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933; Treaty of Neha Bay, Jan. 31, 1855, 12 Stat. 939; Treaty of Olympia (Treaty with the Quillayutes), July 1, 1855 and Jan. 25, 1856, 12 Stat. 971. Governor Stevens understood that assuring the Pacific Northwest Indians of their continued right to fish was an indispensable requirement in securing their agreement to the treaties. \textit{American Friends Service Committee, Uncommon Controversy: Fishing Rights of the Muckleshoot, Puyallup and Nisqually Indians} 21 (1970).


\textsuperscript{119} Using the existence of off-reservation fishing and gathering rights to justify the conclusion that a tribe was not dependent on a disputed resource leads to inequitable results. Tribes to whom off-reservation fishing rights were so important that they insisted on their inclusion in the treaty would find it harder to show dependence than tribes that did not insist on the inclusion of off-reservation fishing rights because they were less important.
C. The Aam Court Failed to Apply the Canons of Construction to the Title Issue

While the Aam court acknowledged that treaties should be construed according to the probable understanding of the original tribal signatories, it arbitrarily limited its consideration of Indian understanding to whether the tidelands were within reservation boundaries. The court did not explain why Indian understanding was irrelevant to the Indians' claim that they owned the tidelands. Prior case law does not suggest that the canons of construction are relevant only to the location of reservation boundaries.

The court's failure to consider Indian understanding with regard to title was even more curious in view of the district court's finding that the Indians would have regarded the tidelands as being for their exclusive use. Governor Stevens assured the Suquamish that, in return for sharing their many off-reservation procurement sites with non-Indians, the area close to their homes would be set apart for their exclusive use. That assurance should have prompted inquiry into the Indians' understanding of such a declaration.

Similarly, in assuring the Suquamish in general terms that the area included in the reservation would be reserved for their exclusive use, the government gave the tribe no reason to suspect that the nature of their title changed abruptly at the high tide line. The canons of construction mandate that ambiguities such as that created by Governor Stevens' assurances be construed in favor of the Indians.

D. Weighing the Policies Behind the Canons of Construction and the Equal Footing Doctrine

In balancing the presumption against conveyance and the canons of construction, courts should consider the relative importance of the

120. See United States v. Aam, 887 F.2d 190, 195–96 (9th Cir. 1989).
122. Memorandum Decision, supra note 65, at 16. The Indians were unfamiliar with the non-Indian concepts of title and alienability. Id. However, the Indians recognized the related right of individual bands or tribes to make exclusive use of a given area. See Puyallup Indian Tribe v. Port of Tacoma, 525 F. Supp. 65, 71 (W.D. Wash. 1981), aff'd 717 F.2d 1251 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984).
123. Memorandum Decision, supra note 65, at 16, 18.
124. The Indians viewed land as an extended plain, parts of which were always covered by water, other parts of which were at times covered by the tide and uncovered at other times. Appellant's Excerpts of Record at 141, Suquamish Tribe v. Aam, No. 82-1522, (filed Feb. 5, 1988).
125. See supra notes 25–26 and accompanying text.
126. The presumption against conveyance is derived from cases where submerged lands were claimed as a result of alleged grants to individuals or private corporations. See Shively v.
respective policies underlying the two doctrines. The public exigency requirement reflects a policy of preventing the piecemeal distribution of submerged lands to private parties prior to a state's admission to the Union. After statehood, the states are not constrained from making piecemeal distributions of submerged lands to private individuals.

In contrast, the canons of construction reflect equitable considerations that constrain the states as well as the federal government in construing instruments affecting Indian rights. The canons of construction discharge the federal trust responsibility and compensate for the disadvantage in bargaining power at which the treaty process placed the Indians. The canons also reflect a concern that the federal government abide by its promises. The policy underlying the presumption against conveyance thus lacks the force of the policies that underlie the canons of construction.

The general policies underlying the establishment of Indian reservations also merit substantial consideration in determining what the government intended to reserve on behalf of the Indians. For example, one purpose of establishing Indian reservations was to promote Indian self-sufficiency and economic development. Thus, where a resource was a necessary link in achieving that purpose, the government's intent should be inferred based on its underlying policy, even if no express intent to convey that particular resource was documented. Once the tribe has shown that a public exigency existed, an inference that the government intended to convey the submerged lands should arise. The canons of construction should thus operate to shift the burden of proving that the federal government's intention was otherwise to the party challenging the conveyance.

Bowlby, 152 U.S. 1, 48 (1894); Packer v. Bird, 137 U.S. 661 (1891). Because a tribe is a quasi-sovereign entity, and because reservations were reserved by the Indians rather than granted by the United States, the reservation of submerged lands for an Indian tribe does not undermine the policy against piecemeal conveyance to private individuals prior to statehood. See Barsh and Henderson, Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States, 56 WASH. L. REV. 27 (1981), cited in United States v. Aranson, 696 F.2d 654, 664 (9th Cir.), cert. denied, 464 U.S. 982 (1983).

127. See supra note 16 and accompanying text.
128. For example, portions of the tidelands at issue in Aam were distributed to private parties by Washington State. See supra notes 68–69 and accompanying text.
129. See generally supra notes 25–29 and accompanying text.
130. See supra note 25 (one reason for the unequal bargaining positions of the United States and the Indians was the fact that treaties were recorded in English).
131. See, e.g., Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting) (“Great nations, like great men, should keep their word.”).
132. See supra note 29 and accompanying text.
Likewise, to the extent that the Indians depended on interpreters provided by the United States to explain treaties, tribal understanding should be regarded as indicative of government intent and the burden placed on the party opposing the conveyance to show a contrary government intent. Courts also should bear in mind that the presumption against conveyance and the public exigency exception were not expressly announced by the courts until 1894.\textsuperscript{133} It is unreasonable to expect that, decades earlier, government negotiators, let alone the Indians, should have anticipated the necessity of including specific language to rebut the as yet unarticulated presumption against conveyance.\textsuperscript{134}

The \textit{Aam} court should have looked to the policies underlying the canons of construction and the presumption against conveyance to determine their respective weight. In that light, the district court's findings as to the significance of the disputed tidelands to the tribe justified the conclusion that the Suquamish depended on the tidelands. The Indians' dependence on the tidelands should in turn have given rise to an inference that the United States intended to reserve the tidelands on behalf of the tribe. The burden of showing that the government's intent was otherwise should consequently have shifted to the parties challenging the Suquamish claim of title to the intertidal lands abutting the reservation.

\textbf{III. CONCLUSION}

In determining title to the beds of navigable waters on Indian reservations, courts have been uncertain as to the respective weight due the presumption against conveyance and the canons of construction. The per se test established by the \textit{Aam} court crystallized an illogical and inequitable resolution to this conflict. The question should instead be resolved by looking to the policies underlying the respective doctrines. The serious equitable considerations that underlie the canons of construction applicable in Indian law outweigh the lesser concern of discouraging piecemeal distributions of submerged lands to private parties. Therefore, when a tribe can show that a public exigency existed, the burden should shift to the party challenging the reservation to demonstrate that the United States did not intend to reserve the submerged lands for the tribe.

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\textsuperscript{133} See supra notes 12, 14 and accompanying text.
\textsuperscript{134} See supra note 19.