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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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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 war over title to submerged lands on reservations. Each has won some battles, 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 to


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.


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. Tribal claimants consistently prevailed on that basis until 1981, when the states’ persistent reliance on Equal Footing finally paid off. In *Montana v. United States*, 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. Many critics viewed the *Montana* decision as a knock-out punch to tribal bedlands claims. However, as this

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).


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.


7. Id. at 551-52.

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*, 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;

10. Id. at 609.
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.\(^\text{15}\)

The *Montana* Court clearly established the dominance of Equal Footing over the traditionally determinative canons of treaty construction.\(^\text{16}\) 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;\(^\text{17}\) or (2) by proving that “public exigenc[i]es” existed during treaty negotiations, which required congressional deviation from the policy of holding bedlands in trust for future states.\(^\text{18}\) 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*.\(^\text{19}\) 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.


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[i]es” under the *Montana* rule see Comment, *supra* note 3, at 125, 137.

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

III. THE PEND OREILLE DECISION

A. The Case

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

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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.
District No. 1 and the State of Washington, alleging tribal ownership of the bed and banks of the Pend Oreille River. 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. 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. 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.

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. 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.

**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. Those rights are accorded the protection of com-

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

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

Where aboriginal title exists, the United States holds a bare fee to the ancestral lands, encumbered by the tribal rights. Conveyance of the lands by the federal government does not automatically extinguish the aboriginal rights. Instead, the encumbrance follows the chain of title. 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.

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. DE VATTEL, 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.


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.


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

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

IV. ANALYSIS

United States v. Pend Oreille County P.U.D. No. 1 decided the first tribal bedlands claim based on aboriginal rights. 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. The irony in this is illustrated by cases, prior to Montana 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. In all other respects, courts have held aboriginal title to afford the same set of beneficial interests as treaty title.

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

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.
full title to bedlands before conveyance, the Pend Oreille court premised its decision on encumbrance of the federal government’s fee by preexisting aboriginal rights. Fault for the inconsistency clearly lies with the Supreme Court. 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, 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. 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, misconstrue the thrust of those exceptions. The Court found such “ex-

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.\textsuperscript{52} Conveyance, however, is neither necessary nor possible in aboriginal title claims.\textsuperscript{53} Moreover, the \textit{Montana} Court implied that a treaty must accompany an assertion of "public exigency."\textsuperscript{54} By definition, tribal claims under aboriginal title require no supporting treaty.\textsuperscript{55}

V. IMPLICATIONS

The \textit{Pend Oreille}\textsuperscript{56} ruling affords tribal bedlands claimants a means of avoiding the \textit{Montana}\textsuperscript{57} rule. Before \textit{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.\textsuperscript{58} The express treaty-language requirement of that rule is especially ambiguous, making tribal bedlands claims even more precarious.\textsuperscript{59} Justice Rehnquist has suggested that nothing less than specific reference by the treaty to bedlands ownership is sufficient.\textsuperscript{60} Considering that all treaties were negotiated more than 110 years before the \textit{Montana} Court decided the specificity required to secure tribal rights,\textsuperscript{61} the burden placed on tribes under so narrow a

\begin{itemize}
\item \textsuperscript{52} See supra note 18 and accompanying text.
\item \textsuperscript{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.
\item \textsuperscript{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 \textit{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.
\item \textsuperscript{55} See F. COHEN, supra note 4, at 492.
\item \textsuperscript{56} 585 F. Supp. 606 (E.D. Wash. 1984).
\item \textsuperscript{57} 450 U.S. 544 (1981).
\item \textsuperscript{58} See supra notes 17-18 and accompanying text.
\item \textsuperscript{59} See supra note 22 (illustrating ambiguities in express treaty language requirement).
\item \textsuperscript{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 \textit{Montana} supporting Justice Rehnquist's narrow interpretation. For instance, the \textit{Montana} Court rejected an attempt to rebut the presumption of state sovereignty, absent "express reference to the riverbed." 450 U.S. at 554.
\item \textsuperscript{61} The Appropriations Act of March 3, 1871, 12 Stat. 512, 528, 25 U.S.C. §
\end{itemize}
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. 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.

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 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, 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. When the

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


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.


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.\(^6\)

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,\(^6\) the Ninth Circuit will likely affirm.\(^6\) 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.

\(^{67}\) 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.