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United States v. Pend Oreille County P.U.D. No. 1: A Signal Conflict between Equal Footing and Aboriginal Indian Title

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NOTE

UNITED STATES V. PEND OREILLE COUNTY P.U.D. NO. 1: A SIGNAL CONFLICT BETWEEN EQUAL FOOTING AND ABORIGINAL INDIAN TITLE

BY

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A summary judgment decision is ordinarily not casenote material. But the denial of summary judgment in Pend Oreille *proved a significant victory to tribal bedlands claimants averting aboriginal rights. The decision allows tribes to avoid the presumption of state ownership of lands beneath navigable rivers, established by the Supreme Court in* Montana v. United States, *without proving conveyance by the federal government. Most importantly the* Pend Oreille *summary judgment decision illustrates the substantial flaws of the* Montana *rule.*

I. INTRODUCTION

Throughout this century, states and Indian tribes have fought a high-stakes[1] war over title to submerged lands on reservations. Each has won some battles,[2] but no decisive victories. New rulings which appear to resolve the conflict merely inspire development of new arguments which perpetuate it.

States persistently rely on the Equal Footing Doctrine[3] to

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1. The economic benefits of bedlands ownership include control of commercial, industrial, and recreational access. For example, Choctaw Nation v. State of Okla., 490 F.2d 521 (10th Cir. 1974), concerned mineral lease revenues totaling more than 780 thousand dollars.

2. Contrast the Choctaw Tribe's victory in Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) with the Crow Tribe's defeat in Montana v. United States, 450 U.S. 544 (1981).

3. The Equal Footing Doctrine ensures newly admitted states sovereignty equal to that of the original 13 states. Because those original 13 states received

support their claims of riverbed ownership, while Indian tribes, until recently, put their faith in the canons of treaty construction, which dictate that treaties be interpreted liberally in favor of the tribes.[4] Tribal claimants consistently prevailed on that basis[5] until 1981, when the states' persistent reliance on Equal Footing finally paid off. In *Montana v. United States*,[6] the Supreme Court ruled that the Equal Footing Doctrine's presumption of state sovereignty over navigable waters takes precedence over the canons of treaty construction.[7] Many critics viewed the *Montana* decision as a knock-out punch to tribal bedlands claims.[8] However, as this

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title to bedlands within their respective borders when the English Crown relinquished its interest, the Supreme Court, in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845), ruled that title must similarly accrue to all future states. For a more detailed explanation of the Equal Footing Doctrine, as it effects tribal bedlands claims, *see* Comment, *Tribal Bedlands Claims Since* Montana v. United States, 6 PUB. LAND L. REV. 119 (1985).

4. *See, e.g.*, Choctaw Nation of Indians v. United States, 318 U.S. 423, 431-32 (1943). In addition, the canons of construction dictate that treaties with Indian tribes are to be interpreted as the tribes would have understood them at the time of negotiation, and that ambiguous expressions in treaties be resolved in favor of the Indians. *See, e.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973).

The judiciary created the canons of construction as corollaries to the federal government's trust obligation to its Indian wards. *See* F. COHEN, HANDBOOK OF AMERICAN INDIAN LAW 221 (1982). Because of the unequal bargaining position of the parties to Indian treaties—among other things, tribal negotiators often did not understand the language—equity required that the courts take extra measures to protect the interests of tribal claimants. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). For a thorough analysis of the federal government's trust responsibilities, and the canons of construction see F. COHEN, *supra*, at 220-28.

5. In fact, tribes prevailed in all but one case between 1905 and 1980. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 632 (1970); Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 82-83 (1922); Alaska Pac. Fisheries v. United States, 248 U.S. 78, 89 (1918); Winters v. United States, 207 U.S. 564, 576-77 (1908); United States v. Winans, 198 U.S. 371, 380-81 (1905). The lone case to hold in favor of a state is United States v. Holt State Bank, 270 U.S. 49 (1926).

6. 450 U.S. 544 (1981).

7. *Id.* at 551-52.

8. *See generally* Arnott, *In the Aftermath of the* Bighorn River *Decision: Montana Has Title, Indian Law Doctrines Are Clouded, and Trust Questions Remain*, 2 PUB. LAND L. REV. 1 (1981); Barsh & Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 WASH. L. REV. 627, 675-85 (1981); Note, Montana v. United States—*Effects on Liberal Treaty Interpretation and Indian Rights to Lands Underlying Navigable Waters*, 57 NOTRE DAME LAW. 689 (1982); Note, *Riverbed*

Note will illustrate, at least one tribe has managed to sidestep the punch and counter with a blow, weakening the knees of Equal Footing. In *United States v. Pend Oreille County P.U.D. No. 1*,[9] Judge Richard Bilby of the United States District Court for the Eastern District of Washington ruled that aboriginal Indian title supercedes the Equal Footing Doctrine in riverbed ownership disputes.[10]

This Note will focus on the *Pend Oreille* decision, and its impact on tribal bedlands claims. A comparison of the Supreme Court's *Montana* ruling with the *Pend Oreille* decision will disclose the irony that aboriginal title to bedlands comprises greater rights than title under treaty. Closer scrutiny will demonstrate, however, that an inconsistency belies that irony, an inconsistency that may ultimately prove fatal to Judge Bilby's decision.

II. TRIBAL BEDLANDS CLAIMS UNDER TREATY: THE *Montana* DECISION

A. *The* Montana *Ruling*

The Supreme Court in *Montana* ruled that the Crow Indian Tribe does not own the bed and banks of the Big Horn River, which flows through its reservation, because the Tribe failed to overcome the presumption of state sovereignty created by the Equal Footing Doctrine.[11] The Tribe asserted its claim of ownership under the two Treaties of Fort Laramie, the first of which constituted federal recognition of aboriginal rights in ancestral lands.[12] The Court, cognizant that the United States could convey bedlands in derogation of the Equal Footing Doctrine,[13] nevertheless concluded that the two treaties failed to establish congressional intent to do so.[14] The Court's reasoning suggests a presumption that the United States held fee title to the riverbed,

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Ownership Law Metamorphosed into a Determinant of Tribal Regulatory Authority—Montana v. United States, 1982 WIS. L. REV. 264 (1982).

9. 585 F. Supp. 606 (E.D. Wash. 1984).

10. *Id.* at 609.

11. Montana v. United States, 450 U.S. 544, 553-57 (1981).

12. *Id.* at 553.

13. *Id.* at 551, 556.

14. *Id.* at 554. The Court dismissed the first Treaty of Fort Laramie out-of-hand, failing to recognize its importance in a potential claim based on aboriginal rights. *Id.* at 553.

unencumbered by any type of Indian title.[15]

The *Montana* Court clearly established the dominance of Equal Footing over the traditionally determinative canons of treaty construction.[16] The Court, however, recognized two ways of rebutting the presumption of state sovereignty: (1) by treaty-language expressly indicating congressional intent to convey the bedlands in contravention of Equal Footing;[17] or (2) by proving that "public exigenc[ies]" existed during treaty negotiations, which required congressional deviation from the policy of holding bedlands in trust for future states.[18] Unfortunately for the Crow Tribe, the Court ruled that the Tribe satisfied neither of the conditions necessary to overcome the presumption under Equal Footing.

B. The Effect of Montana

Seven tribal bedlands-claim cases based on treaty rights have been decided since *Montana*.[19] While those cases indicate that

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15. Without that presumption, the Court's ruling is nonsensical. If the tribe already has rights in the riverbed, conveyance by the federal government is unnecessary; the government cannot convey to the tribe what it already owns.

16. This is made clear by the Court's rejection of the old metes and bounds rule of riverbed ownership. 450 U.S. at 554. Under that rule, tribes owned the beds of all streams flowing through the metes and bounds of their reservations. *See* Choctaw Nation v. Oklahoma, 397 U.S. 620, 628 (1970). The *Montana* Court, while distinguishing *Choctaw Nation*, overruled its rationale. 450 U.S. at 555 n.5.

17. *Montana*, 450 U.S. at 552-53 (discussing United States v. Holt State Bank, 270 U.S. 49 (1926)).

18. *Montana*, 450 U.S. at 555-56. Specifically, the Court recognized two different types of "public exigency" which would rebut the presumption against conveyance: (1) tribal dependence on the river's resources for sustenance, commerce, and religious practices, *id.* at 556, and (2) the national peace. *Id.* at 555 n.5. The Court used the latter exigency to distinguish *Choctaw Nation*. *Id.* A third, somewhat dubious exigency has been added since *Montana*. In Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 962 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982), the Ninth Circuit created the "urgency" exigency. For a thorough treatment of the "public exigenc[ies]" under the *Montana* rule see Comment, *supra* note 3, at 125, 137.

19. The Washington Water Power Co., 25 FED. ENERGY REG. COMM'N. (CCH) ¶ 61,228 (Nov. 16, 1983); Muckleshoot Indian Tribe v. Trans-Canada Enterprises, Ltd., 713 F.2d 455 (9th Cir. 1983) (per curiam), *cert. denied*, 104 S. Ct. 1324 (1984), *reh'g denied*, 104 S. Ct. 2162 (1984); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1324 (1984), *reh'g denied*, 104 S. Ct. 2162 (1984); United States v. Aranson, 696 F.2d 654 (9th Cir.

the Supreme Court ruling was not the death knell for the canons of treaty construction in tribal bedlands claims,[20] they do demonstrate the increased burden placed on tribes by the *Montana* decision.[21] Most importantly, ambiguities inherent in the *Montana* ruling have engendered considerable inconsistency in decisions based on similar treaty-language.[22] Perhaps these ambiguities inspired the Kalispel Tribe to develop its claim based on aboriginal title, which it argued successfully in *Pend Oreille*.[23]

III. THE *Pend Oreille* DECISION

A. *The Case*

The facts in *Pend Oreille* are few and fail to disclose the cause of the litigation.[24] The United States and the Kalispel Indian Tribe brought suit against Pend Oreille Public Utility Dis-

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1983), *cert. denied*, 104 S. Ct. 423 (1983); United States v. Washington, 694 F.2d 188 (9th Cir. 1982), *cert. denied*, 463 U.S. 1027 (1983); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982), *cert. denied*, 459 U.S. 977 (1982); Wisconsin v. Baker, 524 F. Supp. 726 (W.D. Wis. 1981), *modified*, 698 F.2d 1323 (7th Cir. 1983), *cert. denied*, 463 U.S. 1207 (1983).

20. Five of the seven cases held in favor of the tribal claimant, and of the two that did not, one would have been decided just the same regardless of the *Montana* decision. The five holding for tribal claimants are *Namen*, 665 F.2d 951, United States v. Washington, 694 F. 2d 188, *Puyallup Indian Tribe*, 717 F. 2d 1251, *Muckleshoot*, 713 F. 2d 455, and Washington Water Power Co., 25 FED. ENERGY REG. COMM'N (CCH) ¶ 61,228. The court in *Baker*, 524 F. Supp. 726, held for the State under *Montana*, but could have reached the same result under the canons of treaty construction. *See* Comment, *supra* note 3, at 127-28. *Aranson*, 696 F. 2d 654, stands alone as a true product of the *Montana* ruling. *See* Comment, *supra* note 3, at 132-33.

21. *See* Comment, *supra* note 3, at 139-40.

22. Contrast the decisions in *Aranson*, 696 F. 2d 654, and The Washington Water Power Co., 25 FED. ENERGY REG. COMM'N. (CCH) ¶ 61,228. *See also* Comment, *supra* note 3, at 137-40.

23. 585 F. Supp. 606 (E.D. Wash. 1984).

24. The briefs disclose the precise facts of the litigation. The federal government initially brought an action on behalf of the Tribe to recover damages from the utility for flooding tribal lands in its operation of the Box Canyon Dam. *See, e.g.*, Memorandum of Points and Authority in Support of Motion to Dismiss the United States as an Involuntary Plaintiff for Purposes of Phase II at 1, *Pend Oreille*, 585 F.Supp. 606 (E.D. Wash. 1984). The Tribe then intervened in an effort to quiet title to the bed of the Pend Oreille River against the state and utility. *Id.* at 2. The motion for summary judgment filed by the defendants was in response to the quiet title action only. *See* Tribe's Brief Answering Defendants' Motions for Summary Judgment at 1-2, *Pend Oreille*, 585 F. Supp. 606.

trict No. 1 and the State of Washington, alleging tribal ownership of the bed and banks of the Pend Oreille River.[25] The State of Washington and the utility district filed a motion for summary judgment alleging that the Kalispel Tribe had no interest in the riverbed.[26] That motion brought the case before Judge Bilby.

The state argued that the Kalispel Tribe had no interest in the riverbed because the federal government conveyed no interest to the Tribe prior to Washington's statehood.[27] In response, the Tribe argued that aboriginal Indian title gave it an ownership interest in the bed and banks, which was not extinguished when the federal government conveyed title to the State of Washington.[28]

Judge Bilby ruled against the state's motion for summary judgment, finding that the Kalispel Tribe could have retained an interest in the riverbed under aboriginal title, despite operation of the Equal Footing Doctrine.[29] The court did not, however, rule that the Tribe had, in fact, established aboriginal title to the Pend Oreille Riverbed, but left that determination for decision on the merits.[30]

B. The Doctrine of Aboriginal Title

The court's ruling was based on well-settled principles of Indian law relating to aboriginal rights. Aboriginal title vests tribes with the exclusive rights to the use and occupation of their ancestral lands until extinguishment by voluntary abandonment or Act of Congress.[31] Those rights are accorded the protection of com-

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25. *Pend Oreille*, 585 F. Supp. at 606-07.

26. *Id.* at 608.

27. *Id.*

28. *Id.*

29. *Id.* at 609.

30. *Id.* at 610. To prove aboriginal title, the Kalispel Tribe must show actual, continuous, and exclusive possession of the land in question. F. COHEN, *supra* note 4, at 492. The continuous use requirement will be satisfied if the land is used seasonally for specific purposes. *Id.*

31. *Pend Oreille*, 585 F. Supp. at 609. Voluntary abandonment is a defense to aboriginal title claims, based on proof of non-exclusive and non-continuous occupation, or a cessation of continuous and exclusive use. *See* F. COHEN, *supra* note 4, at 492. Voluntary removal of a tribe to non-ancestral lands constitutes voluntary abandonment of aboriginal rights. Buttz v. Northern Pac. R.R., 119 U.S. 55 (1886). Forcible removal does not constitute abandonment. United States *ex rel.* Haulpal Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339 (1941).

plete ownership against all but the federal government, which has exclusive authority to terminate aboriginal title.[32] Thus, states can neither fix the limits of nor extinguish aboriginal rights.

While Congress may terminate aboriginal title, extinguishment will not be implied lightly.[33] Treaties between the federal government and Indian tribes only serve to extinguish aboriginal rights where congressional intent is clear.[34] Furthermore, Indian title survives the actions of federal agencies.[35]

Where aboriginal title exists, the United States holds a bare fee to the ancestral lands, encumbered by the tribal rights.[36] Conveyance of the lands by the federal government does not automatically extinguish the aboriginal rights. Instead, the encumbrance follows the chain of title.[37] When a state enters the Union, and claims title to bedlands under Equal Footing, it takes only that interest previously held by the federal government, subject to any aboriginal rights still in existence.[38]

The court, in *Pend Oreille*, declined to adopt the utility's position that operation of the Equal Footing Doctrine extinguishes all aboriginal rights, absent evidence that Congress expressly in-

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The concept of aboriginal or Indian title derives from the European rules of discovery and conquest, which recognized native possessory rights to the land. *See* 1 E. DEVATTEL, THE LAWS OF NATIONS 99-100 (1852). The European government responsible for discovery held title and exercised dominion over the land, good against all other European governments, but subject to the Indian right of occupancy. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823). *See* F. COHEN, *supra* note 4, at 486-87.

32. *See* United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946). The exclusive right of the federal government to extinguish aboriginal title is dictated by the European rules of discovery, recognized in Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823), and the trust relationship between the federal government and the Indians. *See* F. COHEN, *supra* note 4, at 489.

33. United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 354 (1941).

34. *See Pend Oreille*, 585 F. Supp. at 609, *citing* United States v. Winans, 198 U.S. 371, 381 (1905).

35. *See, e.g.*, Jones v. Meehan, 175 U.S. 1 (1899); *see also* F. COHEN, *supra* note 4, at 490. The same logic dictates that aboriginal title withstands executive orders.

36. *Pend Oreille*, 585 F. Supp. at 609.

37. *Id.* Conveyance will extinguish aboriginal claims only when congressional intent to extinguish is clear. *See supra* note 33 and accompanying text.

38. *Pend Oreille*, 585 F. Supp. at 608.

tended the doctrine to have that effect.[39] Judge Bilby refused to imply extinguishment of aboriginal rights lightly, in view of the historical relationship between the federal government and Indian tribes.[40]

IV. ANALYSIS

United States v. Pend Oreille County P.U.D. No. 1 decided the first tribal bedlands claim based on aboriginal rights.[41] By ruling that aboriginal title supercedes Equal Footing, the court implicitly acknowledged that aboriginal title may comprise greater rights than a treaty purporting to recognize those very aboriginal claims.[42] The irony in this is illustrated by cases, prior to *Montana*[43] and *Pend Oreille*, indicating that aboriginal title differs from title under treaty only in relation to the right of compensation for a taking of the interest, under the fifth amendment to the United States Constitution.[44] In all other respects, courts have held aboriginal title to afford the same set of beneficial interests as treaty title.[45]

The irony of the *Pend Oreille* ruling is belied by its inconsistency with the Supreme Court's decision in *Montana*. While the Supreme Court implicitly presumed that the United States held

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39. *Id.*

40. *Id. See also supra* note 33 and accompanying text.

41. 585 F. Supp. 606, 608 (E.D. Wash. 1984). A similar claim has been made in Yankton Sioux Tribe of Indians v. Nelson, 521 F. Supp. 463 (D.S.D. 1981), *vacated and remanded*, 683 F.2d 1160 (8th Cir. 1982), 566 F. Supp. 1507 (D.S.D. 1983), *amended*, 604 F. Supp. 1146 (D.S.D. 1985). In that case, the district court granted the Tribe's motion for summary judgment on its claim of riverbed ownership. That ruling was vacated on appeal to the Eighth Circuit, where both parties agreed to a trial on the merits. 683 F.2d at 1162. Before reaching the merits, however, the appellate court remanded for a ruling on the navigability of the river at issue. *Id.* at 1163. The district court ruled that the river was indeed navigable. 566 F. Supp. at 1508. The district court then amended the judgment on navigability to define the meander line as the boundary. 604 F. Supp. at 1157. The case is now back before the Eighth Circuit on the merits.

42. This implication is necessitated by *Montana*. *See supra* notes 11-23 and accompanying text.

43. 450 U.S. 544 (1981).

44. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

45. *See* United States v. Shoshone Tribe, 304 U.S. 111, 117 (1938); Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669 (1974); United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946); Mitchel v. United States, 34 U.S. (9 Pet.) 711, 746 (1835). *See also* F. COHEN, supra note 4, at 491.

full title to bedlands before conveyance,[46] the *Pend Oreille* court premised its decision on encumbrance of the federal government's fee by preexisting aboriginal rights.[47] Fault for the inconsistency clearly lies with the Supreme Court.[48] While Judge Bilby based his premise on earlier Supreme Court opinions addressing aboriginal rights and the axiom that a grantor may convey only that interest he possesses,[49] the *Montana* Court, by contrast, merely presumed that some conveyance by the federal government is a necessary prerequisite to tribal rights in bedlands. The *Pend Oreille* decision demonstrates the fallacy in that presumption.[50] The fact that aboriginal rights were not at issue in *Montana* cannot excuse the Court's failure to recognize the possibility that such rights can affect title. The Court must be aware of the implications of its significant rulings.

Arguments that the *Montana* Court resolved—albeit unknowingly—potential conflict with aboriginal title claims by creating the "public exigency" exceptions to its rule,[51] misconstrue the thrust of those exceptions. The Court found such "ex-

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46. *See Montana*, 450 U.S. at 550-51.

47. *See supra* notes 28 and 38-39 and accompanying text.

48. Judge Bilby misinterpreted the law after *Montana*, but only with respect to treaty rights; the mistake did not substantially affect the outcome of the *Pend Oreille* decision. Nor does it cast doubt on the court's aboriginal rights premise. After finding the presumption against conveyance in derogation of Equal Footing "inapplicable" to the aboriginal claim of the Kalispel Tribe, 585 F. Supp. at 610, Judge Bilby stated that even if the presumption were applicable, it would be defeated by a "countervailing" presumption in favor of Indian Tribes, under the *Choctaw Nation* ruling. *Id.* The *Montana* decision, however, clearly demonstrated that the canons of treaty construction relied on in *Choctaw Nation* were ineffective against the Equal Footing Doctrine's presumption of state sovereignty over bedlands. *See supra* note 16 and accompanying text.

The district court also attempted to distinguish *Montana* on the facts, asserting that while the Supreme Court case concerned a claimed conveyance by the federal government, *Pend Oreille* concerned preexisting tribal interests. *Id.* at 609. This indicates Judge Bilby's failure to recognize the inconsistent premises of the two decisions. Some responsibility for the inconsistency must also fall on the Crow Tribe and its federal attorneys for their apparent failure to recognize and argue all the implications of the presumption adopted by the Court in *Montana*.

49. *See Pend Oreille*, 585 F. Supp. at 609.

50. *See supra* notes 36-38 and accompanying text.

51. *See supra* note 18 and accompanying text. Presumably, such an argument would be based on the similar requirements for asserting either aboriginal title or title under the "public exigency" exceptions to the *Montana* rule. On the requirements for asserting aboriginal title see *supra* note 30.

igenc[ies]" would support tribal claims of federal conveyance.[52] Conveyance, however, is neither necessary nor possible in aboriginal title claims.[53] Moreover, the *Montana* Court implied that a treaty must accompany an assertion of "public exigency."[54] By definition, tribal claims under aboriginal title require no supporting treaty.[55]

V. IMPLICATIONS

The *Pend Oreille*[56] ruling affords tribal bedlands claimants a means of avoiding the *Montana*[57] rule. Before *Pend Oreille*, tribal claimants could prevail only under a treaty expressly indicating congressional intent to convey bedlands, or if circumstances leading to treaty negotiations constituted a public exigency.[58] The express treaty-language requirement of that rule is especially ambiguous, making tribal bedlands claims even more precarious.[59] Justice Rehnquist has suggested that nothing less than specific reference by the treaty to bedlands ownership is sufficient.[60] Considering that all treaties were negotiated more than 110 years before the *Montana* Court decided the specificity required to secure tribal rights,[61] the burden placed on tribes under so narrow a

52. *See supra* note 18 and accompanying text.

53. This is axiomatic. By definition, aboriginal title is a possessory right predating European Sovereignty. Any later conveyance by a sovereign to a tribe would be redundant. See discussion of aboriginal title claims, *supra* note 31 and sources therein.

54. In determining whether a "public exigency" exists, the Court will look to the "circumstances surrounding the treaties." 450 U.S. at 556 n.5. Indeed, in *Montana*, the Court concluded that the Crow Tribe failed to prove the existence of "public exigenc[ies]" because "at the time of the treaty," they were not dependent on the Big Horn River. 450 U.S. at 556.

55. *See* F. COHEN, supra note 4, at 492.

56. 585 F. Supp. 606 (E.D. Wash. 1984).

57. 450 U.S. 544 (1981).

58. *See supra* notes 17-18 and accompanying text.

59. *See supra* note 22 (illustrating ambiguities in express treaty language requirement).

60. *See* Justice Rehnquist's dissenting opinion from the Supreme Court's denial of certiorari in Confederated Salish & Kootenai Tribes v. Namen, 459 U.S. 977 (1982). There is language in *Montana* supporting Justice Rehnquist's narrow interpretation. For instance, the *Montana* Court rejected an attempt to rebut the presumption of state sovereignty, absent "express reference to the riverbed." 450 U.S. at 554.

61. The Appropriations Act of March 3, 1871, 12 Stat. 512, 528, 25 U.S.C. §

reading of *Montana* is virtually insurmountable.

Pend Oreille allows tribes retaining aboriginal rights to overcome the Equal Footing Doctrine without the burden of proving the intent of a Congress acting in a previous century. Claimants must merely prove the existence of aboriginal rights which have not been extinguished by an Act of Congress or voluntary abandonment.[62] Unfortunately, the number of tribes retaining aboriginal title today is limited by the voluntary abandonment of most aboriginal claims during the treaty-making years, when many tribes voluntarily agreed to relinquish their ancestral lands, in exchange for new and faraway reservations.[63]

The conflict between the premises of the *Montana* and *Pend Oreille* decisions should be of concern to tribal claimants. Such inconsistencies inevitably lead to confusion in the courts, and confusion, in turn, leads to further inconsistent decisions. Claimants must also be aware that the relative precedential value of the two cases may lead courts to dismiss *Pend Oreille* out-of-hand to avoid grappling with the inconsistency.

VI. CONCLUSION

United States v. Pend Oreille County P.U.D. No. 1[64] proves that Indian tribes have not given up the fight against states over ownership of submerged lands on or within reservation boundaries. When the Supreme Court, in *Montana v. United States*,[65] made assertion of ownership based on treaties overly burdensome, the Kalispel Tribe of western Washington State responded in *Pend Oreille* by arguing from aboriginal title. The United States District Court for the Eastern District of Washington sustained the Tribe's claim. Judge Bilby ruled that aboriginal title encumbers the federal government's fee in the bedlands.[66] When the

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71 (1982), foreclosed further treaty-making with Indian Tribes.

62. *See Pend Oreille*, 585 F. Supp. at 609, *citing* United States v. Winans, 198 U.S. 371, 381 (1905). On the requirements for asserting aboriginal rights see *supra* note 30.

63. *See supra* note 31. It cannot be determined with any degree of accuracy how many tribes retain aboriginal rights today. The very existence of such rights is often unclear until litigated.

64. 585 F. Supp. 606 (E.D. Wash. 1984).

65. 450 U.S. 544 (1981).

66. *See supra* notes 29 and 36-40 and accompanying text.

United States subsequently conveys its title to newly admitted states under the Equal Footing Doctrine, the encumbrance follows.[67]

The premise of *Pend Oreille*—that aboriginal title encumbers the federal government's fee—is inconsistent with the *Montana* Court's presumption that the United States holds full title to the bedlands before statehood. This inconsistency indicates the Supreme Court's failure to consider the possible effect of aboriginal rights on the government's fee in its *Montana* ruling. Ironically, it is Judge Bilby's decision that is placed in jeopardy by that inconsistency. If the Kalispel Tribe succeeds on the merits,[68] the Ninth Circuit will likely affirm.[69] The inconsistency with *Montana* could, however, be fatal if the case were to rise to a Supreme Court predisposed to states rights. That would create the ultimate irony: The law of aboriginal Indian title upended by a faulty presumption in a decision where aboriginal rights were not at issue.

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67. *See supra* note 33 and accompanying text.

68. *See supra* note 30 and accompanying text.

69. The Ninth Circuit has been recognized for its "broad interpretation" of the *Montana* ruling. Note, Montana v. United States—*Effects on Liberal Treaty Interpretation and Indian Rights to Lands Underlying Navigable Waters, supra* note 8, at 703. Of the seven treaty-based bedlands claim cases, six have been in the Ninth Circuit. Tribal claimants have prevailed in all but one of those six. *See supra* note 19. The lone exception is United States v. Aranson, 696 F.2d 654 (9th Cir. 1983), which demonstrated the fallibility of the Ninth Circuit. *See* Comment, *supra* note 3, at 138.