In the Aftermath of the Bighorn River Decision: Montana Has Title, Indian Law Doctrines Are Clouded, and Trust Questions Remain

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IN THE AFTERMATH OF THE BIGHORN RIVER DECISION: MONTANA HAS TITLE, INDIAN LAW DOCTRINES ARE CLOUDED, AND TRUST QUESTIONS REMAIN

Sarah Arnott

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I. INTRODUCTION

The United States Supreme Court, in deciding the scope of state
and tribal power to regulate hunting and fishing on the Crow Reserva-
tion, held in March of 1981 that the state of Montana holds title to the
bed and banks of the Big Horn, a river flowing through the center of
the reservation.\textsuperscript{1} The Court largely ignored established doctrines of In-
dian law. It also, for the first time, required the recipient of the federal
grant to overcome a presumption that the United States holds the beds
and banks of navigable rivers in trust for future states.\textsuperscript{2}

Under the doctrine of ownership of the beds and banks of naviga-
ble waters, state sovereignty vests at the time of statehood to facilitate a
public trust for purposes of fishing and navigation in favor of its citi-
zens. This rule has been recently expanded by the Court to inhibit the
recognition of grants of soils beneath navigable waters prior to state-
hood. Cases until 1892 dealt with small parcels of land and unquali-
fiedly allowed such grants before statehood by the United States and
other sovereigns. State sovereignty vested subject to those grants.
Since 1892, the Court has been confronted with more general Congres-
sional legislation to facilitate settlement of vast amounts of land and
treaties with Indians. The problem became one of deciding whether
prior grants had, in fact, been made of lands beneath navigable waters
prior to statehood. In solving the problem, the Court has either relied
upon Indian law principles of treaty interpretation or has applied in-
creasingly restrictive rules of conveyancing to federal grants.

The decision in \textit{Montana v. United States} judged treaties between
the United States and the Crow Tribe against conveyancing rules of
such stringency that the general rule is effectively changed to vest state
sovereignty in soils beneath navigable waters when a territory is ac-
quired by the United States Government. Not only must the above-
mentioned presumption against a granting during the territorial period
be overcome, but the grant apparently must satisfy additional require-
ments that it have been made for an “appropriate public purpose” in
order to satisfy a “public exigency.”\textsuperscript{3}

As a result of the decision, ownership of the beds and banks of
navigable rivers within public lands and Indian lands is subject to
question. Because of the characteristic vagueness of Indian treaties,
lands reserved for or held in trust for Indians are in particular jeop-
ardy, especially if the Court continues to ignore, as it did in this case,
the usual rule that requires construing treaties as they would have been

\textsuperscript{1} Montana v. United States, 101 S. Ct. 1245 (1981). The decision does not address
the issue of rights to water within the river.

\textsuperscript{2} Discussed in text accompanying footnotes 216 to 240, infra.

\textsuperscript{3} Montana v. United States, 101 S. Ct. 1245, 1253 (1981) citing United States v. Ore-
gon, 295 U.S. 1, 14 (1934). The Court also quoted Martin v. Waddell, 41 U.S. 367, 411
(1842) and Packer v. Bird, 137 U.S. 661, 672 (1891). Grants were to be in “clear and special
words” or the “claim confirmed in terms embraces the land under the water of the stream.”
understood by Indians. Although other federal reserves such as national parks and national forests might be distinguished, nothing in the Court’s opinion would preclude application of the rationale to these entities.

The decision makes possible an ongoing federal-state conflict. State ownership of land beneath navigable waters supports a public trust in favor of citizens of the state. Treaties with the Crow created federal servitudes which support an ongoing federal trust in their favor. The purposes of these state and federal trusts are in conflict, and the United States Supreme Court has said that this particular type of conflict is not to be allowed. States should never be allowed to interfere with the federal trust relationship with Indians.¹

The most surprising thing about the case, and prior cases involving Indian lands, has been its failure to discuss the public trust aspects of state ownership of lands beneath navigable waters. Concepts of a public trust originated in the narrow area of navigable waters, and although the public trust doctrine has spread rapidly to other areas of law,² twentieth century cases precisely related to the origin of the trust doctrine have completely ignored it and related federal servitudes. The conflicts in Montana v. United States and similar cases could be more appropriately settled by once again relying upon those principles.

II. BACKGROUND OF MONTANA V. UNITED STATES

A. The Crow Tribe

The Crows migrated from the Lake of the Woods area of Manitoba to a location near the Missouri River in the Dakotas in the sixteenth century.⁶ Their change in location was part of the general territorial adjustment after the introduction of the horse to the North American continent. In the mid-seventeenth century, they migrated further west to the general area of southern Montana and northern Wyoming.⁷ Like other plains tribes, they subsisted on available game, primarily buffalo, and moved to take advantage of the most abundant supplies.

Plains Indians were under constant pressure to defend their areas

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¹ United States v. Kagama, 118 U.S. 375 (1886).
² The court in United Plainsmen Association v. North Dakota State Water Conservation Commission, 247 N.W.2d 457 (N.D. 1976) found that the public trust doctrine required planning by the state before water permits could be issued for coal-related energy projects. See also Light v. United States, 220 U.S. 523 (1911) holding that the federal government holds public lands in trust for the general public.
of subsistence from encroachment. Nevertheless, the Crows maintained control of the immense Yellowstone basin for about 200 years.

Serious impacts from white settlers first affected the Crows after the discovery of gold in California in 1849. Immigrants crossing the Great Plains used timber and slaughtered game, and the creation of continuously used trials altered game patterns. The United States had engaged in costly wars with several Indian tribes. Congressional appropriations were made and commissioners appointed to carry out negotiations with tribes on the Great Plains to end hostilities and obtain rights of way across Indian lands.

In the late summer of 1851, all of the major tribes residing south of the Missouri River, east of the Rocky Mountains, and north of Texas and New Mexico assembled at Fort Laramie in what is now Wyoming to negotiate a treaty among themselves and with the federal government. To avoid future clashes between tribes, each recognized specified "tracts of country" as its respective territory. That recognized by the Crow comprised 38,531,174 acres within the area of the future states of Montana and Wyoming.

The Indian parties agreed to maintain peaceful relations, recognized the right of the United States to establish roads and military posts, and bound themselves to make restitution for wrongs committed against the people of the United States lawfully passing through the area. The United States promised to protect Indian signators from depredations committed by the people of the United States. Indian signators were promised $50,000 annually by the federal government.

The Crows remained friendly with the United States. They committed few depredations on whites in the area and served often as army scouts. This, in fact, created increased hostility between the Crows and surrounding tribes.

Following the Civil War many of the signator tribes of the Treaty of Laramie became actively hostile toward increasing settlement and immigration. Vigorous military operations resulted in the Indian wars of 1865 and subsequent negotiated peace settlements. The Crows were not among the warring tribes, but were included in the concluding se-
ries of treaty negotiations. In July of 1868 the Crows and the United
States negotiated an agreement reading in part:

The United States agrees that the following district of country
... shall be, and the same is, set apart from the absolute and
undisturbed use and occupation of the Indians herein named,
and for such other friendly tribes or individual Indians as
from to time they may be willing, with the consent of the
United States, to admit amongst them; and the United States
now solemnly agrees that no persons, except those herein des-
ignated and authorized so to do, and except such officers,
agents, and employees of the Government as may be author-
ized to enter upon Indian reservations in discharge of duties
enjoined by law, shall ever be permitted to pass over, settle
upon, or reside in the territory described in this article for the
use of said Indians, and henceforth they will, and do hereby,
relinquish all title, claims, or rights in and to any portion of
the territory of the United States, except such as is embraced
within the limits aforesaid.18

The treaty reduced Crow territory by 30,530,764.8 acres to 8,000,409.2
acres.19 Subsequent cessions to the United States government created
additions of 3,849,950 acres to the public domain and 7,728.32 acres for
use as railroad rights of way.20 Final cessions reduced the Crow hold-
ings to 2,282,764 acres.21 Payment was made for all of these cessions.

Negotiations carried on by the federal government with the Crows
and the resulting addition to the public domain aptly illustrate federal
policies of land acquisition. Felix Cohen wrote:

[P]ractically all of the real estate acquired by the United
States since 1776 was purchased not from Napoleon or any
other emperor or czar but from its original Indian owners.
What we acquired from Napoleon in the Louisiana Purchase
was not real estate, for practically all of the ceded territory
that was not privately owned by Spanish and French settlers
was still owned by the Indians, and the property rights of all
the inhabitants were safeguarded by the terms of the treaty of
cession. What we did acquire from Napoleon was not the

---

18. Act of May 7, 1868, 15 Stat. 649, Article 2. Another group of Crow, known as the
River Crow, was generally based in northern Montana near the Milk River. United States
authorities planned at first to assign them to a territory to be shared with the Blackfeet and
Gros Ventre in north-central Montana. It was later thought preferable to combine them
with the "Mountain Crow." Although unwilling to make the change of location, they peace-
ably complied. 81 Ct. Cl. 238, 248, 265 (1935).
19. United States v. Montana, 504 F.2d 1162, 1164 (9th Cir. 1979).
20. The tribe was paid, or received benefits on its behalf, $1,726,009.04 for these ces-
sions. 1,082,000 acres were sold and the proceeds paid to the tribe. 81 Ct. Cl. 238, 265-266
(1935).
land, which was not his to sell, but simply the power to govern and to tax, the same sort of power that we gained with the acquisition of Puerto Rico or the Virgin Islands a century later.

It may help us to appreciate the distinction between a sale of land and the transfer of governmental power if we note that after paying Napoleon 15 million dollars for the cession of political authority over the Louisiana Territory we proceeded to pay the Indian tribes of the ceded territory more than twenty times this sum for such lands in their possession as they were willing to sell. . . . [T]he keynote of our land policy has been recognition of Indian property rights. And this recognition of Indian property rights, far from hampering the development of our land, was of the greatest significance in such development. Where the Government had to pay Indians for land it could not afford to give the land away to favored retainers who could, in turn, afford to hold the land in idleness. Because land which the Government had paid for had to be sold to settlers for cash or equivalent services, our West has escaped the fate of areas of South America, Canada and Australia, which, after being filched from native owners, were turned over, at the same price, to court favorites, Government bureaus, or other absentee owners incapable of, or uninterested in, developing the potential riches of the land.22

While the public domain via purchase from the Crow and other tribes of the Great Plains increased, steps were being taken for the addition of new states in the area. The Montana Territory was created in 1864, the Organic Act reading, in part,

That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify their assent to the president of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law or otherwise, which it would have ben competent for the government to make if this

Montana was admitted to the Union in 1889, and the Enabling Act granting statehood made the following restrictions in relation to Indian lands:

That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress or the United States;

The next major federal action to affect the Crows and the state of Montana was the Crow Allotment Act. The Act made no direct provision for the acquisition of reservation land by non-members. Allotments were alienable, with certain restrictions, after twenty-five years. The Secretary of Interior was also authorized to sell allotments held in trust if the sale were approved by the allottees or an heir.

Indian complaints about the depletion by whites of game on the Crow Reservation began as early as 1873. Between 1912 and 1923 the Agency Superintendent and Commissioner of Indian Affairs corre-

24. Act of February 22, 1889, ch. 180, 25 Stat. 676. Montana Constitutional provisions have continued this policy. See Mont. Const. of 1889, ord. 1, § 2, "FEDERAL RELATIONS BE IT ORDAINED: . . . . Second. That the people inhabiting the said proposed state of Montana, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States . . . . " See also Mont. Const. art. I, "Compact with United States all provisions of the Enabling Act of Congress (approved February 22, 1889, 25 Stat. 676), as amended and of Ordinance No. 1, appended to the Constitution of the State of Montana and approved February 22, 1889, including the agreement and declaration that all lands owned or held by any Indian or Indian tribes shall remain under the absolute jurisdiction and control of the congress of the United States continue in full force and effect until revoked by the consent of the United States and the people of Montana."
26. Id., Sec. 13. Restrictions were intended to discourage the creation of very large blocks of privately held land on the reservation. Id., Sec. 2. The policy has not been altogether successful as can be seen from the result in Montana v. United States which places about 1,260 square acres of land beneath the Big Horn River under the control of the State of Montana.
27. Id., Sec. 15.
sponded about the problem. The tribe petitioned the United States to place limitations on outsiders and to "conserve fish and game" on the reservation. The Tribal Council closed the Reservation to hunting and fishing by non-members in 1954 and 1957. This ban remained in effect until 1966 when mountain areas of the reservation were opened for hunting, and fishing was allowed with the purchase of a tribal permit.

In 1957 the federal government condemned 5,677 acres within the Crow Reservation for the site of Yellowtail Dam, constructed on the Big Horn River. The dam created a lake within the newly created Big Horn Canyon National Recreational Area, and established a uniform stream flow enhancing the propagation of species of trout not native to the stream. Nearly all land riparian to the Big Horn River within the reservation is owned by Indian allottees, but two riparian tracts purchased by the state facilitated access to the river.

Non-member fishing greatly increased. An estimated 6,800 persons fished the Big Horn River in 1973. In October of 1973 the tribe voted to close the reservation to hunting and fishing by non-members. The stated purpose of the action was "to help alleviate the game and fish shortage and to help the economic conditions of the Crow people." The state of Montana continued to authorize hunting and fish-

29. Id.
30. Id.
31. Id.
33. 16 U.S.C. 460t et seq.
36. Id.
37. Crown Tribal Resolution 74-05. Concerns were voiced about rising food costs, increasing tribal membership, and decreased supplies of fish and game. Brief for United States at 5, Montana v. United States, 101 S. Ct. 1245 (1981). The Superintendent of this Crow Reservation, when reporting on the resolution, said,

The resolution to disallow hunting and fishing on the Crow Indian Reservation expresses the feelings of the Crow people with regard to the ever increasing pressure on reservation game and abuse of hunting and fishing privileges. The tribe's desire to close the entire reservation reflects the grave concern of its members over the erosion of one of the most valued resources and hereditary rights.
ing within the reservation.\textsuperscript{38}

B. The Litigation

James Finch, while standing on property owned by the State of Montana and casting his lure into the Bighorn River, all within the exterior boundaries of the Crow Reservation, was arrested for violating a federal statute prohibiting unlawful fishing upon land belonging to an Indian tribe.\textsuperscript{39} When tried in federal district court, charges were dismissed upon a finding that the title to the bed and banks of the Bighorn River were in the state of Montana and trespass under the federal statute would not lie.\textsuperscript{40} This holding was reversed by the circuit court.\textsuperscript{41} The decision was vacated by the United States Supreme Court on other grounds and the issue of ownership of the river bed was not

\begin{itemize}
\item This office is convinced that the Crows concerns are well founded and that under existing circumstances their action is timely and fully justified. * * *
\item 1. Hunting pressure on the reservation has increased to a point where game is depleted or non-existent in vast areas. * * *
\item 2. Regulation of hunting and fishing has become increasingly uncontrolable with the general public taking advantage of situations beyond the Crow Tribes' ability to control. * * *
\item 3. Actions by the State of Montana and the National Park Service indicate that their unannounced policies are directed toward the development of the entire Crow Indian Reservation for hunting and fishing including the Tribal lands of the Big Horn Mountains, and without regard to the desires of the Crow Tribe of Indians. * * * The press of public opinion to open the entire reservation to hunting and fishing is overwhelming, except for the resistance of the Crow Indians.
\item 4. Regulation of hunting and fishing on the reservation is ineffective under present conditions. * * *
\item a. The general public has taken advantage of interspersed fee and Indian trust lands to utilize the whole reservation without respect to land status. * * *
\item b. The permit system in force prior to this resolution brought in revenue estimated at $8,000. The FY 1972 Tribal Program spent $19,500 for Game Wardens and the FY 1973 Program has set up $95,000 for this purpose. * * *
\item c. * * * Enforcement by the [S]tate [of Montana] is only token to say the least and the [S]tate does not even give the appearance of recognizing that there is a problem.
\item d. The State of Montana has opened a big game season on Big Horn Lake which includes deer and elk. * * * The Crows sold [this] land to the federal government for the sole purpose of building a dam and reservoir. It was not the understanding that big game hunting would be permitted in this area.
\end{itemize}


Crow concerns that fishing would aid tribal members meet subsistence needs are supportable. Census figures for 1970 revealed that Indians had the lowest median income of any national group. Less than half of Indian men were employed. Urban Indians, men and women, were unemployed at twice the national rate. Forty-eight percent of rural Indians and twenty-five percent of urban Indians were below the poverty level. Dept. of Health, Education and Welfare, Pub. No. (05) 75-122, Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based on the 1970 Census 3 (1974).

decided.\textsuperscript{42}

Suit was then instituted by the United States Government, as trustee for the Crow Tribe, to quiet title to the bed and banks of the Bighorn River. Also at issue was the authority of the state of Montana to regulate hunting and fishing on the Reservation.\textsuperscript{43} The district court again held that Montana held title to the bed and banks,\textsuperscript{44} and this was again reversed, the Ninth Circuit relying upon its rationale in Finch.\textsuperscript{45} The circuit court held that the tribe could regulate hunting and fishing by non-members, but could impose no criminal sanctions and could not prohibit hunting and fishing by resident, non-member fee owners upon their own property. The state was also found to have the authority to regulate non-members upon the reservation. Non-members were, in effect, bound to meet whichever standard, state or tribal, was higher.\textsuperscript{46}

Ruling that a presumption exists that the bed and banks of navigable rivers are held in trust for future states, the United States Supreme Court held that the language of treaties made with the Crow in 1851 and 1868 did not overcome that presumption. The United States had not granted beneficial ownership of the river bed in either the 1851 treaty, in which the Tribe did not surrender the privilege of hunting, fishing, or passing over its “tract[s] of country,”\textsuperscript{47} or the 1868 treaty, which “set apart [land] for the absolute and undisturbed use and occupation of the Indians herein named . . . .”\textsuperscript{48} Although the establishment of an Indian tribe could be “appropriate public purpose,” there was, in the case of the Crows, no “public exigency” which would have required Congress to depart from its policy of reserving ownership of beds under navigable waters for future states.\textsuperscript{49}

The Court’s holding concerning the Tribe’s power to regulate hunting and fishing was tied to ownership. Tribal regulatory power, and power to exclude non-members was allowed only on allotted lands, tribal lands and lands held by the United States in trust for the tribe. As for lands within the reservation owned in fee by non-members and state-owned lands, which now include the bed and banks of the Bighorn River, continued regulation by the state of Montana was allowed.

\textsuperscript{42} United States v. Finch, 548 F.2d 822 (9th Cir. 1976), vacated, 433 U.S. 676 (1977).
\textsuperscript{43} 457 F. Supp. 599 (1978).
\textsuperscript{46} \textit{Id}.
\textsuperscript{48} \textit{Id}.
\textsuperscript{49} \textit{Id}. at p. 10 of opinion.
III. PUBLIC LAND ISSUES

A. Introduction

The following section will trace the development of the law of ownership of beds of navigable waters and the related uses attached to that ownership. Because policies central to these public lands issues are direct descendants of English law, English theories of sovereign ownership of lands beneath navigable waters will be examined. The developing case law in the United States will then be traced. First to be discussed will be controversies which arose because of prior grants by the English Crown on the Middle Atlantic Seaboard. Next will be cases concerning congressional confirmation of Spanish grants in Mobile, Alabama after Alabama became a state, and congressional grants, again in Mobile, before Alabama statehood. Another early set of cases involving Spanish grants of trust lands in San Francisco will be discussed. Decisions in the late 19th and early 20th centuries concerning the extent of federal patents granted by Congress under general acts opening the West and Indian land cases decided since 1912 will be evaluated. The policy reasons for the doctrine were often thoroughly discussed through the 19th century and they will be presented. The physical extensions of the doctrine of state sovereignty over navigable water from tidelands to interior rivers and lakes will be noted. Finally, the section will discuss the continuing conflict resulting from the Montana v. United States decision and more appropriate ways to solve such conflicts.

B. The English Doctrine

Ideas of ownership in England advanced from a concept of personal ownership of the kingdom by the Crown, that is, ownership by the proprietor, to ownership as a sovereign in favor of its subject. Expanding concepts of sovereignty were generally inflicted upon an unwilling monarch by such means as the signing of the Magna Carta and acts restricting the Crown's ability to grant lands without Parliamentary consent.

The Crown owned all of England, including the beds of the seas. Grants of tenure to uplands were made as a means of gaining political support from recipients. Those lands not granted and all of the seas

50. H. Farnham, The Law of Waters and Water Rights 166 (1904) [hereinafter cited as Farnham].
51. Id. at 167.
52. Id. at 170.
54. Farnham, supra note 50, at 176.
were part of the "Great Waste."\textsuperscript{55}

The king's ownership of the seas extended up rivers as far as they were affected by normal tides.\textsuperscript{56} Beyond that point, in the "fresh" waters, ownership was presumed to be in holders riparian to the streams.\textsuperscript{57}

The Crown had early exercised the right of recreation in fresh water streams by granting to itself prerogative rights to all fish and foul before others could use the waters for those purposes.\textsuperscript{58} The Crown could also grant individual rights, termed "several" rights, to fish in an area. It was common to allow, by grant, the creation of weirs at the mouths of rivers. This prejudiced upland owners by stopping the movement of fish to fresh waters. It also, to some extent, inhibited navigation. The signing of the Magna Carta ended these practices.\textsuperscript{59}

Thus, on the uplands, servitudes shifted from uses in favor of the Crown to ones in favor of tenured owners.

No public rights of fishing were available in upland streams, but public use of some upland streams for navigation had become a common practice. These streams were considered common highways. Public use of the "Great Waste" was generally allowed and it was here that the concepts of public servitudes of use, the \textit{jus publicum}, was strongest.

There appears always to have been a common right of navigation of the seas, probably subject only to the Crown's jurisdiction to protect the coastline from invasion.\textsuperscript{60} The right was so strong that any private rights in the Great Waste were subject to the common right of navigation. Matthew Hale in his comprehensive treatise \textit{De Jure Maris} stated the right in this manner:

\begin{quote}
The people have a public interest, a \textit{jus publicum}, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions . . . . For the \textit{jus privatum} of the owner or proprietor is charged with or subject to that \textit{jus publicum} which belongs to the king'e subjects; as the soil of a highway is, which though in point of property it may be a private man's freehold, yet it is changed with a public interest of the people, which may not be prejudiced or damned.
\end{quote}

Another ancient right associated with the Great Waste, the right to fish, or the public common of piscary, was a more limited right subject

\begin{itemize}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.} at 179.
\item \textsuperscript{57} M. Hale, \textit{De Jure Maris}, \textit{reprinted in} Moore, \textit{supra} note 53, at 370.
\item \textsuperscript{58} \textit{Id.} at 372.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} Farnham, \textit{supra} note 50, at 175.
\item \textsuperscript{61} M. Hale, \textit{De Jure Maris}, \textit{reprinted in} Moore, \textit{supra} note 53, at 404.
\end{itemize}
to rights in the Crown or granted by the Crown. Hale described the right:

But though the king is the owner of this Great Waste, and as a consequent of his propriety hath and primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers, where either the king or some particular subject hath gained a propriety exclusive of that common liberty.

Notions of public use were expanded when, in a long and unsuccessful battle, the Crown attempted to lay claim to the thousands of acres which comprised the foreshore, that area which lay between low and high tide. The Stewart kings seized upon a theory proposed by Thomas Digges that the foreshore was prima facie in the Crown, and unless it could be proved to have been granted along with the upland manor, was presumptively part of the Great Waste. It was more than 200 years before a court actually held that the foreshore was prima facie in the Crown, and the Crown's attacks on title were almost universally defeated, either by a showing of such grants as "to the shore" or continued use. But the theory was stated by Hale in De Jure Maris, along with statements such as the one quoted above, that even as the grantees of the Crown, the jus privatum was held subject to the jus publicum. The public servitude was thus extended to the foreshore,

62. Farnham, supra note 50, at 171.

In both tidal and fresh waters, title to the bed, several (individual) right to fishery, and the common right to fish were separate rights. If an individual right to take fish were granted, it was usually in conjunction with title. But this was not necessarily so and each right could be held by a different person.


64. Moore, supra note 53, at 180. Digges' theory, introduced in 1569 during the reign of Elizabeth, opened the possibility of adding thousands of acres of waste land to that already under royal control. No suits had previously been brought by the Crown against the foreshore except in its capacity as owner of an estate. During Elizabeth's reign, the first of such claims were made and all of the marshes and foreshore of the country of Kent were returned to the Crown.

When Charles I ascended to the thrown, title attacks were made upon almost every susceptible piece of coastal land. Of these suits, it was found only once that ownership was in the king rather than the owner of the upland.

Charles' claims against the foreshore were one of the reasons for the end of his reign. Article 26 of the Grand Remonstrance presented to him in 1641 charged him with "the taking away of men's rights under color of the king's title to land between high and low water marks." Civil war followed and pending suits against the foreshore were dropped. Moore, supra note 53, at 180-310.

65. Moore, supra note 53, at 443.

66. Farnham, supra note 50, at 189, 194.
whether the Crown granted it or not. A theoretical rule developed that demanded recipients of shoreline grants to overcome a presumption against grants of the foreshore by the Crown.

The most novel and long-lasting idea from this body of law is the attachment of a public servitude, the *jus publicum*, to a private right—so attached that it is inalienable and survives future grants. When courts in the United States began examining the issues of ownership under water, that concept became an important part of the theory.

The theory affected United States law in other ways. The presumption against granting of the foreshore was used, in *Martin v. Waddell*, an early Middle-Atlantic Seaboard case, to decide a point of English law, namely, whether tidelands had actually been conveyed to recipients in the New World. As explained below, the Court in *Montana v. United States*, citing *Martin v. Waddell*, misapplied rules of granting by the English Crown to lands granted by the United States Government to the Crow Tribe.

C. Tidewater Grants by England on the Eastern Seaboard

The first major United States Supreme Court case involving the ownership of submerged lands was *Martin v. Waddell* in 1842. It established the concept that states hold sovereign ownership in lands beneath navigable waters. At issue was whether grants of lands beneath tidewaters had been made by England before the end of the Revolutionary War. Oyster beds in the Rarita River in New Jersey were

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67. The *jus publicum* concept was an ancient one. Suits by the Crown to protect public interests in navigation and fishery were instituted as early as the Thirteenth Century. The inalienable burden of public use attached to the land no matter by whom it was owned, king and subjects alike. But Hale's treatise surely reinforced the notion of a public right to user, particularly upon foreshore.

In 1959, during the reign of Elizabeth, Thomas Digges introduced a theory that title to the shore between high and low tide, the "foreshore," was *prima facie* held by the Crown and this presumption of sovereign ownership could be overcome by a showing of a *de facto* granting by the Crown. Digges' theory opened the possibility of adding thousands of acres of waste land to that already under royal control.

No suits had previously been brought by the Crown against the foreshore except in its capacity as owner of an estate. During Elizabeth's reign, the first of such claims were made. A commission appointed by the Queen, basing its decision purely upon Digges' theory, returned all of the marshes and foreshore of the county of Kent to the Crown.

When Charles I ascended to the throne, title attacks were made upon almost every susceptible piece of coastal land. Of these suits, it would found only once that ownership was in the king than the owner of the upland.

Charles' claims against his foreshore were one of the reasons for the end of his reign. Article 26 of the Grand Remonstrance presented to him in 1641 charged him with "the taking away of men's rights under color of the kings title to land between high and low water marks." Civil war followed and pending suits against the foreshore were dropped. Moore, supra note 53, at 180-310.

claimed by two parties through separate chains of title. The party in
possession had established an oyster farm on a parcel below high tide,
pursuant to an 1824 act of the New Jersey Legislature setting aside
tracts to be rented for that purpose. An action in ejectment was
brought by one claiming through the original English grant to the area.

In 1664 Charles II granted his brother James, then the Duke of
York, lands later part of New Jersey and New York. The Court found
that James and successive proprietors, as sovereign representatives,
could not under English law make conveyances in tidal lands. New
Jersey, as successive sovereign at the end of the American Revolution,
took the tidal lands unencumbered by a prior grant.

A strong perception of the English concept of *jus publicum* moti-
vated the Court. Under applicable principles of English law which per-
tained to the transaction, the Court found that a presumption against a
granting by the Crown was overcome. A granting to the duke was
definitely intended. But the Court found that concepts of public use of
navigable waters necessitated this granting to have been of sovereignty
only. These lands were to be held as a sovereign for the common use of
all, not as a proprietor. How, it was asked, could the *jus publicum* be
served “if the shores, and rivers, and bay, and arms of the sea, and the
land under them, instead of being held as a public trust for the benefit
of the whole community, to be freely used by all for navigation and
fishery, as well as for shellfish and floating fish, had been converted by
the charter itself into private property, to be parcelled out and sold by
the Duke for his own individual emolument? There is nothing we
think in the terms of the letters patent, or in the purposes for which it
was granted, that would justify this construction.”

The court’s interpretation did not fit the actual English treatment
of that kind of factual situation. In fact, much land under navigable
waters had been granted to individuals for fisheries. Private holdings
were subject, of course, to public uses of navigation and fishery. But
by rationalizing that private and public uses in the New World were
incompatible, the Court was able to establish that when New Jersey

69. Id. at 413.

70. “Although the king hath *prima facie* this right in the arms and creeks of the sea
*communi jure*, and in common presumption, yet a subject may have such a right.

And this he may have two ways.

1st. By the king’s charter or grant; and this is without question. The king may grant
fishing within a creek of the sea, or in some known precinct that hath known bounds, though
within the main sea. He may also grant that very interest itself, viz. a navigable river that is
an arm of the sea, the water and soil thereof.” M. Hale, *De Jure Maris*, reprinted in Moore,
*supra* note 53, at 384.

assumed a sovereign status at the end of the Revolutionary War, she took the beds of navigable waters free of any prior grants.

Interestingly enough, after stating its case by finding private grants within the English system to be inconsistent with the concept of "public trust," the practical effect of the case was to allow private ownership sanctioned by the state of New Jersey. *Martin v. Waddell* established the concept that states may dispose of lands beneath navigable waters in any way they wish.

For when the Revolution took place, the people of each state became themselves sovereign; and in that charter hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government. A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation.\(^72\)

In reality, the same situation prevailed in England and the United States. Private ownership in lands beneath navigable waters could be granted, always subject to the public trust stated in *Martin v. Waddell*, "[f]or the benefit of the whole community, to be freely used by all for navigation and fishery . . . ."\(^73\) In the United States, state sovereignty was subject not only to a public trust in favor of the public, but subject to federal constitutional servitudes. State and federal roles delineated in the case derive from the fact that New Jersey took these lands following the Revolutionary War as supreme sovereign prior to the establishment of a federal system.\(^74\) It is interesting to contemplate what the roles of the state and federal government might have been, had the federal system been established prior to the end of the Revolutionary War. Perhaps ownership would have been in the federal government. Federal power was amply protected, however. State sovereignty vested subject to rights since surrendered by the Constitution to the general government.

For when the Revolution took place, the people of each state became themselves sovereign; and in that charter hold the absolute right to all their navigable waters and the soils under them for their own common use, *subject only to the rights since surrendered by the Constitution to the general government*.\(^75\)

Thus, even though the Court dealt with a factual setting in which a

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73. *Id.* at 413.
74. *Id.* at 410.
75. *Id.* Emphasis added.
state took sovereign title as a primary sovereign, adjustments were made to accommodate the subsequent creation of a federal system. State rights were subject to federal power.

The rule has suffered from amputation, the words "subject only to the rights since surrendered by the Constitution to the general government" having often been omitted from recent decisions.

The Court, in *Montana v. United States*, stated an unusually strong version of the rule when it said, "The State's power over the beds of navigable waters remains subject to only one limitation; the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." The states surrendered rights to the federal government beyond commerce powers. And that power extends beyond ensuring that waters remain free for commerce. For instance, the commerce clause supports Congress' plenary power over Indians. In *United States v. Winans* that power supported a federal servitude in favor of Indian treaty rights to fish in off-reservation navigable waters over state-owned lands.

The Court, in *Martin v. Waddell*, had also stated that rules applicable to the English Crown did not apply to New Jersey. "For when the Revolution took place, the people of each state became themselves sovereign... A grant made by their authority must therefore manifestly be tried and determined by different principles from those which apply to grants of the British crown, when the title is held by a single individual in trust for the whole nation."

Thus, no presumption against a granting by the sovereign, New Jersey, was applied against its grantees. English rules applied to English grants and not to those made in a sovereign capacity in the United States. The Court in *Montana v. United States* would have done well to note that distinction when it applied the presumptive rule found inapplicable in *Martin v. Waddell*. This public trust concept, derived from English law and now applied in the United States, was more clearly stated in a subsequent Atlantic Seaboard case, *Smith v. State of Mary-

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77. The Indian Child Welfare Act reads, in part: "Recognizing the special relationship between the United States and the Indian tribes and their members and the federal responsibility to Indian people, the Congress finds—(1) that clause 3, section 8, article I of the United States Constitution [USCU Constitution, Art. I, § 8, cl. 3] provides that, "The Congress shall have Power... To regulate Commerce... with Indian tribes," and, through this and other constitutional authority, Congress had plenary power over Indian affairs; (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources..." 25 U.S.C. § 1901 (1979).
78. 198 U.S. 371 (1905).
which upheld Maryland's power to legislate against oyster dredging. This legislative power was found to fall clearly within the reasons for state sovereignty in lands beneath navigable waters.

This soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well shellfish as floating fish. [citations omitted]. The State holds the propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery. In other words, it may forbid all such acts as would render the public right less valuable, or destroy it altogether. This power results from the ownership of the soil, from the legislative jurisdiction of the State over it and from its duty to preserve unimpaired those public uses for which the soil is held. 81

D. Spanish Grants Confirmed by Congress after Alabama Statehood and Congresional Grants Made Prior to Alabama Statehood

The next set of cases developed in Mobile, Alabama, the site of territorial conflicts with Spain. Spain claimed that certain lands, including Mobile, had not been ceded by her to France, and could not have been part of the Louisiana Purchase. Spain continued to control the area for nine years, and United States courts later determined that she was without power to make grants during those years. 82 Congress subsequently made provision, however, to validate Spanish grants of that period. 83 Claimants included Pollard, a plantation owner who had built a wharf in Mobile to facilitate the shipment of lumber products. Pollard's claim was not recognized because it did not satisfy legislative restrictions that grants must have been made for purposes of farming or habitation. 84 When Congress then allowed claimants an opportunity to reapply, Pollard did so. In 1824 the United States granted river front land it owned to the city of Mobile, providing that the grant should affect no claims in the area. 85 No action was taken on Pollard's second claim and in 1836, by an act of Congress, title was confirmed by his heirs. 86

81. Smith v. Maryland, 18 How. 71, 74, 75.
82. Pollard's Lessee v. Files, 2 How. 591.
83. Act of April 25, ch. 67, 2 Stat. 713.
84. Id.
86. Act of July 2, 1836, ch. 334, 6 Stat. 680. Title was tenuous, a proviso reading: 'This Act shall only operate as a relinquishment, on the part of the United States, all their right
Pollard's claim became the source of regular and vigorous litigation. In Pollard's Heirs v. Kibbe, his ownership was upheld on the basis of the exceptions in favor of prior claims in the granting act of 1824 to Mobile, coupled with the private relief act of 1836.87

Pollard's title was next found good against one claiming under the 1824 United States grant of improved lots to the city of Mobile.88 That attack failed because the Court found the claimant had not made required improvements.

There were broader implications, however, for the development of the law concerning sovereignty of lands beneath navigable waters. The Alabama court had continually maintained that the 1824 and 1836 acts of Congress were void.89 Alabama had been admitted to the Union in 1819, and the Alabama courts asserted that congressional acts granting Alabama's submerged tideland after statehood were without effect. Although the Supreme Court decisions were based upon the narrower issues described above, the Alabama courts had raised the major issue finally decided in Pollard's Lessee v. Hagan.90 When that case reached the Supreme Court the issue was clearly defined: did the federal government have the power to grant submerged tidelands after statehood?

Pollard's lessee brought an action to recover property, asserting his right through the 1824 act of Congress validating Spanish grants and 1836 act of Congress granting private relief to the Pollard heirs. The area in question had been under high tide at all times until 1822, and was thus "navigable" within the meaning of the common law.91

Alabama was formed by means of cession from the state of Georgia pursuant to constitutional powers in the federal government. The deeds of cession stipulated that when a state should be formed, it should be admitted into the Congress of the United States on an equal footing with the original states in all respects.92 The Court interpreted the deeds of cession as investing the United States government with powers of eminent domain for the temporary purpose of carrying out these requirements.93 Alabama then succeeded to all the rights of "sovereignty, jurisdiction, and eminent domain" of which Georgia was pos-

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87. 14 Pet. 353. In a subsequent case, City of Mobile v. Emmanuel, 1 How. 95, one of the losers in Pollard's Heirs v. Kibbe, successfully defended a title attack with the same defense, as the claimant exception to the 1824 Act.


89. See City of Mobile, 16 Pet. 234, 245-247.

90. 3 How. 212.

91. Id. at 214.

92. Id. at 222.

93. Id. at 223.
sessed "except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands."94 Rejected was the United States' argument that Alabama had disclaimed the tidelands when adopting the following language in the Alabama Constitution: "[t]he people inhabiting said territory do agree and declare that they forever disclaim all right and title to the waste or unappropriated land lying within the said territory . . . ."95

The policy reasons for the Court's decision are important. All unreserved lands were part of a common fund to be faithfully disposed of by the federal government for the use and benefit of "all the United States."96 Alabama had all rights of sovereignty, jurisdiction and eminent domain, except so far as they were temporarily deprived of the public lands.97

Finally, stating that any declarations of agreement made between the states and federal government would be void if inconsistent with the Constitution of the United States, the Court examined whether placing state sovereignty in "navigable waters" was contrary to federal powers to regulate commerce.98 The two were found not inconsistent. Favorable policy considerations existed for placing sovereignty tidelands in the hands of the state.

To give to the United States the right to transfer to a citizen the title to the shores and soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the powers to exercise a numerous and important class of police powers.99

Exercise of Alabama's sovereignty was not, in this case, in conflict with federal prerogatives because "in the hands of the states this power can never be used so as to effect the exercise of any national right of eminent domain or jurisdiction with which the United States had been invested by the Constitution."100 For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, her municipal power is subject to the Constitution of the United States, "and the laws which shall be made in pursuance
Recent decisions concerning federal grants prior to statehood have failed to take the final analytical step of Pollard, that is, to question whether the powers which accompany state ownership in navigable waters conflict with any federal powers in those same waters.

The Pollard dispute made one last appearance before the United States Supreme Court. In Goodtitle v. Kibbe, the 1836 congressional act in favor of Pollard's heirs was again asserted as the basis of a claim. The Court disposed of the case quickly, but added significant dictum. The case closed with this statement:

Undoubtedly, Congress might have granted this land to the patentee, or confirmed his Spanish grant, before Alabama became a state. But this was not done and the existence of this imperfect or inoperative Spanish grant could not enlarge the power of the United States over the place in question after Alabama became a state, nor authorize the general government to grant or confirm the titles to land when the sovereignty and dominion over it had become vested in the state.

This dictum became the basis of the Court's decision in the next Mobile case before the Court, Doe v. Beebe. Fort Charlotte in Mobile had been abandoned, and Congress, in 1818, one year before Alabama became a state, provided for its disposition through the sale of lots. In Doe v. Beebe, title of a claimant who had purchased Fort Charlotte lots conflicted with that of a party who had been granted a Spanish grant in 1806, confirmed by the Congressional Act of 1824.

The Court cited Pollard v. Hagan and rejected any claims based upon post-statehood acts of Congress. The practical effect of the case was to uphold, without comment, a grant authorized by Congress before statehood.

Thus far, the Court's approach was to recognize all authorized grants to tidelands made prior to statehood. This was succinctly stated in Smith v. Maryland:

Whatever soil below low-water mark is the subject of exclusive propriety and ownership, belongs to the State on whose maritime border, and within whose territory it lies, subject to any lawful grants of that soil by the State, or the sovereign power which governed its territory before the declaration of independence.

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101. Id.
102. Id. at 471.
103. Id. at 478.
104. 9 How. 25.
105. 18 How. 71.
106. Id. at 74.
The cases agree. In *Martin v. Waddell*, no prior grants were found to have been made. Legitimate Spanish grants, those made when Spain had recognized right to the lands granted, were approved in the Alabama cases. And grants by the United States pre-dating statehood were honored without question. To that point, the only grants to tidelands not accepted by the Court made by a sovereign other than a state, were Congressional grants made after statehood after sovereignty in tidelands had vested.

E. *San Francisco Tideland Cases and Use of the Public Trust to Facilitate Commerce*

Another tideland area to become the object of controversy was San Francisco. *Weber v. Harbor Commissioners*, 107 decided in 1873, presents another example of a state-supported trust flowing from state sovereignty in tidelands. *San Francisco v. Le Roy* and *Knight v. United States Land Association* later interpreted the implications of the transfer of lands held by Spain in trust for municipalities to the United States. 108

In the *Weber* case, the first California legislature, by the passage of the Water-Lot Act, 109 granted the City of San Francisco use and occupancy of designated shoreline lots for 99 years. The act also provided that areas 500 feet beyond the lots granted should be kept clear from obstruction. The right to regulate construction and improvements to facilitate shipping and commercial interest was reserved to the state. Subsequently the legislature established a permanent waterfront line and allowed the city to construct wharves within that area. The area beyond the wharves was to remain free from obstruction for the commercial benefit of the "general commerce of the city and the state." 110

The owner of a lot acquired after the passage of these acts was found to have no rights to wharf out in derogation of legislative restrictions. Although the court did not specifically peg the state's right to regulate and enhance commerce to the public trust doctrine, the right was recognized without question:

Upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tidewaters within her limits passed to the State, with the consequent right to dispose of the title to any part of said soils in such manner

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107. 18 Wall. 57.
108. 138 U.S. 656 (1890) and 142 U.S. 161 (1891).
110. 18 Wall. 57, at 67.
as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the General government.\footnote{111}

The decision made an important change in the doctrine's language. Citing \textit{Pollard's Lessee v. Hagan}, which had disallowed federal dispositions of soils beneath tidelands after Alabama statehood, the Court said: "Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future State."\footnote{112}

In \textit{Pollard}, Alabama was instantly created under deeds of cession from Georgia. In \textit{Weber}, where the territorial period lasted for four years, a concept of "holding in trust" had few practical implications. The statement conjures visions of federal management of the public domain with one eye on an overriding trust to states. In cases such as \textit{Montana v. United States}, however, where statehood was attained 82 years after territorial acquisition from Louisiana, any such principle must be balanced against the strong powers of the federal government to deal in an unfettered manner with the public domain and to carry out trust responsibilities owed to the public as a whole.\footnote{113}

Subsequent cases, \textit{San Francisco v. Le Roy}, and \textit{Knight v. United States Land Association}, dealt with the unique factual situation presented when sovereignty was transferred from Mexico to the United States under the Treaty of Guadalupe Hidalgo.\footnote{114} Mexico had held "pueblo lands" in trust for municipalities. At issue was whether this land vested in San Francisco or the State of California. Ownership in the City of San Francisco was upheld in both cases upon the theory that the lands in question were acquired by the United States under a trust which required a particular disposition.

As to tidelands, although it may be stated as a general principle—and it was so held in \textit{Weber v. Board of Harvard Commissioners} [citation omitted]—that the title acquired by the United States to lands in California under tidewaters, from Mexico, were held in trust for the future state, so that their ownership and right to disposition passed to it upon its admission into the Union, that doctrine can not apply to such lands as had been previously granted to other parties by the former government, or subjected to trusts which would require their

\footnote{111. Id. at 65, 66.}
\footnote{112. Id. at 65.}
\footnote{113. National Bank v. County of Yankton, 101 U.S. 129, 133 (1879).}
disposition in some other way.\textsuperscript{115}

The quote, of course, precisely fits the Indian land cases. The
Court first held, in 1831, in the case of \textit{Cherokee Nation v. Georgia},\textsuperscript{116}
that a trust relationship exists between the federal government and In-
dian tribes. The holding has been the framework for federal legislation
maintaining beneficial ownership of reservation lands in Indian
tribes.\textsuperscript{117} The decision has also provided precedent for subsequent de-
cisions, such as \textit{United States v. Shoshone Tribe of Indians}, where the
Court held that a treaty grant to the tribe had bestowed, along with the
land itself, beneficial ownership of all resources and associated prop-
erty interests.\textsuperscript{118}

In \textit{Montana v. United States}, the lands reserved to the Crow were
subject to a trust that “would require their disposition in some other way”\textsuperscript{119}—some way other than holding a portion of those same lands
in trust for the future state of Montana.

\section*{F. Extension of the Doctrine to Inland Waters}

Until 1876, the doctrine that state sovereignty vests in navigable
waters applied only to tidelands. In that year, in \textit{Barney v. Keokuk},\textsuperscript{120}
the Court held that the doctrine should apply, as well, to inland waters,
reasoning that “the public authorities ought to have entire control of
the great passageways of commerce and navigation, to be exercised for
the public advantage and convenience.”\textsuperscript{121}

At issue in the case was the right of the city of Keokuk to build
wharves and provide easements to railroads below high tide on the
Mississippi River. Riparian owners claimed that their rights precluded
these activities on the city’s part.

The Court could have settled the controversy by using applicable
rules of Iowa law. Instead, it upheld the city’s activities on another
ground. There was no reason that the rules granting states sovereignty
in the navigable waters of the tidelands should not be extended to the
great rivers.

The Court relied heavily upon the logic of a 1851 case, \textit{Genesee Chief v. Fitzhugh}.\textsuperscript{122} That case arose out of a collision on Lake Onta-
rio, and the Court addressed the problem of which forum was appro-
appropriate to decide the case. The congressional act providing for admiralty jurisdiction in such matters had, up until that time, been applied only to water navigable by English common law definition—that is, waters affected by the tide. The Court held that for purposes of jurisdiction, different rules of navigability should apply in the United States. Taken into account were the different physiographic conditions prevalent in England and the United States. In England, ports which allowed the entry and departure of cargo to facilitate trade with foreign nations existed only within the tidelands. Streams above that point were small and unimportant. Different conditions prevailed in the United States, where jurisdiction was “made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide.”

It should be noted that *Genessee Chief* extended concepts of navigability for purposes of jurisdiction only. The decision repeatedly made this qualification. But the use of this reasoning to extend state sovereignty over lands beneath navigable inland streams was eminently sound. The reasons for granting state sovereignty in tidelands—to facilitate a public trust for purpose of navigation, fishing and commerce—was just as appropriate on the Mississippi River as within the harbors of San Francisco.

As a practical matter, the *Barney* decision did not affect ownership of the beds and banks of inland waters. Because states were free to dispose of this land as they wished, a subsequent stamp by the Court of state sovereignty in particular lands beneath navigable waters would simply place United States Supreme Court approval upon the status quo. The major effect of the decision, then, was to apprise states that the public trust opportunities and obligations dictated by state-held sovereignty in navigable waters applied also to states dealing with inland waterways. It also apprised the federal government that lands beneath waters other than tidelands were, as stated in *Weber v. Harbor Commissioners*, held in trust for future states.

This brings up an interesting point relative to the *Montana v. United States* decision. The treaties between the United States and the Crow designating certain areas within Wyoming and Montana and, later, Montana, as an area set aside for Indian use and occupancy were made in 1851 and 1868. The latter treaty was made eight years before the United States or the Crow Tribe could have known that there was any possibility of future state sovereignty in waters affected by the

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123. *Id.* at 451.
124. *Id.* at 457.
125. 18 Wall. 57.
treaty. The United States could not have known that it was under an obligation to hold any inland waters for future states.

And as for treaties with Indians, the creation of Indian Reservations by executive order, and the creation of federal reserves after 1876, the date of the *Barney v. Keokuk* decision, that decision in itself would not have apprised the federal government that the doctrine would be extended to any more than the largest interior waterways. The decision concerned the Mississippi River. And the Court, as part of its rationale, stated that public authorities ought as well to control inland waters which were "great" passageways of commerce and navigation as tidelands.126

The Court itself had difficulty with extensions of the doctrine beyond a river such as the Mississippi. Sixteen years later, after engaging in the same reasoning process formerly used in *Genesee Chief v. Fitzhugh* and *Barney v. Keokuk*, the Court specifically extended the doctrine of state sovereignty in soils beneath tidelands to the Great Lakes in the landmark case of *Illinois Central Railroad Company v. Illinois*.127

One year later, in 1893, in *Shively v. Bowlby*,128 the Court first articulated the rule that navigability for purposes of title should be ascertained on the basis of whether a body of water was navigable in fact. Up until that time, the federal government must be excused for any failure to keep one eye on future state sovereignty when making grants of lands which encompassed bodies of water of a lesser magnitude than Lake Michigan or the Mississippi River.

G. Navigability

The extension of the doctrine to inland waters caused the addition of one new and important dimension to the cases—that of navigability. When the doctrine was applicable only to tidelands, it was fairly easy to identify those areas affected by the tides and therefore within the area of state sovereignty. Few of the early Atlantic, Mexico Gulf or Pacific Ocean cases dealt with issues of navigability, and if so, the question was whether an area was within ordinary high tide, or within an area which had been subject only to tides caused by extraordinary weather conditions.129

Nor was the issue of navigability an important one when the bodies of water in question were the Mississippi River or Lake Michigan. As cases dealt with smaller bodies of inland water, the rather specific rule of navigability "in fact" was refined. In *United States v. Holt State

Bank, a decision which dealt extensively with navigation, the rule was stated in this manner:

[S]treams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboat, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the steam in its natural and ordinary condition affords a channel for useful commerce.  

The result has been that the first question raised in recent cases concerning possible state sovereignty in lands beneath inland waters has been that of navigability. If the stream or lake, or a portion of it, was navigable in fact at the time of statehood, sovereignty vested in the state. If not, the land in question remained under the control of the federal government as part of the public domain and was later patentable to settlers under land disposition acts.

H. Developments in the Public Trust Doctrine

The leading case in the area, Illinois Central Railroad v. Illinois, decided in 1892 significantly extended the doctrine by stressing the obligations of states assuming sovereignty over lands beneath navigable waters. The Illinois Legislature had granted around one thousand acres of reclaimable lands within Lake Michigan to the Illinois Central Railroad. The case arose because of a subsequent legislative revocation. The Court held that a grant of that kind was necessarily revocable because such a disposition had amounted to an abdication of a duty to carry out trust responsibilities in favor of citizens.

The Court first found that the doctrine of state sovereignty in lands beneath navigable waters included Lake Michigan. The reasons for sovereignty in the state, to support trusts in favor of the people of the state, were as compelling on Lake Michigan as in tideland areas along the coasts.

131. Id. at 56.
133. Id. at 353.
134. Id.
135. Id. at 436.
Next, the Court examined the power of the Illinois Legislature to make such a disposition of lands held in trust.

That the States hold the title to the lands under navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants.\textsuperscript{136}

Grants of parcels to enhance commerce, for building wharves, piers and docks, would have been a "valid exercise of legislative power consistent with the trust to the public upon which such lands are held by the State."\textsuperscript{137} This case was instead an abdication of control by the State.\textsuperscript{138}

\textit{Illinois Central Railroad} is important because of its strong reiteration of the public trust doctrine. It is more important, however, because of the decision's presentation of the state's responsibility to faithfully carry out appropriate trust responsibilities in favor of citizens.

An interesting aspect of the case is the Court's logic in deciding that state sovereignty should develop in the lands below Lake Michigan. The Court first found it appropriate that Lake Michigan should be the object of a public trust in favor of state citizens. From this it

\begin{enumerate}
\item \textsuperscript{136} \textit{Id.} at 452.
\item \textsuperscript{137} \textit{Id.} at 453.
\item \textsuperscript{138} "The State can no more abdicate its trust over property in which the whole people are interested. Like navigable waters and soils under them so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace." \textit{Id.} at 453.
\end{enumerate}
followed that sovereignty should vest in the state of Illinois. Sovereignty, therefore, follows the need for sovereignty. The *Montana v. United States* decision did not discuss the public trust doctrine. It would be appropriate when deciding issues of ownership of lands beneath navigable waters to use the *Illinois Central Railroad v. Illinois* analysis. Is it necessary for the state of Montana to uphold trust responsibilities in favor of its citizens on the Bighorn River flowing through the heart of the Crow Reservation? If so, sovereignty would vest. If no such need exists, sovereignty would not vest.

I. Shively v. Bowlby

The 1893 decision of *Shively v. Bowlby* was a significant one in the development of the doctrine and has been relied upon heavily in relevant decisions evaluating the power of the federal government to grant lands beneath navigable water prior to statehood. The Court was called upon to decide whether general congressional legislation providing for the settlement of the Oregon Territory had granted the beds and banks of navigable bodies of water to settlers.

The decision was a comprehensive one. All aspects of the doctrine were presented and prior decisions were quoted at length. The decision lacked emphasis, however, and the Court engaged in little analysis. Bits and pieces of the *Shively* decision have since been used by the Court to arrive at the present rule articulated in *Montana v. United States*.

Public trust policy considerations, however, were the basis of the *Shively* decision, which held that 640 acre tracts for cultivation granted to settlers under the Act should not include lots within tidelands of the Columbia River. Unfortunately, later cases involving Indian lands did not identify the policy reasons related to the public trust doctrine upon which the *Shively* decision was based. Nor was it argued in subsequent cases that policy considerations consistent with the public trust doctrine would dictate a different result than that arrived at in *Shively*.

The Oregon Donation Act of 1850141 made available 640 acre tracts for settlers in the territory. The Act was designed to populate the area with small farms, as lands not suitable for cultivation were specifically exempted from survey.142

Shively had patented a tract of land under the Act which included lots extending several hundred feet into the Columbia River. The Oregon Legislature later provided for the disposition of land below high

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139. The Court used the same analytical approach when it extended state sovereignty to lands beneath the Mississippi River in *Barney v. Keokuk*, 94 U.S. 325 (1876).
140. 152 U.S. 1 (1893).
141. Act of September 27, 1850, ch. 76, 9 Stat. 497.
142. *Id.*, Section 3.
tide for the construction of wharves and piers, some of which was claimed by Shively. Shively's claim to lands beneath the Columbia River were held to be unfounded under the Oregon Donation Act.

The decision was grounded on the proposition that the United States has never "undertaken by general laws to dispose of such lands." The Court launched into an exposition of the public trust concepts as they were conceived in England and applied in the United States. The section ended with the summation that lands beneath navigable water should "not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

The decision makes eminent sense. Small farming settlers received no particular benefit from ownership of lands beneath navigable waters. And any needs settlers would have for fishing, navigation, and commerce would be provided for by the state.

But the manner in which the Shively decision has been interpreted by the Court has changed the doctrine of state sovereignty in lands beneath navigable waters to inhibit grants by the federal government prior to statehood. The Shively statement that, "Notwithstanding the dicta contained in some of the opinions of this Court, . . . to the effect that Congress has no power to grant any land below high water mark of navigable waters in the Territory of the United, it is evident that this is not strictly true," has often been reiterated in subsequent opinions. The Court was apparently referring to an earlier remark in the opinion that the admonitions in Pollard's Lessee v. Hagan against grants of tidelands by the federal government were strong enough to imply that similar restrictions would apply to grants made prior to statehood. We have seen that this was not true. Dictum in Goodtitle v. Kibbe stated that "undoubtedly Congress might have granted this land to the patentee, or confirmed his Spanish grant before Alabama became a State." The Shively decision immediately made that distinction. Nevertheless, these hesitancies by the Court in Shively, al-

144. Id. at 56.
145. Up until the Shively decision, the strongest restriction upon grantings of lands beneath navigable waters by the federal government prior to statehood was the statement in Weber v. Harbor Commissioners that tidewaters acquired by the United States from Mexico were held in trust for future states. Weber v. Harbor Commissioners, 18 Wall. 57, 65.
147. Id. at 28.
though they should have been dispelled by equally persuasive but contradictory language, have changed the Court's approach to federal grants made prior to statehood.

The language from the Shively decision most often quoted is:

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdiction... In short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community.

This is the key to the decision. The section begins by stating that Congress has not disposed of lands beneath navigable waters by general laws, and ends stating that such piecemeal disposals to individuals would inhibit administration by the state "for the public benefit ..." Treaties with Indians were not "general legislation." Indian treaties are neither legislation or general in nature. They are agreements between the federal government and Indian tribes taking into account very specific individual considerations. Nor were the creation of Indian reservations piecemeal dispositions to individuals. Tribes were dealt with as political entities subject to the trusteeship of the federal government. Later decisions concerning Indian lands are easily distinguishable on that basis.

How, then, should agreements concerning Indian lands be recon-

150. Id. at 49-50.
151. Id. at 50.
152. Id. at 48.
153. Id. at 50.
ciled with *Shively*. The *Shively* decision had, once again, as in *Illinois Central Railroad v. Illinois* and *Barney v. Keokuk*, reasoned from the necessity to allow states freedom to administer lands beneath navigable waters for the benefit of citizens of the state.\textsuperscript{154} Private ownership of such land by settlers deprive the state of this freedom. When dealing with lands set aside as a place for Indians the first question would be whether there was a necessity for the state to exercise trusts for the purposes of fishing, navigation or commerce in favor of its citizens within that reserved area. Perhaps there would be. If, for instance, the possibilities of the creation of a major port were foreseen, state sovereignty might vest to enable it to carry out trust responsibilities to develop wharves and piers to enhance commerce. But in the more normal situation which prevailed when an area of country was set aside for the Crow, no such need existed. Nor were there needs to provide fishing for white settlers or to protect rights in navigation within a remote area wholly within lands reserved for Indians. State sovereignty in land beneath the Big Horn River was therefore unnecessary.

The Court decided one other case concerning the extent of patents issued under the Oregon Donation Act with similar results.\textsuperscript{155} All other cases involving the doctrine subsequently addressed by the United States Supreme Court have concerned Indian lands and public lands. Unfortunately, none of them were approached in that manner. Public trust aspects of the doctrine have, in fact, completely disappeared from the Court's rationale.

**J. United States v. Winans and the Federal Servitude**

There is precedent for deciding Indian land and public land cases in another related manner. In *United States v. Winans*,\textsuperscript{156} decided in 1905, state title in lands beneath navigable water was acknowledged by all of the parties. That title was held to be subject, however, to a federal servitude in favor of an adjacent Indian tribe.

The case concerned a group of Yakima Indians who had gone through the familiar procedure of moving to a smaller area of land after ceding their rights of use and occupancy to surrounding lands to the United States Government. As part of their treaty with the United States Government, the Yakimas reserved exclusive rights to fish in one off-reservation area and the right to fish in common at other off-reservation sites. When members of the Yakima Tribe were prohibited from fishing in accustomed places on the Columbia River, the United

\textsuperscript{154} Id.


\textsuperscript{156} United States v. Winans, 198 U.S. 371 (1905).
States Government brought an action to enjoin this prohibition. In defense, it was claimed that when Washington became a state, it assumed authority to dispose of property over the beds and banks of navigable streams "subject only to the paramount authority of Congress with regard to navigation. The United States, therefore . . . could neither grant nor retain rights in the shore to the lands under water."157

The Court found that a servitude had been imposed by the treaty. This servitude created rights in the Yakima which were "intended to be continuing against the United States and its grantees as well as against the state and its grantees."158

This analytical step should be applied after a finding of state sovereignty in navigable waters within an Indian Reservation or public lands. Even if such sovereignty has been found to exist, is it subject to a prior federal servitude? This is entirely in keeping with the analysis of the first major American case to articulate the doctrine as it should apply in the United States, Martin v. Waddell. State sovereignty in lands beneath navigable waters is subject to "the rights since surrendered by the Constitution to the general government."159 Treaty-created federal servitudes in favor of Indians might be slight, such as one in favor of religious sites. Or they might be of such dimension as to preclude any rights or obligations in the state. In that case, the state would be the holder of naked title, entirely subject to preemptive federal servitudes.

K. An Introduction to the Indian Land Cases

The United States Supreme Court has heard six cases since 1912 which decided state ownership of lands beneath navigable waters. Two of these, Donnelly v. United States160 and United States v. Oregon,161 decided in 1912 and 1934, concerned United States dispositions of the public domain after statehood. In Donnelly, where an Indian reservation had been created by executive order after California statehood, and in United States v. Oregon, where a federal bird refuge had been created, again by executive order subsequent to Oregon statehood, the federal issue was navigability. If the bodies of water in question had not been navigable at the time of statehood, they remained part of the public domain and were subject to a federal disposition. If they were navigable, the lands beneath these waters vested in California and Oregon at statehood and under the rule of Pollard's Lessee v. Hagan were

157. Id. at 382-83.
158. Id. at 381-82.
not subject to subsequent federal grants. The question of the ability of the federal government to dispose of the lands beneath these waters during the territorial period prior to statehood was not at issue and subsequent reliance by the Court upon these cases should be read with that caveat.\textsuperscript{162}

The remaining four cases decided by the Court have all concerned Indian lands. In one of these \textit{Brewer Oil Co. v. United States},\textsuperscript{163} decided in 1922, a portion of the Arkansas River was found not to have been navigable at the time of Oklahoma statehood. Whether there had been a pre-statehood disposition by the federal government was, therefore, not reached.

Thus, only three Indian land cases have gone beyond the issue of navigability and reached the question of possible federal disposition of lands beneath navigable waters prior to statehood. Of these, \textit{United States v. Holt State Bank},\textsuperscript{164} a 1925 case, concerned the Minnesota Chippewas; \textit{Choctaw Nation v. Oklahoma},\textsuperscript{165} decided in 1969, adjudicated rights of Oklahoma tribes; and \textit{Montana v. United States},\textsuperscript{166} decided this year, adjudicated rights of the Montana Crow Tribe.

Of the four cases cited since 1912 deciding whether a federal grant had been made prior to statehood, the first three involved lands no longer part of a reservation. In \textit{Brewer Oil Co. v. United States} and \textit{Choctaw Nation v. Oklahoma}, reservation status had terminated in 1906.\textsuperscript{167} The land in question in \textit{United States v. Holt State Bank} had not been part of an Indian reservation for 36 years. In all of these cases the United States Government was under a duty to dispose of these lands in trust for designated tribes. \textit{Montana v. United States} was not only the first case evaluating federal grants prior to statehood that found state ownership of land within an ongoing, functioning Indian reservation, it was the first such case before the Court where such an outcome was even possible.

Another way to analyze these cases as a whole is this: Of the Indian cases evaluating a federal disposition prior to statehood, a federal grant was found in favor of only the Coctaw and Chickasaw tribes. The federal government had moved these tribes from their aboriginal homes to a new area. In those cases in which tribes were within their aboriginal area and their treaty with the federal government involved

\footnotesize{\begin{itemize}
\item \textsuperscript{163} \textit{Brewer Oil Co. v. United States}, 260 U.S. 77 (1922).
\item \textsuperscript{164} \textit{United States v. Holt State Bank}, 270 U.S. 49 (1925).
\item \textsuperscript{165} \textit{Choctaw Nation v. Oklahoma}, 397 U.S. 620 (1969).
\item \textsuperscript{166} \textit{Montana v. United States}, 101 S. Ct. 1245 (1981).
\item \textsuperscript{167} \textit{Act of April 26, 1906}, ch. 1876, 34 Stat. 137.
\end{itemize}}
their ceding surrounding territory and retaining their rights of use and occupancy to that area, which remained a federal disposition of lands beneath navigable waters to the tribe prior to statehood was not found. The Court apparently has trouble understanding the concept of ownership in Indian lands it first articulated in the case of *Worcester v. Georgia.* The Court may not be able to conceptualize the most usual kind of Indian treaty in which a tribe cedes surrounding land, reserving rights of use and occupancy to everything else. This sort of treaty, of course, will not contain precise granting language from the federal government to the tribe because nothing is being granted. The tribe is retaining that which it previously controlled.

Not only will the Court's present conveyancing rules tend to favor tribes which have been moved from aboriginal lands, such a movement will be seen by the Court as a hardship creating an "exigency" facilitating the finding of a federal grant. The result is an unfair application in favor of Indian tribes which happen to have been moved from their aboriginal lands by the federal government. In fact, if *Montana v. United States* is followed, tribes with those kinds of historical backgrounds may be the only ones able to retain ownership of the beds and banks of navigable waters.

The remainder of this section will emphasize *United States v. Holt State Bank* and *Choctaw Nation v. Oklahoma,* the two cases prior to *Montana v. United States* which found the waters involved to be navigable and went on to find whether beneficial ownership had been placed in the tribe prior to statehood. The cases were decided using radically different approaches. The *Choctaw* case construed the relevant treaties between the Choctaws and the United States using the usual rules viewing the language as it would have been viewed by the participating Indian tribe. *Holt State Bank,* on the other hand, using isolated language from the *Shively* decision, applied conveyancing rules to federal grants made prior to statehood. The Court in *Montana v. United States,* following the *Holt* decision, has created conveyancing rules of extreme stringency particularly inappropriate to the Indian land cases. Aspects of the Public Trust Doctrine have been completely ignored in all of the cases since 1912.

169. The rule was well stated in *United States v. Winans,* 198 U.S. 371, 380-81 (1904): "[W]e will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right without regard to technical rules.'" *Id.* 119 U.S. 1; 175 U.S. 1. "How the treaty in question was understood may be gathered from the circumstances."
L. United States Supreme Court Cases Between 1912 and 1969

1. Brewer Oil Co. v. United States

Of the block of cases after 1912 deciding the issue of whether a federal grant was made prior to statehood in land beneath navigable waters, Brewer Oil Co. v. United States, United States v. Holt State Bank, Choctaw Nation v. Oklahoma, and Montana v. United States—the first, the Brewer case, was decided on the issue of navigability. The body of water in question was found non-navigable at the time of statehood and therefore the issue of whether the federal government had made a grant of lands beneath navigable waters was not met.

The case is of some importance, however. The Montana v. United States decision follows dictum in the case stating the logical steps to be used when going beyond the issue of navigability. The case also raises an interesting idea about determining the intention of the parties to a federal disposition in relation to the circumstances that existed at the time.

In Brewer, the United States Government brought an action to quiet title to a portion of bed of the Arkansas River which the state of Oklahoma was leasing to various oil companies.171 It was the United States' claim that this portion of the Arkansas River had been granted by treaty to the Osage Indians 35 years prior to Oklahoma statehood. Osage trust funds had been used to purchase a portion of what was later Oklahoma from the Cherokee Tribe. The treaty delineated the boundary of the Osage Reservation as the mid-channel of the Arkansas River. Oklahoma argued that the Arkansas was navigable at this point and that the United States Government had no power to grant lands beneath navigable waters prior to statehood. The portion of the Arkansas in question was found non-navigable and the Court, therefore, was not required to decide whether the federal government had, in fact, granted any of it to the Osage Tribe.

If the Arkansas River were navigable in the fact at the locus in quo, the unrestricted power of the United States when exclusive sovereign, to part with the bed of such a stream for any purpose, asserted by the Circuit Court of Appeals would be before us for consideration. If that could not be sustained, a second question would arise whether vesting ownership of the river bed in the Osages was for "a public purpose appropriate to the objects for which the United States hold territory."172

Thus, the Court in dictum stated how it would approach the prob-

171. Id. at 85.
lem had the river, in fact, been navigable. After deciding whether the United States had the power to make such a grant, the Court would have inquired whether the grant was for an appropriate purpose. The *Montana v. United States* decision appears to depend upon that logical pattern. The *Montana* court asked first whether the imposed presumption against grantings by the sovereign had been overcome. It then said the next inquiry should be whether the grant satisfied an "appropriate public purpose" presented by a "public exigency" existing at the time of the grant. The *Brewer* test of a purpose appropriate to the objects for which the United States hold a territory, and the additional test in *Montana v. United States* that it be made to satisfy an existing public exigency, are both conjectural in that neither court applied them. In *Brewer* this language was dictum. The Court stated that it was not called upon to consider these issues. And in the Montana case, because the Crow Tribe was found not to have overcome a presumption against granting by the sovereign, there was no need to impose these additional hurdles. Nevertheless this shows the Court's willingness to build upon dictum when deciding questions of state sovereignty in lands beneath navigable waters.

The *Brewer* decision also raised an interesting point relating to navigability and the intention of the parties participating in a federal disposition prior to statehood. The power of the federal government to deal with non-navigable waters was unquestioned.

The title of the Indians grows out of a federal grant when the federal government had complete sovereignty over the public lands in the condition of ownership as they were then, and if the bed of a navigable stream had then become the property of the Osages, there was nothing in the admission of Oklahoma into a constitutional equality of power with other states which required or permitted a divesting of the title.

Because the river was non-navigable and presumably appeared non-navigable, the Court found that it would be Congress' intention to convey it to the Osage, knowing that there was no policy to hold it in trust for a future state. The idea omits some important points. The treaty with the Osage was signed on March 3, 1873. The first decision stating that the United States holds the lands beneath navigable waters in trust for future states, *Weber v. Board of Harbor Commissioners*, was decided later that year. Congress could not have known of any possible differences in policy between navigable and non-navigable wa-

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174. *Id.* at 86-87.
The doctrine of state sovereignty in lands beneath navigable waters was first extended to inland waters before 1876. Before 1876, Congress could not have been thinking about the doctrine in relation to inland waters.

The Court's approach in Brewer is important, however, in finding that the intention of the parties to a treaty agreement should be viewed in accordance with conditions that existed at the time.

2. United States v. Holt State Bank

The next case to articulate the doctrine was United States v. Holt State Bank. The case decided the ownership of lands which had once been part of the Chippewa Red Lake Reservation. In 1855, the Minnesota Chippewa, as part of a treaty with the United States Government, ceded all their lands within the territory of Minnesota. Also as part of the treaty, specific lands were reserved for the Chippewas. Minnesota subsequently become a state in 1858.

Further cessions of land were made by the Chippewa by treaty in 1889. The United States was to dispose of that territory ceded and hold the proceeds in trust for the benefit of the Chippewa bands. Lands were to be designated as pine land or agricultural land and disposed of accordingly. Pine lands were to be logged under regulations specified in the treaty and the Chippewa were to be paid $1.25 an acre for the disposal of agricultural land opened to homesteading. No provision was made to pay tribe members for lands not classified as either agricultural or pine lands.

Much of the land ceded by the Chippewas was marshy. In 1906, Congress authorized a survey of the area with the aim of draining suitable portions. Over half of the cost of the survey was provided by funds held in trust for the Chippewa.

Mud Lake, comprising nearly 5,000 acres, was drained in 1910 and

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177. It is stated in Montana v. United States, 101 S. Ct. 1245, 1251 (1981): “The lake lay wholly within the boundaries of the Red Lake Indian Reservation, which had been created by treaties entered into before Minnesota joined the Union.” This is incorrect. Mud Lake was part of an area ceded by the Chippewa(s) to the United States 36 years before the case was decided.

178. Treaty with the Chippewa, Act of February 22, 1855, Ch. 204, 10 Stat. 686.

179. Id., Article 2.


182. Id., Article 7.

183. Id.


186. Id. at 3, 4.
1911 and opened to homesteading.\textsuperscript{187} Two years later, in a friendly suit to delineate the extent of ownership of a party who had been a riparian owner of Mud Lake, it was held, in a state court proceeding, that Mud Lake was navigable under principles of Minnesota law, and further, that applicable Minnesota law placed ownership of the bed of the former lake in its riparian owners, excluding the possibility of ownership in recent homesteaders. The case reached the United States Supreme Court in 1922.

The high court's decision reiterates the general rules pertaining to the doctrine. Navigability for purpose of title is a federal question to be determined by applicable federal rules. And streams are navigable in law when they are navigable in fact. That is, when they "are used, or are susceptible of being used, in their natural condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water . . . ".\textsuperscript{188}

The United States claimed that Mud Lake had never been navigable. In the alternative, it was argued that Mud Lake had always belonged to the Chippewa.\textsuperscript{189} Under the principles announced in \textit{Worcester v. Georgia}, they held absolute title to lands they used and occupied, subject only to a right of purchase by the United States and a prohibition against its sale to any other party.\textsuperscript{190}

The Court found that Mud Lake had been navigable before it was drained. In examining the possibility of a federal grant of the lake to the Chippewa prior to Minnesota statehood, the Court started with the proposition that states own lands beneath navigable waters subject to the paramount power of Congress to control such waters for the purpose of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States after acquiring the territory and before the creation of the State, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the States and with foreign nations, or carrying out other public purpose appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the State, but remain unimpaired, and the rights which otherwise would pass to the State in vir-

\begin{footnotesize}
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\item[188.] Brief for United States at 17, 18, United States v. Holt State Bank, 270 U.S. 49 (1925). The United States Court could have argued a granting to the Chippewa. The treaty provided for a comprehensive cession by the Chippewa to the United States followed by a granting to the Chippewa. Treaty with the Chippewa, Act of February 22, 1855, ch. 284, Articles 1 and 2, 10 Stat. 686.
\item[189.] \textit{Id.} at 20, 21.
\end{enumerate}
\end{footnotesize}
tue of its admission into the Union are restricted or qualified accordingly.\textsuperscript{191}

The Court immediately qualified this, however, by saying that, as stated in \textit{Shively v. Bowlby}, because the United States has adhered to a general policy of holding lands under navigable waters for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposal by some international duty or public exigency . . . . [It followed that] disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.\textsuperscript{192}

The \textit{Shively} language nowhere approached this in tone. And, as we have seen, a finding that \textit{Shively} owned no portion of the tidelands of the Columbia River was made, not because the grant was not "definitely declared or otherwise made very plain," but because such ownership would have conflicted with state duties to administer this land to properly carry out trust responsibilities toward its citizens. The \textit{Shively} Court's first statement, by way of conclusion, read,

\begin{quote}
Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishery. Their improvement by individuals, when permitted, is incidental or subordinate to the public use of the right. Therefore the title and the control of them are vested in the sovereign of the benefit of the whole people.\textsuperscript{193}
\end{quote}

When considering the 1855 treaty between the United States and the Chippewa(s), the \textit{Holt State} Court stated, "An affirmative disposal is not asserted."\textsuperscript{194} That was correct. The United States, in its brief, had not argued that a grant had been made by the federal government to the Chippewa(s), but that the land had always belonged to the Chippewa bands prior to its cession to the United States. The Court in \textit{Montana v. United States} made the same sort of complaint when denying a federal disposition in favor of the Crow Tribe. The Court said the 1851 treaty represented a covenant between the Tribe and the United States Government, rather than a formal conveyance. And the 1868 treaty expressed no clear intention to convey the riverbed.\textsuperscript{195} The Court's de-

\begin{enumerate}
\item \textit{Id.} at 55.
\item \textit{Shively v. Bowlby}, 152 U.S. 1, 57 (1893).
\end{enumerate}
mand that treaties between the federal government and Indian tribes must be in the form of grants by the federal government, and its concomitant dismissal of agreements which instead constitute reservations by Indian tribes, is not only arbitrary, but appallingly arrogant. It is the Court's place to interpret Congress' intercourse with Indian tribes, not dictate the form of that intercourse.

The *Holt State* Court may have been considering possible claims by the Chippewa(s) against the federal government. This was said:

If the reservation operated as a disposal of the lands under a part of the navigable waters within its limits it equally worked a disposal of the lands under all. Besides Mud Lake, the reservation limits included Red Lake, having an area of 400 square miles, the greater part of the Lake of the Woods, having approximately the same area, and several navigable streams.\(^{196}\)

The treaty of 1897 dictating the disposal of these ceded lands, however, provided only for payments to the Chippewa for monies derived from the sale of pine lands and agricultural lands. They were promised no compensation for ceded lands not of those descriptions.

The finding of navigability in *United States v. Holt State Bank* warrants some discussion. The facts in *Holt State Bank* are very close to those in another case, *United States v. Oregon*,\(^ {197}\) with differing results. A determination of navigability is, in itself, somewhat subjective, despite the clarity of the rule that waters navigable in fact are navigable in law.

In wetter years, Mud Lake could be navigated in a gasoline launch, if shallow areas were avoided.\(^ {198}\) In seasons of drought, the lake could be crossed with a team and wagon.\(^ {199}\) An area of water was found non-navigable in *United States v. Oregon* although it was traversed frequently with gasoline-powered boats. In the Oregon case, the United States claimed that a bird refuge created by executive order in 1908, 49 years after Oregon statehood, was made up entirely of land beneath non-navigable water which had remained part of the public domain at the time of statehood. In both *United States v. Holt State Bank* and *United States v. Oregon*, a different finding of navigability by the Court would have resulted in possible claims against the United States Government.

\(^{196}\) *United States v. Oregon*, 295 U.S. 1 (1934).


Choctaw Nation v. Oklahoma

The next case deciding whether state sovereignty in lands beneath navigable waters vested subject to prior grants by the federal government was *Choctaw Nation v. Oklahoma*, a 1969 case. The case was decided upon entirely different principles than those relied upon in *United States v. Holt State Bank*. The ruling principles were those of Indian law-treaties, requiring that they be read as they would have been read by participating Indians at the time the agreement was made.

The controversy addressed in the case was essentially the same as that in *Brewer Oil Co. v. United States*. The Choctaw and Cherokee Nations attacked the issuance of oil leases by the river of Oklahoma on lands beneath the steambed of the Arkansas River. The state claimed ownership in the area in question, and argued that its sovereignty had vested at the time of Oklahoma statehood in 1906. The navigability of the river was apparently unquestioned. It was held that the lands granted to these Indian groups prior to statehood had included lands beneath the Arkansas River.

The history of the United States' dealings with the Choctaw and Cherokee Nations was considered at length. These Indians, who had originally inhabited the southeastern and southern United States, had been persuaded to move to Arkansas. After treaties had been entered into, ceding lands in Georgia and Mississippi and reserving lands in Arkansas, the United States was forced to concede that a move to Arkansas would be impossible. That area was already heavily settled. It would, instead, be easier to relocate these groups in advance than to attempt to move entrenched white settlers from Arkansas.

Those Indians who had decided to assume agricultural existences in Georgia and Mississippi, with the consent of the United States Government, were also in peril. Both of those states passed legislation extending their jurisdiction over Indians and made preparations to distribute lands they held under the protection of the federal government. Again, moving the affected Indians was seen as preferable to a clash with white citizens.

Thus, through the treaties of Dancing Rabbit Creek with the Choctaws in 1830 and the New Echota with the Cherokees in

1835, agreements were made to provide these groups with new homes in Oklahoma. The lands granted were to be patented in fee simple and were never to be part of a state or territory.

Pressure from settlers again caused the final termination of tribal affairs and the subsequent formation of the state of Oklahoma. Individual Indians were granted allotments and the United States government was charged with selling remaining lands in trust for then members of the tribes. Lands not yet sold were to be held in trust for the use and benefit of terminating tribes. The land in conflict was unallotted, unsold land held by the United States under this trust obligation.

The Court found that the agreements under which the affected tribes had moved to Oklahoma were not ordinary exercises in conveyancing.

The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them, see, e.g., Jones v. Meehan, 175 U.S. 1, 11 (1899), and any doubtful expressions in them should be resolved in the Indian's favor.

In answer to assertions that the logic of the Holt State Bank decision should apply, it was stated that "[I]t seems well settled that the United States can dispose of lands underlying navigable waters just as it can dispose of other public lands. See, Shively v. Bowby, 152 U.S. 1, 47-48 (1894). Rather, the question is whether the United States intended to convey title to the river bed to petitioners." Nothing in the

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205. Act of April 26, 1906, Ch. 1876, 34 Stat. 137.
206. Id., Section 16.
207. Id., Section 27. Section 27 reads, in part: "that the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, of Seminole Tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes . . . ."
208. Choctaw Nation v. Oklahoma, 397 U.S. 620, 630-31 (1969). The Court did engage in some common sense boundary interpretation. The treaty read "up the Arkansas" and "down the Arkansas." This was contemporaneously framed in the patent as "down the main channel of the Arkansas." That portion of the river within the area reserved was considered to be, without discussion, "within the metes and bounds of the treaty grants to petitioners."
209. Id. at 633. To the assertion by counsel that governmental purpose to convey away the bed of a navigable river is "not lightly to be inferred," Douglas in a concurring opinion said, "such exceptional circumstances are present here."
210. Id. at 634.
Holt State Bank opinion required the Court to blind itself to "the circumstances of the grant in determining the intent of the grantor."\(^{211}\)

In addition, the fact that affected Indian Nations had been granted land in fee simple and were promised that "no part of the land grant to them shall ever be embraced in any Territory or State" aided the Court in its conclusion that the United States intended to grant those portions of the Arkansas River within and contiguous to reserved lands to Indian Nations, rather than hold them for future states.\(^{212}\)

The dissent relied rather heavily on principles and cases only peripherally related to the doctrine. These cases, *Packer v. Bird*\(^ {213}\) and *Railroad Co. v. Schurmeier*,\(^ {214}\) were mentioned in the *Shively* decision and were again referred to in *Montana v. United States*. In *Packer v. Bird* the Court had ruled that while the question of navigability was a federal one, the incidents of ownership attaching to a federal grant to the banks of a navigable steam were to be decided by local law.

In *Railroad Co. v. Schurmeier*, the question was whether a federal grant on the shores of the Mississippi should extend to the meander line or the banks of the river. The Court was called upon to interpret surveying laws dating back to 1796. The act, and subsequent acts, read that surveys should be made to the banks of navigable streams for the reason that all navigable streams should remain public highways.\(^ {215}\)

These acts were in line with English ideas about public use—that certain rivers, although owned by private riparian owners, were subject to the *jus publicum* of navigation in favor of the English people. Congress, when passing such legislation, had navigational servitudes in mind, and was not prospectively determining whether states should or should not have title to the beds of navigable waters. The issue of state sovereignty in tidelands was not met by the Court until *Martin v. Waddell*, decided in 1842.\(^ {216}\) The *Packer* case is important to the doctrine in again stating that the states are free to dispose of lands beneath navigable waters in whatever manner they please. Aspects of these cases which refer to congressional policy not to survey navigable waters relate, however, to an intention to preserve a navigational servitude in favor of citizens as a whole and any reliance upon them to show a congressional policy in favor of holding lands beneath navigable waters for future states is misplaced.

\(^{211}\) *Id.* at 635.

\(^{212}\) *Packer v. Bird*, 137 U.S. 661 (1890).

\(^{213}\) *Railroad Co. v. Schurmeier*, 74 U.S. 272 (1868).

\(^{214}\) The first such act was the Act of May 18, 1796, ch. 29, § 9, 1 Stat. 468.


IV. MONTANA V. UNITED STATES

This section will discuss first the presumption against a granting by the United States Government applied by the Court. The words "by the United States Government" are used because the Court has not decided a case involving a grant by another sovereign since the case of Knight v. United States Land Association in 1891, and it is highly unlikely that it will meet such a case again. The cases before the Court since 1892, and the cases that it will continue to meet, involve grants by the United States Government made during the territorial period. Again, recent cases have all involved grants by the United States Government, or the retention by Indians, of large blocks of land reserved for Indians, and, in one case, a reservation, after statehood, of a large area to be used as a federal bird refuge. The conflicts before the Court are federal-state conflicts and the issue is the power of the federal government, in its active management of the public domain prior to statehood, to dispose freely of that domain for the benefit of the general public, or whether it was inhibited in that disposal by a duty to hold lands beneath navigable waters for future states.

Second, this section will discuss the power of the Court to apply rules developed in the twentieth century affecting those transactions—rules which had to have been known to the parties at the time of the transactions in order to meet the present requirements of the Court. Is the Court acting properly by demanding that grants and reservations made during the territorial period should now have a different meaning than the parties have always assumed them to have had, because they do not now meet requirements the parties could not have known of at the time the transaction was made?

A. The Presumption Against Granting

When deciding Montana v. United States, the United States Supreme Court had, as precedent, two conflicting cases. One that went beyond the issue of navigability, United States v. Holt State Bank, and determined whether Minnesota assumed statehood subject to prior grants of land beneath navigable waters, applied conveyancing rules to a federal grant. In that case, a grant was not found to have been made to the Chippewa Indians. The Montana v. United States Court could also have followed the reasoning used in Choctaw Nation v. Oklahoma and decided the case using principles of Indian law. In finding that the United States had not granted the bed of the Big Horn River to the Crow Tribe prior to Montana statehood in 1895, the Court chose to follow United States v. Holt State Bank. It, in fact, extended the con-

veyancing rules previously applied in that case and made one significant change in the doctrine. The Court, for the first time in any United States Supreme Court decision, required the grantee of a federal grant to overcome a presumption against a granting by the United States Government prior to statehood. There follow quotes from the opinion.

A court deciding a question of title to the bed of the navigable water must, therefore, begin with a strong presumption against conveyance by the United States. *United States v. Oregon*, supra, 295 U.S. at 14, and must not infer such a conveyance “unless the intention was definitely declared or otherwise made plain.” *United States v. Holt State Bank*, supra, 270 U.S. at 55, or was rendered in “clear and special words,” *Martin v. Waddell*, supra, 41 U.S. at 411, or “unless the claim confirmed in terms embraces the land under the waters of the stream.” *Packer v. Bird*, supra, 137 U.S. at 672.218

When measured against this standard, it was found that the Crow treaties failed to overcome the presumption. The 1851 treaty did not by its terms formally convey any land to the Indians at all, but instead chiefly represented a covenant among several tribes which recognized specific boundaries for their respective territories. It referred to hunting and fishing only insofar as it said that the Crow Indians “do not surrender the privilege of hunting, fishing or passing over any of the tracts of country heretofore described,” a statement that had no bearing on ownership of the riverbed. By contrast, the 1868 treaty did expressly establish a territory for the Crow Tribe. Article 2 of the treaty described the reservation land in detail and stated that such land would be “set apart for the absolute and undisturbed use and occupation of the Indians herein named . . . .” The treaty then stated:

[T]he United States now solemnly agrees that no persons, except those herein designated and authorized to do so, and except such officers, agents, and employees of the government as may be authorized to enter upon the Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . . . Whatever property rights the language of the 1868 treaty created, however, its language is not strong enough to overcome the presumption against the sovereign’s conveyance of the riverbed.219

The treaty did not expressly refer to the riverbed, nor express an intention to convey the riverbed in “clear and special words,” or by language “definitely declared or otherwise made plain.”220

218. *Id.* at 1252.
219. *Id.*
In documenting the existence of such a presumption, the *Montana v. United States* Court cited *United States v. Oregon*. The presumption language in the *Oregon* case was made as part of the general statement of law leading to a discussion of navigability where it was found that marshlands reserved by Executive Order were non-navigable and had remained part of the public domain when Oregon became a state. The *Oregon* Court’s entire reference was a quote from *Massachusetts v. New York* referring to a presumption against a state’s divesting itself of sovereignty in navigable waters. The quote read:

Dominion over navigable waters and property and the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself.

*Massachusetts v. New York*, concerned the interpretation of the Treaty of Hartford, made between Massachusetts and New York in 1786. Both states had claimed much of the same territory of western New York. They settled their differences by agreeing that New York should have sovereignty to the area, and Massachusetts should be paid the proceeds of sales of public domain. The Court found that “the proper construction of the technical language of the treaty [which both granted and reserved to New York the right and title of sovereignty and jurisdiction over the area described] gave to New York, as incident to its sovereignty, title to all lands under navigable waters.”

The case relied, as well, on the principles stated in *Illinois Central Railroad v. Illinois*. A state, which it can, under the rule of *Martin v. Waddell*, grant proprietary ownership in lands beneath navigable waters, cannot in so doing inhibit its own ability to carry out trust responsibilities to further navigation, commerce and fishing in favor of its citizens. A grant of sovereignty in lands beneath navigable waters would certainly be in derogation of such a trust responsibility. *Massachusetts v. New York* is within that line of cases inhibiting a state’s relinquishment of its trust responsibilities.

Should such an inhibition against a divestment by a state of sovereignty be used against the United States in the context of *Montana v. United States*? It should not, for the reason that the responsibilities of the federal government are to the general public, and not to the citizens of the state to protect their rights in fishing and navigation.

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222. *Id.* at 81.
223. *Id.* at 90.
The English system was two-tiered. Sovereignty in navigable waters was in the Crown subject to uses in favor of the general public. When this was transferred to the United States, a four-tier system developed. Sovereignty was placed in the states with an obligation to uphold a trust in favor of the citizens of the state. At the same time, this was subject to paramount constitutional powers in the federal government in favor of general citizens. The federal government has no obligations to uphold a trust to enhance fishing and navigation in favor of citizens of a state. It has, however, constitutional powers to manage the public domain and carry out trust responsibilities in favor of Indians. As a general proposition, the application of a presumption against granting a land beneath navigable water prior to statehood places the protection of states' interest ahead of conflicting constitutional powers in favor of the general public—an impermissible demand upon the federal government. The effect is an extension of the equal footing doctrine to vest state sovereignty in navigable waters at the time territories are formed, rather than at the time of statehood.

And even if a presumption against granting of lands beneath navigable waters were applied to a sovereign other than a state, to which sovereign, in this case, would the rule apply? The sovereigns engaging in treaty were the Crow and the United States Government. The Crow were ceding land while the United States was purchasing the land ceded. Lands retained by the Crow were "set apart" for their undisturbed use and occupancy. It is natural to infer that, in the context, should a presumption against granting be applied, or, as stated in Massachusetts v. New York, should a presumption against separation from sovereignty be applied, the affect would be that the Crow did not divest themselves of sovereignty to lands beneath navigable waters in those lands retained.

Finally, a presumption against grants by the sovereign would presumably develop for the protection of that sovereign. If, as it is presumed by the Court, the United States is the sovereign, the application of the rule in Montana v. United States defeats the sovereign and the general public. This illogical result is, in itself, sufficient reason to avoid such an application.

If the Court is willing to apply such an obscure presumption, it should also be willing to consider the traditional defenses developed within the English Common law. A showing of a very general grant, such as "to the sea" was sufficient to show that the holder of an upland manor had been granted the foreshore along with the uplands.²²⁵

And a showing that the area had been under the control of the
grantee for at least 60 years defeated claims by the Crown. The 1868 treaty between the Crow and the United States was signed 113 years before the *Montana v. United States* decision and the Crow had maintained undisputed control over the Big Horn River from that time until the present, as well as the 200 years prior to that.

A somewhat related idea is examined in *Massachusetts v. New York*. When construing that grant, the Court said, "The applicable principles of English law then well understood, the object of the grant, contemporaneous construction of it and usage under it for more than a century, all are to be given consideration and weight." The contemporaneous construction of the 1868 treaty could not have been, by either of the treatying parties or surrounding settlers, that the waters within the Crow Reservation were reserved for whites then moving into the Montana Territory. The federal government, by reserving special areas for the Crow, were presumably reserving surrounding areas for settlers.

Nor did the State of Montana subsequently behave in such a manner as to indicate that it believed navigable waters ceded by the Crow had been reserved for the state. The Crow ceded lands encompassing the Big Horn, Yellowstone, and Musselshell Rivers in 1868, 1891, 1892, and 1904. Claims that sufficient amounts had not been paid the Crow for these cessions were adjudicated by the Court of Claims. The State of Montana did not at that time intervene and claim that the Crow did not own the beds of these rivers. It was assumed by everyone that sovereignty in those rivers had been in the Crow Tribe and that they were the rightful recipients of adjustments for payments due for those lands as well as all others.

And, most determinative, when the United States was purchasing ceded land from the Crow throughout this period, some of which had been reserved to the Crow in 1868, ceded land encompassing navigable waters was paid for with no exclusions made for the beds of navigable waters. The federal government assumed that lands reserved by the Crow had contained the beds of navigable waters and that when it was subsequently ceded to the United States the beds of navigable waters were part of that ceded and paid for.

The contemporaneous meaning of the grant and usage for it for 113 years should have been given consideration and weight by the Court in *Montana v. United States*.

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226. Id. at 196.
The presumption against granting, as will be remembered, originally developed to aid the Stewart kings in suits aimed at divesting ownership in the foreshore of the English coast. In almost all English cases, however, the rule failed to have a practical effect. Almost without exception, owners of upland manors and buildings along the rivers of London had been able to prove ownership, either by evidence of a grant, or by prescription. It is ironic that a specific rule of English Common law, which could have no application in England today where Parliament now is responsible for the "Great Waste" and as a legislative body representing the people, could presumably grant away the whole thing, continues to haunt the issue of sovereignty in navigable waters in the United States.

Never before has the recipient of a grant by a United States sovereign been forced to overcome a presumption against such a grant. Statements referring to such a rule were made in United States v. Oregon and in Massachusetts v. New York, where it was found unlikely that New York would intend to divest itself of sovereignty in lands beneath navigable waters for reasons related to the public trust doctrine. "[A] grant of the soil under water in private ownership would have set material limits on the free exercise of the sovereign control of New York over the navigable waters of the state and on the free use of the principal waterway of the newly settled territory." In the cases referring to this presumption, mention is made of it in passing without discussion. It is as possible to refer to isolated statements within this line of cases diametrically opposed to a presumption against a granting by the sovereign. This statement, for instance, appears in Hardin v. Jordan:

Where the government has not reserved any right or interest that might pass by the grant, nor done any act showing an intention of reservation, such as platting or surveying, we must construe its grant most favorably for the grantee and that it intended all that might pass by it.

In a footnote, the Court stated, "Congress was, of course, aware of this presumption once it was established by this Court." The Court can, of course, at any time decide that the stream was navigable at the time of statehood and title to the bed beneath vested in the state as an incidence of sovereignty. We have seen that under the operation of the doctrine, it makes no practical difference to possible

230. See text accompanying footnotes 51 to 67, supra.
231. Farnham, supra note 50, at 195, 198.
stream bed owners, as states are free to grant away soils beneath navigable waters, as long as the granting is not detrimental to trust responsibilities inuring to the state because of sovereignty.

It is quite another thing to engage in revisionism requiring altered states of mind of the parties who engaged in treaty ing and granting in the mid-nineteenth century. No one could know that grantees would be forced to overcome a presumption against granting of lands beneath navigable waters by the federal government prior to statehood until this case was decided.

The presumption was never before applied against a sovereign other than one responsible to uphold trust responsibilities for its citizens in favor of fishing and navigation. It was established in England to protect a trust obligation by the Crown in favor of citizens. It was not applied against states in Martin v. Waddell. The Court found that different rules should apply in the United States and states should be free to dispose of lands beneath navigable waters as they saw fit. However, grants in derogation of trust responsibilities were found to be revokable in Illinois Central Railroad v. Illinois if grants were in conflict with trust responsibilities. Massachusetts v. New York stated a presumption against granting by the State of New York, the sovereign with municipal powers to uphold trust obligation in favor of citizens, partially because “[A] grant of the soil under water in private ownership would have set material limits on the free exercise of the sovereign control of New York over the navigable waters of the state and on the free use of the principal waterway of the newly settled territory.”

Never before 1981 was a presumption against granting applied to a federal grant made before statehood in such a manner as to protect rights of future citizens of a state. The federal government could not have known that this application in 1981 would make it necessary that their grant in 1868 be made “in clear or special words” or that it should be “definitely declared or otherwise made plain.” The federal government, in fact, would assume that its responsibilities ran to the nation as a whole to manage the public domain for the benefit of all citizens.

And even if such a presumption existed which could be overcome only by a conveyance which was “definitely declared or otherwise made plain,” the parties to the Crow treaties of 1851 and 1868 could not have known that it applied to rivers. It would be another eight years before the Court first extended the doctrine of state sovereignty over tidelands to the beds of navigable rivers, in that instance, the Mississippi, in Barney v. Keokuk in 1876. Four years later the principle

was generally applied in *Packer v. Bird*, 238 and two years later, in 1892, it was extended to the Great Lakes.239

Even if it could have been known in 1851 or in 1868 that a presumption of granting must be overcome with clear language, it could not clearly have been known to the treaty makers that state sovereignty extended to inland streams larger than the Mississippi before 1892 when navigability in fact became an established test.240

Speaking in 1890, in *Hardin v. Jordan*, the Court itself said,

The right of the States to regulate and control the shores of tide waters, and the land under them is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each State to what waters and to what extent this prerogative of the State over the lands under water shall be exercised.241

The United States government cannot now be asked to have had a clearer idea about the bodies of water to which state sovereignty had extended than that expressed by the Court.

V. RESULTS OF THE CASE

The result of the case places a strip of land 50 miles long, within the exterior boundaries of an ongoing Indian reservation, under absolute state ownership, as proprietor and sovereign. As discussed above, this is the first time a United States Supreme Court decision has had this effect, or could, in fact, have had this effect.242 In *Holt State Bank*, the Chippewas had ceded the area including Mud Lake to the United States' government 36 years before. In *Choctaw*, and *Brewer*, most tribal powers were officially terminated in the early 1900s.

The decision allows the intrusion of the state in a trust capacity within an Indian reservation, something the Court itself has said is impermissible.243

As a practical matter, the decision could allow the state of Montana to mine coal under the Big Horn River.

As another practical matter, when the Montana Fish and Game

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240. See text accompanying footnotes 120 to 128, supra.
242. See discussion accompanying footnotes 164 to 167, supra.
Department opens the river to fishing, thousands of sports fishermen from all parts of the globe are expected to converge on the river to take advantage of what has been described as the best trout fishing in the lower 48 states. Just as Indians were moved to satisfy late 19th century needs for locatable minerals, they are now being exploited to satisfy an important public demand of the late 20th century for recreation.

One bizarre result could obtain from the case. The Submerged Lands Act quitclaimed the beds and banks of navigable waters to states. The interpretation of the Act has placed congressional approval of state sovereignty upon lands found navigable by the Court. The congressional quitclaim, interestingly, applies to lands beneath navigable streams, that is, determined by the Court as navigable streams, "hereafter modified by accretion, erosion, and relitigation." In a concurring opinion in Hughes v. Washington, Justice Stewart opined that accretion had resulted in a retroactive unconstitutional taking by the state of privately held lands. Under the facts in Montana v. United States, there certainly will be areas of the Big Horn where changes in the river, natural changes and those created by the Yellowtail Dam, have brought new areas of land under the bed and banks of the river. It could be argued by parties not privy to Montana v. United States that the State of Montana is responsible for any such taking over coal beds. Montana could defend by raising the claim that the Big Horn was not, in fact, navigable in those areas at the time Montana attained statehood. Montana could raise that claim, whether or not it were allowed, because the issue of navigability of the Big Horn was not appealed in Montana v. United States.

The Court's role in this case is questionable. Indian matters have

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244. "But fishermen are afraid the Fish and Game Commission's proposed daily limit of three trout, only one longer than 24 inches, is too liberal and could wreck the river's tremendous fishery.

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"The Bighorn could easily be the best trout stream in North America outside of Alaska. \ldots \ [T]he big trout should be protected by allowing anglers to keep only one fisher over 18 inches.\]

"Anglers are urging tighter regulations because fishing pressure is expected to be 'awesome,'" Bailey said.

"'You will have corporate jets landing down there and everthin else,' he said.

"George Anderson, a Livingston fishing guide who plans to operate a guide service from Fort Smith along the Bighorn, agreed with Bailey.

"'There's going to be a tremendous amount of pressure,' Anderson said. 'I know guys all over the country who are willing to drop everything and come here anytime the river opens.'" The Missoulian, July 20, 1981, at 12, col. 3.

245. 43 U.S.C. §§ 1301 et seq.


traditionally been within Congress' domain. Although the Court in *Montana v. United States* recognized the difference between formal conveyances and federal Indian compacts, it did not defer to Congress' power to deal with Indian tribes in any manner historically appropriate. Rather, the Court has imposed strict hurdles Congress must overcome to achieve its purpose. The result is an intrusion by the Court into Congress' traditional plenary capacity to act as trustee for Indian lands and Indian tribes. The Court has said that this authority is a political one that has been exercised by Congress from the beginning and is not subject to control by the judiciary.

**VI. USE OF THE PUBLIC TRUST DOCTRINE TO DETERMINE SOVEREIGNTY IN LANDS BENEATH NAVIGABLE WATERS**

The results of the *Montana v. United States* decision bring home the necessity of finding a more suitable way to solve what will be a continuing problem before the Court.

The intention of a federal government is determinative. There is no constitutional doctrine which demands that lands beneath navigable waters not be granted prior to statehood. The equal footing doctrine demands that, at statehood, state sovereignty vest in lands beneath navigable waters. Currently, the Court is using conveyancing rules in an apparent attempt to determine whether a grant of navigable waters was intended. Was the grant specific enough to show an actual intention to include it and therefore overcome a presumption that such land is held in trust for future states? In the past, as we have seen, a determination of whether sovereignty vested in states was determined by whether there was a need for the state to administer municipal plenary powers to uphold and protect local needs for navigation, fishing and commerce.

If such a need existed, sovereignty vested in the state. When looking at grants or reservations of large areas of public lands and Indian lands, the Court's inquiry should be to determine whether the federal government foresaw future state activity within the area. If none was anticipated, there would be no necessity to, and no intention on the part of, the federal government to hold such lands in trust for future states.

An examination of the contrasting situations in the *Shively* case and *Montana* case is helpful. In *Shively*, individual settlers were granted homesteads for purposes of cultivation under the Oregon Donation Act. It would be natural to infer that a future need for state sovereignty in the lands beneath navigable waters existed to protect the

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grantee-settlers in their enjoyment of the use of navigable waters near their settlements. In the case of the Crow, no such need existed. Indians looked to the federal government as the trustee who administered in their favor. Any state trusteeship in favor of Indians were contrary to congressional policy.

And there was no future need for the state to administer navigable waters within reservations for future citizens of the state. Ample portions of the public domain had been ceded to the federal government to be used as areas for white settlement. They did not need the additional use of navigable waters within Indian reservations.

A further inquiry should be made when determining the intention of the federal government at the time of a pre-statehood grant. A vesting of state sovereignty does more than place obligations upon the state to support certain trusts in favor of citizens. Ownership in the state is also proprietary, and gives the state the power to use that land as an absolute owner. Gravel may be extracted from the beds of navigable rivers. Oil may be leased. Coal may be mined from beneath the bed. All this may be done, assuming that such activities are not in derogation of trust responsibilities. Would the federal government, when treatying with the Crow, ever have intended that the state of Montana be allowed to carry on those activities in an area set aside for the exclusive use of the Crow? Such activities would surely be in conflict with federal responsibilities to administer the area in trust for Indians.

And even though sovereignty might vest in a state, under the holding in the Winans case, it could be subject to easements in favor of nearby Indian tribes. In short, federal servitudes in favor of Indian tribes could exist. Under the rule of Martin v. Waddell, state sovereignty in lands beneath navigable waters vests subjects to constitutional powers since surrendered to the federal government. Thus, although state sovereignty has vested, conflicting federal servitudes imposed upon the area could be such that the state has naked title only.

And one further inquiry should be made. Are the activities supported by the state within those municipal powers the state is obliged to uphold? In Montana v. United States, the activity supported may not be one of those trust obligations. The jus publicum supporting fishing was in favor of the common people. State supported trust obligations in the United States are to state citizens. The Montana Department of Fish and Game seems actually to be supporting a trust in favor of recreation for the elite—those able to take advantage of some of the world’s most splendid fishing. Activities by the state most in harmony with the doctrine would support fishing activities of local people, most of whom are Crow Indians. And the state’s activities are such that they may conflict with the federal government’s servitude to support recrea-
tion in the area. By stocking fish and encouraging the intrusion of anglers, the state is burdening the federal government in its attempt to preserve a reserved place for Indians.

If the state's activities are not, in fact, those obligated by the public trust doctrine, they should not be allowed. Under the facts of this case, then, Montana is not administering the proper fishing trust. And, because of the nature of the Big Horn, the state has no need to administer a trust in favor of navigation and commerce. There is no need, for instance, to regulate harbors or provide for the building of wharves. Even though, in this case, sovereignty has vested in the state, activities supported by the public trust doctrine are either unnecessary or should be discontinued because they are being inappropriately administered.

VII. CONCLUSION

In analyzing the Indian land cases, and federal reservation cases, future control of the area should be considered. When the federal government negotiated waters with Indians, the tribes ceded land to the United States Government and moved to smaller areas under a protected trust relationship with the United States Government. Different circumstances prevailed when Congress opened the public domain to settlement. In both these activities Congress was acting in a plenary capacity. But while settlers and the United States Government normally articulated eventual state control, the United States Government and Indians, who were promised protection from outside intrusion, did not.

If states were to be afforded no future control within a granted area, there was no need to "guarantee them full public enjoyment of their watercourses" and therefore no need to hold such lands in trust for future state sovereignty.

A failure to analyze the very area of law which produced the public trust doctrine under the principles of that doctrine has resulted in substantial state and federal conflicts that would be avoided by a new look at the principles and duties involved in federal grants and reservations of public lands and Indian lands.