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Montana v. United States--Effects on Liberal Treaty Interpretation and Indian Rights to Lands Underlying Navigable Waters

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Montana v. United States—Effects on Liberal Treaty Interpretation and Indian Rights to Lands Underlying Navigable Waters

Title to lands underlying navigable waters[1] gives the titleholder important rights and powers, including mineral rights and jurisdictional powers.[2] Indian rights to such lands have been a frequently litigated question.[3] This issue has arisen when an Indian tribe has claimed title to lands underlying navigable waters based upon a treaty executed and ratified before a state entered the Union. This area of law is still unsettled, however, because two well-established doctrines appear to clash in these cases—liberal treaty interpretation[4] and equal footing.[5] The Supreme Court of the United States, in *Montana v. United States*,[6] has seemingly ended the controversy by impliedly overruling the use of liberal treaty interpretation when applying the equal footing doctrine. However, the Court's seemingly narrow construction of the equal footing doctrine in *Montana*, may not be correct.

This note examines *Montana* and its effect on liberal treaty interpretation and the equal footing doctrine, and on Indian claims to lands underlying navigable waters. Part I reviews the liberal treaty interpretation and equal footing doctrines; Part II analyzes *Montana*;

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1 The courts have had problems in defining "navigable waters." *Compare* Kaiser Aetna v. United States, 444 U.S. 164, 170 (1979) *with* 444 U.S. at 182 (Blackmun, J., dissenting). *See generally* Note, *Indian Rights to Lands Underlying Navigable Waters: State Jurisdiction Under the Equal Footing Doctrine vs. Tribal Sovereignty*, 55 N.D. L. REV. 453, 454 n.17 (1979) (navigability standards described) [hereinafter cited as Note, *Indian Rights*]. The difficult questions involved there are beyond the scope of this note.

2 The Indians' beneficial interests in the lands are significant. For example, the owners of beds or tidelands can receive revenue from the river's natural resources and dam projects on the body of water. The owner may also restrict access to the water for recreational and commercial purposes. Finally, ownership of the beds and tidelands can have important judicial consequences by dictating whether a federal, state, or tribal court has subject matter jurisdiction over a particular cause of action. *See, e.g.*, Note, *Indian Rights*, *supra* note 1, at 453-54.

3 *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); Holt State Bank v. United States, 270 U.S. 49 (1926); Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982); United States v. Finch, 548 F.2d 822 (9th Cir. 1976), *vacated per curiam*, 433 U.S. 676 (1977).

4 *See* notes 7-15 and accompanying text *infra*.

5 *See* notes 16-30 and accompanying text *infra*.

6 450 U.S. 544 (1981).

Part III critiques *Montana*; and Part IV discusses *Montana*'s implications.

I. Liberal Treaty Interpretation and the Equal Footing Doctrine

A. *Liberal Treaty Interpretation*

Indian treaties approved pursuant to the Articles of Confederation and the United States Constitution are equivalent to treaties with foreign nations.[7] Yet, Indian treaties are also very different.[8] The differences caused the Supreme Court of the United States to develop liberal treaty interpretation principles. These principles were summarized by the Supreme Court in *Choctaw Nation of Indians v. United States*:[9]

> [T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. . . . Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed so far as possible in the sense in which the Indians understood them, and "in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.". . . But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.[10]

The principles established in *Choctaw Nation of Indians v. United States* developed because the relative bargaining positions of the parties to the treaties were substantially disproportionate. The United States occupied the superior position for many reasons. The United States was more advanced technologically; it was a united nation; the treaties were written in its language, English; and its representatives were not only skilled negotiators but understood the significance of the legal terms they inserted into the treaties.[11]

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7 W. CANBY, AMERICAN INDIAN LAW 78 (1981); Comment, *Indian Land Claims Under the Nonintercourse Act*, 44 ALBANY L. REV. 110, 118 (1979) (Indian treaties and foreign treaties have the same dignity and legal force). *See* Holden v. Joy, 84 U.S. (17 Wall.) 211, 242-43 (1872); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832). Since Indian treaties are made pursuant to the United States Constitution, they also take precedence over any conflicting state law. U.S. CONST. art. VII, § 2 (supremacy clause); W. CANBY at 78. *See generally* Note, *State Sovereignty and Indian Land Claims: The Validity of New York's Treaties Prior to the Nonintercourse Act of 1790*, 31 SYRACUSE L. REV. 797, 816-17 (1980).

8 *See* Jones v. Meehan, 175 U.S. 1, 10-11 (1899).

9 318 U.S. 423 (1943).

10 *Id.* at 431-32 (citations omitted). Except in purely political cases, the Supreme Court also established that the judiciary should interpret the treaties. 175 U.S. at 32.

11 175 U.S. at 10-11.

On the other hand, the Indian tribes were scattered and divided. The Indians did not believe in and found it hard to comprehend land ownership.[12] The vast majority of the Indians were unfamiliar with the written language, much less the meaning of legal terms. They relied on what the United States' interpreters said the treaties meant.[13] Finally, many of the treaties were forced on the Indians and they had no choice but to consent.[14]

These policies led the Supreme Court to adopt liberal treaty interpretation principles for determining an Indian treaty's real meaning. The Court did not intend courts to use these principles to rewrite or expand a treaty's terms.[15] Thus, in any case involving the interpretation of an Indian treaty, liberal treaty interpretation principles seem a fair way to proceed. Yet, these principles appear to clash with the equal footing doctrine in cases involving lands underlying navigable waters.

B. *The Equal Footing Doctrine*

The Supreme Court in *Shively v. Bowlby*[16] established the constitutional doctrine of equal footing.[17] This doctrine creates a presumption that lands underlying navigable waters passed to a state upon its admission to the Union, and that after admission these lands could not be granted away by Congress.[18] The Supreme Court in *Shively* added, however, that in certain circumstances Congress could grant lands underlying navigable waters before a state entered the Union.[19]

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12 *See* Morrison, *Comments on Indian Water Rights*, 41 MONT. L. REV. 39, 43 (1980)(quoting A. JOSEPHY, THE INDIAN HERITAGE (1968)).

13 175 U.S. at 10-11.

14 Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1970).

15 318 U.S. at 432.

16 152 U.S. 1 (1894). *Shively* involved a dispute over title in certain lands below the high water mark in the Columbia River in Oregon. *Id.* at 9.

17 This doctrine does not rest on an express provision of the United States Constitution, but rather on the Supreme Court's interpretation of the Constitution that this country is a union of political equals. Note, *Indian Rights*, *supra* note 1, at 456.

18 Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 230 (1845).

19 152 U.S. at 48. The Court stated that these circumstances existed:

> [W]henever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the Territory.

Id. The Court in *Montana* found that the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively*. Montana v. United States, 450 U.S. at 556. *See also* Donnelly v. United States, 228 U.S. 243, 258-59 (1913) (holding that a river bed may be granted by executive order as well as by an Act of Congress).

The policies behind the equal footing doctrine are twofold. First, the Supreme Court wanted to avoid the piecemeal distribution of lands underlying navigable waters.[20] Second, the Court wanted the states admitted into the Union after the Constitution's adoption to have the same rights as the original states in the lands underlying navigable waters.[21]

In *United States v. Holt State Bank*,[22] the Supreme Court examined the policies behind equal footing, and decided to strengthen the presumption against congressional grants of lands underlying navigable waters prior to a state's entering the Union. There, the Court held that such grants "should not be regarded as intended unless the intention was definitely declared or otherwise very plain."[23]

More than forty years later, the State of Oklahoma argued in *Choctaw Nation v. Oklahoma*[24] that the bed of the Arkansas River was not included in the grant to the Cherokee, Choctaw, and Chickasaw Nations. The state argued that under a skilled draftsman's accepted standard for ordinary conveyancing "the land description in the treaties, standing alone, actually excluded the river bed."[25]

Justice Marshall, writing for a plurality, rejected this argument and instead applied the principles of liberal treaty interpretation in

20 152 U.S. at 50.

21 *Id.* at 26.

22 270 U.S. 49 (1926). *Holt State Bank* involved an action to quiet title in Mud Lake, which is within what was formerly known as the Red Lake Indian Reservation in Minnesota. *Id.* at 52-53.

23 *Id.* at 55. This notion requiring definitely declared intent or an "otherwise very plain" indication of intent had been previously adopted by the Supreme Court as a general guideline for construing all grants by the sovereign to private individuals. Caldwell v. United States, 250 U.S. 14, 20 (1919); Note, *Indian Rights*, *supra* note 1, at 462. In determining whether there has been a disposal of land to the Indians, however, a number of factors have been considered by the Supreme Court that are not considered for individuals. These factors include economic dependence on the waters and submerged lands, evidence of congressional intent to establish a sovereign but dependent nation, and whether the language of the agreement included the submerged land, applying either the reasonable language or treaty interpretation principles. Note, *Indian Rights*, *supra* note 1, at 460-61. *See, e.g.*, Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Donnelly v. United States, 228 U.S. 243 (1913). Thus, the *Holt State Bank* addition to *Shively* may not have been a principled extension in cases involving Indian treaties.

In *Shively*, the Supreme Court established the equal footing doctrine to prevent piecemeal distribution of lands underlying navigable waters to individuals. 152 U.S. at 50. A grant to an independent but dependent nation, such as the Indians, differs significantly from a grant to an individual and, therefore, should be treated differently.

24 397 U.S. 620 (1970). The sole question the Supreme Court faced was whether the treaty grants from the United States conveyed title to the bed of the Arkansas River to the Cherokee and Choctaw Nations. As a practical matter, the ownership of minerals beneath the riverbed and the dry land were at stake. *Id.* at 621, 628.

25 *Id.* at 628.

determining whether the treaties in *Choctaw* conveyed the lands under the Arkansas River to the Indians.[26] He concluded that under the circumstances and terms of the treaties, such a grant had been made to the Indians.[27]

Justice Marshall determined that *Holt State Bank* did not prevent the Court from using liberal treaty interpretation principles because *Holt State Bank* also looked at the circumstances surrounding the treaty.[28] Applying liberal treaty interpretation principles undermines the equal footing doctrine's presumption against conveyance of lands underlying navigable waters prior to statehood.[29] In effect, where Indian treaties are involved, applying liberal treaty interpretation principles may actually provide a presumption of conveyance. And, in light of the circumstances surrounding Indian treaties, such a result is not unwarranted.[30]

Both equal footing and liberal treaty interpretation are well established principles the Supreme Court follows,[31] but these two principles appear to clash when the Court decides disputes between Indian tribes and states over title to lands underlying navigable waters. In *Holt State Bank*, the Court expressed a preference for the equal footing doctrine, while in *Choctaw* the Court seemed to favor liberal treaty interpretation. Yet, *Choctaw*'s questionable precedential value left the question unsettled.[32] In *Montana v. United States*,[33] a recent Supreme Court case, the Court had an opportunity to resolve the question and yet failed to do so.

II. *Montana v. United States*

In *Montana*, the United States, proceeding in its own right and as a fiduciary for the Crow Tribe of Montana (Crow Tribe),[34] filed a

26 *Id.* at 630-31.

27 *Id.* at 631.

28 *Id.* at 634. Justice Douglas, in his concurring opinion, carefully distinguished *Holt State Bank*, placing heavy emphasis upon the granting of fee simple title to the Indian Nations in *Choctaw*. *Id.* at 638-39 (Douglas, J., concurring).

29 *See* Note, *Indian Rights*, *supra* note 1, at 470-71.

30 *See* notes 64-70 and accompanying text *infra*.

31 *See* notes 7-21 and accompanying text *supra*.

32 Only seven justices participated in *Choctaw*. Two justices joined Justice Marshall's opinion, Justice Douglas concurred and the other three justices joined Justice White's dissent.

33 450 U.S. 544 (1981).

34 As the United States became the sole western power on the continent, treaties became primarily an instrument of land transfer. *See* Note, *Indian Rights—What's Left?*, 41 U. PITT. L. REV. 75, 76 (1979). One commentator suggests that the present legal relation between "the Indians and the federal government may be a type of trust, with legal title in the United States and the equitable title in the Indians." Morrison, *supra* note 12, at 43. *See* Nadeau v.

suit seeking, among other things, a declaratory judgment quieting title to the Big Horn River bed in the United States as trustee for the Crow Tribe.[35] The Crow Tribe based its ownership claim on the treaties of 1851 and 1865, which created the reservation and antedated Montana's entrance into the Union.[36]

If these treaties conveyed the riverbed before Montana entered the Union, then the United States would have been holding the riverbed in trust for the Crow Tribe. But, if they did not convey the riverbed, the riverbed would have passed to Montana upon its admission to the Union.[37] The issue's resolution, therefore, rested on the Court's interpretation of the treaties. The Court concluded that title to the riverbed passed to Montana upon its admission to the Union.[38]

Justice Stewart, writing for the majority, further clarified the test to be used in determining whether the United States had conveyed lands underlying navigable waters before a state entered the Union. He stated that a strong presumption existed against such conveyances and that courts "must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain,'. . . or was rendered 'in clear and especial words,'. . . or 'unless the claim confirmed in terms embraces the land under the waters of the stream.'"[39] He also stated that "some international duty or public exigency" would be sufficient to uphold a pre-statehood conveyance.[40]

Next, Justice Stewart examined and compared the treaties in *Holt State Bank* and *Montana*. In *Holt State Bank*, the United States promised the Chippewas to "set apart and withold from sale, for the

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Union Pac. R.R., 253 U.S. 442, 445-46 (1920). This notion finds support in the federal government's power to revoke the grant of lands underlying navigable waters, and the power by statute and regulation to protect the public rights in lands underlying navigable waters. Thus the United States retains title in trust for the tribe. *See* Note, *Indian Rights*, *supra* note 1, at 472.

35 450 U.S. at 549. The United States also sought a declaratory judgment establishing that it and the Tribe had sole authority to regulate hunting and fishing within the reservation and an injunction requiring Montana to secure the permission of the Crow Tribe before issuing a hunting or fishing license for use within the reservation. *Id.*

Relying on its purported ownership of the bed of the Big Horn River and on its inherent power as a sovereign, the Crow Tribe claimed authority to prohibit all hunting and fishing by non-members of the Crow Tribe on non-Indian property within the reservation. *Id.* at 566-67. The State of Montana prevailed on both claims. *Id.*

36 *Id.* at 548, 553-55.

37 *Id.* at 550-51.

38 *Id.* at 556-57.

39 *Id.* at 552 (citations omitted).

40 *Id.* (quoting *Holt State Bank*, 270 U.S. at 55).

use"[41] of the Chippewas a large tract of land and to convey "a sufficient quantity of land for the permanent homes"[42] of the Indians. The Supreme Court in *Holt State Bank* found the language in the treaties reserved "in a general way for the continued occupation of the Indians what remained of their aboriginal territory."[43] The Court concluded in *Holt State Bank* that the bed of the navigable lake remained in trust for future states and did not pass to the Chippewas.[44]

In *Montana*, the 1851 treaty did not formally convey any land to the Indians, but instead represented a covenant among several tribes recognizing specific boundaries for their respective territories.[45] This treaty was thus analogous to the one in *Holt State Bank*.

The 1868 treaty, however, expressly conveyed land to the Crow Tribe. This treaty described the reservation land in detail and stated that such land was "set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . ."[46] But since "[t]he treaty in no way expressly referred to the riverbed, . . . nor was an intention to convey the riverbed expressed in 'clear and especial words,'. . . or 'definitively declared or otherwise made very plain,'"[47] Justice Stewart concluded that this language was not strong enough to overcome the presumption against conveyance.[48]

Justice Stewart's conclusion in *Montana* was contrary to the holding in *United States v. Finch*.[49] There, the United States Court of Appeals for the Ninth Circuit, using liberal treaty interpretation principles, construed the 1868 treaty as granting to the Crow Tribe all the lands within the described boundaries, including the riverbed.[50] Yet, the parties in *Finch* had agreed that the United States retained a navigational easement in the navigable waters for the benefit of the public, regardless of who owned the riverbed.[51]

41 *Id.* (quoting Treaty of Sept. 30, 1854, 10 Stat. 1109 (1855)).

42 *Id.* (quoting Treaty of Feb. 22, 1855, 10 Stat. 1165 (1855)).

43 450 U.S. at 553 (quoting *Holt State Bank*, 270 U.S. at 58).

44 United States v. Holt State Bank, 270 U.S. at 58-59.

45 450 U.S. at 553.

46 *Id.* (quoting Second Treaty of Fort Laramie, May 7, 1868, art. II, 15 Stat. 650 (1868)).

47 450 U.S. at 554 (citations omitted).

48 *Id.* Justice Stewart does admit, however, that a property right was created but never bothers to define it. He simply found that it was not enough to meet the test the Court had established. *Id.*

49 548 F.2d 822 (9th Cir. 1976), *vacated per curiam*, 433 U.S. 676 (1977) (vacated on other grounds). The Ninth Circuit relied on this case in deciding *Montana*. *See* United States v. Montana, 604 F.2d 1162, 1166 (9th Cir. 1979).

50 450 U.S. at 554 (citing *Finch*, 548 F.2d at 829).

51 450 U.S. at 555.

Based on this, Justice Stewart, in discussing *Finch*, concluded that the phrases in the 1868 treaty,[52] "whatever they seem to mean literally, do not give the Indians exclusive right to occupy all the territory within the described boundaries."[53] Thus, it appears the Supreme Court, in *Montana*, overruled the *Finch* holding and its use of liberal treaty interpretation.

In a footnote to the Court's opinion, Justice Stewart also attempted to distinguish *Choctaw* from the case before him.[54] He noted that the circumstances and terms of the *Choctaw* treaties differed in two important respects from those in the *Montana* treaties. First, the treaties in *Choctaw* had special historical origins, and second, the treaties gave the Indians fee simple ownership of the land and promised the Indians freedom from state jurisdiction.[55] Thus, Justice Stewart impliedly held that the presence of these two factors made the conveyance "clear" enough to overcome the presumption against conveyance.

Justice Stewart then concluded his analysis by admitting that the establishment of an Indian reservation can be an "appropriate public purpose" within the meaning of *Shively* justifying a congressional conveyance of a riverbed.[56] He asserted, however, that the Crow Indians at the time of the treaties presented no "public exigency." He seemingly limited "public exigency" to tribes that require fishing as an important part of their diet or way of life. Since he found that the Crow Indians were nomadic and did not rely on fishing for their livelihood, no "public exigency" existed in *Montana*.[57]

III. Critique

The Supreme Court in *Montana* impliedly decided that the liberal treaty interpretation principles are inapplicable when determining whether the Indians or the states own lands underlying navigable waters.[58] The Court's failure to squarely address this issue and to

52 *See* note 46 and accompanying text *supra*.

53 450 U.S. at 555.

54 The Crow Tribe relied upon *Choctaw* in its contention that the reservation included the bed of the Big Horn River.

55 450 U.S. at 555-56 n.5.

56 *See* note 19 and accompanying text *supra*.

57 450 U.S. at 556. In dissent, Justice Blackmun questions this conclusion. 450 U.S. at 570 (Blackmun, J., dissenting). *See* notes 71-76, 94 and accompanying text *infra*.

58 Although the majority opinion did not discuss liberal treaty interpretation, Justice Stevens, in his concurring opinion, stated that *Choctaw* should not be read "as having been intended to indicate that the strong presumption against disposition by the United States of lands under navigable waters in the territories is not applicable to Indian reservations." He

balance the policies behind liberal treaty interpretation and equal footing will now be discussed. Also, the questionable precedential value of the cases supporting the test set forth by Justice Stewart,[59] the applicability of the equal footing doctrine's *Holt State Bank* extension to *Montana*, and the strict construction given "public exigency" by the Court will be discussed.

A reasonable interpretation of *Montana* could be that the Supreme Court impliedly held that liberal treaty interpretation principles are inapplicable when applying the equal footing doctrine.[60] Justice Stewart stated that, "whatever [the 1851 and 1865 treaties] seem to mean literally," they do not give the Indians the exclusive right to occupy all the territory within the described boundaries.[61] He deviated from liberal treaty interpretation principles which would require a court to look at the literal meaning of an Indian treaty.[62] Further, in distinguishing *Choctaw*, Justice Stewart seemed to impliedly require an explicit grant of fee simple title to overcome the equal footing doctrine's presumption against conveyances of lands underlying navigable waters.[63] Liberal treaty interpretation principles, however, provide that the "technical meaning of words"[64] should not guide the interpretation of an Indian treaty.[65]

The Supreme Court in *Montana* should have squarely addressed the application of liberal treaty interpretation principles to lands underlying navigable waters. Even though liberal treaty interpretation principles appear to substantially undermine the strong presumption against conveyance, this is only fair considering the policies involved. As discussed earlier, the policies behind equal footing are twofold. The Supreme Court wanted to avoid piecemeal distribution of lands underlying navigable waters, and the Court wanted the states admitted into the Union after the Constitution's adoption to have the same rights as the original states in the lands underlying navigable wa-

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emphasized that the equal footing doctrine applies to lands underlying navigable waters on Indian reservations. *Id.* at 567-68 (Stevens, J., concurring).

59 *See* notes 39-40 and accompanying text *supra*.

60 *See* note 58 and accompanying text *supra*.

61 450 U.S. at 555.

62 *See* Jones v. Meehan, 175 U.S. 1, 10-11 (1899).

63 *See* 450 U.S. at 555-56 n.5.

64 175 U.S. at 11.

65 In Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842), an opinion the majority in *Montana* used to support its test, the Supreme Court recognized that in deciding cases involving lands underlying navigable waters the "strict technical meaning of the words" should not govern. 41 U.S. (16 Pet.) at 411.

ters.[66] Making a grant to an entire Indian tribe is not the type of piecemeal distribution the Court feared in establishing the equal footing doctrine.[67] Further, the establishment of Indian reservations are an "appropriate public purpose,"[68] and since states are not entitled to lands granted under an appropriate public purpose,[69] the second policy consideration used in establishing the equal footing doctrine does not apply to grants creating an Indian reservation.

Since many grants have been made to the Indian tribes through treaties, it would only seem fair that the treaties be construed so as to ascertain their true meaning. Therefore, to determine if a treaty grants to an Indian tribe the title to lands underlying navigable waters, liberal treaty interpretation principles should be applied. Even if courts applied these principles, not all cases involving Indian treaties would result in the conveyance of the lands underlying navigable waters. For example, in *Holt State Bank* the circumstances and terms of the treaty, interpreted according to liberal treaty interpretation principles, would not justify such a conveyance.[70]

Montana, however, would be decided differently if the Supreme Court had applied liberal treaty interpretation principles. The terms of the 1865 treaty,[71] if literally construed, support the argument that the United States conveyed the riverbed to the Crow Tribe.[72] Further, as pointed out by Justice Blackmun in dissent, the reference in the 1868 treaty to the midchannel of the Yellowstone River as part of the reservation's boundary could only be interpreted to mean the Crow Tribe owned the river. Thus, since they owned half of this river boundary, it would only follow that they completely owned all the rivers within their boundaries.[73] Finally, the historical setting of the 1868 treaty also points to a complete grant to the Crow Tribe. Justice Blackmun, in dissent, referred to United States Commissioner Taylor's speech at Fort Laramie in 1867 to support this interpreta-

66 *See* notes 20-21 and accompanying text *supra*.

67 In *Shively*, the Supreme Court did not want to allow conveyances to individuals, although it never mentioned an Indian tribe. 152 U.S. at 50.

68 *See* note 19 and accompanying text *supra*.

69 *See* 450 U.S. at 556.

70 *See* 270 U.S. at 57-59.

71 The 1865 treaty provided that such land would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . ." *See* note 46 and accompanying text *supra*.

72 When the terms of the 1865 treaty are read in light of the circumstances surrounding the creation of Indian treaties, it could reasonably be asserted that an Indian would understand the terms to mean a grant of all the lands, including the underlying navigable waters. *See* notes 7-15 and accompanying text *supra*.

73 450 U.S. at 578-79 (Blackmun, J., dissenting).

tion. In that speech, Commissioner Taylor referred to the land as the Crow Tribe's land, and he also stated that the United States initiated the treaty talks to provide the Crow Tribe with relief from encroachment by "white people."[74] This latter point somewhat parallels the circumstances in *Choctaw* since encroachment existed there also.[75] Chief Blackfoot, in response to Commissioner Taylor's speech, made reference to the Crow Tribe's ownership of all the land, including the rivers.[76]

The majority's use of *Martin v. Waddell*[77] and *Packer v. Bird*[78] to support the test it set forth is also suspect. According to the majority, *Martin* supported the proposition that a grant of lands underlying navigable waters will only be acceptable if made in "clear and especial words."[79]

Martin involved land in one of the original thirteen states. It was an action between a person claiming title to the lands underlying navigable waters through a patent by the English Crown and another person claiming title through a grant from the State of New Jersey.[80] In discussing the patent, the Court stated that:

> In such cases, whatever does not pass by the grant, still remains in the crown for the benefit and advantage of the whole community. Grants of that description are therefore construed strictly—and it will not be presumed that he intended to part from any portion of that public domain, *unless clear and especial words* are used to denote it.[81]

The grant in *Martin*, however, differed significantly from the grant in *Montana*. In *Montana*, the grant was made to an entire Indian tribe, not just to an individual. The grant to an individual presents a greater danger of violating the policies behind equal footing than does the 1868 treaty's grant to the Crow Tribe.[82] In a recent case[83] involving the interpretation of an Indian treaty to determine the ownership of lands underlying navigable waters, the

74 *Id.* at 578.

75 *Compare* Montana v. United States, 450 U.S. at 574-75 (Blackmun, J., dissenting), *with Choctaw*, 397 U.S. at 623. Both cases involved miners.

76 450 U.S. at 578 (Blackmun, J., dissenting).

77 41 U.S. (16 Pet.) 367 (1842).

78 137 U.S. 661 (1891).

79 450 U.S. at 552.

80 41 U.S. (16 Pet.) at 407.

81 *Id.* at 411 (emphasis added).

82 *See* notes 67-69 and accompanying text *supra*.

83 Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982).

Court of Appeals for the Ninth Circuit distinguished *Martin*'s "clear and especial word" test, by stating that:

> The requirement was explicitly characterized as dictum. . . . Moreover, the underlying rationale for this requirement is of doubtful relevance to a reservation of land by a sovereign Indian tribe. Such a reservation does not, properly speaking, involve a "grant" of public land. . . . Nor does it convert public domain into an individual's private property.[84]

Furthermore, a grant from the English Crown differs from a grant by the United States to an Indian tribe, since the people who received the grants in *Martin*, unlike the Indians in *Montana*, at least knew the language. More importantly, the people receiving grants from the English Crown understood land ownership and sought out the Crown for grants, while the Indians did not believe in and could not conceive of land ownership.[85]

The Supreme Court in *Montana* also relied on *Packer v. Bird*[86] for the proposition that a grant of lands underlying navigable waters cannot be made "unless [the] claim confirmed in terms embraces the land under the water of the stream."[87] In applying this proposition to *Montana*, the Court ignored that the grant in *Packer* only involved one person, not an entire Indian tribe as in *Montana*. Thus, the possibility of piecemeal distribution in *Packer* was greater than in *Montana*,[88] and the individual's familiarity with the written language further distinguishes *Packer* from *Montana*.[89]

In *Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana v. Namen*,[90] the Court of Appeals for the Ninth Circuit, in discussing the presumption against conveyances of lands underlying navigable waters before a state entered the Union and the test established in *Montana*, noted that the *Montana* Court emphasized that "Congress was, of course, aware of this presumption once it was established by this Court."[91] No evidence exists, however, that the presumption against pre-statehood federal grants of lands under navigable waters had been established at the time the treaty involved was negotiated and ratified. The earliest statement of the presump-

84 *Id.* at 961 n.27 (citations omitted).

85 *See* Morrison, *supra* note 12, at 43 (quoting A. JOSEPHY, THE INDIAN HERITAGE (1968)).

86 137 U.S. 661 (1891).

87 450 U.S. at 552 (citation omitted).

88 *See* notes 67-69 and accompanying text *supra*.

89 *See* note 85 and accompanying text *supra*.

90 665 F.2d 951 (9th Cir. 1982).

91 *Id.* at 961 n.27 (quoting Montana v. United States, 450 U.S. at 552 n.2).

tion appeared in *Holt State Bank* seven decades after the treaty involved in *Namen*. Hence, this indicates that perhaps the presumption against conveyances should not have been applied in *Montana*.[92]

The majority also established in its test that a "public exigency" will overcome the presumption against conveyances.[93] But Justice Stewart seemed to limit "public exigency" in the Indian context to Indian tribes that depend on fishing for their livelihood.[94]

It appears that neither the circumstances nor the case law required such a narrow reading of "public exigency." In *Montana*, as in *Choctaw*, Congress had responded to "pressure for Indian land by establishing reservations in return for the Indians' relinquishment of the claim to other territories."[95] Congress also wanted to "provide for the Crow Indians."[96] The United States' retaining title to the riverbed "would have been inconsistent with each of these purposes."[97] Further, the Court of Appeals for the Ninth Circuit has held that a railroad[98] and a wildlife refuge[99] are "public exigencies." It seems reasonable that an Indian reservation be given status equal to a railroad or wildlife refuge. Thus, the reservation's establishment could have been held to be the "public exigency" necessary to overcome the presumption against conveyance.

IV. Implications

Justice Stewart sets forth a reasonable test in *Montana*,[100] but he failed to apply the principles of liberal treaty interpretation under this test or to specifically reject its application in cases involving a possible grant of lands underlying navigable waters to an Indian

92 *Id.* at 961 n.27. Since the treaties in *Montana* also were negotiated and ratified at about the same time as the *Namen* treaty, one could argue that the *Namen* court's rationale could be applied to *Montana*.

93 450 U.S. at 552.

94 *Id.* at 556. Justice Blackmun questioned the Court's factual premise. At trial, the United States presented evidence that the Crows ate fish as a supplement to their buffalo diet and as a substitute for meat in times of scarcity. *Id.* at 570 (Blackmun, J., dissenting).

95 *Id.* at 574.

96 *Id.* at 571.

97 *Id.*

98 United States v. City of Anchorage, 437 F.2d 1081, 1085 (9th Cir. 1971). The court had to determine whether the United States retained title to lands underlying navigable waters. The United States had used the lands to build the Alaska Railroad. *Id.* at 1083. The court noted that its analysis, as in *Choctaw*, involved "no express reservation of the lands underlying navigable waters, but the Court found an implicit intention to pass such lands to the Indian Nations in the treaties between the Government and the Indians made prior to Oklahoma's statehood." *Id.* at 1085 n.7.

99 United States v. Alaska, 423 F.2d 764 (9th Cir.), *cert. denied*, 400 U.S. 967 (1970).

100 *See* notes 39-40 and accompanying text *supra*.

tribe. By ignoring the principles of liberal treaty interpretation,[101] he established a difficult, if not impossible, presumption for an Indian tribe to overcome except in certain narrowly defined circumstances.

Montana indicates that the United States will only have granted Indian tribes title to lands underlying navigable waters before a state entered the Union if the treaty specifically conveys the lands under the navigable waters,[102] the entire grant is in fee simple,[103] or the Indians have the fishing "public exigency."[104] These are very narrow exceptions, especially since the poorly drafted treaties rarely mention the riverbeds or grant land in fee simple, and since most inland Indian tribes, like the Crow Tribe, probably did not rely on fishing for their livelihood.[105] But a closer examination of the Supreme Court's test and a recent Ninth Circuit case suggest that *Montana* does not have to be so narrowly construed.

Possibly the most critical aspect of Justice Stewart's opinion is his seemingly narrow definition of "public exigency."[106] Lower federal courts, as well as Justice Blackmun, have construed "public exigency" more liberally.[107] One lower court case[108] provides a basis upon which "public exigency" could be read more liberally and yet not be inconsistent with *Montana*.

A sense of "urgency" could provide the basis for a "public exigency." In *Namen*, a Ninth Circuit case, the Kootenai Indians depended heavily on fishing as part of their diet so they met the fishing "public exigency" as defined in *Montana*.[109] The court, however, went on to suggest that the urgency with which the Office of Indian Affairs pressed the Senate to ratify the treaties involved demonstration that securing the Indians' assent to the large areas of the Washington territory was a "public exigency." A "public exigency" existed because the United States believed that to end the ongoing war, it had to grant the Indians all the land, including lands underlying navigable waters.[110] This approach further emphasizes how important it is to consider the actual situation surrounding the signing

101 *See* notes 60-65 and accompanying text *supra*.
102 *See* notes 79,87 and accompanying text *supra*.
103 *See* note 63 and accompanying text *supra*.
104 *See* note 94 and accompanying text *supra*.
105 *See* 450 U.S. at 556.
106 *See* note 94 and accompanying text *supra*.
107 *See* notes 95-99 and accompanying text *supra*.
108 Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982).
109 *Id.* at 962.
110 *Id.*

and ratification of a treaty in determining whether a public exigency existed.

The sense of urgency found in *Namen* did not exist in *Montana*. The need to avert war provided the basis for the "urgency" in *Namen*,[111] while in *Montana* the encroachment by the United States[112] did not reach the level of "urgency" found in *Namen*. Hence, these cases are consistent, and *Namen* provides a reasonable extension of "public exigency."

V. Conclusion

Courts apply the equal footing doctrine to cases involving title to lands underlying navigable waters that were granted to the Indians before a state's entering the Union.[113] Such grants are often found in treaties. A conflict arises, however, between the equal footing doctrine's strong presumption against conveyances and the principles of liberal treaty interpretation which require courts to construe Indian treaties liberally. Following the plurality decision in *Choctaw*, the question remained unsettled. *Montana*, the most recent Supreme Court case on the issue, implies that liberal treaty interpretation principles are inapplicable when courts apply the equal footing doctrine to pre-statehood grants of lands underlying navigable waters.[114] Since the Court failed to specifically resolve the issue, the implication of this decision seems to be that few Indian treaties will be found to have conveyed to Indian tribes title to lands underlying navigable waters prior to a state's entering the Union. Perhaps the Supreme Court will adopt the Ninth Circuit's broad interpretation of "public exigency," so as to include grants made by the United States in a sense of "urgency."[115] This would help mitigate *Montana*'s detrimental effect on an Indian tribe's right to land, which the principles of liberal treaty interpretation seek to protect.

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111 *See* notes 109-110 and accompanying text *supra*.

112 450 U.S. at 574-75 (Blackmun, J., dissenting).

113 *See, e.g.*, Montana v. United States, 450 U.S. 544 (1981); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970); Holt State Bank v. United States, 270 U.S. 49 (1926).

114 *See* notes 60-65 and accompanying text *supra*.

115 *See* notes 109-110 and accompanying text *supra*.