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I. INTRODUCTION

The United States Court of Appeals for the Ninth Circuit's decision in *United States v. Milner*[1] cements the idea and recognition that the federal government may make reservations of land prior to statehood, despite the equal footing doctrine. The *Milner* court first addressed ownership of the tidelands with respect to the equal footing doctrine [2] and subsequently directed its attention to a civil trespass claim and alleged violations of both the Rivers and Harbors Appropriation Act of 1899 (RHA)[3] and the Clean Water Act (CWA).[4] This comment will address the argument that the state of Washington, and not the United States, holds title to the tidelands, as that is a precursory issue to the trespass action. *Milner* is unique because, unlike controlling cases, the status of title depends heavily on an executive order never officially ratified by Congress.

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1. *U.S. v. Milner*, 583 F.3d 1174 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3273 (May 17, 2010).

2. *Id.* at 1180. Tideland is defined as the land between the ordinary high and low tide lines. *Black's Law Dictionary* 719 (Bryan A. Garner ed., 3d pocket ed., West 2006). On the Pacific Coast, there are two tides daily, and accordingly, two different means of measurement. The mean high-water (MHW) is an average of a day's high tides, while the mean higher-high-water (MHHW) is the higher of the two. *Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 746 (9th Cir. 1978). The Homeowners did not raise an argument as to the extent of the tidelands under the issue of ownership addressed in this case note. *See Milner*, 583 F.3d at 1183.

3. 33 U.S.C. § 403 (2006).

4. *Id.* at § 1311.

II. HISTORICAL PERSPECTIVE

The Lummi people have traditionally resided along the Pacific Coast in the area north of what is now Seattle, Washington.[5] For centuries, the Lummi have been substantially dependent upon fishing as a means of nutritional sustenance and economic viability.[6]

In August of 1848, the Thirtieth Congress established the Oregon Territory,[7] which encompassed present-day Washington, and was subject to the Northwest Ordinance of 1787.[8] The Northwest Ordinance provided, in part, that "good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent . . . for [the purpose of] preserving peace and friendship with them." [9] In 1850, Congress authorized negotiations with tribes residing in the Oregon Territory for the purpose of securing title to their lands.[10] In March of 1853, the Washington Territory was formed by culling it from the northern portion of the Oregon Territory, maintaining the laws in effect for the Oregon Territory at that time.[11]

In order to secure title to the land and comply with the Northwest Ordinance, the Treaty of Point Elliot[12] (Treaty) was

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5. Ann Stark, *Lummi Nation Atlas: February 2008*, at 6, http://www.lumminsn.gov/NR/GIS/PDF/LummiAtlas Feb2008.pdf (last updated Feb., 2008).

6. The Plan. Support Group of the Bureau of Indian Affairs, *The Lummi Reservation: History – Present – Potential* 1 (U.S. Dept. of the Int. 1974).

7. *An Act to Establish the Territorial Government of Oregon*, ch. CLCXXVII, 9 Stat. 323 (1851).

8. *Id.* at 329.

9. *An Act to Provide for the Government of the Territory Northwest of the River Ohio*, ch. VIII, 1 Stat. 50, 52 (1845) (enacted 1789).

10. *Handbook of Western Washington Indian Treaties: With Special Attention to Treaty Fishing Rights* 23 (Daniel L. Boxberger ed., Lummi Indian School of Aquaculture and Fisheries 1979) [hereinafter *Treaties Handbook*].

11. *Id.* On March 2, 1853, Congress established the Washington Territory, with a southern border of the middle of the main channel of the Columbia River, a northern boundary at the forty sixth parallel, and west to the Continental Divide. *See An Act to Establish the Territorial Government of Washington*, ch. XC, 10 Stat. 172 (1855).

12. *Treaty Between the United States and the Dwámish, Suquámish, and Other Allied and Subordinate Tribes of Indians in Washington Territory* (signed Jan. 22, 1855) 12 Stat. 927 [hereinafter *Treaty of Point Elliot*].

executed between the United States and Indian tribes, including the Lummi, in western Washington Territory on January 22, 1855.[13] First, the Treaty called for the Indians to surrender all lands west of the Cascade Mountains in what is now the northwest portion of Washington State, near present-day Bellingham.[14] Article II set aside land for the exclusive use of the tribes, including a peninsula that now comprises the eastern portion of the Lummi Reservation (Reservation).[15] The Treaty expressly mandated that the Lummi reside exclusively within the bounds of their Reservation and that no white person be allowed to occupy its land without permission or agreement.[16] Article V retained the Lummi's right to use their traditional fishing grounds in common with the citizens of the territory.[17] Furthermore, Article VII of the Treaty delegated to the President of the United States the discretion and authority to move the Reservation, alter its bounds or allow for the allotment of lands within the Reservation.[18]

An executive order, issued by President Ulysses Grant in 1873, expanded the Reservation onto the mainland, to include Sandy Point in present-day Whatcom County, Washington.[19] As of the date

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13. *Id.*

14. The Plan. Support Group of the Bureau of Indian Affairs, *supra* n. 6, at 2.

15. *Treaty of Point Elliot*, *supra* n. 12, at 928.

16. *Id.*

17. *Id.*

18. *Id.* at 929.

19. Charles J. Kappler, *Indian Affairs: Laws and Treaties* vol. 1, 917 (2d ed., Govt. Printing Off.) (stating "[i]t is hereby ordered that the following tract of country in Washington Territory be withdrawn from sale and set apart for the use and occupation of the Dwamish and other allied tribes of Indians, viz: Commencing at the eastern mouth of Lummi River; thence up said river to the point where it is intersected by the line between sections 7 and 8 of township 38 north, range 8 east of the Willamette meridian; thence due north on said section line to the township line between townships 38 and 39; thence west along said township line to the low water mark on the shore of the Gulf of Georgia; thence southerly and easterly along the said shore, with the meanders thereof, across the western mouth of Lummi River, and around Point Francis; thence northeasterly to the place of beginning; so much thereof as lies south of the west fork of the Lummi River being a part of the island already set apart by the second article of the treaty

of the order, the Reservation was extended "to the low water mark on the shore of the Gulf of Georgia."[20] The tidelands within the defined borders of the Reservation were withdrawn from sale and set aside for the Lummi's exclusive use.[21] This addressed a primary concern of the Lummi, as they were heavily dependent on harvesting aquatic species for subsistence.[22]

The Allotment Act of 1887, commonly known as the Dawes Act, provided the land within the Reservation could be allotted to tribal members on a *pro rata* basis.[23] Section 5 of the Dawes Act required the United States to hold the land in trust for a period of twenty five years, during which time it was to be maintained for use solely by the native peoples.[24] Following the twenty-five year period, an allottee could either retain the property or alienate the land to a non-Indian.[25] Many, though not all, allottees opted for the latter.[26] According to President Grant's Executive Order, the allotment applied only to the uplands,[27] while the tidelands were still held in trust for the Lummi.[28] The order did not, however, explicitly prohibit leasing the tidelands.[29]

In 1863, the Idaho Territory was established and, in its inception, defined the boundaries of what is now Washington State.[30] Anticipating Washington's application for statehood, Congress passed the Enabling Act of 1889 outlining the requirements for

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with the Dwamish and other allied tribes of Indians, made and concluded January 22, 1857." *See infra* Appendix B).

20. *Id.* The Gulf of Georgia is now known as the Strait of Georgia.

21. Kappler, *supra* n. 19, at 917.

22. *Treaties Handbook*, *supra* n. 10, at 25.

23. *An Act to Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations, and to Extend the Protection of the Laws of the United States and the Territories Over the Indians, and for Other Purposes*, ch. 119, 24 Stat. 388 (1887).

24. *Id.* at 389.

25. *Id.*

26. The Plan. Support Group of the Bureau of Indian Affairs, *supra* n. 6, at 2.

27. Uplands indicate those lands above the MHW mark. *Pub. Util. Dist. No. 1 of Pend Oreille Co. v. City of Seattle*, 382 F.2d 666, 668 n. 1 (1967); *see also Utah v. U.S.*, 394 U.S. 89, 91 n. 1 (1969).

28. *Milner*, 583 F.3d at 1181.

29. Kappler, *supra* n. 19, at 917.

30. *An Act to Provide a Temporary Government for the Territory of Idaho*, ch. CXVII, 12 Stat. 808 (1863).

admission to the Union.[31] The Act specified that title to Indian reservation land would not pass to the state upon admission but rather would remain with the United States under Congress' control until expressly surrendered.[32] On November 11, 1889, having met the requirements set forth in the Enabling Act, Washington was admitted to the Union.[33]

Presently, the Lummi Reservation is situated primarily on the Lummi Peninsula, approximately ninety miles north of Seattle, Washington, bordering Bellingham and Lummi Bays to the east and west, respectively.[34] As of 2008, the Lummi claimed that the Reservation consisted of approximately twenty-six square miles of land and thirty-eight miles of shoreline, including Portage Island and the floodplains and deltas of both the Red and Nooksack Rivers.[35] Of the uplands, 9,848 acres were designated as affiliated with the Lummi Tribe or its members, while 3,000 acres were classified as non-tribal fee.[36] The tidelands, totaling approximately 7,000 acres, were noted as held in tribal trust.[37]

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31. *An Act to Provide for the Division of Dakota into Two States and to Enable the People of North Dakota, South Dakota, Montana, and Washington to Form Constitutions and State Governments and to be Admitted into the Union on an Equal Footing with the Original States, and to Make Donations of Public Lands to Such States*, ch. 180, 25 Stat. 676 (1889).

32. *Id.* at 677. The Enabling Act stated citizens agreed to "disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limited 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."

33. President Benjamin Harrison proclaimed that Washington had met the prescribed requirements set forth previously by Congress, and that ratification of Washington's statehood was complete. *By the President of the United States of America: A Proclamation*, 26 Stat. 1552, 1553 (1891) (proclaimed 1889).

34. Stark, *supra* n. 5, at 6. *See infra* Appendix A.

35. *Id.*

36. *Id.* at 52. The status of the land is broken down as follows in acres: Individual Native Trust, 6,800; Tribal Trust, 1,575; In Process of Becoming Trust Land, 990; Tribal Fee, 289; Individual Native Fee, 194; Non-Native Fee, 3,000. *See generally id.*

37. *Id.*

Despite the shift away from their traditional seafood diet in recent years, many tribal members still rely on the harvest of aquatic species for subsistence and income.[38] The right to exclude, arguably paramount in a bundle of property rights, ensures exclusive tribal access to the tidelands, which is essential to maintaining the Lummi's connection to a culture rooted in fishing.[39]

III. *UNITED STATES v. MILNER*

A. *Factual and Procedural Background*

Due to the Allotment Act, title to a substantial portion of uplands within the Lummi Reservation eventually came to be held by non-Indians.[40] In 1963, several successors in interest, through a homeowners' organization, secured a lease on the tidelands from the Lummi for the purpose of erecting "shore defense structures."[41] These structures were comprised of large boulders and other "rip rap" to dissipate the tide and mitigate erosion.[42] The structures were erected during the homeowners' lease, which was effective from 1963 to 1988. Thereafter, the homeowners did not renew the lease either individually or as an organization.[43] Since the lease's expiration, the shore defense structures have remained in place.[44] However, over time, erosion has caused the shoreline to fluctuate, and as a result, many structures now sit below the high-water mark, within the Lummi tidelands.[45]

In 1999 and 2001, the United States Army Corps of Engineers and the United States Attorney for the Western District of Washington, respectively, sent letters to the homeowners informing

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38. *Id. at* 12.

39. *See e.g. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

40. Ans. Br. of Appellee U.S. 10, 2007 WL 1511743 (9th Cir. Apr. 2, 2007).

41. *Milner*, 583 F.3d at 1181.

42. Appellants' Rev. Opening Br. 9, 2006 WL 4055746 (9th Cir. Dec. 29, 2006).

43. *Milner*, 583 F.3d at 1181.

44. *Id.*

45. *Id.*; *supra* n. 2 (providing a definition of tideland and high-water mark).

them they neither possessed the requisite permits to maintain structures and discharge fill material in the navigable waters of the United States, nor did they possess the necessary permission from the Lummi Nation to continue to maintain structures on the tidelands.[46] The letters instructed the homeowners to either remove the structures or secure leases on the tidelands.[47] When the homeowners did neither, the United States filed complaints alleging trespass, violation of the RHA, and violation of the CWA.[48] Thereafter, the Lummi Nation intervened as a plaintiff to assert its ownership interest in the tidelands.[49]

On partial summary judgment, the United States District Court for the Western District of Washington held that: (1) the tidelands were owned by the United States and not the State of Washington; (2) the erosion of the homeowners' property was the result of a gradual change; and (3) the tideland was ambulatory[50] and not arrested "so that it lay where the MHW [mean high-water mark] line would be located but for the [h]omeowners' structures."[51] The court then ruled on summary judgment that the homeowners were liable for trespass to the tidelands and in violation of the RHA and that one homeowner individually violated the CWA.[52] Accordingly, the court ordered an injunction against the homeowners under the RHA, calling for the removal of any structures located below the MHW.[53]

On appeal, the homeowners made three separate arguments regarding the trespass claim. However, only the threshold issue—whether title to the tidelands rests with Washington State pursuant to the equal footing doctrine, thereby stripping the United States of

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46. *Milner*, 583 F.3d at 1181; *see also* Ans. Br. of Appellee U.S. at 7.

47. *Milner*, 583 F.3d at 1181.

48. *Id.*

49. *Id.*

50. *Id.* at 1187. An ambulatory tideland is one where the boundary between the uplands and tidelands changes with shifts in the body of water.

51. *Id.* at 1181–1182.

52. *Id.* at 1182.

53. *Id.*; see *supra* n. 2 (discussion of mean high-water mark). On appeal, the Homeowners challenged the summary judgment as to the trespass, RHA, and CWA claims, as well as the injunction.

standing to assert a trespass claim—will be addressed in this comment.[54]

Principally, the homeowners asserted that, under the equal footing doctrine,[55] title to the tidelands passed to the state upon its admission to the Union.[56] The homeowners' argument was largely premised on a lack of congressional intent and the district court's use of dated and allegedly improper precedent.[57] The homeowners argued Congress did not intend for the tidelands to become part of the Reservation because it did not ratify the 1873 Executive Order.[58] To further dispute congressional intent, the homeowners stated that the federal government's policy at the time Washington joined the Union was the destruction of tribal government through allotment.[59] The United States responded that the equal footing assertion was barred by collateral estoppel since a prior action had quieted title to the lands.[60] Even so, the United States contended there was no defect to its title to the tidelands under the equal footing doctrine.[61]

B. *Holding*

The Ninth Circuit held that a presidential expansion of an Indian reservation to include submerged lands precludes state ownership under the equal footing doctrine, and therefore, the United States, not the State of Washington, owns the tidelands.[62]

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54. Appellants' Rev. Reply Br. 8, 2007 WL 2426727 (9th Cir. July 31, 2007).

55. The equal footing doctrine was established to ensure that new states entering the Union did so on an "equal footing" with states that had previously been admitted by almost always conveying title to land under navigable waters to the newly admitted state. *Idaho v. U.S.*, 533 U.S. 262, 272 (2001).

56. *Milner*, 583 F.3d at 1183.

57. Appellants' Rev. Opening Br. at 13–14 (Petitioners challenged the district court's citation of *U.S. v. Romaine*, 255 F. 253 (9th Cir. 1919), and *U.S. v. Stotts*, 49 F.2d 619 (1930)).

58. *Id.* at 15.

59. *Id.*

60. *Id.* at 15–16. The issue of Lummi tidelands had been litigated in district court, where title was found to rest with the United States. *Stotts*, 49 F.2d at 620 (referencing *Romaine*). As for collateral estoppel, the court determined the matter closed, but still sought to buttress this determination with a thorough analysis. *Milner*, 583 F.3d at 1184.

61. Ans. Br. of Appellee U.S. at 16.

62. *Milner*, 583 F.3d at 1186.

The court recognized that whether the United States held title to the tidelands depended on the effect of President Grant's Executive Order under the equal footing doctrine.[63] The equal footing doctrine aimed to put newly admitted states on a level playing field with their previously admitted counterparts by transferring title to submerged lands to states upon admission to the Union.[64] The presumption of equal footing can be overcome by showing that: (1) the lands were intentionally reserved by the United States, and (2) that intent, in a way to prevent transfer, is recognized by Congress.[65] Passing this two-step, conjunctive test overcomes the strong presumption that title to submerged lands passed to a state upon admission.[66] The court said that "disposals by the United States during the territorial period are not lightly to be inferred . . ."[67] In determining that the presumption of equal footing had been overcome, the court cited *United States v. Romaine*,[68] in which the Ninth Circuit previously held the executive order alerted Congress of the reservation, fulfilling the required congressional intent.[69]

Despite the court's finding that the issue had previously been addressed, it went through the analysis anyway.[70] The court found that the Treaty of Point Elliot gave the President power to alter the boundaries of the Reservation, and that his so doing fulfilled the intent required by the first prong of the test.[71] Congress' act of admitting Washington into the Union fulfilled the second prong because the executive order placed Congress on notice of the reservation and Congress subsequently admitted Washington into the Union, intentionally recognizing that reservation.[72] The court relied on policy and precedent to bolster its conclusion, noting that President Grant reserved the tidelands for the purpose of enhancing

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63. *Id.* at 1183.
64. *Idaho*, 533 U.S. at 272–274.
65. *Milner*, 533 U.S. at 1183 (citing *Idaho*, 533 U.S. at 273).
66. *Id.* at 1185.
67. *Id.* (citing *U.S. v. Holt St. Bank*, 270 U.S. 49, 55 (1926)).
68. *Id.* at 1184.
69. *Romaine*, 255 F. at 260.
70. *Milner*, 583 F.3d at 1184.
71. *Id.*
72. *Id.* at 1184–1187.

the Lummi's fishing access.[73] This reinforced an understanding long held by the Lummi Tribe and others that "the United States owns the tidelands and holds them in trust from the Lummi."[74] With this, the court noted that treaties and other agreements with Indians are to be liberally construed so that any ambiguities are resolved in favor of the tribes.[75]

IV. DISCUSSION OF CONTROLLING LAW

The equal footing doctrine arises from Congress' "power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States."[76] Although the equal footing doctrine was born of nineteenth century precedent, a series of United States Supreme Court decisions in the latter part of the twentieth century, particularly *Montana v. United States* in 1981, advanced the issue of title to submerged lands on Indian reservations.[77] Furthermore, when considering treaties between the United States and Indian tribes, deference is granted to the tribes because of the unequal footing on which the treaties were made.[78]

A. *The Equal Footing Doctrine*

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73. *Milner*, 583 F.3d at 1184. In *Stotts*, the United States successfully claimed ownership of the same tidelands by demonstrating that the Treaty of Point Elliot and Grant's Executive Order, respectively, established the Lummi's prerequisite need for the shoreline and the expansion of the Reservation to encompass it. 49 F.2d at 620–621.

74. *Milner*, 583. F.3d at 1186.

75. *Id.* at 1185 (citing *Choctaw Nation v. U.S.*, 318 U.S. 423, 431-432 (1943). The Court believed the statement here was broader than that in *U.S. v. Alaska. See* 521 U.S. 1, 41–42 (1997). *Milner*, 583 F.3d at 1186. However, the Court paralleled the setting aside of lands for an Indian reservation to lands withdrawn for wildlife refuges in *U.S. v. Alaska*, 545 U.S. 75, 105 (2005). *Milner*, 583 F.3d at 1186.

76. U.S. Const. art I, § 3, cl. 2 (*see Pollard v. Hagan*, 44 U.S. 212, 224 (1845)).

77. *Mont. v. U.S.*, 450 U.S. 544 (1981). Through much of the twentieth century, the principle case addressing ownership of submerged lands on Indian reservations was *Holt St. Bank*. From 1970 until the decision in *Montana*, the controlling case was *Choctaw Nation v. Okla.*, 397 U.S. 620 (1970).

78. *Jones v. Meehan*, 175 U.S. 1, 11 (1899).

While the equal footing doctrine is meant to ensure the passage of land beneath navigable waters to newly formed states, precedent has carved out several tests and exceptions where the federal government may retain title to those lands. In *United States v. Holt State Bank*, the Supreme Court held that a lack of language specifically reserving disputed land was insufficient to overcome the equal footing doctrine.[79] Some fifty-five years later, *Montana* effectively integrated prior precedent and held the United States did not reserve title to a riverbed absent both specific language and a showing that the Crow Tribe was dependent on fishing.[80] Following *Montana*, the Supreme Court decided *United States v. Alaska*, in which the Court inferred congressional intent to ratify an executive reservation by looking to language in the Alaska Statehood Act.[81] Several years later, in 2001, the *United States v. Idaho* Court looked to extrinsic evidence of intent to find a reservation of a lakebed for the Coeur d'Alene, a fishing tribe.[82] In deciding *Milner*, the Ninth Circuit relied heavily upon the Supreme Court's decision and reasoning in *Idaho*.[83]

Where the objective to reserve submerged lands has not been made clear, intent will not be found.[84] In *Holt State Bank*, the United States sought to quiet title to a dried lakebed that was once part of the Red Lake Indian Reservation, occupied by the Chippewa Tribe in Minnesota.[85] The lake was contained within the reservation at the time of Minnesota's admission to the Union.[86] The treaties on which the Court relied used general language laying out only the boundaries of the reservation.[87] The Court reasoned that, in the absence of any language within the treaty expressly indicating the United States' intention to retain rights to the lakebed, title passed to the State of

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79. *Holt St. Bank*, 270 U.S. at 55.
80. *Mont.*, 450 U.S. at 551–552.
81. *Alaska*, 521 U.S. at 1.
82. *Idaho*, 533 U.S. at 272–274.
83. *Milner*, 583 F.3d at 1183–1184.
84. *Holt St. Bank*, 270 U.S. at 55.
85. *Id.* at 49.
86. *Id.* at 55.
87. *Id.*

Minnesota and the Chippewa shared the privilege of common access to the lake with the public.[88]

In *Montana*, the Court held that the mere fact that a riverbed lies within the boundaries defined by a treaty does not overcome the presumption against its conveyance to a state upon admission to the Union, especially when that would not defeat the purpose of the reservation.[89] The Crow Tribe asserted a claim to bed of the Big Horn River under both the First Treaty of Fort Laramie of 1851[90] and the Second Treaty of Fort Laramie of 1868.[91] The latter defined the boundaries of the Crow Reservation for the "absolute" use by the Crow people.[92] Though the portion of the Big Horn River at issue fell within the reservation's bounds, the Supreme Court found the "treaty in no way expressly referred to the riverbed."[93] The Court noted that under the equal footing doctrine, the general rule is that title to the land underlying all navigable waters passes to a newly admitted state upon admission to the Union.[94] In holding that title to the Big Horn riverbed passed to Montana at statehood, the Court found no "public exigency" existed that would justify a reservation of the riverbed because "the Crows were a nomadic tribe dependent

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88. *Id.* at 58–59.

89. *Mont.*, 450 U.S. at 544.

90. The Crow did not agree to the final terms of this treaty and were not signatories to the amended treaty in 1851. Kappler, *supra* n. 19 at 594; (*see also* 11 Stat. 743).

91. *Treaty between the United States of America and the Crow Tribe of Indians; concluded May 7, 1868; Ratification advised July 25, 1868; Proclaimed August 12, 1868.* 15 Stat. 649 (1869) [hereinafter *Second Treaty of Fort Laramie*].

92. *Id.* at 650.

93. *Mont.*, 450 U.S. at 554. The Court then distinguished the broad language establishing the boundaries of the Crow Reservation in *Montana* from the treaty in *Choctaw Nation v. Okla.*, where the federal government pledged that "no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation . . . and that no part of the land granted to them shall ever be embraced in any Territory or State." *Mont.*, 450 U.S. at 555 n. 5. (discussing *Choctaw Nation v. U.S.*, 397 U.S. 620, 635 (1970)).

94. *Id.* at 551. The equal footing doctrine established that all lands held by the United States in a territorial period, passed to the state at statehood. *Pollard*, 44 U.S. at 222–223. Nearly fifty years later, the Supreme Court held that the United States could withhold land for an "international duty or public exigency." *Shively v. Bowlby*, 152 U.S. 1, 50 (1894). Navigable waters are those bodies of water that are navigable in fact, meaning they are capable of being used for commerce. *The Daniel Ball*, 77 U.S. 557, 563 (1871).

chiefly on buffalo, and fishing was not important to their diet or way of life."[95]

Alaska determined that although Congress may not have specifically ratified an executive reservation, subsequent broad language in the Alaska Statehood Act sufficiently indicated Congress' intent to ratify the executive acts.[96] There, the State of Alaska challenged President Harding's authority to issue the executive order retaining lands below the high-water mark on the coast of Alaska.[97] The Court concluded that the President was authorized under the Pickett Act[98] to set aside land for public purposes subject to revocation by either the executive or an act of Congress.[99] Still, Alaska maintained the Pickett Act did not authorize the President to withhold submerged lands, since such reservations were neither expressly authorized by the Act nor subject to general land laws.[100] The Court held that, regardless of whether the Pickett Act intended for the executive to reserve submerged lands, the executive order demonstrated the requisite intent to reserve those lands and placed Congress on notice.[101] Congress recognized that intent when it admitted Alaska as a state because the Alaska Statehood Act referenced the lands reserved by the president.[102]

In *Idaho*, the Supreme Court held Congress clearly intended to recognize the pre-statehood reservation of a lakebed by the United

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95. *Id.* at 556. *Compare with Stotts*, 49 F.2d at 621, finding that as a matter of common sense, the Lummi subsisted on fishing, for which the tidelands were a necessary requisite; the President's proclamation recognized the need and logically extended the Reservation to encompass the low-water mark.

96. *Alaska*, 521 U.S. at 45.

97. *Id.* at 43. *Compare with Romaine*, 255 F. at 260, holding that President Grant's executive order expanding the Reservation's boundaries could not be compromised by a surveyor's erroneous exclusion of the islands in controversy. Notably, this holding rested on the unchallenged presumption that the president possessed authority to make a lasting pre-statehood reservation.

98. *An Act to Authorize the President of the United States to Make Withdrawals of Public Lands in Certain Cases*, ch. 421, 36 Stat. 847 (1911).

99. *Alaska*, 521 U.S. at 43.

100. *Id.* at 44.

101. *Id.* at 45.

102. *Id.*; *see* Pub. L. No. 85-508, § 11(b), 72 Stat. 339 (1959).

States for the benefit of the Coeur d'Alene Tribe.[103] In *Idaho*, the United States brought suit against the state of Idaho seeking to quiet title to submerged lands within the Coeur d'Alene Indian Reservation.[104] The *Idaho* Court acknowledged that when deciding a question involving title to the bed of navigable waterways, the presumption favors retention by a state.[105] The Court applied a two-part test to rebut the equal footing doctrine, asking whether Congress intended the land to be included in the reservation, and if so, whether it intended title to remain with the United States upon statehood.[106] The Court expressly stated that "congressional intent is satisfied when an executive reservation clearly includes submerged lands and Congress recognizes the reservation in a way that demonstrates intent to defeat state title."[107]

Whether Congress adequately recognized the reservation likewise appeared to be subject to a two-part analysis. First, the *Idaho* Court considered whether Congress was put on notice that the executive reservation included submerged lands.[108] Secondly, it examined whether the purpose of the reservation would have been compromised had title been allowed to pass to the state.[109] Where the purpose of the reservation would have been undermined, the Court concluded, "it is not simply plausible that the United States sought to reserve only the upland portions of the area."[110]

In *Idaho*, an 1873 Executive Order by President Grant defined the bounds of the Coeur d'Alene Reservation. However, the order failed to address whether the reservation included submerged lands.[111] Idaho acknowledged that by the time it was admitted as a state, Congress had reasonably interpreted that the executive branch intended to include the submerged lands, based on the Coeur d'Alene's dependence on fishing and need for access to the lake.[112]

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103. *Idaho*, 533 U.S. at 280–281.

104. *Id.* at 265.

105. *Id.* at 273 (citing *Alaska*, 521 U.S. at 31).

106. *Idaho*, 533 U.S. at 273 (The *Idaho* Court adopted this test from *Utah Div. of St. Lands v. U.S.*, 482 U.S. 193, 202 (1987)).

107. *Id.*

108. *Id.* at 274.

109. *Id.*

110. *Id.*

111. Kappler, *supra* n. 19, at 837.

112. *Idaho*, 533 U.S. at 274.

Instead of relying on the executive order to demonstrate the intent to reserve the submerged lands, the *Idaho* Court looked to two negotiations with the tribe.[113] In 1887, the tribe ceded part of the reservation in exchange for the assurance that "no part of said reservation shall ever be sold, occupied, open to white settlement or otherwise disposed of without the consent of the Indians residing on said reservation."[114] The tribe disposed of the northern portion of the reservation in 1889, at which time the government agent handling the transaction stated "you still have the St. Joseph River and the lower part of the lake."[115] After the Senate, but before the House, had ratified the agreements, Idaho was admitted to the Union on July 3, 1890 "on an equal footing with the original States."[116] In *Idaho*, the Court found Congress intended to reserve title to submerged lands, where neither the executive order nor the agreements between the Coeur d'Alene and the United States had specifically articulated their inclusion.[117] The Court found that the negotiating history of the 1887 and 1889 agreements made Congress well aware that when it admitted Idaho as a state, admission was subject to the full extent of the executive order reserving the submerged lands.[118]

In his dissent, Chief Justice Rehnquist argued that the Court "must not infer such a conveyance unless the intention was definitely declared or otherwise made very plain, or was rendered in clear and especial words, or unless the claim confirmed in terms embraces the land under the waters . . . ." [119] The dissent also criticized the majority for considering events after Idaho's admission—the ratification of the 1887 and 1889 agreements—to determine the United States intended to reserve title.[120]

Over time, overcoming the presumption of equal footing has largely required specific language of a reservation. However, as

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113. *Id.* at 266–267.
114. *Id.* at 267.
115. *Id.* at 270.
116. *Id.*
117. *Id.* at 280–281.
118. *Idaho*, 533 U.S. at 280–281.
119. *Id.* at 282 (Rehnquist, C.J., dissenting).
120. *Id.*

indicated in *Montana* and illustrated in both *Alaska* and *Idaho*, the Court has been willing to stretch its analysis in the case of a public exigency or a clearly intended reservation. Of course, such exceptions have not come without strong dissenters, such as that of Chief Justice Rehnquist in *Idaho* as noted above.

B. *Justice in Interpretation*

In interpreting treaties with Indians tribes, the United States Supreme Court has long maintained that treaties must be interpreted as the Indians would have understood them,[121] and any ambiguities should be resolved in the Indians' favor.[122] In *Jones v. Meehan*, the Supreme Court was charged with determining the nature of a grant of land to a member of the Chippewa Tribe who consequently entered into lease agreements with non-Indian lessors.[123] Justice Gray, writing for the majority, surmised that consideration should be given to the circumstances under which the Indians were compelled to agree.[124] Treaties between the United States and Indian tribes were made on an unequal footing; while the United States was armed with skilled negotiators and were "masters of written language,"[125] the tribes were considered "wholly unfamiliar with all the forms of legal expression, and . . . the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States . . . ."[126] For that reason, the Court held that the treaty must be construed in a manner favorable to the Indians despite the language within.[127]

From the foregoing precedent, it is apparent that to overcome the presumption granted under the equal footing doctrine, a court must apply a two-part analysis to recognize reservations held in title by the United States to submerged lands on Indian reservations. First, a court must consider congressional intent that the submerged

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121. *Worcester v. Ga.*, 31 U.S. 515, 551 (1832).

122. *Choctaw Nation v. Okla.*, 397 U.S. at 631 (citing *Jones*, 175 U.S. at 11).

123. *Jones*, 175 U.S. at 11.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 32.

lands were to be part of the Indian reservation, and second, a court must ask whether Congress recognized that intention. If both prongs are met, then the United States defeats the presumption that title to those lands passed to a state upon admission to the Union.[128] The second prong of the test considers two additional factors: (1) whether Congress took notice of the executive branch's reservation[129] by ratifying a treaty; and (2) whether, in the absence of the reserved lands, the purpose of the reservation would be undermined in conjunction with a tribe's traditional way of life and needs.[130]

V. ANALYSIS

The Ninth Circuit decided the issue of title to the tidelands in *Milner* correctly. As a preliminary matter, the Pacific Ocean is undisputedly navigable-in-fact. Further, the Supreme Court has held that the equal footing doctrine applies to tidelands subject to the ebb and flow of the tide.[131] The *Milner* court first stated that the issue of title had previously been settled, and as a matter of *stare decisis*, should be laid to rest.[132] Even so, the court undertook an analysis to rebut the presumption under the equal footing doctrine. The court analyzed the United States' intent to reserve the tidelands and whether Congress recognized that intent. While the homeowners argued that the lack of ratification of President Grant's 1873 Executive Order prohibited title from remaining with the United States, controlling law provides a more compelling application in this case for an effective reservation of the tidelands by the United States because a public exigency existed. The facts presented in *Milner* fulfilled the two-prong test because Congress gave the executive the power to make reservations and recognized that reservation when Washington was admitted as a state.

.128. *Idaho*, 533 U.S. at 273.

129. *Id.* at 274.

130. *Compare id. with Mont.*, 450 U.S. at 556.

131. *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469 (1988).

132. *Milner*, 583 F.3d at 1184–1185 (citing *U.S. v. Wash.*, 969 F.2d 752, 755–756 (9th Cir. 1992)).

A. *Intention to Reserve the Tidelands*

Congress has the ability to reserve, or grant the power to reserve, territorial lands for a public purpose. Congress' authority to act regarding public land under the property clause is "without limitations."[133] By recognizing the Treaty of Point Elliot, Congress delegated its Article IV powers to regulate lands subject to the treaty to the executive branch. Since *Pollard v. Hagan*,[134] the Supreme Court has recognized the federal government's right to make pre-statehood reservations or conveyances of land; however, the presumption is in favor of the state.[135]

The President was authorized to alter the bounds of the Lummi Reservation.[136] President Grant, acting within the power delegated to him by Congress in Article VII of the Treaty of Point Elliot, issued his 1873 Executive Order, and in plain and unambiguous language expanded the bounds of the Lummi Reservation to the low-water mark of the Gulf of Georgia.[137] In giving the President this power, it was certainly foreseeable that he would exercise his ability to expand, relocate or contract the bounds of the Reservation. When President Grant included the tideland in the Reservation, Article II of the Treaty of Point Elliot, prohibiting non-tribal occupation of the Reservation lands without permission, applied to the newly annexed tidelands, no longer making them subject to common use under Article V.[138]

The United States intended to reserve the tidelands because President Grant's executive order clearly included them in the Lummi Reservation.[139] The express language defining the bounds of the reservation was notably absent in both *Holt State Bank* and *Montana*; both cases ultimately found that title rested with the states.[140] Likewise, in *Idaho*, neither the executive order nor the relevant treaties contained language specifically addressing

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133. *U.S. v. S.F.*, 310 U.S. 16, 29 (1940).
134. *Pollard v. Hagan*, 44 U.S. 212 (1845).
135. *Utah*, 482 U.S. at 198; *see also Holt St. Bank*, 270 U.S. at 55.
136. *Treaty of Point Elliot*, *supra* n. 12, at 929.
137. Kappler, *supra* n. 19, at 917.
138. *Treaty of Point Elliot*, *supra* n. 12, at 928–929.
139. Kappler, *supra* n. 19, at 917; 26 Stat. 1552, 1553.
140. *See generally Mont.*, 450 U.S. 544; *Holt St. Bank*, 270 U.S. 49.

submerged lands; yet, their inclusion had to be interpreted to satisfy the purpose of the reservation.[141] However, in *Milner* the intention to reserve the tidelands for the Lummi was made clear through express language in President Grant's Executive Order, as required by the Supreme Court since *Holt State Bank.* Because the President appropriated the tidelands, specifically to the low-tide line,[142] this case indeed presents a stronger set of facts for intent to reserve than *Idaho*, where the language did not specifically call for the retention of submerged land on the Coeur d'Alene Reservation.[143] Furthermore, the plain and explicit description of the land to be reserved meets the higher burden proposed by the dissenting Chief Justice Rehnquist in *Idaho.*[144]

B. *Congress Recognized the Intent to Reserve the Tidelands*

Congressional intent was fulfilled because Congress recognized the effect of the Executive Order when Washington was admitted as a state in 1889. *Milner* is similar to *Alaska,* where Congress likewise entrusted the President with the power to reserve submerged lands.[145] Because the tidelands were part of the Reservation in 1889 due to the Executive Order, they were expressly included in the Enabling Act of 1889 under Section IV in a subsection labeled: "Renunciation of public lands."[146] When Congress ratified Washington's statehood, a condition of which was the reservations under Section IV, it follows that the borders of the Lummi Reservation included all adjustments which Congress had

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141. *Idaho*, 533 U.S. at 274.

142. Kappler, *supra* n. 19, at 917.

143. *Idaho*, 533 U.S. 266–267. While the homeowner's argument - that *Romaine* involves a similar set of facts - is not misplaced, the *Milner* court used the case to illustrate the historic treatment of the executive order and to set the stage for an application of more recent authority. *See supra* n. 91.

144. *Id.* at 292. Justices Scalia, Kennedy and Thomas joined in Chief Justice Rehnquist's dissent, and with the exception of Chief Justice Rehnquist, all remain on the Court as of the publication of this comment.

145. *Alaska*, 521 U.S. at 43.

146. 25 Stat. at 677.

authorized the President to make, as alluded to in *Alaska*.[147] Had Congress not wanted the President to exercise his authority, it simply could have withheld the enumeration of his power to do so from the Treaty of Point Elliot. For this reason, congressional ratification of Washington's statehood included the Lummi tidelands reserved by President Grant in 1873.

Furthermore, the Supreme Court stated in *Idaho* that an underlying consideration as to congressional intent to defeat the presumption of state title is whether doing so would undermine the purpose of the reservation.[148] The question, however, is not whether the impact of transferring title would frustrate the purpose of the reservation of the tidelands today, but rather at the time of Washington's admission as a state. The culture of the Coeur d'Alene in *Idaho* traditionally centered on fishing.[149] The classification of a tribe's dependency on fishing in *Idaho* as a public purpose for reservation was derived from *Montana*.[150]

The Lummi's dependence upon fishing creates a strong inference in their favor. In *Montana*, the Court specifically held the federal government could reserve lands in the case of a public exigency.[151] Since the Crow did not depend on fishing for either their sustenance or way of life at the time of the treaty, the Court determined that they did not meet the criteria for such an exception.[152] In *Milner*, if title had passed to Washington at statehood, it would have taken away the Lummi's unencumbered right to use the tidelands. Unlike the Crow, the Lummi have long been dependent on fishing and therefore fit the category of public exigency at—as well as prior to—Washington's admission to the Union.[153]

The exclusive-use provision in the Treaty of Point Elliot strengthens the presumption in favor of the Indians.[154] In *Montana*,

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147. *Alaska*, 521 U.S. at 45.

148. *Idaho*, 533 U.S. at 274.

149. Stark, *supra* n. 5, at 12.

150. *Idaho*, 533 U.S. at 274. *Montana*, likewise derived the concept of a public exigency from *Shivley*.

151. *Mont.*, 450 U.S. at 556 (citing *Shively*, 152 U.S. at 48).

152. *Id.*

153. *Supra* n. 6.

154. *Treaty of Point Elliot*, *supra* n. 12, at 928.

there was also an exclusive-use provision, but that seemed to disintegrate, due in part to the lack of a public exigency.[155] On the other hand, an exclusive-use provision in *Idaho* appeared to be greatly buttressed by both subsequent dealings with the Lummi and, most especially, the Lummi's reliance on fishing.[156] For this reason, we can conclude that dependence on fishing is a public exigency and a valid purpose for a reservation.[157]

Considering exclusive-use provisions, the finding of a public exigency appears to be more determinative of the outcome than does the plain language of the contested reservations. For example, the language in the Second Treaty of Fort Laramie of 1868, implicated in *Montana*, stated that the Crow would have the "absolute and undisturbed use and occupation" of their reservation, which encompassed portions of the Big Horn River.[158] Similarly, the lakebed in *Holt State Bank* fell within the defined bounds of the Red Lake Indian Reservation but was not specifically mentioned in the reservation.[159] Conversely, in *Idaho*, where the executive order did not expressly define the contested reservation, the Court reached for extrinsic evidence of intent to find a reservation of a portion of Lake Coeur d'Alene.[160] The difference was that in *Montana* and *Holt State Bank*, neither the Crow nor the Chippewa, respectively, were fishing tribes, while the Coeur d'Alene, in *Idaho*, were dependent upon fishing.[161] Drawing upon historic application, the Lummi's reliance upon fishing in and of itself would seem to seal the fate of any party contesting the intent to reserve the tidelands.

Because the finding of a public exigency carries such great weight, it is surprising that it has not been expanded beyond fishing to include other uses of the beds of navigable waters. The Crow, for example, believed water possessed great medicinal values, enabling

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155. *Mont.*, 450 U.S. at 555–556.

156. *Idaho*, 533 U.S. at 269; Kappler, *Indian Affairs: Laws and Treaties* vol. 1, 837 (2d ed., Govt. Printing Off.)

157. *Idaho*, 533 U.S. at 274.

158. *Second Treaty of Fort Laramie*, *supra* n. 91, at 50.

159. *Holt St. Bank*, 270 U.S. at 55.

160. *Idaho*, 533 U.S. at 266–267.

161. *Id.* at 274.

them to "live and enjoy life."[162] Each day, the Crow were summoned to drink all the water they could, believing "water *is* your body."[163] Surely there is an argument to be considered for the Crow's philosophical regard for water. Furthermore, the Crow were dependent upon maintaining large herds of horses for social status and mobility in both warfare and hunting.[164] Horses require a great deal of water, and water provides a natural boundary to aid in controlling a herd in the otherwise sparse and semi-arid climate surrounding the Big Horn River. The Crow continued to utilize horses even after the establishment of the Crow Reservation.[165] Undoubtedly, the threshold of what constitutes a public exigency is murky. Why observations such as these were not deemed viable arguments in *Montana* may never be known. Such arguments may arise in future disputes concerning the equal footing doctrine.

It is also notable in this case that the Lummi were seeking a lesser quantity of property than the Crow, or any of the other claimants discussed. The Lummi sought only the riparian area between the high and low water marks. This evades a prior concern noted by the Supreme Court that the waters remain free for commerce.[166] The Crow and Coeur d'Alene sought title to the literal bed of the respective waterways in their litigation, while the Lummi only claimed a portion of an ambulatory shoreline. Even though the disputed land may seem an insignificant patch of terrain, resources and property rights at stake for the prevailing party.[167]

Looking to the Treaty of Point Elliot, specifically Article V, the drafters clearly understood that the Lummi and other coastal tribes who were privy to the Treaty of Point Elliot depended on the

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162. Robert H. Lowie, *The Crow Indians* 89 (J.J. Little and Ives Co. 1935).

163. *Id.* (emphasis in original).

164. John Wade Stafford, *Crow Culture Change: A Geographical Analysis* 46-48 (U. Microfilms 1980).

165. *Id.* at 48.

166. *U.S. v. Or.*, 295 U.S. 1, 14 (1935).

167. *E.g. Okla. v. Tex.*, 258 U.S. 574 (1922) (states both claimed title to portions of the bed of the Red River where parties had staked placer mining claims and oil and gas proceeds were at stake); *PPL Mont., LLC v. Mont.*, 2010 MT 64, 355 Mont. 402, 229 P.3d 421(*petition for cert. filed*, Aug. 8, 2010), (finding State owned three riverbeds and was entitled to damages for the electric generator's use those riverbeds at hydroelectric power sites).

shores of the Pacific Ocean for their own survival.[168] Because this apparent dependence existed and Congress granted the president the authority to make such a reservation, Congress clearly intended to include the tidelands in the Lummi Reservation when Washington was admitted to the Union.

C. *The Lummi Understood the Tidelands to be Reserved for Their Exclusive Use*

Any uncertainties as to the reservation of the tidelands should have been resolved in favor of the Lummi. Because the Supreme Court has adhered to a policy of interpreting treaties and agreements with the Indians as the Indians would have understood them, and evidence clearly demonstrates the Lummi believed that they were the sole beneficiaries of the tidelands, title appropriately came to rest with the United States in trust for the Lummi.[169]

The Lummi understood the tidelands to be reserved for them by the United States. By 1889 the Lummi certainly believed they were the beneficiaries of the tidelands held in trust by the United States in accordance with President Grant's 1873 Order. Evidence of this is noted by the fact that the Lummi did not attempt to shift title to the tidelands along with the uplands that were subject to the Allotment Act of 1887. Furthermore, over the past century, the Lummi entered into leasing agreements of the tidelands, even with the defendant homeowners. To be a lessor, one must have a property interest in the leased property.[170] The Lummi's leasing of the tidelands demonstrated, in an open and obvious manner, a good faith belief that they held a property interest in those lands, and the continued longevity of those leases further supports this good faith belief.

In the absence of express language, a public exigency may compel a court to give greater deference to a tribe's understanding of

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168. *Treaty of Point Elliot*, *supra* n. 12, at 928.

169. *Jones*, 175 U.S. at 11.

170. *Restatement (Second) of Property* §1.2 (1977). *U.S. v. Gen. Motors Corp.*, described property rights as the rights "to possess, use and dispose" of physical things. 323 U.S. 373, 378 (1945).

a treaty or contract.[171] Although the presumption as stated in *Jones* was not specifically referred to in *Idaho*, the Court's discussion took into account the Coeur d'Alene's actions after the bounds of the reservation were described to them in general terms, evidencing their belief that they were the beneficiaries of the lakebed.[172] The dissent in *Idaho* took odds with the fact that despite a lack of an express articulation of an intention to reserve the submerged lands; the Court still found in favor of the tribe.[173]

In the case of the Lummi, the executive branch of the federal government expressly reserved tidelands for the tribe, which at that time was chiefly dependent on fishing. Similar to *Idaho*, the Lummi have since acted in a way that demonstrates a good faith belief of a property interest in the tidelands. Because the Lummi believed that the express reservation by the executive set aside the tidelands thereafter for their exclusive benefit, the reservation should be interpreted as surviving Washington's territorial period.

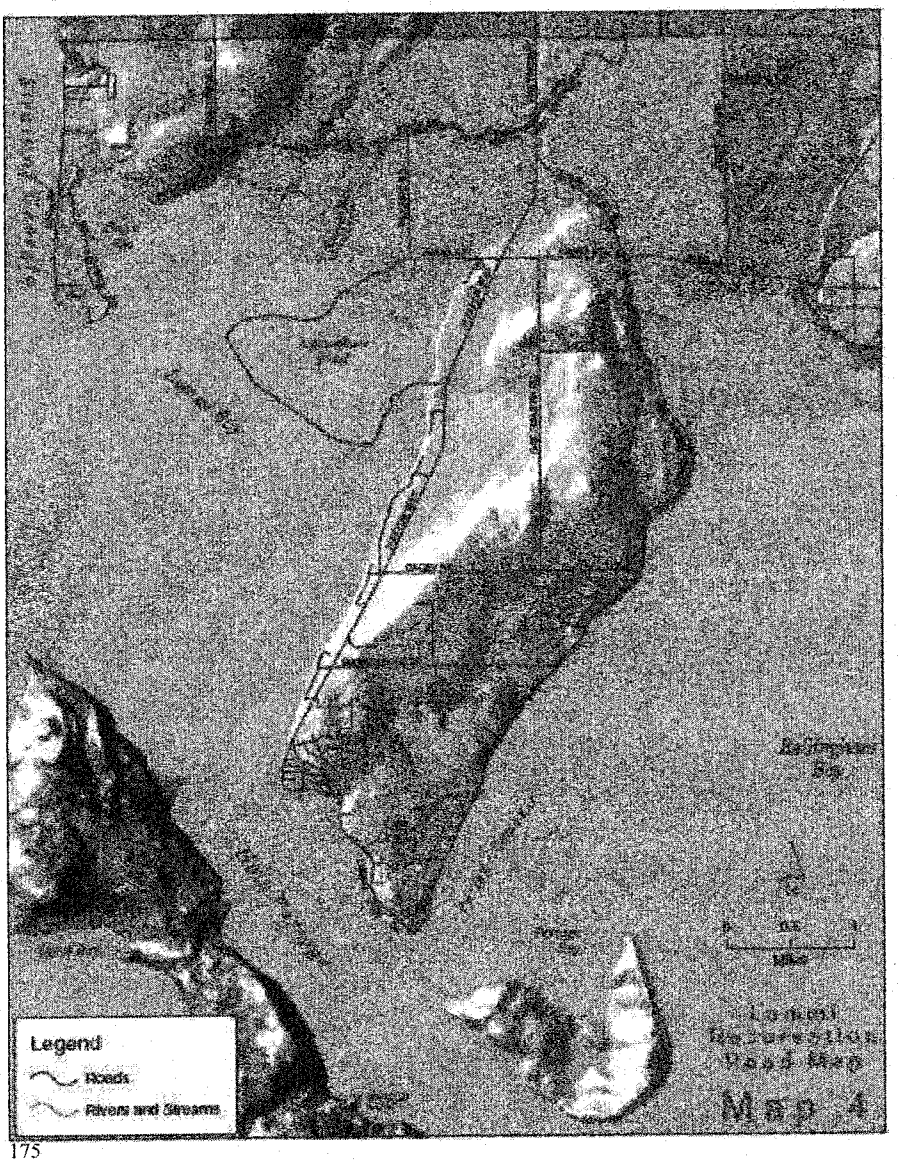
VI. CONCLUSION

The Ninth Circuit's decision in *Milner* is consistent with Supreme Court precedent regarding both federal reservations under the equal footing doctrine and interpretation of treaties with Indian tribes. In *Alaska*, the Supreme Court left the door open as to whether an executive order that had not been overtly ratified was alone sufficient to make a lasting reservation of property for the federal government.[174] The equal footing doctrine is often very contentious due to the natural resources and property rights at stake and will presumably remain that way as new methods emerge to develop the nation's previously untapped reserves. Resolving these issues often depends on extrinsic evidence of intent surrounding treaties executed in the nineteenth century. Although the circumstances under which the treaties were executed have been obscured by time, a look to the original public exigency or general purpose of the reservation is often as accurate as courts can reasonably be without embarking on an

171. *E.g. Idaho*, 533 U.S. at 274.
172. *Idaho*, 533 U.S. at 267, 270.
173. *Id.* at 282 (Rehnquist, C.J., dissenting).
174. *Alaska*, 521 U.S. at 44.

impossible quest for the precise facts. Reserving land beneath navigable waters for a tribe dependent upon fishing, as in *Milner,* appears from both *Idaho* and *Montana* to be a public exigency, a valid purpose for the reservation. Had the Supreme Court granted certiorari, it is likely that the bounds surrounding the somewhat-obscure rule pertaining to federal reservations of submerged lands would have become more clearly defined. However, given the current authority on the subject, along with the policy that treaties with Indians be interpreted as they understood them, *Milner* was correctly decided.

APPENDIX A



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APPENDIX B

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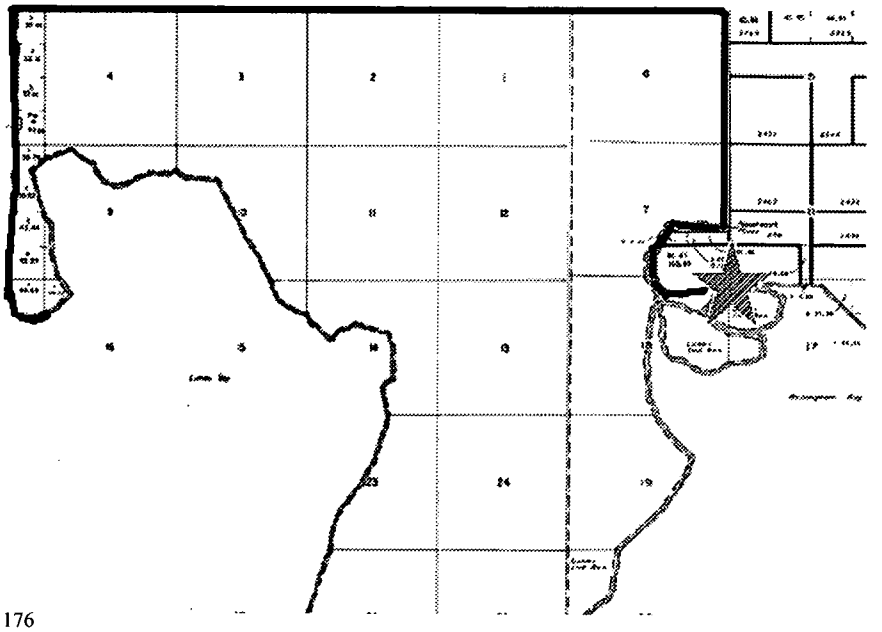
175. Stark, *supra* n. 4, at 15. The Gulf of Georgia is located in top left-hand corner of the map. The tidelands at issue are located on Sandy Point, the small peninsula in the same area dividing the Gulf of Georgia from Onion Bay.



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176. U.S. Dept. of the Int., *Master Title Plats – Washington*, http://www.blm.gov/or/landrecords/wa/380n010em01.jpg (Apr. 3, 2010). The bold line commencing at the mouth of the Lummi River, marked with a star, represents the northern portion of President Grant's reservation under the executive order. The reservation continued along the low-water mark around the rest of the peninsula until meeting up again at the mouth of the Lummi River.