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NAMEN II: DO THE TRIBES HAVE THE AUTHORITY TO REGULATE NON-INDIAN RIPARIAN RIGHTS ON FLATHEAD LAKE?

Sheri L. Flies

I. INTRODUCTION

Non-Indian owners of land riparian to the south half of Flathead Lake are subject to the regulation of their property, which is situated below the highwater mark, by the Confederated Salish and Kootenai Tribes of the Flathead Reservation. The purpose of this casenote is to examine how the Tribes acquired this regulatory authority.

II. BACKGROUND

A. *Namen I*

The 1855 Treaty of Hell Gate¹ established the Flathead Indian Reservation in what is now western Montana. The treaty provided that the south half of Flathead Lake would be contained within the boundaries of the reservation.² Subsequently in 1904, Congress passed the "Flathead Act,"³ which authorized allotments in reservation land to Indian residents. The Act was implemented by congressional proclamation in 1904.⁴ Under this new policy, a federal patent was issued to Antoine Morais, a Flathead Indian, for an allotment of reservation land riparian to the south half of Flathead Lake.⁵

In 1973, the Confederated Salish and Kootenai Tribes of the Flathead Reservation [hereinafter referred to as Tribes] initiated an action in Federal court for declaratory judgment and injunctive relief against the Namens, successors in interest to Morais.⁶ The Namens operate a marina on the land, and have constructed docks and other facilities that extend beyond the highwater mark of the lake onto the bed and banks.⁷ The state of Montana and the City of Polson [hereinafter referred to as Polson] also own riparian land upon which similar structures, extending beyond the

1. 12 Stat. 975 (1859). The treaty was between the Flathead Nation and the United States Government. The Flathead Nation included the tribes of the Flathead, Kootenai, and Upper Pend d'Oreilles Indians.

2. *Id.*

3. 33 Stat. 302, ch. 1495 (1904).

4. 36 Stat. 2494 (1909).

5. *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. 452, 456 (D.Mont. 1974), *aff'd*, 534 F.2d 1376 (9th Cir. 1975), *cert. denied*, 429 U.S. 929 (1976). This has been designated as *Namen I*.

6. *Id.*

7. 380 F. Supp. at 455.

highwater mark, are located.⁸ The Tribes claimed that the Namens were trespassing on reservation property by erecting buildings and structures below the highwater mark. The Tribes asked the district court to enjoin all future trespass, require Namens to remove all structures below the highwater mark, and restore those lands to their original condition.⁹

The district court held that: 1) the Namens owned the title to the highwater mark; 2) the United States owned title to the beds and banks below highwater mark in trust for the Tribes; and 3) the Namens had a federal common law right of access and wharfage out to navigable waters.¹⁰ The Namens, therefore, had a right to build structures below the highwater mark to allow them to enjoy their right of access and wharfage.¹¹

The district court's holding was based upon two principles: First, that "[i]n all other situations in which the Federal Government holds title to the beds and banks of navigable waters, a fee patent issued by the United States to riparian lands would include the rights of access and wharfage without an express provision in the patent"¹² and second, where the United States holds title in trust for Indian tribes, federal common law applies.¹³ The court reserved judgment on the question of whether the Namens' structures abused their riparian rights.¹⁴

B. *Namen II*

*Namen II*¹⁵ consisted of three lawsuits that were consolidated for trial. In 1975, the City of Polson, Montana, with the state of Montana intervening, filed suit against the Tribes for a declaratory judgment that the Flathead Reservation had been terminated by the enactment of the 1904 Flathead Act. In 1977, the United States, as trustee for the Tribes, filed suit for a declaratory judgment that the Flathead Reservation had not been terminated, and that the Tribes had the authority to regulate the use of the beds and banks of the south half of the lake.¹⁶ Also, in 1977, the Tribes enacted the Shoreline Protection Ordinance¹⁷ with the approval of the Secretary of Interior. The purpose of the Ordinance is to regulate

8. *Id.* at 452 n. 2.

9. 380 F. Supp. at 455.

10. 380 F. Supp. at 466. *See Note, Namen: Riparian Rights on Flathead Lake*, 1 PUB. LAND. L. REV. 103 (1982).

11. 380 F. Supp. at 457.

12. *Id.* at 466.

13. *Id.*

14. 380 F. Supp. at 467.

15. *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982).

16. 665 F.2d at 963-64.

17. *Confederated Salish and Kootenai Tribe, Ordinance 64A* (July 19, 1977 and revised, October 16, 1977).

riparian structures along the south half of the lake.¹⁸ The Tribes initiated a suit claiming Namens' structures violated the Ordinance, abused their riparian rights, degraded water quality and interfered with Tribal fishing rights.¹⁹

The district court held that the reservation had not been terminated or diminished and that the United States held title to the south half of the lake in trust for the Tribes.²⁰ The court, however, held that the Tribes had no authority to regulate the riparian rights of the Namens, Polson, and the state of Montana.²¹ Each party appealed to the Court of Appeals for the Ninth Circuit on some aspect of the district court's decision.²²

III. ANALYSIS OF NAMEN II

The Ninth Circuit considered three issues: termination, ownership, and regulation.

A. *The Termination Issue*

Congressional intent was critical when deciding whether the 1904 Flathead Act had terminated the Flathead Indian Reservation because reduction or termination of a reservation requires congressional action.²³ Congressional intent can be shown either on the face of the Act, from surrounding circumstances, or from legislative history.²⁴

Intent on the face of the Act can be found in three ways: 1) explicit language of termination;²⁵ 2) less explicit "language of cession";²⁶ or 3) statutory reference to diminished or reduced reservations.²⁷ Polson attempted to analogize certain sections of the Flathead Act which granted surplus lands to Montana for school purposes²⁸ and banned liquor sales on

18. 665 F.2d at 954.

19. *Id.*

20. 665 F.2d at 954.

21. *Id.*

22. *Id.* Namens, Montana and Polson appealed from the rulings on the ownership issue and the termination issue. The Tribes and the United States appealed from the ruling on the regulatory issue.

23. *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586 (1977); *Mattz v. Arnett*, 412 U.S. 481, 504-505 (1979); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975), mentioned at 665 F.2d at 954, 955 n. 3.

24. 665 F.2d at 955.

25. For example, "the Smith River reservation is hereby terminated." Act of July 27, 1868, ch. 248, 15 Stat. 198, 221. See 665 F.2d at 955 n. 4.

26. For example, Indians agreed to "cede, surrender, grant, and convey all their claim, right, title and interest." 665 F.2d at 955 n. 5.

27. For example, "diminished reservation" was held to have diminished the Pine Ridge Reservation in *United States ex rel Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975), *cert. denied*, 430 U.S. 982 (1977); 665 F.2d at 955 n. 6.

28. Section 8, ch. 1495, 35 Stat. 781.

surplus land²⁹ to similar provisions in other Acts which were construed as intent to disestablish the lands.³⁰ The court, however, cited several statutes with the same provisions that did not terminate the reservation.³¹ The court did not find any intention by Congress, on the face of the Act, to terminate the Flathead Reservation.³²

The legislative history of the Flathead Act is sparse.³³ Nevertheless, according to the court, the Act was changed in such a way prior to its enactment as to suggest that there was no Congressional intent to terminate the reservation.³⁴ At the request of the Secretary of the Interior, the language was changed from lands "in the tract herein ceded" to "in the tract under consideration" because the Tribes had not agreed to cession.³⁵ Polson urged the court to recognize that Congress enacted three other statutes that same week which were held to terminate reservations.³⁶ The court distinguished these statutes from the Flathead Act, noting that the former ratified prior negotiations regarding cession, whereas there had been no prior negotiations on that subject with the Tribes.³⁷

Finally, Polson urged the court to consider three "surrounding circumstances": 1) general federal policy, prevailing at the time of the 1904 Act, to disestablish existing reservations; 2) prior negotiations with the Tribes suggesting termination; and 3) subsequent administrative and legislative actions suggesting termination.³⁸ The court found evidence of federal policy "scanty"³⁹ and inapplicable. While it was true that, at the turn of the century, Congress adopted a program for allotting land to the Indians and opening the surplus land to non-Indians, this was not the same as an explicit or implicit policy of termination.⁴⁰

Prior negotiations with the Tribes failed to induce them to cede land to the United States. Polson contended that Congress intended to terminate

29. Section 21, Act of March 3, 1909, ch. 263, 35 Stat. 781, 795-96.

30. 665 F.2d at 956.

31. *Id.* at 956 n. 11.

32. In fact, the purpose of the Act refers to the reservation in an existing sense. The Act is described as "an Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment." Ch. 1495, 35 Stat. 302.

33. 665 F.2d at 956.

34. *Id.*

35. *Id.*

36. 665 F.2d at 957 n. 12 (Rosebud Act, Devils Lake Act, Crow Act).

37. 655 F.2d at 957.

38. *Id.*

39. 665 F.2d at 957 n. 15.

40. Federal policy of outright termination was espoused by only one individual, Thomas J. Morgan, Commissioner of Indian Affairs under President Benjamin Harrison. When Cleveland succeeded Harrison as President, a new Secretary was appointed who expressed doubts about reservation termination. 665 F.2d at 957 n. 15.

the reservation by authorizing the negotiations and the intent was then carried out by Congress unilaterally adopting the Flathead Act. This rationale was held to be ill-advised.⁴¹

The subsequent legislative and administrative actions were composed of three subparts: a) jurisdictional history, b) pronouncements of officials in the Interior Department and c) subsequent congressional legislation. Polson contended state jurisdictional authority had supported termination previously.⁴² The court stated the Flathead situation was different. Indeed, the Montana Supreme Court had disclaimed state jurisdiction over major crimes⁴³ and civil disputes between Indians and non-Indians⁴⁴ on the Flathead Reservation.⁴⁵

Polson relied upon numerous pronouncements by officials of the Interior Department indicating a belief that the reservation had been terminated.⁴⁶ The court noted that the Tribes had voluminous support for its contention that the reservation had not been terminated. The court felt neither party's evidence was persuasive or significant.⁴⁷ But Polson pointed to congressional actions after 1904 that referred to the "former" Flathead Reservation to demonstrate that Congress intended to terminate the reservation.⁴⁸ The court pointed out, however, that there were only two references to "former" reservation compared to seventy-two references to "existing" reservation after 1904.⁴⁹

In summary, the court held there was no congressional intent to terminate the reservation either on the face of the Act, or from legislative history, or from surrounding circumstances after the Act was passed.

B. Ownership Issue

The Ninth Circuit had previously held, in *Montana Power Co. v. Rochester*,⁵⁰ that the United States holds title to the bed and banks of the

41. The Court said "[t]his is an unjustified extension of the reasoning of *Rosebud*," [*Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), which held that the Rosebud Act terminated the reservation status of a portion of the Rosebud Sioux Reservation] and was ill-advised because the Rosebud Act terminated a portion and here, Polson wants the entire reservation terminated. 665 F.2d at 958. Also, there was no prior cession agreement.

42. *Rosebud* and *DeCoteau* stated that the State exercised jurisdiction over the lands since the enactment of the statute. 665 F.2d 959.

43. *State ex rel Irvine v. District Court*, 125 Mont. 398, 239 P.2d 272 (1951).

44. *Security State Bank v. Pierre*, 162 Mont. 298, 511 P.2d 325 (1951).

45. 665 F.2d at 959.

46. *Id.*

47. "Actions and utterances of federal officers that manifest no single clear perception of the reservation's status can hardly be treated as a significant item in determining that status." 665 F.2d at 959.

48. 665 F.2d at 960.

49. 665 F.2d at 959.

50. 127 F.2d 189 (9th Cir. 1942).

south half of Flathead Lake in trust for the Tribes. The court noted that its *Rochester* holding was strongly supported by *stare decisis*.⁵¹ Polson pointed out that this was not entirely true. In *United States v. Holt State Bank*⁵² the United States Supreme Court held that Minnesota became the owner of the bed of Mud Lake located within the Red Lake Reservation, upon that state's admission into the Union.⁵³ But the Ninth Circuit was convinced that *Holt State Bank* was inapplicable to the facts of the immediate case.⁵⁴

Polson countered that *Rochester* was no longer good law due to the 1981 United States Supreme Court decision in *Montana v. United States*.⁵⁵ Because of this decision, Polson argued that the Hell Gate Treaty did not convey beneficial ownership of the south half of Flathead Lake to the Tribes, but that title passed to the State of Montana upon its admission into the Union.⁵⁶ *Montana* held that the treaty establishing the Crow Reservation had not conveyed to the Indians beneficial ownership of the bed of the Big Horn River, which flows through the reservation. Instead, title to the river bed had passed to the State of Montana upon its admission into the Union.⁵⁷ *Montana* also cited *Holt State Bank* approvingly.⁵⁸

The Supreme Court in *Montana* stressed that there is a strong presumption against the United States conveying title to navigable waterways in a territory, thereby defeating the title to the future state.⁵⁹ It held that the language of the 1868 Crow Treaty was not strong enough to overcome the presumption, because the treaty neither expressly referred to the riverbed, nor provided a clear intention to convey the riverbed.⁶⁰ Furthermore, the Supreme Court stated that while the treaty gave the Crow Indians "sole right to use and occupy the reserved land. . . . [The] mere fact that the bed of navigable water [lay] within the boundaries described in the treaty [did] not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that

51. *United States v. Title Insurance and Trust Company*, 265 U.S. 472 (1924); *United States v. Pollman*, 364 F. Supp. 995 (D. Mont. 1973); *Namen I*, 380 F. Supp. 995 (D. Mont. 1973); *Oregon ex rel State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977). Also, the Court stated that hydroelectric power development has relied upon the *Rochester* holding. There is an assumption that the Tribes beneficially own the south half of Flathead Lake and have received rental payments to demonstrate this beneficial ownership. Since 1975, Montana Power has paid \$2.6 million to the Tribes for the Kerr Dam Project, of which the lake bed rental is \$468,000 annually. 665 F.2d at 961 n. 26.

52. 270 U.S. 49 (1976).

53. *Id.* at 59.

54. 554 F.2d at 961.

55. 450 U.S. 544 (1981).

56. 665 F.2d at 961.

57. 450 U.S. at 556-57.

58. 450 U.S. at 552.

59. 450 U.S. at 554.

60. *Id.*

might overcome the presumption against its conveyance.”⁶¹

The Ninth Circuit distinguished the Hell Gate Treaty from the Crow Treaty because the former expressly referred to Flathead Lake. However, the court went on to point out that the treaty described the northern boundary of the reservation as bisecting the lake. The court felt a “natural interpretation” should be adopted which would “infer an intent to convey title to the southern half of the lake.”⁶² In addition, the inference should be made because doubtful language in Indian Treaties should be construed in favor of the Indians.⁶³ The Hell Gate Treaty also stated that the land described for the reservation is “for the exclusive use and benefit of said Confederated tribes as an Indian reservation.”⁶⁴ *Montana* held that the “right of exclusivity” even if the same as ownership, could not establish a reservation grant.

The court distinguished the treaties further:

The *Montana* Court supported its conclusion. . .by reasoning that “the situation of the Crow Indians at the time of the treaties presented no ‘public exigency’ which would have required” a departure from the federal policy of reserving ownership of the land under navigable waters for future states. . . .No exigency existed because “fishing was not important to [the Crows’] diet or way of life.” By contrast, the Kootenai Indians. . .depended heavily on fishing.⁶⁵

Even though the Hell Gate Treaty and Crow Treaty appeared to be similar, thereby rendering *Montana* applicable to this case, the court felt they differed markedly. Therefore, it reaffirmed *Rochester* and held that the bed and banks of the south half of Flathead Lake are held in trust for the Tribes by the United States.

C. Regulatory Issue

The district court held that the Tribes had no power to regulate the federal common law rights of riparian non-Indian owners of land bordering the south half of Flathead Lake, because when the reservation was opened to settlement by non-Indians, the Tribes’ regulatory authority had been implicitly divested. The “implicit divestiture” rationale was derived from two Supreme Court decisions. *Oliphant v. Suquamish Indian Tribe*⁶⁶ held that Indian tribes were prohibited from exercising powers terminated by

61. *Id.*

62. 665 F.2d at 962.

63. *Id.*

64. 12 Stat. 975-76.

65. 665 F.2d at 962 (citations omitted).

66. 435 U.S. 191 (1978). *See* 665 F.2d at 963.

Congress and “those powers inconsistent with their status.” *United States v. Wheeler*⁶⁷ held that implicit divestiture occurs when relations between Indians and non-Indians are involved.

The Supreme Court later decided two cases from which emerged two regulatory rules—the *Colville*⁶⁸ rule and the *Montana*⁶⁹ rule. The *Colville* rule states that “tribal powers are not implicitly divested by virtue of the tribes’ dependent status. . . [on the contrary, divestiture is found only] where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government.”⁷⁰

The *Montana* rule provides that “a tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”⁷¹ *Montana* cited *Wheeler* approvingly, stating that the dependent status of the Tribes had implicitly divested them of powers over non-Indians.⁷² *Montana* went on to state that, “the exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes.”⁷³

The court found it hard to compose a single theory from the two rules.⁷⁴ Therefore, it applied the Flathead situation to both rules and found that the Tribes had authority to regulate riparian rights. If the *Colville* rule applied the Tribes would prevail because no federal interests would be impaired.⁷⁵ If the *Montana* rule applied the court felt the Tribes would prevail for two “distinct” reasons. First, *Montana* held that the Crow Tribe

67. 435 U.S. 313 (1978). See 665 F.2d at 963.

68. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980).

69. *Montana v. United States*, 450 U.S. 544 (1981).

70. *Colville*, 447 U.S. at 153-54. The National interests included those instances when the tribes seek to engage in foreign relations, alienate their lands to non-Indians without federal consent, or prosecute non-Indians in tribal courts which do not accord the full protections of the Bill of Rights. See 665 F.2d at 965. The Court held the tribes could impose cigarette taxes on non-tribal purchasers who purchased cigarettes on tribal land because the Court could see no overriding federal interest that would be frustrated by the tribal law.

71. *Montana*, 450 U.S. at 565-66. The Court held that non-Indian hunting and fishing did not threaten the Tribes’ political or economic security to justify tribal regulation of the Tribal land—the Big Hole River and surrounding area.

72. 665 F.2d at 963.

73. 450 U.S. at 564-65.

74. *Id.*

75. 665 F.2d at 963. The Court disagreed with appellees’ suggestion that a federal interest preventing intrusions on the non-Indian personal liberties, and fulfilling the justifiable expectations of non-Indians would be impaired. These arguments, the Court felt, were too broad, vague and tenuous. 665 F.2d at 963 n. 30. Also, the Secretary of the Interior approved the Ordinance and the United States joined the Tribes, showing that the federal government approved of the Tribes’ actions, and that federal interests could not then be hindered.

had the authority to regulate hunting and fishing by non-Indians on lands held in trust for the tribes if certain requirements were met.⁷⁶ By analogy, the Tribes could regulate the shoreline activities of non-Indian landowners.⁷⁷ Second, the Crow Tribe could have regulated non-Indian use of reservation land if the regulated conduct threatened or had some effect on the "political integrity, economic security or welfare of the Tribe."⁷⁸ The court found that these factors were affected by the conduct of non-Indian riparian owners of property bordering the south half of Flathead Lake. "Such conduct, if unregulated, could increase water pollution, damage the ecology of the lake, interfere with treaty fishing rights, or otherwise harm the lake, which is one of the most important tribal resources."⁷⁹

The court decided the Tribes had the authority to regulate non-Indian riparian landowners of the south half of Flathead Lake, and could therefore, enforce Ordinance 64A.

IV. CONCLUSION

Namen II was appealed to the United States Supreme Court by Polson and non-Indian riparian landowners. Certiorari was denied on November 1, 1982.⁸⁰ Justices Rehnquist and White dissented. They agreed that the termination issue was correctly decided, but not the ownership issue or the regulatory issue. They felt that the *Montana* decision could lead to a contrary decision and felt review was necessary.⁸¹

With the go-ahead, the Tribes will now be able to enforce Ordinance 64A, the Shoreline Protection Ordinance. Generally, the Tribes may regulate structures along the shores of the south half of Flathead by issuing variances, assessing fees and penalties for non-compliance. The existing 4000 docks are expected to be "grandfathered" in and not be affected by the ordinance as long as they conform to the safety and environmental standards.⁸² *Namens* and all other riparian landowners still hold title to the highwater mark, but their structures beyond the highwater mark will be regulated. The effect of this is that the federal common law right of access and wharfage is not absolute. It is subject to the regulation of the Tribes.

76. 665 F.2d at 964.

77. *Id.*

78. *Montana*, 450 U.S. at 1258.

79. 665 F.2d at 964.

80. 103 S.Ct. 314 (1982).

81. *Id.*

82. *Missoulian*, Dec. 13, 1982, at 13, col. 4.