American Indian Law Review

Volume 8 | Number 1

1-1-1980

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TRIBAL SOVEREIGNTY: AN ANALYSIS OF *MONTA V. UNITED STATES*

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In *Montana v. United States, 101 S.Ct. 1245 (1981)*, the Supreme Court has taken another major step in its evolving quest to restructure the doctrine of tribal sovereignty. At the same time, it apparently has disregarded a body of law more than four centuries old, which delineates the existing proprietary rights of tribes to their aboriginal lands, and which at the same time is the historical basis of federal claims to land ownership in the United States.

By tribal resolution, the Crow Tribe of Montana prohibited hunting and fishing within their reservation by nonmembers of the tribe. The state of Montana, however, also asserted the authority to regulate hunting and fishing by non-Indians within the reservation. Proceeding in its own right and as fiduciary for the tribe, the United States filed suit against the state seeking a declaration that the tribe and the United States have sole authority to regulate on-reservation hunting and fishing. In addition to the tribe's inherent sovereignty and a claim of federal preemption, the federal government relied upon its purported ownership in trust for the tribe of the bed of the Big Horn River to justify tribal jurisdiction.

Rejecting these claims, the Supreme Court held that neither the 1851 nor the 1868 Fort Laramie treaties with the Crow Tribe had conveyed beneficial ownership of the riverbed to the tribe. Invoking the "strong presumption" against the conveyance by the United States of the beds of navigable rivers that it holds in trust for future states, the Court declared that the state of Montana holds title to the bed of the Big Horn River. Further, the Court said, the state has regulatory jurisdiction over non-Indians on lands within the reservation owned by non-Indians, and the Crow Tribe may regulate such nonmembers only where they "enter consensual relationships with the tribe or its members," or when nonmembers' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[1]

In the Treaty of Fort Laramie of 1851,[2] the United States and various signatory tribes, including the Crow Tribe, acknowledged

1. 101 S.Ct. 1245, 1257 (1981).
2. 11 Stat. 749 (1851).

designated lands as the territories of the respective tribes. The treaty identified approximately 38.5 million acres as the territory of the Crows. In the treaty with the Crows at Fort Laramie in 1868,[3] the Crow Tribe ceded to the United States all but 8 million acres of their territory, which both parties to the treaty agreed were to be set apart for the "absolute and undisturbed use and occupation" of the Crow Tribe. Subsequent cession agreements and an act of Congress reduced the reservation to slightly less than 2.3 million acres.[4] As a result of the allotment program, approximately 28 percent of the reservation is held in fee by non-Indians.[5]

It is difficult to see how any question could arise about whether the United States had conveyed to the tribe lands which the tribe had withheld from its cession to the United States. After all, who was ceding its territory to whom? The Court consciously avoids the issue by characterizing the 1868 Treaty as having "reduced" the size of Crow territory, without ever indicating that the United States *acquired* rights at the same time.[6] Instead, we are told that the "ownership of land under navigable waters is an incident of sovereignty."[7] The United States owning the land in the first in-

3. 15 Stat. 649 (1868).

4. Act of Apr. 11, 1882, ch. 74, 22 Stat. 42; Act of Mar. 3, 1891, ch. 543, § 31, 26 Stat. 989; Act of Apr. 27, 1904, ch. 1624, 33 Stat. 352; Act of Aug. 31, 1937, ch. 890, 50 Stat. 884. The Acts of 1882, 1891, and 1904 ratify agreements between the Crow Tribe and the United States; the Act of 1937 appears to be unilateral.

5. 101 S.Ct. 1245, 1251 (1981).

6. *Id.* Admittedly, the 1868 Treaty does not expressly declare that land is being ceded. In article 2 of the Treaty, "The United States agrees that" designated lands be "set apart for the absolute and undisturbed use and occupation" of the Crow Tribe. The tribe agrees to "relinquish all title, claims, or rights in and to any portion of the territory of the United States, except" within the designated reservation. Nevertheless it is clear that all territory within the present Crow Reservation is territory that was withheld from cession to the United States. Article eleven of the 1868 Treaty provides that "No treaty for the cession of any portion of the reservation herein described . . . shall be of any force or validity as against the said Indians" unless signed by at least a majority of adult males of the tribe. In the agreement ratified by the Act of 1882, *supra* note 4, the Crow Tribe agrees to "dispose of and sell to the Government of the United States" a portion of the reservation. This is referred to later in the agreement as "the session [*sic*] of territory to be made by us." In the agreement ratified by the Act of 1891, *supra* note 4, the tribe again agrees to "dispose of and sell to the Government" designated lands. This also is later termed a "cession of territory" by the tribe. Finally, in the agreement ratified by the Act of 1904, *supra* note 4, the tribe agrees to "cede, grant, and relinquish to the United States" another portion of Crow territory. The Court in *Montana* describes these as "subsequent Acts of Congress [which] *reduced the reservation.*" *Id.* at 1250 (emphasis supplied).

7. *Id.* at 1251, *citing* Martin v. Waddell, 41 U.S. 367, 409-11 (1842).

stance, the question was whether it had conveyed the land to the tribe, or instead had retained the land in trust to pass to the state of Montana upon its admission to the Union, under the "equal footing" doctrine.

Although the Court fails to tell us, the United States in fact did assert a claim to Crow territory prior to its cession and continues to assert that claim to the unceded portion. Based upon the discovery doctrine, the United States claimed an entitlement to Crow territory through the cession of that entitlement to the United States by France in 1803.[8] This entitlement through "discovery" was variously termed a right of preemption, or more commonly, the fee simple subject to Indian right of occupancy, or the "naked fee."[9] This fee title was a legal fiction used to reconcile the granting of patents by the holder of the preemption right to lands still subject to the recognized rights of tribes to sovereign possession. The fee was "naked" because it was devoid of any right to possession, which was in the Indian tribes. A fee simple absolute did not result until the Indian right to possession was united with the naked fee.[10] As recently as 1941, in *United States v. Santa Fe Pacific Ry.*,[11] the Supreme Court unanimously denied that any right to possession attaches to a grant in fee simple by the United States of lands that are subject to the tribal aboriginal right to possession. Even if the United States *had* conveyed the fee to Crow lands to Montana upon its admission in 1889, therefore, this does not mean that any right to possession was conveyed. If the state owns the fee to the bed of the Big Horn River, that fee is still only an entitlement to the river, without possessory rights until the United States might obtain them from the Crow Tribe.

The Court places great emphasis on its opinion in *United States v. Holt State Bank*,[12] which it reads as having "reject[ed] an Indian tribe's claim of title to the bed of a navigable lake," which lay "wholly within the boundaries of the Red Lake Indian reservation, which had been created by treaties entered into before Minnesota joined the Union."[13] According to the Court, "[t]he Crow treaties in this case, like the Chippewa treaties in

8. The Louisiana Cession, Treaty of Apr. 30, 1803, 8 Stat. 200.

9. Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-45 (1832). *See* R. BARSH & J. HENDERSON, THE ROAD 31-49 (1980).

10. Beecher v. Wetherby, 95 U.S. 517, 526 (1877).

11. 314 U.S. 339 (1941).

12. 270 U.S. 49 (1926).

13. 101 S.Ct. 1245, 1251 (1981).

Holt State Bank, fail to overcome the established presumption that the beds of navigable waters remain in trust for future States and pass to the new States when they assume sovereignty."[14] What the Court fails to tell us is that the land in question in *Holt State Bank* had been ceded by the Chippewas to the United States more than thirty-five years before the case was decided. In fact, no tribal claim was even at issue in the case. Instead, the United States claimed that *it* held the land under the terms of the cession agreement, where it had promised to dispose of the ceded lands at a stated price and deposit the proceeds in a trust account for the tribe.[15] *Holt State Bank* held that the terms of a cession agreement cannot affect the prior rights of the holder of the preemption right in the ceded lands. Conveyance of the fee by the United States prior to the cession conveyed the entitlement to have complete title after the tribe's rights were relinquished. After cession by the tribe, the right to possession immediately attached to the fee. Furthermore, the *Holt State Bank* decision does not support the Court's holding in *Montana* that the terms of the Crow treaty did not overcome a presumption against conveyance by the United States of its title to the tribe. The Court in *Holt State Bank* expressly relied upon the fact that there "was no formal setting apart of what was not ceded" in the Chippewa treaty at issue, taking care to distinguish it from another treaty reserving the lands of other Chippewa bands.[16] Significantly, the Crow treaty in *Montana v. United States* expressly declared that the unceded Crow lands were set apart for their "undisturbed use and occupation."[17]

The other case chiefly relied upon, *Choctaw Nation v. Oklahoma*,[18] is totally inapposite to the situation in *Montana*. In *Choctaw Nation*, the Supreme Court upheld the tribe's claim of rights under its treaty with the United States. In the Choctaw treaty, the federal government ceded lands *outside* the tribe's aboriginal domain *to* the tribe in return for the cession of the tribe's entire aboriginal territory to the United States. Nevertheless, in his concurring opinion, Justice Stevens reads *Choctaw Nation* for the proposition that "the strong presumption against dispositions by the United States of land under navigable waters

14. *Id.* at 1251.
15. 270 U.S. 49, 52 (1926).
16. *Id.* at 58 & n.1.
17. 101 S.Ct. 1245, 1251 (1981).
18. 397 U.S. 620 (1970).

in the territories . . . *applie[s] to Indian reservations.*"[19] Of course, the presumption only applies to *grants*; while the Choctaw Reservation in Oklahoma *was* created by a grant from the United States, the Crow Reservation was "created" by the Crow Tribe having *withheld* lands from sale to the United States.

But why should the mere non-Indian ownership of lands within the Crow Reservation give the state sovereign authority over those lands? State sovereignty is not dependent upon ownership of land within its jurisdiction, nor can a state be sovereign outside its territorial bounds.[20] The answer is that the Court considers both the state and the tribe to be sovereign within the bounds of the Crow Reservation. Identity of parties and ownership of lands involved are factors the Court balances in determining whether the state, the tribe, or both has subject matter jurisdiction in a particular case.

Although it was held as early as 1881 that an incoming state obtains criminal jurisdiction over non-Indians on reservations within the state's external boundaries,[21] the absence of tribal criminal and civil jurisdiction is of recent origin. It is significant that the Court in *Montana* is only able to cite a single case that denied the right of tribes to exercise jurisdiction over non-Indians within tribal territory—the Court's recent decision in *Oliphant v. Suquamish Indian Tribe*.[22] In *Montana*, as it did in *Oliphant*, the Court places great reliance on Justice Johnson's words in his "concurrence" in *Fletcher v. Peck*,[23] "the first Indian case to reach this Court—that the Indian tribes have lost 'any right of governing every person within their limits except themselves.' "[24] Of course, Justice Johnson actually was *dissenting* in his opinion in *Fletcher*.[25] More importantly, the Court in *Montana* misquotes Johnson's remarks, and both *Montana* and *Oliphant* attribute to Johnson's words an improbable meaning. According to Justice Johnson, "All of the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except them-

19. 101 S.Ct. 1245, 1265 (1981) (Stevens, J., concurring).

20. *See* Nevada v. Hall, 440 U.S. 410 (1979).

21. United States v. McBratney, 104 U.S. 621 (1881).

22. 435 U.S. 191 (1978). *See* Barsh & Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979).

23. 10 U.S. (6 Cranch) 87, 143 (1810) (opinion of Johnson, J.).

24. 101 S.Ct. 1245, 1257 (1981).

25. 10 U.S. (6 Cranch) 87, 145-47 (1810).

selves."[26] This is not to say that "the limitation upon their sovereignty amounts to *the loss of* the right of governing," as the Court would have us read it. Clearly, it is the *existence* of, rather than the loss of, the right to govern within tribal territory which limits tribal sovereignty. But a "right" can be a "limitation" only if it limits some other right. Under Johnson's view, the federal government has gained the right to govern non-Indians within tribal territory; the limitation on tribes is the resulting loss of the exclusiveness of their right to govern. Johnson claimed only that the tribes must share concurrent jurisdiction.

In *Oliphant* we are told that "the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments."[27] Rather, "Indian tribes are prohibited from exercising both those powers . . . that are expressly terminated by Congress *and* those powers '*inconsistent with their status.*' "[28] In *Montana* we find that the powers lost because of the tribes' "status" are considerable: "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, and so cannot survive without express Congressional delegation."[29] For such a sweeping statement, the Court refers us to four cases, only one of which even involved tribal rights: *Mescalero Apache Tribe v. Jones.*[30] In that case, the Supreme Court upheld the authority of the state of New Mexico to assess sales taxes on the operation of the tribe's ski resort, which was located *off* the reservation, outside of tribal territory. The only question was whether either the terms of the Indian Reorganization Act[31] or the federal instrumentality doctrine prohibited taxation of the tribal enterprise. No question of either tribal or state authority *on* the reservation arose.

The Court's heavy reliance upon *Williams v. Lee*[32] is also misplaced. *Williams*, of course, was a conflict of laws case, with only state judicial competence at issue. In that case, the Supreme Court denied the state courts competence over causes arising on the reservation, even though they may have jurisdiction over the parties, if exercise of such authority "infringes" upon tribal self-

26. *Id.* at 147.
27. 435 U.S. 191, 208 (1978).
28. *Id.* (emphasis in original).
29. 101 S.Ct. 1245, 1257-58 (1981).
30. 411 U.S. 145, 148 (1973).
31. 25 U.S.C. § 465.
32. 358 U.S. 217 (1959).

government. If the reservation were simply a foreign nation or another state, on the other hand, state court competence *would* have existed. How can such a rule support the denial of tribal authority within the tribe's boundaries? It does not, of course; instead, the "governmental interest" approach in *Williams* is used to justify a similar balancing of interests in determining the subject matter competence of both state and tribal legislative bodies. As a final contortion of legal logic, the Court finds that "[a]ny argument" that tribal regulation of hunting and fishing "is necessary to Crow tribal self-government is refuted by" a finding that "the parties to this case had *accommodated* themselves" to the state's exercise of " 'near exclusive' jurisdiction over hunting and fishing on fee lands within the reservation."[33] If merely becoming "accommodated" to the illegitimate exercises of governmental authority were to render that authority legitimate, of what use is the Constitution? Such a principle would mean that the entire line of Supreme Court decisions imposing the limitations of the Bill of Rights on the states through fourteenth amendment incorporation was mistaken,[34] and that *Brown v. Board of Education*,[35] where the Court struck down state-imposed "separate but equal" schooling, was wrongly decided. Is the Court ready to overrule these cases?

The Court in *Montana* claims to base its decision upon principles, and it therefore admits the necessity of a principled approach. However, close analysis of its opinion in *Montana* reveals that the Court prefers to base its decision upon ad hoc principles and extraneous language taken out of context from prior decisions. It is apparent from the Court's use of legal authority that it has disregarded a fundamental principle of the legal method: that the language of a court opinion must be interpreted in light of its holding. The propensity of the Court to base its decision on the selective use of *dictum*, rather than principled analysis of actual holdings, undermines the integrity of both the Court and the entire judicial process. Such behavior by the Court diminishes the rights of all of us.

33. 101 S.Ct. 1245, 1264-66 (1981).

34. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Mapp v. Ohio, 367 U.S. 643 (1961).

35. 349 U.S. 294 (1955).