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Tribal Bedlands Claims Since Montana v. United States

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I. INTRODUCTION

The titleholder to a riverbed can reap significant economic benefits. For example, ownership includes control over access to the lake or river, as well as a right to revenues generated by allowing commercial, industrial or recreational access. Ownership of a riverbed also has important consequences for regulatory jurisdiction and for determining whether federal, state or tribal courts have subject matter jurisdiction over a cause of action.

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2. For example, in Choctaw Nation v. Oklahoma, 490 F.2d 521 (10th Cir. 1974), the Choctaw and Chickasaw tribes sought damages totalling 786,641.67 dollars, derived from sand, gravel, and oil and gas leases granted by the state on bedlands owned by the tribes.

The high stakes involved have engendered considerable litigation over riverbed rights, pitting states against Indian tribes as adverse claimants. The disputed claims reflect a persistent conflict between two federal policies. On one side, the canons of treaty construction represent a long-standing policy in favor of upholding federal obligations to Indians, 

\[4\] dictating that ambiguities in treaties and statutes should be resolved in favor of Indian tribes. On the other side, the federal "equal footing doctrine" 

\[5\] supports state claims in bedlands conflicts by creating a strong presumption in favor of state sovereignty over navigable waterways within state boundaries. 

Prior to 1981, the courts were remarkably consistent in their disposition of riverbed claims cases, despite the conflict between the two federal policies. The vast majority of decisions favored tribal claims in water rights and streambed issues, 

\[8\] while only a single case held for state sovereignty on

\[4\] See, e.g., United States v. Kagama, 118 U.S. 375, 384-85 (1886). Of course, the federal government is not obligated to uphold treaties made with Indian tribes. See Lone Wolf v. Hitchcock, 187 U.S. 553, 564-65 (1903) (which held that the federal government had power to abrogate treaty with Kiowa, Comanche and Apache Tribes under its plenary authority over the tribes). However, when the government does abrogate a treaty, just compensation may be due. See United States v. Creek Nation, 295 U.S. 103 (1935).

\[5\] See Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918). It has also been held that treaties with Indian tribes are to be interpreted as the Indians would have understood them at the time they were signed. See Jones v. Meehan, 175 U.S. 1, 11 (1899); see also Choctaw Nation v. Oklahoma, 397 U.S. 620, 630 (1970).

\[6\] The equal footing doctrine ensures newly admitted states sovereignty equal to that of the original thirteen states.

\[7\] The Supreme Court, in Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), ruled that beds of navigable waters are held by the United States in trust for future states. Sovereignty over the bedlands passes to each state upon its admission to the Union. Equal footing was the rationale for the decision. The original thirteen states had gained sovereignty over lands and bedlands within their respective boundaries when the English Crown relinquished its title to those lands. For newly admitted states to have equal sovereignty, it was thought necessary that they also acquire title to the bedlands within their borders. Id. at 230.

That ruling was given the form of a strong, but rebuttable presumption in Shively v. Bowlby, 152 U.S. 1 (1894). Absent contrary congressional intent, federal grants of land to individuals were held to extend no further than the high-water mark of navigable streams. Below that point, the bedlands are held in trust for future states. Id. at 13, 48, 51. In order to rebut that presumption, claimants must show congressional intent to cede the bedlands in advance of a state's admission to the Union, which may only be done to improve commerce with foreign nations or among the several states, or for other justifiable public purposes. Id. at 48.

The Shively presumption was first used to invalidate a tribal bedlands claim in United States v. Holt State Bank, 270 U.S. 49 (1926). The application of Shively to tribal claims cases, however, has been criticized on grounds that the decision in Shively only considered conflicting claims between states and individuals. The critics argue that Indian tribes are not individuals, and that the Shively Court did not contemplate the application of its rule to tribes. See, e.g., Barsh and Henderson, Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. U.S., 56 WASH. L. REV. 627, 676-77 (1981).

\[8\] See Choctaw Nation v. Oklahoma, 397 U.S. 620, 630 (1970); Alaska Pacific Fisheries v. United States, 248 U.S. 78, 89 (1918); Winters v.
the basis of the equal footing doctrine. In 1981, however, the Supreme Court, in *Montana v. United States*, ruled that the presumption of state sovereignty over lands lying beneath navigable waters takes precedence over the canons of treaty construction. The Court avoided overruling prior decisions by enunciating sufficient exceptions in its ruling to support all prior contrary rulings.

The Supreme Court's decision in *Montana* has been roundly criticized. However, it is not the purpose of this article to repeat those criticisms. Rather, its purpose is to examine the difference *Montana* has made in subsequent riverbed claim cases. Seven such cases have arisen since *Montana*, all but one of them in the Ninth Circuit. Surprisingly, five of the seven decisions have been in favor of the tribal claimants.

This paper examines the *Montana* ruling, which will be compared with earlier precedent. It will become apparent that neither the *Montana* rule, nor its exceptions, were precisely defined by the Court, leaving questions as to the ruling's practical effect. Each of the *Montana* progeny will then be examined to determine how the courts have applied the *Montana* rule and exceptions. Finally, the *Montana* rule will be reviewed, as it has evolved through the various subsequent court interpretations. While aspects of the rule remain vague, exceptions to the rule have been significantly extended, leading to the conclusion that *Montana* has not had the extensive detrimental effect on Indian claims critics have feared. Indeed, its rule has affected the disposition of only two cases.

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11. Id. at 551.
12. This argument has been made in Note, supra note 3, at 292.
17. See supra note 15.
would have been precisely the same, based upon earlier precedent. However, the Montana ruling has affected the reasoning applied, requiring the courts to make decisions within its framework.

In the final analysis, Indian tribes are not much worse off under the Montana rule, as it has evolved through subsequent litigation. There is reason for concern over the ambiguities in the rule, which allow opposite conclusions to be drawn from similar language in different treaties. But tribes may well consider the current state of affairs preferable to additional Supreme Court decisions, which might shore up the rule, making it even more difficult for tribes to succeed with bedlands claims.

II. MONTANA v. UNITED STATES

A. The Case

The Crow Indian Tribe of Montana sought to prohibit hunting and fishing within its reservation by any non-member of the Tribe. The Tribe claimed it had the right to regulate fishing within its reservation based in part on its ownership of the bed of the Big Horn River. The State of Montana disputed the Tribe's claim, arguing that title to the bed of the Big Horn River vested in the State upon its entry into the Union, under Pollard's Lessee v. Hagan, Shively v. Bowlby, and the equal footing doctrine. The United States brought suit proceeding in its own right and on behalf of the Crow Tribe, as its fiduciary, to quiet title to the Big Horn River.

The Tribe based its claim of ownership upon the two Treaties of Fort Laramie, the first signed in 1851 and the second in 1868. Under the first treaty, the Federal Government recognized approximately 38.5 million acres of land as Crow Territory, and Article 5 of the treaty specifically reserved for the Indians their hunting and fishing rights on the land. Under the second Treaty of Fort Laramie, an 8 million acre reservation was created for the Crows, through which the Big Horn River flows. That treaty implicitly secured hunting and fishing rights for the Tribe by prohibiting non-Indians from residing on or passing through the reservation.

19. Id. at 547.
20. Id. at 544, 550.
21. 44 U.S. (3 How.) 212 (1845).
22. 152 U.S. 1 (1894).
23. See supra notes 6-7.
24. 450 U.S. at 549.
25. Id. at 547-48.
26. Id. at 548.
27. Id.
The issue, as framed by the Court, was whether the Federal Government had conveyed ownership of the riverbed to the Crow Tribe by the treaties of 1851 or 1868.\(^\text{28}\) If so, the United States continued to hold the land in trust for the Tribe; if not, the bedlands passed to the State of Montana upon its admission to the Union in 1889.\(^\text{29}\)

Justice Stewart, writing for a 6-3 majority, accepted the State's argument that the ownership of bedlands of navigable rivers are an incident of state sovereignty, and title to those lands passes to the state upon its entry into the Union.\(^\text{30}\) While the Court recognized that the United States has the power to convey lands below the high-water mark prior to a state's admission, in order to perform some "appropriate public purpose,"\(^\text{31}\) the Court adopted a strong presumption against such prior conveyance, which could be defeated only by proof of an express or clearly implied intention of Congress to convey.\(^\text{32}\) Justice Stewart admitted that the establishment of an Indian reservation can be an appropriate public purpose justifying Federal conveyance of a riverbed.\(^\text{33}\) Thus, the question before the Court was whether the language of the two Treaties of Fort Laramie or the circumstances surrounding enactment of the treaties manifested a clear congressional intent to convey title of the Big Horn River to the Crow Tribe.

The Court first concluded the language of the 1851 treaty was insufficient to rebut the presumption against conveyance of the riverbed because that treaty did not convey any land at all, but merely represented a covenant with several tribes, recognizing the boundaries of their respective territories.\(^\text{34}\) By contrast, the 1868 treaty did constitute a conveyance of land to the Crow Tribe, setting aside a specifically described reservation for the undisturbed use and occupation of the Tribe. The Court, however, determined that the language of that treaty was not strong enough to overcome the presumption against conveyance of the bed of the Big Horn River,\(^\text{35}\) and concluded:

The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption

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28. Id. at 550-51.
29. Id. at 551.
30. Id. See also Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367 (1842).
31. 450 U.S. at 551. See Shively v. Bowlby, 152 U.S. at 48; see also supra note 7.
32. 450 U.S. at 552. See United States v. Holt State Bank, 270 U.S. at 55; see also supra note 7.
33. 450 U.S. at 555-56.
34. Id. at 553.
35. Id. at 554.
against its conveyance. Nor was the presumption against conveyance overcome simply because the reservation was set aside for the sole use and occupation of the Tribe.

The Court found no evidence of special circumstances surrounding the enactment of the treaty which clearly indicated a congressional intent to convey the bedlands to the Tribe. The situation of the Crow Indians, at the time the treaties were entered into, presented no "public exigency" which might have compelled Congress to deviate from its ordinary course of holding bedlands in trust for future states. Consequently, the Supreme Court ruled that neither the language nor the surrounding circumstances of the treaties indicated any congressional intention to convey ownership of the bed of the Big Horn River to the Crow Indian Tribe. Therefore, title to the riverbed passed to the State of Montana upon its admission to the Union, under the equal footing doctrine.

The question now becomes, just how explicit must a treaty be in order to rebut the presumption against federal conveyance of a riverbed to an Indian Tribe? And, absent specific treaty language, what surrounding circumstances are necessary to indicate congressional intent?

B. The Rule

Prior to Montana, the rule had been that a river flowing through a reservation was owned by the tribe, unless specifically excluded from the grant of lands by the treaty. The leading case in support of that rule is Choctaw Nation v. Oklahoma. That case concerned the Arkansas River, which flowed through the Choctaw and Cherokee reservations, under the 1835 Treaty of New Echota. The Supreme Court ruled that the canons of treaty construction controlled the disposition of the case, and not the equal footing doctrine as the State of Oklahoma contended.

In Montana v. U.S., the Supreme Court abruptly changed its view of the law, making it very clear that the United States holds the beds of navigable waters in trust for future states. Any prior conveyance of those lands by the Government is not to be lightly inferred, and can only be

36. Id.
37. Id.
38. Id. at 556.
39. Id. at 556-57.
40. It should be noted that the Shively presumption was not yet in effect at the time most of the federal conveyances to Indian tribes took place. Therefore, when the treaties were drafted, it is not likely the drafters would have been careful to indicate congressional intent to rebut the presumption, even where there was such intent.
42. Id.
43. Id. at 628.
44. Id. at 630.
accomplished in furtherance of some appropriate public purpose. The fact that the bed of a navigable water lies within the metes and bounds of an Indian reservation is not a sufficient indication of congressional intent to convey, absent corroborating evidence.

The *Montana* court recognized two indicators of congressional intent to convey, either of which alone would rebut the presumption of state sovereignty. First, where the treaty expressly recognized tribal ownership of the riverbed, congressional intent is obvious, and the conveyance will stand. Even where the treaty language is not sufficiently express, congressional intent to convey bedlands may be indicated by the circumstances surrounding the treaty. The Court asserted that where there exists a "public exigency," requiring Congress to deviate from its policy under the equal footing doctrine, intent to convey will be sufficiently clear. The Court recognized two public exigencies which might operate in tribal bedlands disputes. First, where an Indian tribe is dependent on the river for its diet or way of life, the presumption of state ownership will be defeated. The presumption will also be defeated when the circumstances surrounding the signing of the treaty indicate that the Government was attempting to placate a dangerously unhappy tribe, in assuring that no reserved land would ever be embraced within a state or territory. The "public exigency" in such cases will be referred to as the "national peace." The "national peace" exigency allowed the *Montana* Court to avoid overruling the *Choctaw Nation v. Oklahoma* decision, while, at the same time, the Court rejected the *Choctaw decision's* legal premise that the canons of treaty construction control disposition of tribal bedlands claims.

Justice Blackmun, in dissent, joined by Justices Brennan and Mar-
shall, argued that the Court ignored settled rules of treaty construction in creating a presumption of state sovereignty over bedlands in tribal claim cases.\textsuperscript{52} Regardless of what the government intended, ownership of a riverbed should depend on the tribe's understanding of relevant treaty language.\textsuperscript{53} Blackmun also argued that under the majority's own rule, the Tribe should have prevailed in \textit{Montana}. In his view, \textit{Montana} was indistinguishable from \textit{Choctaw Nation}; the same exigencies which led to the Treaty of New Echota also inspired the Treaties of Fort Laramie.\textsuperscript{54} Justice Stevens, concurring in the Court's opinion, disagreed with Blackmun's assessment of the facts, finding it "significant" that Justice Stewart, a member of the majority in \textit{Choctaw Nation}, authorized the \textit{Montana} decision.\textsuperscript{55}

Therefore, the \textit{Montana} rule is that congressional intent to convey bedlands to Indian tribes must be made clear either through express treaty language or by the circumstances of the tribe, its needs and way of life, and its relationship with the federal government. By establishing these reasonably broad indicators of intent, the \textit{Montana} Court succeeded in preserving all the important prior rulings on tribal bedland claims.\textsuperscript{56}

If \textit{Montana} indeed preserved all those previous rulings, what is its practical effect? Only two conclusions can be drawn from \textit{Montana} with certainty: first, the old metes and bounds rule has gone by the wayside; the United States will not be held to have conveyed the bed of a navigable river solely because it lies within the boundaries of a reservation.\textsuperscript{57} Second, \textit{Montana} clearly establishes the primacy of the equal footing doctrine over the traditionally determinative canons of treaty construction. No longer will ambiguous treaty provisions be construed in favor of tribes when riverbed ownership is at issue.

\section*{III. Tribal Bedlands Claims After \textit{Montana}}

Seven tribal bedlands claim cases have been decided since \textit{Mon-
tribal bedslands claims

six of them within the geographic area of the Ninth Circuit. The courts have held for tribal claimants in all but two of the cases, despite having to work within the rule and exceptions provided by the Supreme Court in Montana. Of the two cases that have held for the states, one likely would have been decided precisely the same under earlier precedent, while the other certainly owes its disposition to the Montana ruling.

A. Wisconsin v. Baker

Wisconsin v. Baker was the first case to be decided under the rule set forth in Montana, and one of only two cases decided after Montana to hold against tribal claimants. In Baker, the Lac Courte Oreilles Band of the Chippewa Tribe of Lake Superior claimed a right to control hunting and fishing on their reservation under treaties of 1837 and 1854. That claim was based in part on ownership of navigable waters flowing through the metes and bounds of the reservation. The court found the language of the treaties insufficient to overcome the presumption against conveyance of the bedlands. The court further found no "public exigency" on which to support an implied governmental conveyance. In making that determination, the court relied on the primary congressional purposes behind the treaties: to acquire title to Chippewa lands and to open the lands for non-Indian settlement, while concentrating the Tribe in a small area. There

58. Two additional cases focus on an issue ancillary to that which is the subject of this paper, whether aboriginal Indian title to riverbeds survives statehood. Aboriginal title gives a tribe the right to continued exclusive occupation of its ancestral lands. See Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823). In United States v. Pend Oreille County PUD No. 1, No. C-80-116-RMB (E.D. Wash., May 29, 1984) (slip op.), the court held that the equal footing doctrine cannot operate where tribal ownership is claimed under aboriginal title. In such cases, the federal government never has the title to hold in trust for future states. Of course, it is still incumbent on the tribes to prove the existence of aboriginal title, which must not have been abandoned or abrogated by clear act of Congress. The equal footing doctrine cannot itself abrogate such title. By proving aboriginal title, tribes are able to perform an end-run around the Montana rule, which simply doesn't apply in such cases. See 27 Anad. Fish L. Memo 15 (August, 1984).

For another case on the same issue, see Yankton Sioux Tribe of Indians v. Nelson, 521 F. Supp. 463 (D.S.D.), vacated and remanded, 683 F.2d 1160 (8th Cir.), 566 F. Supp. 1507 (D.S.D. 1983). 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. The district court ruled that the river was indeed navigable, and the case is now back before the Eighth Circuit for a ruling on the merits.


60. See Aranson, infra notes 90-114 and accompanying text.

61. 524 F. Supp. 726 (W.D. Wis.), modified, 698 F.2d 1323 (7th Cir.), cert. denied, 103 S. Ct. 3537 (1983).

62. Id. at 733.

63. Id. It should be noted that the court did not set forth the relevant language of either treaty in the opinion.

64. Id. at 731 (findings of fact numbers 74 and 75). It is interesting to note that the court did not
was no indication of federal concern with the “national peace,” as in *Choctaw Nation.*\(^6\) Neither did the court find that the Tribe’s reliance on fishing constituted a “public exigency,” concluding instead that by 1854 the Tribe had grown more dependent on agriculture than on hunting and fishing.\(^6\) Therefore, the court held the Tribe did not own the beds of navigable waters within the boundaries of the reservation. Nevertheless, the court concluded that the federal government had intended to give the Tribe regulatory authority over hunting and fishing within the reservation.\(^6\) So even though *Montana* was dispositive of the ownership issue, it did not control the final outcome of the case.

It was unnecessary for the court to rely on *Montana* in order to rule against tribal ownership of bedlands within the Chippewa reservation. Based on certain findings of fact, the Government clearly intended by the treaties to convey only *dry* lands to the Tribe.\(^8\) Moreover, tribal spokesmen at the 1837 treaty negotiations were aware that such was the government’s intent.\(^9\) Therefore, even if the court relied exclusively on the rule of liberal treaty construction, without reference to *Montana,* the outcome of the case would have been the same.

### B. The Namen and U.S. v. Washington Cases

The second case to be decided in the wake of *Montana,* and the first to be decided by the Ninth Circuit, was *Confederated Salish & Kootenai Tribes v. Namen.*\(^7\) In that case, the court upheld the rights of Indian tribes on the Flathead Reservation to regulate the exercise of riparian rights of non-members on the southern half of Flathead Lake. The Tribes derived their regulatory power from their ownership of that lake under the 1855 Treaty of Hell Gate, ratified in 1859.\(^7\) The treaty established a northern boundary of the reservation which bisected Flathead Lake, thereby including the southern half of the lake within the reservation.\(^7\)

This was not the first occasion in which the Ninth Circuit had to determine ownership of the bed of Flathead Lake; forty years earlier, the

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:\(^6\) See supra notes 50-51 and accompanying text.
\(^6\) 524 F. Supp. at 730.
\(^6\) id. at 734.
\(^8\) id. at 732 (finding of fact number 86).
\(^9\) id.
\(^7\) 665 F.2d 951 (9th Cir.), cert. denied, 459 U.S. 977 (1982) (Justices Rehnquist and White dissenting); see generally Note, Namen II: Do the Tribes Have the Authority to Regulate Non-Indian Riparian Rights on Flathead Lake?, 4 PUB. LAND L. REV. 170 (1983).
\(^7\) id. at 953.
\(^7\) id. at 962.
court held that the Tribes of the reservation owned it. The appellees, including Namen, the City of Polson and the State of Montana, argued that, after Montana v. United States, those earlier cases were no longer good law. But the court was able to distinguish Montana on the facts, determining that the language of the Hell Gate Treaty was intended to convey the bed of the southern half of Flathead Lake to the Tribes.

The court held that the bed of the south half of Flathead Lake is owned by the United States in trust for the Tribes because that was the only sensible interpretation the treaty allowed; why else would Congress create a boundary half way across a lake? If the intention was to establish reservation lands running only to the high-water mark, Congress would most likely have made the southern edge of the lake the boundary of the reservation.

Reasonable as the Ninth Circuit's construction may have been, it is unclear whether the Montana decision supports such an interpretation. This is due to the Supreme Court's failure in Montana to clearly establish what constitutes express conveyance for the purpose of overcoming the presumption in favor of state ownership of bedlands. Indeed, Justice Rehnquist, dissenting from the Supreme Court's denial of certiorari in Namen, suggested that conveyance to the mid-stream of a river would not be a sufficient expression of congressional intent to convey bedlands to overcome the presumption. Rehnquist would find a conveyance only where a treaty specifically referred to rights granted in land under navigable water.

The Ninth Circuit, in Namen, did not rely solely on the express language of the Hell Gate Treaty, but also rested its decision on two "public exigencies." First, the court found that the Kootenai Indians, one of the Tribes on the Flathead Reservation, depended heavily on fishing. Furthermore, the "urgency" with which the Office of Indian Affairs pressed Senate ratification of the treaty in the 1850's, in order to open up large areas of the Washington Territory for non-Indian settlement, was perceived by the court as constituting a separate "public exigency" under the Montana rule. However, the court did not elaborate on either the

74. 665 F.2d at 961. See 450 U.S. 544.
75. 665 F.2d at 962.
76. Id.
77. See supra note 48, and accompanying text.
78. 459 U.S. 977 (Rehnquist, J., dissenting), denying cert. to 665 F.2d 951 (9th Cir. 1982).
79. Id.
80. 665 F.2d at 962.
81. Id. The court, however, gave no precise definition or scope of application to its new exigency.
“urgency” or the fishing exigency, but seemed to allude to them for the sole purpose of satisfying the Montana criteria. Had the court truly relied on those factors in making its determination, it is likely that evidence would have been provided to support its findings.

In United States v. Washington, the Quinault Tribe of western Washington presented the Ninth Circuit with precisely the same factual situation as the Namen case. Like the Salish and Kootenai’s, the Quinault’s reservation was established under the Hell Gate Treaty of 1859. As a result, the court disposed of the Quinault’s case merely by reference to its prior decision. The court exhibited some concern with Justice Rehnquist’s dissenting opinion in the United States Supreme Court’s denial of certiorari in Namen, but concluded that it was for the Supreme Court to more precisely define the Montana rule if it so desired.

Thus, after the first three decisions subsequent to Montana, the scope of the rule remained uncertain. The Namen decision did, however, expand the exceptions to the rule, establishing “urgency” as a valid “public exigency,” indicating congressional intent to convey bedlands of navigable waters. The Ninth Circuit, however, failed to clarify its new exception to the Montana rule; “urgency” seems indistinguishable from the general concept of “public exigency.” The “urgency” the Ninth Circuit found to indicate congressional intent to convey bedlands concerned the need to quickly open former Indian lands to non-Indian settlement. But it is questionable whether the government has ever entered into a treaty with an Indian tribe without some similar kind of “urgency.” The purpose and scope of the “urgency” exigency remain unclear because no court has applied the exception since Namen.

The Supreme Court’s denial of certiorari in Namen marks the only occasion the Court has taken since Montana to comment on the evolution of the rule adopted in that case. By denying certiorari, the Court tacitly approved the Ninth Circuit’s application of the Montana rule and its

Query: what is the difference between “urgency” and the general concept of “public exigency”?

82. 694 F.2d 188 (9th Cir.), cert. denied, 103 S. Ct. 3536 (1983).
83. Id. at 189.
84. Id.
85. Id. See 459 U.S. 977; see also supra notes 78-79 and accompanying text.
86. Id.
87. Arguably, “urgency” refers to congressional concerns, while “public exigencies” generally refer to tribal circumstances. There is also some doubt as to whether “urgency” is distinguishable from the “national peace” exigency. Perhaps the latter applies to situations of open hostility, while “urgency” appears in circumstances where possible future hostility is threatened. Even so, that would not constitute much of a distinction. And regardless, the question remains, what treaties were ever entered into without some sense of urgency.
88. 665 F.2d at 962.
89. 459 U.S. 977.
exceptions. The approval was not unanimous, however, as Justice Rehnquist's dissent, joined by Justice White, indicates.

C. United States v. Aranson

The Aranson case is the most troublesome of the tribal bedlands claim cases since Montana. In Aranson, the Colorado River Indian Tribes sought to have a number of individuals and corporations removed from what they claimed was a part of their reservation, which centers on and around the meandering Colorado River.

The Tribes claimed ownership of a part of the bed of the river along the border between California and Arizona under an 1865 treaty. The treaty expressly conveyed lands to, and sometimes beyond, the eastern bank of the river. After the treaty was signed, the river altered its course, carving out various channels through the valley, and moving slowly westward. The Tribes claimed that the changes in course were due to accretion, and therefore, the boundaries of the reservation had expanded to include lands currently occupied by the individuals and corporations named as defendants. However, the court did not decide the boundaries of the reservation, merely stating the applicable law to be applied by the District Court in making that determination on remand.

The court, in a section of the opinion authored by Judge Trask, ruled on the Tribes' claim of ownership of the bed of the Colorado River, holding that the bedlands had not been conveyed by the 1865 treaty. This determination was made especially difficult due to the anomalous nature of the transaction.

An executive order, subsequent to the treaty, dated 1876, expressly provided that the western boundary of the reservation was to run along the west bank of the Colorado River. Under normal circumstances, the

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90. 696 F.2d 654 (9th Cir.), cert. denied, 104 S. Ct. 423 (1983).
91. Id. at 656. The Tribes also sought damages for wrongful possession.
92. Id.
93. Id. at 656, 664.
94. Id. at 656.
95. "Accretion" occurs when land is gradually eroded from one bank of a river and deposited on the other side. In such cases, the boundary between the two properties or states moves with the river. Thus, an accretion of land from east to west would increase the size of the eastern property—in this case, Arizona.

Where a sudden change occurs in a river's course, the change is labelled "avulsive." Such changes in course do not affect the boundaries. See 696 F.2d at 659-63.
96. 696 F.2d at 656-57.
97. The court concluded that California state law should rule the decision, but denied invocation of that state's artificial accretion exception, to the effect that the state's law would not decide the boundaries differently than would federal law. 696 F.2d at 663.
98. Id.
99. Id. at 664.
probable interpretation of such a grant would be that Congress intended thereby to convey the riverbed.\textsuperscript{100} However, there was a complicating factor: In 1876, the United States could not have conveyed the western half of the riverbed, because California had already become a state.\textsuperscript{101} The Aranson court stated that, prior to Montana, it would have read the 1876 order as conveying the eastern half of the riverbed to the Tribes, but concluded that Montana precluded such an analysis.\textsuperscript{102} The court held the language of the order was not sufficiently express to indicate congressional intent to convey any of the Colorado River bedlands.\textsuperscript{103} Neither did the court find any “public exigency” to justify tribal ownership: The Tribes were not heavily dependent on the river as in Namen\textsuperscript{104} and the legislative history behind the treaty was not compelling.\textsuperscript{105} The court did not consider either the Namen “urgency” exigency\textsuperscript{106} or the “national peace” exigency.\textsuperscript{107}

This is a puzzling decision from the Ninth Circuit, which has been recognized for its “broad interpretation” of the Montana ruling.\textsuperscript{108} Unless the language in the treaty referring to the west bank of the river was simply a drafting mistake,\textsuperscript{109} it would be far more reasonable to interpret the executive order of 1876 as conveying the eastern half of the riverbed to the Tribes. It is unclear why the court was dissuaded from that conclusion by the existence of the Montana rule, especially considering the Namen ruling.\textsuperscript{110}

Aranson stands alone among the seven cases arising since Montana; it is the only one that owes its disposition exclusively to the Montana rule. The Ninth Circuit made clear that if the Montana rule had not existed, the court would have held the lands underneath the eastern half of the Colorado River were owned by the Tribes.\textsuperscript{111} What makes the case

\begin{itemize}
\item \textsuperscript{100} Otherwise, why not simply convey to the east bank? The language in Aranson is analogous to a grant to the mid-point of a river. See supra note 49 and accompanying text.
\item \textsuperscript{101} 696 F.2d at 664. California was admitted to the Union in 1850. At that time, under the equal footing doctrine, California received ownership of the bedlands of all navigable waters in the state (see supra notes 6-7 and accompanying text). As the Colorado River formed the boundary between California and Arizona, California received title to the western half of that river’s bed.
\item \textsuperscript{102} 696 F.2d at 664.
\item \textsuperscript{103} Id.
\item \textsuperscript{104} Id. at 666. See supra notes 75-86 and accompanying text.
\item \textsuperscript{105} Id. at 665.
\item \textsuperscript{106} See supra note 87 and accompanying text.
\item \textsuperscript{107} See supra note 50 and accompanying text.
\item \textsuperscript{108} Lusvardi, supra note 13, at 703.
\item \textsuperscript{109} There was no evidence to that effect.
\item \textsuperscript{110} The Namen court held conveyance to a river’s mid-channel is sufficient expression of congressional intent to convey bedlands. See supra notes 75-76, and accompanying text.
\item \textsuperscript{111} 696 F.2d at 664. Even the Baker case, supra notes 61-69 and accompanying text, could have been disposed of exactly the same without reliance on Montana.
\end{itemize}
especially troublesome is that it appears to conflict strongly with the earlier \textit{Namen} decision. In \textit{Namen}, conveyance to the midpoint of a lake was held to be sufficient expression of congressional intent to convey. By contrast, in \textit{Aranson}, the court found treaty language insufficient, where conveyance was to the far bank of a river. While it is true that the \textit{Namen} court buttressed its decision by finding the existence of public exigencies, the court asserted that the language of the Hell Gate Treaty alone was sufficiently expressive of congressional intent to convey. The \textit{Namen} and \textit{Aranson} cases simply cannot be reconciled. Indeed, \textit{Namen} was not even mentioned in \textit{Aranson}, which followed \textit{Namen} by a full year. This may indicate a failure of counsel for the Tribes in \textit{Aranson} to adequately research and present the relevant precedent, and a failure of the court to supplement counsel's efforts with research of its own.

D. The Puyallup and Muckelshoot Cases

The Ninth Circuit quickly reasserted itself as a liberal interpreter of the \textit{Montana} rule, deciding two cases in a single day, both in favor of tribal claimants. In \textit{Puyallup Indian Tribe v. Port of Tacoma}, the Tribe sought to quiet title to the bed of the Puyallup River. The Tribe claimed ownership of the river under the Treaty of Medicine Creek of 1854 and a subsequent executive order in 1857.

Under the Treaty of 1854, the Puyallup Tribe was settled on a site that did not include access to the Puyallup River and its fishery, on which the Tribe was heavily dependent. The Tribe was very dissatisfied with its reservation and "agitated vigorously" for an enlargement to include a section of the river. When hostilities arose between the dissatisfied Indians and the non-Indian settlers, the United States Government convened the Fox Island Council to restore peace. The resulting agreement enlarged the reservation to include the lower portion of the river. The agreement was adopted by President Pierce in an Executive Order of January 20, 1857. According to the \textit{Puyallup} court, the federal government's intention to convey title to the riverbed to the Puyallup Tribe

\begin{itemize}
  \item \textsuperscript{112} See supra notes 70-81, and accompanying text.
  \item \textsuperscript{113} See supra notes 80-81, and accompanying text.
  \item \textsuperscript{114} 665 F.2d at 962.
  \item \textsuperscript{115} 717 F.2d 1251 (9th Cir.), \textit{cert. denied}, 104 S. Ct. 1324 (1984).
  \item \textsuperscript{116} \textit{Id.} at 1253.
  \item \textsuperscript{117} \textit{Id.} at 1253, 1260.
  \item \textsuperscript{118} \textit{Id.} at 1253, 1259.
  \item \textsuperscript{119} \textit{Id.} at 1253.
  \item \textsuperscript{120} \textit{Id.} at 1260.
  \item \textsuperscript{121} \textit{Id.}
  \item \textsuperscript{122} \textit{Id.}
  \item \textsuperscript{123} \textit{Id.}
\end{itemize}
was made clear by the negotiations at the Fox Island Council.\textsuperscript{124} The court found sufficient evidence of intent to convey on the basis of two “public exigencies” surrounding the Treaty of Medicine Creek and subsequent executive order. First, the court determined that the Tribe was dependent on the fish runs of the Puyallup for their year-round subsistence and commercial trade.\textsuperscript{126} Moreover, the executive order, resulting from the Fox Island Council agreement, evidently was issued to restore peace to the region and to calm the hostilities caused by the insufficiency of the original Treaty of Medicine Creek.\textsuperscript{126}

The Puyallup ruling controlled the subsequent decision in \textit{Muckelshoot Indian Tribe v. Trans-Canada}.\textsuperscript{127} The Muckelshoot Tribe sought to quiet title and to eject trespassers from lands that had constituted the bed of the White River, where it had formerly passed through the Muckelshoot reservation.\textsuperscript{128}

As in Puyallup, the reservation was first established under the treaty of Medicine Hat in 1854, but that Treaty did not grant the Tribe access to the river, on which they were heavily dependent.\textsuperscript{129} The Tribe made known their dissatisfaction with the Treaty, and Indian agents and officers warned the government of impending trouble.\textsuperscript{130} In 1874, President Grant signed an executive order enlarging the Muckelshoot reservation to include the White River, as a direct response to the Tribe’s dissatisfaction with the Medicine Hat Treaty, and its desire to have a traditional fishery within the reservation.\textsuperscript{131}

Thus, the same public exigencies present in Puyallup were also present in the Muckelshoot case: concern with the “national peace” and recognition of the tribe’s dependency on the fish runs of a neighboring river for food, trade and religious practices.\textsuperscript{132} The court in Muckelshoot did not need to go through the entire argument again; it simply relied on Puyallup.

\textit{Puyallup and Muckelshoot} did not add anything substantive to the \textit{Montana} rule or its exceptions. However, the two decisions firmly entrenched the concept of “public exigency,” making it very clear that

\begin{itemize}
\item \textsuperscript{124} \textit{Id.} at 1260-61.
\item \textsuperscript{125} \textit{Id.} at 1259.
\item \textsuperscript{126} \textit{Id.} at 1260. Thus, this case falls within the “public exigency” represented by \textit{Choctaw Nation}, 397 U.S. 620. \textit{See supra} notes 50-51 and accompanying text. The Ninth Circuit reaffirmed the status of \textit{Choctaw Nation}, concluding that \textit{Montana} had overruled neither the holding nor the analysis of that case. 717 F.2d at 1257.
\item \textsuperscript{127} 713 F.2d 455 (9th Cir.), \textit{cert. denied}, 104 S. Ct. 1324 (1984). This decision was only subsequent to \textit{Puyallup} by a matter of hours, and was, in fact, reported prior to \textit{Puyallup}.
\item \textsuperscript{128} 713 F.2d at 456.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.} at 458.
\item \textsuperscript{131} \textit{Id.} at 456.
\item \textsuperscript{132} \textit{Id.} at 458.
\end{itemize}
reliance on fish runs for food, commerce and religious practices would indicate congressional intent to convey. The Puyallup and Muckelshoot cases were also the first two decisions after Montana to make use of the "national peace" exigency, which the Montana Court had only-vaguely fashioned to distinguish Choctaw Nation v. Oklahoma. Perhaps most importantly, the Puyallup and Muckelshoot cases signified the Ninth Circuit's return to a reasonably liberal interpretation of the Montana rule, after the court's position had been placed in doubt by its ruling in Aranson.

E. The Spokane River Project Case

The most recent case to be decided under the Montana rule was In re The Washington Water Power Co., a Federal Energy Regulatory Commission (FERC) decision, requiring a licensee under the Federal Power Act of 1920 (FPA) to pay the Coeur d'Alene Tribe of Indians an annual fee for the use of tribal lands by the Spokane River hydro-electric project. The licensee proposed to use Coeur d'Alene Lake as a reservoir. However, a part of that lake was within the Indian reservation, established in 1867, by executive order of President Johnson. The Tribe claimed beneficial ownership of the bedlands at the southern end of the lake, and therefore claimed a right, under § 10 of the FPA, to compensation for its use as a reservoir. The licensee argued that the Tribe did not have title to the bedlands beneath Coeur d'Alene Lake because ownership of the lake passed to the State of Idaho upon its admission to statehood in 1890, under the equal footing doctrine and Montana v. United States.

FERC found the history of the Coeur d'Alene Indian reservation indicated that Congress intended to convey the lakebed to the Tribe. In

134. See supra notes 90-114 and accompanying text.
135. 25 FERC P61,228 (1983).
136. 16 U.S.C. §§ 790-828 (1982). As a FERC decision, this case may be of more limited precedential value than the other cases analyzed in this paper. Because of the judicial review provisions of the FPA, however, its value should not be underestimated. 16 U.S.C. § 825 l(b) (1984), allows aggrieved parties to petition an appropriate U.S. Court of Appeals for review of a FERC decision. In this case, the appropriate courts would be the Ninth and D.C. Circuits.
137. 25 FERC at 61,577. See also 16 FERC P62,096, 63,192 (1981) (concerning use of Coeur d'Alene Lake as a reservoir).
138. 25 FERC at 61,576. § 10 of the FPA provides: "(e) That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the Commission . . . for recompensing it for the use, occupancy, and enjoyment of its lands or other property . . . Provided, that when licenses are issued involving the use of . . . tribal lands embraced within Indian reservations the Commission shall . . . , subject to the approval of the Indian tribe having jurisdiction of such lands . . . , fix a reasonable annual charge for the use thereof. 16 U.S.C. § 803(3).
139. 25 FERC at 61,567.
140. There were a number of successive executive orders and agreements between the Tribe and
1887, the Tribe entered into an agreement with the Northwest Indian Commission, under which the Tribe ceded a large portion of aboriginal territory to the federal government in exchange for a permanent home. The federal government agreed that “no part of said reservation shall [ever] be sold, occupied, open to white settlement or otherwise disposed of without consent of the Indians residing on said reservation.” When Congress ratified that agreement in 1891, it also ratified a conveyance by the Tribe of three river-channels running through the reservation, to a non-Indian. Congress at that time must have been under the impression that in 1867 the president had conveyed the reservation’s bedlands to the Tribe.

Moreover, an 1873 executive order by President Grant created a northern boundary of the reservation that ran along the center channel of the Spokane River. FERC concluded that an express reference to the center of a channel in a treaty or executive order was sufficient to show congressional intent to convey bedlands. A subsequent 1889 agreement between the Tribe and the Indian Commission resulted in a new northern boundary of the reservation, which bisected Lake Coeur d’Alene, making the case analogous to the Ninth Circuit’s Namen decision. The 1889 agreement, like that of 1887, was ratified by Congress in 1891.

Based on the numerous agreements between the Tribe and the government, the government clearly intended at all times that the Indians should own the beds of navigable waters within their reservation. If the government had intended otherwise, congressional actions taken after Idaho was admitted to the Union were inconsistent with state ownership of the bedlands. FERC concluded that throughout the various agreements, the government and the Indian Tribe “were negotiating the beneficial ownership of the bedlands of the lake and river.”

Apparently, FERC was content to base its ruling of tribal ownership entirely on the language of the various executive orders and ratified agreements between the Tribe and the government. Nowhere in its opinion

the government, altering the reservation, but never to the exclusion of Coeur d’Alene Lake. See 25 FERC at 61,577-578.
141. 25 FERC at 61,581-582.
142. Id. This agreement was ratified by Congress in 1891, eight months after Idaho was admitted to the Union, on an equal footing with the other states. 25 FERC at 61,576. Thus arose an interesting and unique issue for the Commission, which concluded that the controlling date was the date of agreement, not the date of congressional ratification. 25 FERC at 61,587.
143. 25 FERC at 61,593 n.11, 61,587. See also the Indian Department Appropriations Act of 1891, 25 U.S.C. § 177 (1982).
144. 25 FERC at 61,580-581.
145. Id.
146. 25 FERC at 61,583. See also supra notes 70-76 and accompanying text.
148. 25 FERC at 61,584.
did FERC refer to the issue of "public exigenc[ies]."

The importance of the FERC decision lies in its reading of the express treaty language rule of Montana. As noted earlier, the Supreme Court had not made clear whether an express reference to a river's mid-channel would be sufficient to indicate congressional intent to convey under the Montana rule.\textsuperscript{149} Although the FERC ruling supports such an interpretation,\textsuperscript{150} the decision did not rest solely on the language of the various documents, but also on the history of the negotiations between Tribe and government. Of conclusive importance was the congressional ratification of the Tribe's 1871 conveyance of river-channels to a non-Indian.\textsuperscript{151}

IV. IMPLICATIONS

The trend of the Montana progeny is clearly towards an expansion of the "public exigency" exceptions to the Montana rule. At least in the Ninth Circuit, if a tribe has historically been dependent on a body of water for subsistence fishing, trade or for religious practices, then the court will hold that the tribes own bedlands within their reservation.\textsuperscript{152} The Ninth Circuit has also added a new exigency not mentioned in Montana: If the circumstances behind the creation of a reservation indicate a sense of "urgency" on the part of Congress, e.g., to secure Indian territory for non-Indian settlement, then that "urgency" might indicate congressional intent to convey bedlands to a tribe.\textsuperscript{153} Finally, the courts have made consistent use of the "national peace" exigency, established by the Supreme Court in Montana to avoid overruling Choctaw Nation v. Oklahoma.\textsuperscript{154}

More difficult to assess is the status of the Supreme Court's alternative

\textsuperscript{149} See supra notes 49 and 77.
\textsuperscript{150} See supra note 145 and accompanying text.
\textsuperscript{151} See supra note 143 and accompanying text.
\textsuperscript{152} For an especially strong statement of this exigency, see Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d at 1258.
\textsuperscript{153} See Namen, 665 F.2d at 962.
\textsuperscript{154} See supra notes 87-88 and accompanying text.

The "urgency" exigency is of questionable value because it does not seem distinguishable from the general concept of "public exigency" in any meaningful way. Also, "urgency" is one term applicable to virtually every circumstance in which the United States entered into a treaty with an Indian tribe. The "overriding goal" of the United States in treaty negotiations was to obtain Indian lands for non-Indian settlement in areas where Indian lands had become surrounded by non-Indian settlements. F. Cohen, Handbook of American Indian Law 66 (1982 ed.). Securing Indian lands for non-Indian settlement was the basis for the "urgency" exigency fashioned by the Namen court. 665 F.2d at 662. See supra notes 87-88 and accompanying text.

The "urgency" exigency has not been employed by a single court since Namen, indicating a lack of judicial faith in its value as a distinct exigency under the Montana rule.

\textsuperscript{154} See supra notes 50-51 and accompanying text. Subsequent cases making use of that exigency include: Puyallup Indian Tribe, 717 F.2d at 1260; Muckelshoot Indian Tribe, 713 F.2d at 457-58.
means of establishing congressional intent to convey bedlands to a tribe: express treaty language. Is it sufficient for the treaty to mention the mid-channel of a stream, or does the *Montana* rule require that the treaty expressly refer to the beds beneath that channel? The *Montana* progeny give conflicting answers.

In *United States v. Aranson*, the Ninth Circuit held treaty language insufficient to convey even the eastern half of the Colorado River, where the treaty set the western boundary of a reservation on the western bank of a river. In contrast, the Federal Energy Regulatory Commission, in *In re Washington Water Power Co.*, ruled that a reservation boundary established at the mid-channel of a river indicated conveyance of the bedlands of that river, within the boundary. The FERC decision was based on the earlier Ninth Circuit decision in *Namen*, which was not even mentioned in *Aranson*. The *Montana* decision gave no indication whether the mention of a mid-channel would be sufficient expression of congressional intent to overcome the presumption against conveyance. Nevertheless, it is likely that the Supreme Court would find a conveyance in such circumstances, in order to avoid overruling a number of pre-*Montana* cases decided on that basis. Another reason the Court might be more inclined to find a conveyance in such situations is the common sense reason expressed by both the Ninth Circuit and FERC. If Congress had not intended to convey bedlands by bounding a reservation at the mid-point of a river or lake, then why did it go through the trouble of drawing the boundary at that point? Certainly Congress was not precluded from bounding the reservation at the near bank of the river or lake. If the Ninth Circuit in *Aranson* had asked those questions, perhaps the case would have come out differently. As it stands, the decision remains contrary to the trend of Ninth Circuit cases.

### V. Conclusion

The Supreme Court’s decision in *Montana v. United States* seemed to establish the dominance of the equal footing doctrine over the canons of

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155. 696 F.2d 654.
156. See supra notes 92-103 and accompanying text.
157. 25 FERC P61,228.
158. See supra notes 144-145 and accompanying text.
159. 25 FERC at 61,584.
160. See supra notes 112-114 and accompanying text.
161. See supra note 56 and accompanying text.
162. See 665 F.2d at 962 n.28; 25 FERC at 61,584.
163. See supra notes 90-114 and accompanying text.
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liberal treaty construction. In conveyances of lands to Indian tribes under treaties, executive orders and congressionally ratified agreements, the equal footing doctrine creates a presumption against conveyance of lands lying beneath the high-water mark of navigable waters. The presumption favors federal retention of bedlands in trust for future states. According to the Court, there are only two ways the presumption can be rebutted: by sufficiently express treaty language indicating congressional intent to convey, or by a showing that a “public exigency” existed at the time the treaty was entered into, making it clear that Congress intended to act contrary to the equal footing doctrine.

Critics feared the impact of Montana on future cases, but their fears have not been realized. Of seven cases decided since Montana, only Baker and Aranson owe their disposition to the Montana rule, and Baker might well have been decided the same under earlier precedent. Of course, all seven of the decisions had to base their reasoning along the lines of the Montana rule and its exceptions.

The Montana progeny have significantly extended the “public exigency” exception to the rule, adding a new, if indistinguishable “urgency” exigency, while enlarging the scope of those originally established in the Montana decision. However, what constitutes sufficiently express congressional intent has remained vague, resulting in conflicting decisions in cases based on similar treaty language. Such conflicts are likely to continue until the Supreme Court decides another tribal bedlands case, at which time the Court should more precisely define the parameters of the Montana rule and its exceptions.

Tribes might prefer to take their chances under the ambiguities of the rule as it now stands, however, rather than give the Supreme Court an opportunity to fortify the rule and narrow its exceptions. Justice Rehnquist has indicated that if tribes take the question back to the Supreme Court, they may lose more than they gain. The Montana decision itself demonstrates that the traditional trust relationship between the federal government and Indian tribes, with its attendant canons of treaty and statutory construction, has lost the support of a Supreme Court with a
predilection for states' rights. Fortunately, it is unlikely the Court will be hearing a tribal bedlands claims case any time in the near future. With the exception of Justices Rehnquist and White, the Court seems content to allow the Montana rule to evolve in the lower courts for the time being. Certiorari has been denied to each of the six cases discussed in this paper which have been decided at the appellate level.

176. On the federal government's trust relationship with the Indians, see F. COHEN, supra note 153, at 220-228.

177. See supra note 14. The seventh decision, the Spokane River Project Case, will have to be appealed to either the Ninth Circuit or the D.C. Circuit before the Supreme Court may be petitioned for certiorari. See supra note 136.